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UNITED STATES – CONTINUED EXISTENCE AND APPLICATION OF ZEROING METHODOLOGY

Report of the Panel

TABLE OF CONTENTS

Page

I. INTRODUCTION 1
II. FACTUAL ASPECTS 2
III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS 3
IV. ARGUMENTS OF THE PARTIES 4
V. ARGUMENTS OF THE THIRD PARTIES 4
VI. INTERIM REVIEW 4
A. REQUEST OF THE EUROPEAN COMMUNITIES 4
B. REQUEST OF THE UNITED STATES 10
VII. FINDINGS 14
A. RELEVANT PRINCIPLES REGARDING STANDARD OF REVIEW, TREATY INTERPRETATION AND BURDEN OF PROOF 14
1. Standard of Review 14
2. Rules of Treaty Interpretation 15
3. Burden of Proof 16
B. THE TERMS "MODEL ZEROING" AND "SIMPLE ZEROING" 16
C. TERMS OF REFERENCE 16
1. Measures Not Included in the European Communities' Consultations Request 17
(a) Arguments of the Parties 17
(i) United States 17
(ii) The European Communities 18
(b) Evaluation by the Panel 18
(i) The 14 Additional Anti-Dumping Proceedings 18
(ii) Continued Application of 18 Anti-Dumping Duties 23
2. Specificity of the European Communities' Reference to 18 Cases 24
(a) Arguments of the Parties 24
(i) United States 24
(ii) European Communities 25
(b) Arguments of Third Parties 25
(i) Japan 25
(c) Evaluation by the Panel 26
3. Inclusion of Ongoing Proceedings in the European Communities' Panel Request 34
(a) Arguments of the Parties 34
(i) United States 34

(ii) *European Communities* *34*
(b) Evaluation by the Panel 35
D. CONTINUED APPLICATION OF 18 ANTI-DUMPING DUTIES 37
1. Arguments of the Parties 37
(a) European Communities 37
(b) United States 37
2. Arguments of Third Parties 38
(a) Japan 38
3. Evaluation by the Panel 38
E. ZEROING IN INVESTIGATIONS 38
1. Arguments of the Parties 38
(a) European Communities 38
(b) United States 39
2. Arguments of Third Parties 40
(a) India 40
(b) Japan 40
(c) Korea 40
(d) Norway 40
(e) The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu 41
(f) Thailand 42
3. Evaluation by the Panel 42
F. ZEROING IN PERIODIC REVIEWS 45
1. Arguments of the Parties 45
(a) European Communities 45
(b) United States 47
2. Arguments of Third Parties 49
(a) Brazil 49
(b) Japan 49
(c) Korea 50
(d) Mexico 51
(e) Norway 52
3. Evaluation by the Panel 52
(a) Relevant Facts 52
(i) *Steel Concrete Reinforcing Bars From Latvia (Period of Review: 1 September 2002 – 31 August 2003)* *55*

(ii) *Stainless Steel Bar From France (Period of Review: 1 March 2004 – 28 February 2005)* *56*

(iii) *Stainless Steel Bar From France (Period of Review: 1 March 2003 – 29 February 2004)* *56*

(iv) *Stainless Steel Bar From Germany (Period of Review: 1 March 2004 – 28 February 2005)* *56*

(v) *Stainless Steel Bar From Germany (Period of Review: 2 August 2001 – 28 February 2003)* *56*

(vi) *Stainless Steel Bar From Italy (Period of Review: 2 August 2001 – 28 February 2003)* *57*

(vii) *Certain Pasta From Italy (Period of Review: 1 July 2004 – 30 June 2005)* *57*

(b) Is Simple Zeroing in Periodic Reviews WTO-Inconsistent? 57

(i) *Description of the Calculation Methodology Used By the USDOC in Periodic Reviews* *57*

(ii) *Legal Analysis* *58*

(iii) *The Role of Jurisprudence* *62*

(iv) *Conclusion* *66*

G. ZEROING IN SUNSET REVIEWS 66

1. Arguments of the Parties 66

(a) European Communities 66

(b) United States 67

2. Arguments of Third Parties 67

(a) Japan 67

(b) Korea 67

(c) Norway 67

3. Evaluation by the Panel 68

(a) Relevant Facts 68

(b) Legal Analysis 69

VIII. CONCLUSIONS AND RECOMMENDATIONS 71

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 73

LIST OF ANNEXES

ANNEX A

FIRST WRITTEN SUBMISSIONS BY
THE PARTIES

Contents		Page
Annex A-1	First Written Submission of the European Communities	A-2
Annex A-2	First Written Submission of the United States	A-70
Annex A-3	Response to the United States' Request for Preliminary Rulings by the European Communities	A-116

ANNEX B

THIRD PARTIES' WRITTEN SUBMISSIONS

Contents		Page
Annex B-1	Third Party Written Submission of Japan	B-2
Annex B-2	Third Party Written Submission of the Republic of Korea	B-23
Annex B-3	Third Party Written Submission of Norway	B-29
Annex B-4	Third Party Written Submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	B-42
Annex B-5	Third Party Written Submission of Thailand	B-48

ANNEX C

SECOND WRITTEN SUBMISSIONS BY
THE PARTIES

Contents		Page
Annex C-1	Second Written Submission of the European Communities	C-2
Annex C-2	Second Written Submission of the United States	C-58

ANNEX D

ORAL STATEMENTS OF THE PARTIES AND THIRD PARTIES
AT THE FIRST AND SECOND MEETINGS OF THE PANEL

Contents		Page
Annex D-1	Opening Statement of the United States at the First Meeting of the Panel	D-2
Annex D-2	Opening Statement of the European Communities at the First Meeting of the Panel	D-10
Annex D-3	Closing Statement of the United States at the First Meeting of the Panel	D-15
Annex D-4	Closing Statement of the European Communities at the First Meeting of the Panel	D-18

Contents		Page
Annex D-5	Third Party Oral Statement of Brazil at the First Meeting of the Panel	D-20
Annex D-6	Third Party Oral Statement of India at the First Meeting of the Panel	D-25
Annex D-7	Third Party Oral Statement of Japan at the First Meeting of the Panel	D-26
Annex D-8	Third Party Oral Statement of Korea at the First Meeting of the Panel	D-28
Annex D-9	Third Party Oral Statement of Mexico at the First Meeting of the Panel	D-30
Annex D-10	Third Party Oral Statement of Norway at the First Meeting of the Panel	D-34
Annex D-11	Third Party Oral Statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu at the First Meeting of the Panel	D-37
Annex D-12	Opening Statement of the European Communities at the Second Meeting of the Panel	D-39
Annex D-13	Opening Statement of the United States at the Second Meeting of the Panel	D-40
Annex D-14	Closing Statement of the European Communities at the Second Meeting of the Panel	D-49
Annex D-15	Closing Statement of the United States at the Second Meeting of the Panel	D-50

ANNEX E

PARTIES' COMMENTS ON THE APPELLATE BODY REPORT
IN *US – STAINLESS STEEL (MEXICO)* (DS344)

Contents		Page
Annex E-1	Comments of the European Communities on the Appellate Body Report in *US – Stainless Steel (Mexico)* (DS344)	E-2
Annex E-2	Comments of the United States on the Appellate Body Report in *US – Stainless Steel (Mexico)* (DS344)	E-3
Annex E-3	Comments of the European Communities on the United States' Comments on the Appellate Body Report in *US – Stainless Steel (Mexico)* (DS344)	E-25
Annex E-4	Comments of the United States on the Comments of the European Communities on the Appellate Body Report in *US – Stainless Steel (Mexico)* (DS344)	E-28

ANNEX F

REQUEST FOR THE ESTABLISHMENT OF A PANEL

Contents		Page
Annex F-1	Request for the Establishment of a Panel by the European Communities	F-2

TABLE OF CASES

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear (EC)*"), WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut* ("*Brazil – Desiccated Coconut*"), WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft ("Canada – Aircraft")*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* ("*Canada – Wheat Exports and Grain Imports*"), WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report, WT/DS276/AB/R, DSR 2004:VI, 2817
EC – Bananas III (Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador* ("*EC – Bananas III (Ecuador)*"), WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:III, 1085
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
Japan – Agricultural Products II	Panel Report, *Japan – Measures Affecting Agricultural Products* ("*Japan – Agricultural Products II*"), WT/DS76/R, adopted 19 March 1999, as modified by Appellate Body Report, WT/DS76/AB/R, DSR 1999:I, 315
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* ("*Japan – DRAMs (Korea)*"), WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report, WT/DS336/AB/R

Short Title	Full Case Title and Citation
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* ("*Japan – Film*"), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice* ("*Mexico – Anti-Dumping Measures on Rice*"), WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report, WT/DS295/AB/R, DSR 2005:XXIII, 11007
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – Corn Syrup*"), WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities* ("*US – Certain EC Products*"), WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*"), WT/DS58/AB/RW, adopted 21 November 2001
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measures on Shrimp from Ecuador* ("*US – Shrimp (Ecuador)*"), WT/DS335/R, adopted 20 February 2007
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875

Short Title	Full Case Title and Citation
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* ("*US – Stainless Steel (Mexico)*"), WT/DS344/AB/R, adopted 20 May 2008
US –Stainless Steel (Mexico)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* ("*US –Stainless Steel (Mexico)*"), WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report, WT/DS344/AB/R
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("*US – Steel Plate*"), WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, 2073
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1.1 On 2 October 2006, the European Communities ("EC") requested consultations[1] with the United States of America ("United States" or "US") pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"); Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"); and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "Agreement") with regard to the practice and methodologies for calculating dumping margins involving the use of zeroing, and the application of zeroing in certain specified anti-dumping measures. In its request for further consultations[2], dated 9 October 2006, the European Communities added two measures to its initial request.

1.2 On 10 May 2007, the European Communities requested the Dispute Settlement Body ("DSB") to establish a panel pursuant to Articles 2.1 and 6.1 of the DSU; Article XXII:2 of the GATT 1994; and Articles 17.4 and 17.5 of the Anti-Dumping Agreement "with regard to an 'as such' measure or measures providing for the practice or methodologies for calculating dumping margins involving the use of zeroing, and the application of zeroing in certain specified anti-dumping measures maintained by the United States...".[3]

1.3 At its meeting on 4 June 2007, the DSB established a panel pursuant to the request of the European Communities in document WT/DS350/6, in accordance with Article 6 of the DSU.

1.4 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS350/6, the matter referred to the DSB by the European Communities in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 29 June 2007, the European Communities requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.6 On 6 July 2007, the Director-General accordingly composed the Panel as follows:

> Chairperson: Dr. Faizullah Khilji

[1] WT/DS350/1.
[2] WT/DS350/1/Add.1.
[3] WT/DS350/6.

Members: Mr. Michael Mulgrew
Ms Lilia R. Bautista

1.7 Brazil, China, Egypt, India, Japan, Korea, Mexico, Norway, Chinese Taipei and Thailand reserved their rights to participate in the panel proceedings as third parties.

1.8 Following the resignation on 8 November 2007 of Ms Lilia R. Bautista, the parties, on 27 November 2007, appointed a new Panel Member. Accordingly, the composition of the Panel is as follows:

Chairperson: Dr. Faizullah Khilji

Members: Mr. Michael Mulgrew
Ms Andrea Marie Brown

1.9 The Panel met with the parties on 29-30 January 2008 and on 22 April 2008. The meetings with the parties were opened to public viewing. The Panel met with the third parties on 30 January 2008. A portion of the Panel's meeting with the third parties was also opened to public viewing.

1.10 Following the second meeting with the parties, and pursuant to a request from the United States made on 2 May 2008, to which the European Communities did not object, the Panel provided the parties with the opportunity to make comments on the relevance of the Appellate Body report in *US – Stainless Steel (Mexico)* to this dispute as well as to comment on each other's comments.

II. FACTUAL ASPECTS

2.1 This dispute involves the EC's claims regarding the continued application by the United States of anti-dumping duties resulting from the anti-dumping orders enumerated in 18 cases[4], as calculated or maintained in place at a level in excess of the margin of dumping that in the EC's view would have resulted from the correct application of the relevant provisions of the Anti-Dumping Agreement. The European Communities also challenges the specific instances of application of what it describes as the "zeroing methodology" in 4 anti-dumping investigations, 37 periodic reviews and

[4] The EC's panel request describes this measure as "[t]he continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request..." In its submissions to the Panel, the European Communities uses slightly different descriptions to refer to the measure at issue. Although it generally refers to this measure as "the application or continued application" of the 18 anti-dumping duties at issue, in some instances it only uses the term "continued application". In response to questioning, the European Communities stated that "the use of this slightly different phrasing is for ease of reference and ease of understanding only, and has no incidence on the legal assessment to be conducted by the Panel". Response of the European Communities to Question 1(b) from the Panel Following the First Meeting. For ease of reference, in our report, we also refer to this measure as "the continued application" of the 18 duties at issue. The United States acknowledges that for ease of reference the Panel may choose to use the term "continued application" as a shortcut for "continued application or application". Regarding the second component of the term that the Panel prefers to use, however, the United States notes that the European Communities challenges "the continued application or application of anti-dumping duties in 18 cases", not "the continued application or application of 18 anti-dumping duties", and requests the Panel to use a description that conveys this difference. Put differently, the United States emphasises the difference between the continued application of duties *per se* and the continued application of duties arising from different anti-dumping cases. Request by the United States for the Review of Precise Aspects of the Interim Report of the Panel, paras. 3-6. We would like to reiterate that the abbreviated description that we use to refer to the measure at issue is for ease of reference only and by no means prejudges our legal reasoning (*supra*, paras. 7.40-7.67) regarding the WTO-compatibility of such measure.

11 sunset reviews pertaining to the same 18 cases. The 18 cases and the 52 proceedings pertaining to such cases are listed in the annex to the EC's panel request. The European Communities does not challenge the zeroing methodology "as such" in this dispute.[5]

2.2 Zeroing, according to the European Communities, is a methodology that fails to take into consideration the totality of export transactions in the calculation of margins of dumping for the product under consideration as a whole. Specifically, the European Communities takes issue with the use of zeroing in investigations where the normal value and the export price are compared on a weighted average-to-weighted average ("WA-WA") basis (referred to by the European Communities as "model zeroing")[6], periodic reviews where margins are calculated on the basis of a weighted average normal value and individual export transactions ("WA-T") (referred to by the European Communities as "simple zeroing")[7], and sunset reviews where the investigating authorities rely on previous margins obtained through either model or simple zeroing.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 The European Communities requests the Panel to find that:

> "(a) The United States failed to comply with Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement since it continues applying duties which were calculated by using zeroing in the 18 anti-dumping measures mentioned in the Annex to the EC's Panel request.
>
> (b) The United States violated Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994 when applying model zeroing in the 4 original investigation proceedings mentioned in the Annex to the EC's Panel request.
>
> (c) The United States violated Articles 2.4, 2.4.2, 9.3 and 11.2 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT when using zeroing in the 37 administrative review proceedings included in the Annex to the EC's Panel request.
>
> (d) The United States violated Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the Anti-Dumping Agreement in the sunset review proceedings mentioned in the Annex to the EC's Panel request when relying on margins of dumping calculated in prior investigations using the zeroing methodology."[8]

3.2 The European Communities also requests the Panel to suggest, pursuant to Article 19 of the DSU, that the United States cease using zeroing when calculating dumping margins in any anti-dumping proceeding in connection with the 18 cases identified in the annex to the EC's panel request.

3.3 The United States asks the Panel to reject the EC's "as applied" claims regarding periodic reviews, sunset reviews, and investigations[9] and find that the United States has not acted

[5] First Written Submission of the European Communities, para. 2.
[6] See para. 7.7 below for an explanation of the term "model zeroing".
[7] See paras. 7.159-7.160 below for an explanation of the term "simple zeroing".
[8] First Written Submission of the European Communities, para. 264.
[9] The United States, in these proceedings, does not contest the alleged inconsistency with Article 2.4.2 of the Agreement of zeroing in investigations where the weighted average normal value is compared with the weighted average export price. It, however, disagrees with the claims developed by the European Communities under other provisions of the Agreement and Article VI of the GATT 1994 regarding such zeroing. Thus, the

inconsistently with the Anti-Dumping Agreement and the GATT 1994. The United States also raises three preliminary objections regarding the Panel's terms of reference.[10] First, the United States asks the Panel to find that 14 of the 52 anti-dumping determinations, and the continued application of the 18 anti-dumping duties at issue are outside the Panel's terms of reference because they were not included in the EC's consultations request. Second, the United States requests that the Panel find that the EC's reference in its panel request to the continued application of the 18 anti-dumping duties does not meet the specificity requirement of Article 6.2 of the DSU. Third, the United States asks the Panel to find that four preliminary measures identified in the EC's panel request are not within the Panel's terms of reference because the identification of the mentioned measures did not meet the conditions laid down in Article 17.4 of the Agreement.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and their answers to questions. The parties' submissions and oral statements are attached to this report as annexes (see List of Annexes, pages iv and v).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 Brazil, China, Egypt, India, Japan, Korea, Mexico, Norway, Chinese Taipei and Thailand reserved their rights to participate in the Panel proceedings as third parties. Brazil, China, Egypt, India and Mexico did not present written submissions and China, Egypt and Thailand did not submit oral statements to the Panel. The arguments of Japan, Korea, Norway and Chinese Taipei are set out in their written submissions and oral statements, the arguments of Brazil, India and Mexico are set out in their oral statements, while Thailand's arguments are set out in its written submission to the Panel. The third parties' written submissions and oral statements are attached to this report as annexes (see List of Annexes, pages iv and v).

VI. INTERIM REVIEW

6.1 On 27 June 2008, we submitted our interim report to the parties. On 11 July 2008, both parties submitted written requests for the review of precise aspects of the interim report. On 25 July 2008, both parties submitted their comments on the other party's request for review. None of the parties requested an interim review meeting.

6.2 We set out our treatment of the parties' requests below. In addition to the changes explained in the following paragraphs, we have, where necessary, made technical revisions to our report and corrected typographical and other minor errors found in the interim report.

A. REQUEST OF THE EUROPEAN COMMUNITIES

6.3 First, the European Communities requests the Panel to reconsider its assessment of the evidence submitted by the European Communities regarding the seven periodic reviews discussed in paragraphs 7.151-7.157 below and to find that the European Communities has shown *prima facie* that the USDOC used the simple zeroing methodology in the mentioned reviews. The United States argues that the European Communities should not be provided an opportunity to make a *prima facie* case at this late stage of the proceedings. The United States submits that the interim review stage is

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US request that the Panel dismiss the EC's "as applied" claims regarding zeroing in investigations where the weighted average normal value is compared with the weighted average export price pertains to claims other than the one under Article 2.4.2. See, Response of the United States to Question 15 from the Panel following the First Meeting.

[10] First Written Submission of the United States, paras. 42-46.

only for parties to make comments on precise aspects of the Panel's interim report, not for a party to make a *prima facie* case that it failed to make until that point in time. The United States recalls the opportunities that the Panel provided for the European Communities to explain the factual bases of its assertions regarding the seven reviews at issue. Since the European Communities failed to take advantage of those opportunities to demonstrate the factual bases of its claims regarding the seven reviews at issue, it should not be given another chance to do that at the interim review stage.

6.4 Although we understand the US concern regarding the relative lateness in the EC's attempt to explain the factual bases of its claims regarding the seven periodic reviews at issue, we see no provision in the DSU that would preclude us from assessing the EC's explanations. Nor has the United States cited such a legal provision in its argumentation in this regard. We therefore proceed to our assessment of the EC's comments.

6.5 The European Communities first makes general comments concerning all seven periodic reviews, followed by comments specifically addressing evidence submitted in connection with five of the seven reviews at issue.

6.6 The European Communities commences its general comments by recalling the USDOC notice published on 27 December 2006, which reads in relevant parts:

> "In its March 6, 2006 **Federal Register** notice, the Department proposed only that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding."[11] (emphasis in original)

6.7 According to the European Communities, this part of the USDOC's notice means that:

> "[T]he USDOC expressly stated that it was *not modifying* any aspect of its comparison methodologies for calculating dumping, other than the abandonment of zeroing when making average-to-average comparisons in original investigations. Thus, since the results of all the administrative reviews covered by this dispute were published before the date of the publication of the USDOC Notice (*i.e.*, 27 December 2006), it should be concluded that the European Communities has made a *prima facie* case that the United States actually applied simple zeroing also in those seven administrative reviews."[12] (footnote omitted, italic emphasis in original, underline emphasis added)

6.8 In the view of the European Communities, this Federal Register notice creates a presumption that simple zeroing was used in the seven reviews at issue because they were conducted before the issuance of the notice.[13] In this regard, the European Communities also notes our reasoning in paragraph 7.200 below as to whether the same notice showed that the USDOC had used model zeroing in the four investigations at issue in these proceedings. The United States responds that such a broad statement cannot be evidence of the fact that zeroing was used in each of the seven periodic reviews at issue. "To the contrary, because each assessment review involves a distinct product,

[11] Exhibit EC-90, p. 77724.

[12] Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, p. 2.

[13] Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, p. 6.

country, period of time, and sales data, the [European Communities] must demonstrate that zeroing occurred in each of the individual administrative reviews challenged."[14]

6.9 We note that the context in which we accepted the inference made by the European Communities in paragraph 7.200 below is remarkably different from the context in connection with the EC's claims regarding the alleged use of simple zeroing in the seven periodic reviews at issue. The part of the USDOC's notice quoted in paragraph 7.200 makes a specific reference to investigations where a particular comparison methodology is used and states that the USDOC will no longer use that methodology without taking into consideration the results of all comparisons. Logically, this means that until the date of the policy change, the methodology at issue was used by the USDOC without considering the results of all comparisons. Because the particular comparison methodology described there, WA-WA, was the methodology in which what we call "model zeroing" was routinely used in investigations, and the investigations at issue were completed before the policy change, we concluded that the European Communities had showed *prima facie* that the USDOC used model zeroing in investigations completed before this policy change. By contrast, the USDOC's policy change makes no specific reference to periodic reviews and the methodologies that may be used in such reviews. It simply mentions that the USDOC is not changing the methodologies it uses in investigations where methodologies other than WA-WA are used, and in other anti-dumping proceedings. As such, we find this statement to be too broad to support the EC's argument that the USDOC used simple zeroing in all periodic reviews carried out before the effective date of the policy change at issue. We therefore reject the EC's contention in this regard.

6.10 The European Communities argues that the fact that the USDOC's Issues and Decision Memoranda pertaining to the seven periodic reviews at issue do not mention the methodology used is not determinative of whether simple zeroing was used in such reviews. We agree with the European Communities. Nowhere in our report do we imply that such memoranda constitute the only way through which the European Communities could demonstrate that the USDOC used the simple zeroing methodology in the seven reviews at issue. In paragraphs 7.151-7.157 below, we only note that the USDOC's Issues and Decision Memoranda pertaining to the mentioned reviews do not shed light on the methodology used.

6.11 The European Communities also asserts that given the several years of WTO litigation against the United States regarding the zeroing methodology, it should not be disputed that simple zeroing was used in the seven periodic reviews at issue. The United States responds that prior dispute settlement reports are only binding with regard to the resolution of the disputes they concern and that the US response or reaction to such reports is irrelevant for purposes of these proceedings. We disagree with the EC's contention. We do not consider that the existence of past disputes against the United States regarding zeroing discharges the European Communities' burden of proving in this dispute that the simple zeroing methodology was used in specific periodic reviews challenged. We consider that whether the United States complied with the DSB recommendations and rulings in past disputes is irrelevant to our task in these proceedings, since every dispute stands on its own merits. This is so, even if, as the European Communities argues, such past disputes concern the same measure that is at issue in these proceedings.

6.12 The EC's general comments are followed by specific comments regarding five of the seven periodic reviews at issue. These reviews are: *Steel Concrete Reinforcing Bars From Latvia (Period of Review: 1 September 2002 – 31 August 2003)*, *Stainless Steel Bar From Germany (Period of Review: 1 March 2004 – 28 February 2005)*, *Stainless Steel Bar From Germany (Period of Review: 2 August 2001 – 28 February 2003)*, *Stainless Steel Bar From Italy (Period of Review: 2 August 2001 – 28 February 2003)* and *Certain Pasta From Italy (Period of Review: 1 July 2004 – 30 June 2005)*.

[14] Comments of the United States on the Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, para. 6.

6.13 Regarding the periodic review in *Steel Concrete Reinforcing Bars From Latvia (Period of Review: 1 September 2002 – 31 August 2003)*, the European Communities asserts that the calculation tables submitted in Exhibit EC-35 show that zeroing was used because the percentage of value with anti-dumping margins and the percentage of quantity with anti-dumping margins used was not 100 per cent. This means that "for the remaining transactions, no 'dumping' was found and no 'offsets' were provided."[15] The European Communities also argues that the standard programme used by the USDOC in the review at issue contained the zeroing line which excluded the comparisons with negative results. According to the European Communities, when read together, the tables and the standard programme show that simple zeroing was used in the periodic review at issue.

6.14 Regarding the periodic reviews in *Stainless Steel Bar From Germany (Period of Review: 1 March 2004 – 28 February 2005)* and *Stainless Steel Bar From Germany (Period of Review: 2 August 2001 – 28 February 2003)*, the European Communities refers to the calculation tables submitted in Exhibits EC-57 and EC-58 and argues that such tables show that zeroing was used in the two reviews at issue. The European Communities also draws attention to the fact that the columns in the mentioned two tables, which show calculations with zeroing, correspond to the margins calculated by the USDOC and hence the figures in such columns are accurate. The European Communities contends that the standard computer programme used by the USDOC in these reviews contained the zeroing line which would eliminate comparisons with negative results.

6.15 Regarding the periodic review in *Stainless Steel Bar From Italy (Period of Review: 2 August 2001 – 28 February 2003)*, the European Communities submits that the calculation table submitted in Exhibit EC-62 shows that the percentage of value with anti-dumping margins and the percentage of quantity with anti-dumping margins used was not 100 per cent. This means that zeroing was used in this review because "for the remaining transactions, no 'dumping' was found and no 'offsets' were provided."[16] The European Communities also argues that the standard programme used by the USDOC in the review at issue contained the zeroing line which excluded the comparisons with negative results. According to the European Communities, when read together, the table and the standard programme show that simple zeroing was used in the periodic review at issue.

6.16 Regarding the periodic review in *Certain Pasta From Italy (Period of Review: 1 July 2004 – 30 June 2005)*, the European Communities submits that the calculation table submitted in Exhibit EC-65 shows that the percentage of value with anti-dumping margins and the percentage of quantity with anti-dumping margins used was not 100 per cent. This means that zeroing was used in this review because "for the remaining transactions, no 'dumping' was found and no 'offsets' were provided."[17] The European Communities also argues that the standard programme used by the USDOC in the review at issue contained the zeroing line which excluded the comparisons with negative results. According to the European Communities, when read together, the table and the standard programme show that simple zeroing was used in the periodic review at issue.

6.17 The United States objects to the EC's arguments. The US comments in this regard apply to all five periodic reviews with respect to which the European Communities asks the Panel to change its findings. The United States submits that because the calculation tables submitted by the European Communities in connection with the five reviews at issue were not generated by the USDOC, the United States is not in a position to confirm their accuracy. Such tables, therefore, do not show that zeroing was applied in the periodic reviews at issue. The United States also asserts that there is no

[15] Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, pp. 2-3.

[16] Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, p. 5.

[17] Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, p. 6.

such thing as a "standard computer programme" that the USDOC uses in every periodic review, nor is there a programme that requires zeroing. The United States, therefore, invites the Panel to reject the EC's request with regard to the five periodic reviews at issue.

6.18 Having carefully considered the EC's comments regarding the five periodic reviews addressed in the preceding paragraphs, we do not see any reason to change our conclusion that the European Communities failed to show *prima facie* that the USDOC used simple zeroing in such reviews. We have, however, modified paragraph 7.151 and paragraphs 7.154 through 7.157 of our report in order to reflect certain concerns mentioned in the EC's comments and to set out our reasoning in more detail.

6.19 The European Communities asserts that there are no other documents available regarding the five periodic reviews at issue and therefore it is for the United States to rebut the *prima facie* case made by the European Communities. The European Communities contends that the United States has failed to unconditionally accept the prior adopted Appellate Body reports regarding zeroing and asserts that the United States should not be allowed to evade its international obligations by withholding information from the exporters, the European Communities and the Panel in these proceedings. The United States objects, arguing that it has not contested documents that it was able to authenticate in these proceedings and that it cannot confirm the accuracy of other documents contained in the EC's exhibits. The United States recalls that the European Communities has the burden of making a *prima facie* case to the effect that the USDOC used simple zeroing in the five periodic reviews at issue.

6.20 We recall that according to the principles concerning burden of proof applicable in WTO dispute settlement,[18] it is for each party to submit evidence of factual assertions that it makes. In order to make out a *prima facie* case that the USDOC acted inconsistently with the Anti-Dumping Agreement by using simple zeroing in the five periodic reviews at issue, therefore, the European Communities must submit evidence of the underlying factual assertion. The European Communities has met that burden with regard to 29 of the 37 periodic reviews which are within our terms of reference in these proceedings. It has not, however, done so with regard to the five reviews that the European Communities addresses in its request for review of the interim report. The European Communities having failed in this regard, there is nothing for the United States to rebut - we cannot expect the United States to rebut a *prima facie* case that has not been made by the European Communities. With regard to the EC's assertion that the United States withholds information from the exporters, the European Communities and the Panel, we recall that pursuant to Article 13 of the DSU, the Panel has the right to seek information from any individual or body it deems appropriate, including the parties to a dispute.[19] If the European Communities believed that the United States was withholding necessary information, it could have asked the Panel to seek such information from the United States. It did not do so.[20] We make no representations as to whether such a request would

[18] See *infra*, para. 7.6.

[19] Considering Article 13.1 of the DSU, and other provisions, the Appellate Body concluded in *Canada – Aircraft* that "a panel has broad legal authority to request information from a Member that is a party to a dispute, and ... a party so requested has a legal duty to provide such information." Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft ("Canada – Aircraft")*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 197.

[20] In its response to a question from the Panel following the Second Meeting with the Parties, the European Communities stated that "in case the Panel would consider it necessary to obtain the detailed margin calculations for each of the cases covered by these seven exhibits, it should request copy of these detailed calculations from the [United States]." Response of the European Communities to Question 1(c) From the Panel Following the Second Meeting. Such a general statement clearly does not suffice as a request to the Panel to seek specific factual information from the USDOC pursuant to its authority under Article 13. Moreover, we consider that it would be inappropriate for a panel to exercise its authority to seek information based on its own

have been granted had it been made in a timely fashion. What is clear is that in the absence of such a request, there is in our view no basis upon which to conclude that the United States improperly withheld information, thereby preventing the European Communities from making out its *prima facie* case. Thus, we can see no reason why the United States should be expected to rebut a factual assertion unsupported by relevant evidence from the party making the assertion. In effect, this would be much the same as drawing an adverse inference against the Untied States in this regard. While a panel has the authority to draw such inferences where information it requested is not provided,[21] such an inference should not be drawn by a panel lightly, and only where the circumstances warrant, which they do not in this case.

6.21 The European Communities contends that should the Panel reject the EC's request with regard to the above-mentioned five periodic reviews, the Panel should refer to 30 periodic reviews, not 29, in paragraphs 7.183 and 8.2(b) below. The United States objects, arguing that the European Communities fails to exclude from 37 the one review which the Panel excluded from the scope of its terms of reference on the grounds that the European Communities challenged a preliminary determination in connection with the mentioned review. As the United States argues, and as explained in paragraph 7.158 below, we have found that the periodic review in *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands (Period of Review: 1 November 2004 – 31 October 2005)* is not within the scope of our terms of reference on the grounds that the review at issue involved a preliminary determination made by the USDOC. Together with our other conclusions concerning reviews not properly before us, it therefore follows that our conclusions regarding the use of simple zeroing in periodic reviews only apply to 29 of the 37 periodic reviews challenged by the European Communities in these proceedings.

6.22 Second, the European Communities requests the Panel to change the second sentence in paragraph 7.179 to "Such an objective assessment, *including the standard of review pursuant to Article 17.6(ii) of the Anti-Dumping Agreement,* does not, of course, occur in a vacuum". According to the European Communities, this would reconcile different statements found in our report regarding permissible interpretations of a treaty provision. The United States disagrees with the EC's request. The United States argues that paragraph 7.179 addresses the Panel's duty to carry out an objective assessment pursuant to Article 11 of the DSU and that the additional phrase requested by the European Communities concerns the standard of review. While acknowledging that Article 17.6(ii) of the Anti-Dumping Agreement supplements Article 11 of the DSU, the United States contends that it would be incorrect to state that the "objective assessment" obligation includes the standard of review under Article 17.6(ii). We see no legal basis for the change proposed by the European Communities. Nor would such a modification serve to clarify our reasoning. We therefore decline to modify our finding in this regard.

6.23 Third, the European Communities invites the Panel to reconsider its finding in paragraph 8.7 below not to make a suggestion as to how the United States has to bring its measures into compliance with its WTO obligations. The European Communities argues that making suggestions as provided for under the second sentence of Article 19.1 of the DSU would contribute to the prompt resolution of this dispute. The European Communities also draws attention to the fact that the United States has failed to implement DSB recommendations and rulings in the past disputes where the use of the zeroing methodology in various contexts was condemned. The United States submits that the authority given to panels under Article 19.1 of the DSU should not be lightly exercised by panels. The United States reiterates its argument that the DSU does not allow a suggestion of the kind requested by the European Communities, *i.e.*, one that would clarify the scope of a potential compliance panel that may or may not be established in the future for the resolution of this dispute.

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judgement as to what information is necessary for a party to prove its case, as opposed to seeking information in order to elucidate its understanding of the facts and issues in the dispute before it.

[21] Appellate Body Report, *Canada – Aircraft*, *supra*, note 19, para. 203.

6.24 Having analyzed the arguments presented in the EC's comments on our interim report, we consider that it fully and clearly expresses our views, and therefore see no reason to change our analysis regarding the suggestion requested by the European Communities. We therefore reject the EC's request.

B. REQUEST OF THE UNITED STATES

6.25 First, the United States requests that we modify paragraph 1.10 of our report to reflect the fact that it was following a request by the United States that the Panel invited parties to make comments on the relevance to this dispute of the Appellate Body report in *US – Stainless Steel (Mexico)*. In case the US request is granted, the European Communities requests that we also mention that the European Communities did not object to the US request. We have modified paragraph 1.10 in order to accommodate both parties' requests.

6.26 Second, the United States requests the Panel to change the description used for the measure at issue in connection with the EC's claim regarding the continued application of the duties resulting from 18 cases specified in the EC's panel request. The United States notes that the EC's panel request takes issue with the continued application of, or the application of the specific anti-dumping duties resulting from 18 different cases identified in the annex thereto. The United States therefore argues that the Panel should describe the measure at issue in this regard as "the continued application or application of anti-dumping duties in 18 cases" throughout this report, instead of "continued application of 18 anti-dumping duties". The United States, however, considers that for ease of reference, the Panel may prefer to use "continued application". That is, the United States does not take issue with the Panel using "the continued application" instead of "continued application or application" in the description of the measure at issue. The United States, however, requests the Panel to refer to "anti-dumping duties in 18 cases" instead of "18 anti-dumping duties" in the description of this measure. In other words, the United States argues that the Panel should use, at a minimum, "continued application of anti-dumping duties in 18 cases" instead of "continued application of the 18 anti-dumping duties". Although the United States raises this issue in connection with paragraph 3.3 of our report, it requests the Panel to apply this change to the entirety of the report.

6.27 The European Communities objects to the US request. The European Communities, however, argues that should the Panel agree to change the description used to refer to the measure at issue, it should use the actual language found in the EC's panel request, *i.e.*, "the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders in 18 cases".

6.28 We recall, and the United States also acknowledges, that in footnote 4 of our report, we observe that the European Communities uses different formulations to describe the measure at issue in its panel request and in different places of its submissions to the Panel, and explain that for ease of reference we refer to this measure as "the continued application of the 18 duties" at issue. It is therefore clear that the term that we use is only intended to facilitate the multiple references that we make to the measure at issue throughout our report, and by no means prejudges the legal significance that different descriptions for the same measure might have. We have nevertheless changed the placement of footnote 4 and modified its content in order to further clarify this point.

6.29 Third, the United States requests the Panel to modify paragraph 7.8 to clarify that the terms mentioned in that paragraph were used by past panels and the Appellate Body to describe the measures at issue in other disputes. The European Communities did not object to this request, and we have made the requested modification.

6.30 Fourth, the United States contends that the Panel should change the sixth sentence of paragraph 7.12 to clarify that the US argument concerned the EC's addition of 14 measures in its

panel request, rather that the description of "the matter" in general. The European Communities argues that there is no need for such a change because the sentence at issue provides an accurate description of the US argument and the modification sought by the United States would repeat what the last sentence of the paragraph at issue says.

6.31 We agree with the European Communities that the sentence at issue correctly describes the US argument. We recall that this sentence finds basis in the US submissions to the Panel.[22] We also note that the gist of the modification sought by the United States, *i.e.*, the argument that measures not identified in the EC's consultations request fall outside the Panel's terms of reference, is already conveyed in the last sentence of paragraph 7.12. We therefore decline to make the modification requested by the United States.

6.32 Fifth, the United States refers to paragraph 7.25 of our report and argues that it would be inaccurate to consider that the United States does not dispute the similarity between the EC's claims in connection with the 38 determinations identified in the EC's consultations request and the claims in connection with the 14 determinations identified for the first time in the EC's panel request. Because each determination is separate and distinct from the others, so are claims pertaining to such determinations. The United States therefore requests that we modify the mentioned paragraph to eliminate this inaccuracy. The European Communities argues that the United States misconstrues the Panel's statement in the mentioned paragraph and contends that there is no need to modify it.

6.33 We note that the relevant part of paragraph 7.25 notes the similarity between the claims that the European Communities raises in connection with the 38 determinations identified in the EC's consultations request and the claims raised in connection with the additional 14 determinations identified in its panel request. The paragraph at issue then mentions that the United States does not contest this similarity. This statement thus does not address the similarities or dissimilarities between the 38 and the 14 determinations, but rather between the claims concerning those determinations. We have nevertheless modified paragraph 7.25 in order to further clarify this point.

6.34 Sixth, the United States argues that it would not be accurate to state that as part of its request for a preliminary ruling in connection with the 14 additional measures identified in the EC's panel request, the United States cited the Appellate Body decision in *US – Certain EC Products* without elaboration. The United States requests the Panel to correct the relevant part of paragraph 7.26 in order to eliminate this inaccuracy. The European Communities did not object to this request, and we have modified paragraph 7.26 in order to more accurately reflect the US argument in this regard.

6.35 Seventh, the United States requests the Panel to change the phrase "indeterminate number of measures", used in paragraphs 7.31, 7.34 and 7.42 below, to "indeterminate measures" because the latter explains the US arguments more accurately. The European Communities contends that the phrase at issue, which is frequently used in the US submissions, accurately reflects the US position and invites the Panel to decline the US request. We note that the phrase at issue has been used by the United States itself in its submissions to the Panel.[23] Furthermore, we are not convinced that this change would have any significance in our assessment of the EC's claims regarding the continued application of the 18 anti-dumping duties. We therefore decline to make a modification to our findings in this regard.

6.36 Eighth, the United States argues that paragraph 7.32 contains two different arguments that the United States made in its Second Written Submission and requests that this paragraph be modified in order to better reflect those arguments. The European Communities contends that should the Panel agree to make the requested modification it should use the actual language found in the US

[22] First Written Submission of the United States, paras. 55-58.
[23] See, for instance, First Written Submission of the United States, paras. 44, 51, 66, 67 and 69.

submission. We have modified paragraph 7.32 and added paragraph 7.53 in order to provide a more accurate description of the US arguments.

6.37 Ninth, the United States argues that paragraph 7.33 fails to fully reflect the US argument regarding the EC's characterization of the continuation of the 18 duties as a measure and requests that this paragraph be modified. The European Communities did not object to this request, and we have made the requested modification to the mentioned paragraph.

6.38 Tenth, the United States contends that the last two sentences of paragraph 7.44 do not accurately reflect the US argument concerning the nature of the EC's claims on the continued application of the 18 duties and invites the Panel to modify it. The European Communities submits that the Panel should reject the US request since the language that the United States suggests renders the meaning of the sentences at issue confusing. The European Communities requests the Panel to take this into consideration should the Panel consider to make the requested modification. We have modified paragraph 7.44 taking into consideration the views of both parties.

6.39 Eleventh, the United States argues that paragraph 7.71 of our report does not reflect accurately the US arguments regarding the preliminary determinations that the European Communities challenges in these proceedings. The United States requests that we change the last sentence of the mentioned paragraph to clarify that the United States asserts that the European Communities failed to comply with any one of the two conditions set out under Article 17.4 of the Agreement. The European Communities objects to the US request and argues that the paragraph at issue should not be modified as it accurately describes the US argument. Furthermore, the European Communities recalls that it did address the issue of the significant impact of the preliminary determinations at issue. We have modified paragraph 7.71 in order to reflect the US arguments regarding the preliminary determinations at issue, and in addition, have modified paragraph 7.73 in order to clarify that the European Communities raised the issue of the impact of preliminary determinations made by the USDOC.

6.40 Twelfth, the United States takes issue with the statement in paragraph 7.80 of our report that the United States has not made substantive counter-arguments regarding the EC's claims on the continued application of the 18 duties. The United States argues that because the European Communities stated that the legal basis of its claims regarding the continued application of the 18 duties was identical to that of its claims regarding the 52 determinations, the US arguments concerning the EC's claims with respect to the 52 determinations equally respond to the EC's claims with respect to the continued application of the 18 duties. In addition, the United States directs the Panel's attention to the substantive arguments it made regarding the EC's claim under Article XVI:4 of the WTO Agreement in connection with the continued application of the 18 duties. The European Communities submits that where the United States intended to incorporate parts of its previous submissions in these proceedings, it did so explicitly. There is, however, no such reference in the US submissions that would make the US arguments with respect to the 52 determinations equally applicable to the continued application of the 18 duties. The European Communities therefore requests the Panel to reject the US request.

6.41 We agree with the European Communities that there is no indication in the US submissions that the US arguments with respect to the EC's claim concerning the 52 determinations were also applicable to the EC's claims with respect to the continued application of the 18 duties. In any event, we recall that we have not addressed any of the EC's claims regarding the continued application of the 18 duties since we have concluded that this measure falls outside our terms of reference. We have, however, modified paragraph 7.80 to reflect the US arguments regarding the EC's claim under Article XVI:4 of the WTO Agreement in connection with the continued application of the 18 duties.

6.42 The United States also requested that we delete paragraph 6.78 of our interim report because it did not reflect the arguments it had made regarding the EC's claim under Article XVI:4 of the WTO Agreement. The European Communities objected and argued that the Panel should only modify this paragraph to reflect the US arguments in this regard. Since we have summarized these US arguments in the new paragraph 7.80 of our report, we have deleted paragraph 6.78 of our interim report.

6.43 Thirteenth, the United States requests the Panel to replace the word "concedes" with "recognizes" in the second sentence of paragraph 7.88 because the United States did not concede the WTO-inconsistency of model zeroing in investigations, it simply recognized the Appellate Body's findings in *US – Softwood Lumber V* and acknowledged that the same reasoning was applicable to the EC's claim in this dispute. For the same reasons, the United States requests the Panel to modify paragraphs 7.105 and 7.120 of the report. The European Communities objects to the US request. The European Communities notes that the United States did not contest the WTO-inconsistency of model zeroing in investigations and acknowledged that the Appellate Body's reasoning in *US – Softwood Lumber V* was "equally applicable" with respect to the EC's claims in this dispute.

6.44 We have modified paragraphs 7.88, 7.105 and 7.120 in order to more accurately describe the US position with regard to the WTO-consistency of model zeroing in investigations.

6.45 Fourteenth, the United States requests three modifications to paragraph 7.123 of our report so that the US arguments regarding zeroing in periodic reviews are better reflected. The European Communities did not object to this request, and we have made the requested modifications.

6.46 Fifteenth, the United States argues that the last sentence of paragraph 7.127 does not accurately reflect the US position regarding the WTO-consistency of model zeroing in investigations and requests the Panel to modify the mentioned sentence. The European Communities did not object to this request, and we have modified the sentence at issue in order to better reflect the US position.

6.47 Sixteenth, the United States requests the Panel to make three changes in paragraph 7.129 of our report in order to more accurately reflect the US arguments. The European Communities did not object to this request, and we have made the requested changes to paragraph 7.129.

6.48 Seventeenth, the United States requests the Panel to make modifications to paragraphs 7.159 and 7.161 so that the calculation methodology used by the USDOC in periodic reviews is better described. The European Communities did not object to this request, and we have made the requested modifications.

6.49 Eighteenth, the United States requests that a modification be made to paragraph 7.162 of our report to more accurately reflect the basis of one of the aspects of the Appellate Body's reasoning in *US – Stainless Steel (Mexico)*. More specifically, the United States takes issue with the use of the phrase "product as a whole" and submits that because the Appellate Body in the mentioned decision did not rely on this phrase, the Panel should also refrain from using it. The European Communities objects to the US request. The European Communities contends that because the Appellate Body in *US – Stainless Steel (Mexico)* did use the concept of "product as a whole" in its reasoning, the Panel can also use it when referring to the Appellate Body decision. To support this contention, the European Communities refers to paragraphs of the Appellate Body decision other than those cited in paragraph 7.162 of our report. In paragraph 7.162 of our report, we cite specific paragraphs of the Appellate Body decision at issue where, strictly speaking, the concept of "product as a whole" is not mentioned. We have therefore modified paragraph 7.162 in order to more accurately reflect the Appellate Body's decision in this regard.

6.50 Nineteenth, the United States requests the Panel to modify the third sentence of paragraph 7.180 to clarify that security and predictability for the multilateral trading system may be

provided if panels undertake an objective examination and do not add to or diminish the rights and obligations of Members. According to the United States, "providing security and predictability to the multilateral trading system" is not distinct from "not adding to or diminishing the rights and obligations of Members". The European Communities submits that the Panel should reject the US request. The European Communities considers the statement in the sentence at issue to be correct. We consider that while the proposition that when panels do not add to or diminish the rights and obligations of Members, this provides security and predictability to the multilateral trading system may be true in a general sense, it is not a proposition which can be discerned from the text of the DSU. Furthermore, we do not consider that the modification requested by the United States would clarify our reasoning or facilitate the resolution of this dispute. We therefore reject the US request.

6.51 Twentieth, the United States contends that the Panel should modify its statement in paragraph 7.194 to state that it was not clear whether the past dumping margins relied upon by the investigating authorities in the sunset review at issue in *US – Corrosion-Resistant Steel Sunset Review* had been calculated inconsistently with Article 2.4 of the Anti-Dumping Agreement. The European Communities did not object to this request, and we have modified paragraph 7.194 in order to more accurately reflect the facts pertaining to the sunset review at issue in the mentioned dispute.

6.52 Twenty-first, the United States submits that the Panel should modify the third sentence of paragraph 8.4 below in order to better describe the US argument regarding the suggestion that the European Communities seeks from the Panel. The European Communities did not object to this request, and we have made the requested modification in order to better reflect the US argument.

6.53 We have also corrected some minor errors in our interim report, which the United States brought to our attention.

VII. FINDINGS

A. RELEVANT PRINCIPLES REGARDING STANDARD OF REVIEW, TREATY INTERPRETATION AND BURDEN OF PROOF

1. Standard of Review

7.1 Article 11 of the DSU, which provides the standard of review for WTO panels in general, requires panels to carry out an "objective assessment of the matter", an obligation that applies to all aspects of a panel's examination of the "matter", both factual and legal.[24]

7.2 Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review that applies in dispute settlement proceedings under the Anti-Dumping Agreement. This provision reads:

> "In examining the matter referred to in paragraph 5:
>
> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even

[24] Article 11 of the DSU provides in part:
"The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

> though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) 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."

Thus, taken together, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement establish the standard of review that we must apply with respect to both the factual and the legal aspects of this dispute.

2. Rules of Treaty Interpretation

7.3 Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that these customary rules are reflected in Articles 31-32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). Article 31(1) of the *Vienna Convention* provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.4 In the context of disputes under the Anti-Dumping Agreement, the Appellate Body has stated that:

> "The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* 'shall' interpret the provisions of the *AD Agreement* 'in accordance with customary rules of interpretation of public international law'. Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*'). Clearly, this aspect of Article 17.6(ii) involves no 'conflict' with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *AD Agreement*. …
>
> The *second* sentence of Article 17.6(ii) … *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *AD Agreement*, which, under that Convention, would both be '*permissible* interpretations'. In that event, a measure is deemed to be in conformity with the *AD Agreement* 'if it rests upon one of those permissible interpretations'."[25] (emphasis in original)

7.5 Thus, under the Anti-Dumping Agreement, the same rules of treaty interpretation apply as in other disputes, with one distinction being that Article 17.6(ii) provides explicitly that if we find more than one permissible interpretation of a provision of the Anti-Dumping Agreement, we are required to uphold a measure that rests on one of those interpretations.

[25] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, paras. 57 and 59.

3. Burden of Proof

7.6 In WTO dispute settlement, a party claiming a violation of a provision of the WTO Agreement by another Member has the burden to assert and prove its claim.[26] The European Communities, as the complaining party, must therefore make a *prima facie* case of violation of the relevant provisions of the agreements at issue, which the United States must refute. We also note that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[27] It follows that it is also for the United States to provide evidence for the facts which it asserts. In this regard, we recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

B. THE TERMS "MODEL ZEROING" AND "SIMPLE ZEROING"

7.7 This dispute concerns the application in certain anti-dumping proceedings of a certain methodology that the European Communities describes as "zeroing". This particular methodology, which is used in the calculation of the margin of dumping, in the view of the European Communities, does not reflect all the export transactions. More specifically, the European Communities takes issue with the use of the zeroing methodology in three different contexts. First, the European Communities challenges the use of zeroing in the context of investigations where the WA normal value is compared with the WA export price for different models of the product under consideration and where such model-specific results are subsequently aggregated in the calculation of the margin for the product under consideration. The European Communities describes this methodology as "model zeroing". Second, the European Communities challenges the use of zeroing in periodic reviews where the WA normal value is compared with individual export transactions. The European Communities calls this "simple zeroing". Finally, the European Communities takes issue with the use in sunset reviews of dumping margins calculated either through model zeroing in prior investigations and/or through simple zeroing in prior periodic reviews.

7.8 We note that the terms used by the European Communities to describe different calculation methodologies are not found in the Anti-Dumping Agreement or the GATT 1994. We also note, however, that these terms have been used by prior panels and the Appellate Body in the description of the specific measures at issue in those disputes. We will, therefore, also use the same terms in describing the methodologies at issue in this dispute. We would like to underline, however, that such use is for ease of reference only, and does not prejudge our assessment of the WTO-compatibility of the measures at issue.

C. TERMS OF REFERENCE

7.9 The European Communities does not raise any "as such" claims in this dispute.[28] That is, the European Communities does not challenge the WTO-consistency of the zeroing methodology *per se*. All of the EC's claims are "as applied" claims, *i.e.*, they concern the use of the zeroing methodology in connection with certain anti-dumping duties or in certain anti-dumping proceedings. The EC's claims relate to two sets of measures adopted by the United States:

> "First, the European Communities challenges the application or continued application of specific anti-dumping duties resulting from the 18 anti-dumping orders in the

[26] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323 at 337.

[27] *Ibid.*

[28] First Written Submission of the European Communities, para. 2.

> Annex to the Panel request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding, since these anti-dumping duties are calculated and are maintained in place at a level in excess of the dumping margin which would result from the correct application of the Anti-Dumping Agreement.
>
> Second, the European Communities challenges the application of zeroing (i.e., either using the model or simple zeroing technique) as applied in 52 anti-dumping proceedings, including original proceedings, administrative review proceedings and sunset review proceedings listed in the Annex to the Panel request."[29] (emphasis added)

7.10 The United States presents three preliminary objections regarding the claims that the European Communities raises in connection with certain measures and requests the Panel to find that such claims fall outside the Panel's terms of reference. Our assessment with regard to each one of these three preliminary objections is provided below.

1. Measures Not Included in the European Communities' Consultations Request

(a) Arguments of the Parties

(i) United States

7.11 The United States argues that the EC's panel request contains measures not included in its consultations request. In this respect, the United States takes issue with two sets of measures. First, the United States contends that the EC's consultations request does not reference the continued application of 18 specific anti-dumping duties. Second, the United States argues that some of the 52 measures that reflect the specific instances of application of the zeroing methodology were not included in the EC's consultations request. More specifically, the United States recalls that the EC's initial consultations request[30] was limited to 38 specific measures, *i.e.*, 33 periodic reviews, four original investigations and one sunset review. The EC's additional consultations request[31] added two additional periodic reviews of which one was then ongoing. The EC's panel request, however, identifies 52 measures, adding 14 measures to the 38 that were subjected to consultations. The 14 new measures were seven final and three then-ongoing sunset reviews and three final and one then-ongoing periodic reviews.

7.12 The United States notes that under Article 7.1 of the DSU, it is the complaining party's panel request that determines a panel's terms of reference. Article 4.7 of the DSU, however, stipulates that the complaining Member may request the establishment of a panel only with respect to measures that have been subjected to consultations between the parties. Furthermore, the United States notes that Article 4.4 of the DSU requires that the consultations request identify the specific measures at issue. According to the United States, there is a clear progression between the measures discussed in consultations and those that appear in the panel request. In this regard, the United States finds support in the Appellate Body's finding, in *Brazil – Aircraft*, that "Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."[32] The United States is of the view that the matter which determines a panel's terms of reference, both in the context of the DSU

[29] First Written Submission of the European Communities, paras. 34-35.
[30] WT/DS350/1.
[31] WT/DS350/1/Add.1.
[32] Appellate Body Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para. 131.

and Articles 17.3 through 17.5 of the Anti-Dumping Agreement, is the matter that is raised in the complaining party's consultations and panel requests. Hence, measures not identified in the consultations request cannot subsequently be brought into the scope of a dispute through the panel request.

7.13 Based on this reasoning, the United States requests the Panel to rule that the 14 of the 52 measures raised in the EC's panel request, and the measure described as "the application or continued application of the 18 anti-dumping duties," which were identified for the first time in the EC's panel request, are not within the Panel's terms of reference, and to refrain from making findings with regard to such measures.

(ii) The European Communities

7.14 The European Communities notes that the subject matter of this dispute has been described as the "continued existence and application of the zeroing methodology" in its request for consultations, and remained unchanged afterwards. The EC's consultations request refers to the country and the product concerned in describing 18 anti-dumping duties, which the United States argues are outside the Panel's terms of reference. It also cites, with reference to the country and the product concerned, specific anti-dumping proceedings where the contested zeroing methodology was used by the USDOC. The description in the EC's panel request follows the same approach, *i.e.*, it identifies both the continued application of the 18 anti-dumping duties and the specific proceedings where zeroing was used, by reference to the country and the product at issue.

7.15 The European Communities acknowledges that some of the specific anti-dumping proceedings identified in its panel request did not appear in its consultations request. It asserts, however, that such measures are nevertheless within the Panel's terms of reference. According to the European Communities, as long as the consultations and the panel requests concern essentially the same matter, Articles 4 and 6 of the DSU, as interpreted in the relevant case law, do not require that the measures identified in these two documents be the same. Since the measures identified in the EC's consultations request and the 14 measures identified in its panel request are defined by reference to the relevant countries and the products, the European Communities contends that they concern essentially the same matter. Furthermore, the European Communities asserts that the 14 measures at issue fall within the Panel's terms of reference since they have a direct relationship with the measures listed in the consultations request. According to the European Communities, therefore, its claims pertaining to the 14 measures that appear for the first time in its panel request and the claims regarding the continued application of the 18 anti-dumping duties are within the Panel's terms of reference.

(b) Evaluation by the Panel

7.16 The US request for a preliminary ruling regarding measures that are allegedly not identified in the EC's consultations request concerns two sets of measures: a) the 14 additional specific anti-dumping proceedings, and b) the continued application of the 18 anti-dumping duties. Below, we provide our evaluation of the US request regarding these two sets of measures, respectively.

(i) The 14 Additional Anti-Dumping Proceedings

7.17 There is no disagreement between the parties that 14 specific anti-dumping proceedings that were identified in the EC's panel request had not been identified in its consultations request. The United States argues that claims pertaining to measures not identified in the EC's consultations request fall outside the Panel's terms of reference. The European Communities argues that its claims in connection with the 14 proceedings at issue are within the Panel's terms of reference because its consultations and panel requests concern essentially the same matter, *i.e.*, continued existence and

application of the zeroing methodology. The European Communities contends that its claims in connection with the 14 proceedings fall under the Panel's terms of reference also because the 14 proceedings have a direct relationship to the 38 proceedings identified in its consultations request.

7.18 Since it is factually undisputed that the EC's panel request refers to 14 proceedings that were not identified in its consultations request, the issue to be resolved in this regard is the extent to which the EC's consultations request affects our terms of reference. In other words, the basic issue is whether the fact that certain measures were not identified in the EC's consultations request precludes us addressing claims raised in the EC's panel request in connection with such measures. If we find that claims pertaining to measures not identified in the EC's consultations request fall outside the Panel's terms of reference, we shall refrain from addressing such claims. If not, we have to address these claims.

7.19 We note that pursuant to Article 7.1 of the DSU, the terms of reference of a panel are governed by the matter referred to the DSB in the complaining Member's panel request.[33] Article 6.2 of the DSU sets out the requirements that apply to requests for the establishment of a panel:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."

According to Article 6.2, therefore, a panel request must identify *the specific measures at issue* and must provide a *brief summary of the legal basis of the complaint*. Together, these two elements comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU. It is important that the panel request be sufficiently clear for two reasons: First, it defines the scope of the dispute. Second, it serves the *due process* objective of notifying the parties and third parties of the nature of a complainant's case.[34]

7.20 The US request for a preliminary ruling concerns the significance, if any, that a complaining party's consultations request has on a panel's terms of reference. We generally note that the DSU does not contain a provision that addresses this specific issue. Article 4 of the DSU, entitled "Consultations", provides in relevant parts:

> "*Article 4*
>
> *Consultations*
>
> ...
>
> 4. ... Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

[33] That a panel's terms of reference are determined by the complaining Member's panel request is a well established canon of WTO dispute settlement. See, for instance, Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779, para. 124.

[34] Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut* ("*Brazil – Desiccated Coconut*"), WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167, p. 22.

> 7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute." (emphasis added)

7.21 Article 17 of the Anti-Dumping Agreement which contains parallel provisions regarding consultations between Members of the WTO regarding matters that arise under the mentioned agreement, provides in relevant parts:

> "*Article 17*
>
> *Consultation and Dispute Settlement*
>
> 17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.
>
> ...
>
> 17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.
>
> 17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.
>
> 17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:
>
> (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and
>
> (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.
>
> ..." (emphasis added)

Article 4.4 of the DSU provides that a consultations request has to identify the measures at issue and indicate the legal basis of the complaint. Article 4.7 of the DSU, in turn, stipulates that if the parties fail to settle the dispute within 60 days from the receipt of the consultations request, the complaining Member may request the establishment of a panel. Article 17.1 of the Anti-Dumping Agreement provides that the DSU applies to the consultations and the settlement of disputes that arise under the

Anti-Dumping Agreement. Article 17.3 of the Anti-Dumping Agreement states that if a Member considers that any benefit accruing to it, directly or indirectly, under the mentioned Agreement is nullified or impaired, or that the achievement of any objective is impeded by another Member, it may request consultations with the Member concerned. Article 17.4 states that if the parties fail to settle the dispute through consultations, the complaining Member may refer the matter to the DSB to seek the establishment of a panel. Finally, Article 17.5 stipulates that the DSB shall, in such a situation, establish a panel to resolve the dispute.

7.22 The provisions cited above do not directly address the issue of whether a complaining Member is barred from raising claims in connection with measures identified in its panel request, which were not identified in its consultations request. Article 6.2, entitled "Establishment of Panels", requires that a panel request mention whether consultations were held, but it does not stipulate that the scope of the consultations request limits the scope of the claims that may subsequently be raised before a panel. Article 4.7 of the DSU provides that if parties fail to settle "the dispute" within 60 days, the complaining Member may request the establishment of a panel. Similarly, Article 17.4 of the Anti-Dumping Agreement provides that if consultations fail, the complaining Member may refer "the matter" to the DSB. These provisions, in our view, support the argument that as long as the consultations request and the panel request concern the same matter, or dispute, claims raised in connection with measures identified in the complaining Member's panel request would fall within a panel's terms of reference even if those precise measures were not identified in the consultations request.

7.23 We note that this issue also arose in some prior disputes and that our reasoning in this case finds support in the reasoning developed by panels and the Appellate Body in those disputes. In *Canada – Aircraft*, the panel reasoned that as long as the consultations and panel requests refer to the "same dispute", claims pertaining to that dispute would fall under the panel's terms of reference.[35] According to that panel, this approach would observe the defendant's due process rights and at the same time recognize that the nature of the dispute could change between consultations and the establishment of a panel.[36] It follows that the scope of a consultations request and that of a panel request do not necessarily have to be identical. This reasoning was also followed by the panel in *Brazil – Aircraft*. The panel in that case underlined the fact that a WTO panel's terms of reference are governed by the complaining Member's panel request, as opposed to its consultations request.[37] While acknowledging

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[35] The panel in *Canada – Aircraft* held:

"Accordingly, our terms of reference are determined by document WT/DS70/2, *i.e.*, Brazil's request for establishment of this Panel. This document refers expressly to "financing … provided by the Export Development Corporation …". In principle, therefore, EDC "financing" falls within our jurisdiction. As noted above, EDC "financing" would only fall outside our jurisdiction if EDC "financing" were not part of the "dispute" on which Brazil had requested consultations. In our view, Brazil requested consultations in respect of a "dispute" concerning prohibited export subsidies allegedly provided to the Canadian civil aircraft industry by *inter alia* EDC. This "dispute" is also the subject of Brazil's request for establishment of this Panel. Since the EDC "financing" identified in Brazil's request for establishment of a panel was part of the same "dispute" with respect to which consultations were requested, we find that EDC "financing" falls within the Panel's jurisdiction." (emphasis added)

Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443, para. 9.14.

[36] *Ibid.*, para. 9.12.

[37] The panel in *Brazil – Aircraft* held:

"We recall that our terms of reference are based upon Canada's request for establishment of a panel, and not upon Canada's request for consultations. These terms of reference were established by the DSB pursuant to Article 7.1 of the DSU and establish the parameters for our work. Nothing in the text of the DSU or Article 4 of the SCM Agreement provides that

that the complaining Member should seek the establishment of a panel with regard to the same dispute that was subjected to consultations, the panel in *Brazil – Aircraft* reasoned that this does not require a precise identity between the matter that was subject to consultations and that with respect to which the establishment of a panel was requested.[38] On appeal, the Appellate Body upheld the panel's reasoning and reiterated the fact that the DSU does not require precise identity between the measures identified in the complaining Member's consultations request and those identified in its panel request.[39]

7.24 The United States contends that the ruling of the Appellate Body in *Brazil – Aircraft* is not relevant to the issue presented in this case. In the view of the United States, although the new measures in *Brazil – Aircraft* were regulatory instruments that entailed periodic re-enactments of identical measures, the measures added to the EC's panel request in this case are new and legally distinct determinations by the USDOC. Although the 14 new measures concern the same products originating in the same countries, they resulted from proceedings that are independent from those identified in the EC's consultations request.[40]

7.25 In our view, whether the new measures were taken in proceedings that, as a matter of US law, are independent from one another is but one relevant consideration in deciding whether such new measures are within our terms of reference. We note that the 14 and the 38 measures concern different determinations pertaining to the same products originating in the same countries. Furthermore, these two groups of measures entail the alleged use of the same methodology, zeroing, which is the gist of the EC's claims before us. In terms of the formulation of the EC's claims, there is no difference whatsoever between these two sets of measures. That is, the claims that the European

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the scope of a panel's work is governed by the scope of prior consultations." (footnote omitted, emphasis added)

Panel Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221, para. 7.9.

[38] "Accordingly, we consider that a panel may consider whether consultations have been held with respect to a 'dispute', and that a preliminary objection may properly be sustained if a party can establish that the required consultations had not been held with respect to a dispute. We do not believe, however, that either Article 4.7 of the DSU or Article 4.4 of the SCM Agreement requires a precise identity between the matter with respect to which consultations were held and that with respect to which establishment of a panel was requested." (footnote omitted)

Panel Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221, para. 7.10.

[39] "We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel... We are confident that the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that were referred to the DSB for the establishment of a panel. We emphasize that the regulatory instruments that came into effect in 1997 and 1998 did not change the essence of the export subsidies for regional aircraft under PROEX." (footnote omitted, italic emphasis in original, underline emphasis added)

Appellate Body Report, *Brazil – Aircraft*, *supra*, note 32, para. 132. We also note that the panels in *Japan – Agricultural Products II*, *Mexico – Anti-Dumping Measures on Rice* and *US – Steel Plate* also made similar findings. See, Panel Report, *Japan – Measures Affecting Agricultural Products* ("*Japan – Agricultural Products II*"), WT/DS76/R, adopted 19 March 1999, as modified by Appellate Body Report, WT/DS76/AB/R, DSR 1999:I, 315, para. 8.4(i); Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice* ("*Mexico – Anti-Dumping Measures on Rice*"), WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report, WT/DS295/AB/R, DSR 2005:XXIII, 11007, para. 7.41; Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("*US – Steel Plate*"), WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, 2073, para. 7.18.

[40] Second Written Submission of the United States, para. 13.

Communities raises in connection with the 38 and the 14 measures at issue are identical. The United States does not dispute this similarity between the claims. In our assessment of the US request for a preliminary ruling, we consider that the substantive similarity between the two sets of measures at issue, and the fact that they concern the same country and the same product outweigh the fact that they represent independent determinations under US law.

7.26 The United States maintains that its arguments on this issue are supported by the reasoning of the Appellate Body in *US – Certain EC Products*. Specifically, the United States cites paragraphs 70 and 82 of that report.[41] The Appellate Body's reasoning in that case, however, shows that it carried out a very detailed analysis regarding the relationship between the two measures at issue in that dispute and came to the conclusion that these measures were not sufficiently related so as to allow the complaining party to raise claims in connection with the (new) measure that was identified for the first time in its panel request. Among others, the Appellate Body analysed differences regarding: (a) the content of the measures[42], (b) the government agencies that issued the measures[43] and (c) the legal linkage between the measures.[44]

7.27 Given the striking similarities between the 14 new measures and the 38 measures identified in the EC's consultations request, however, we do not agree that the Appellate Body's reasoning in *US – Certain EC Products* undermines our reasoning outlined above.

7.28 We recall that there is a considerable similarity between the 38 measures that were identified in the EC's consultations request and those that appeared for the first time in the EC's panel request. These two sets of measures relate to the same products originating in the same countries. More importantly, the legal nature of the EC's claims regarding the additional 14 measures does not in any way differ from that of the 38 measures identified in the EC's consultations request. The 14 measures entailed the same types of zeroing methodology as the 38 measures. Hence, it is clear that the EC's consultations request and its panel request refer to the same subject matter, the same dispute. We therefore reject the US request for a preliminary ruling in this regard and find that the 14 measures at issue are within our terms of reference.

(ii) Continued Application of 18 Anti-Dumping Duties

7.29 We recall that in addition to the 14 new measures that we have discussed, the United States also requests that the Panel find that the EC's claims pertaining to the continued application of the 18 anti-dumping duties also fall outside the Panel's terms of reference because this measure was identified for the first time in the EC's panel request. Parties disagree as to whether the continued application of the 18 anti-dumping duties was identified in the EC's consultations request. The United States asserts that this measure was identified for the first time in the EC's panel request whereas the European Communities contends that it was also identified in its consultations request. We note our finding below (para. 7.61) that the EC's claims regarding the continued application of the 18 anti-dumping duties fall outside our terms of reference because this purported measure does not meet the specificity requirement set out under Article 6.2 of the DSU. We therefore need not, and do not, address the US assertion that the continued application of the 18 duties at issue also falls outside our terms of reference on the grounds that it was not raised in the EC's consultations request.

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[41] First Written Submission of the United States, paras. 59-60; Second Written Submission of the United States, para. 11.

[42] Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities* ("*US – Certain EC Products*"), WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373, para. 74.

[43] *Ibid.*, para. 75.

[44] *Ibid.*, paras. 76-77.

2. Specificity of the European Communities' Reference to 18 Cases

(a) Arguments of the Parties

(i) United States

7.30 The United States recalls that the Panel's terms of reference are set by the claims raised in the EC's panel request. Pursuant to Article 6.2 of the DSU, the EC's panel request has to identify, *inter alia*, the specific measures at issue. The United States notes that the EC's panel request refers to the continued application of 18 specific anti-dumping duties resulting from anti-dumping orders enumerated in the Annex to its panel request, as calculated or maintained in the most recent periodic review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding. The United States contends that as far as the EC's claim regarding the application or continued application of the 18 duties is concerned, the panel request fails to identify the specific measures at issue, as required under Article 6.2 of the DSU. According to the United States, it is not clear which specific measure this claim refers to.

7.31 The United States notes the EC's statement that "the application or continued application of the 18 duties" would also cover any subsequent proceeding that would modify such duty levels and argues that this formulation effectively requests the Panel to make findings on measures that are not in existence as of the date of the Panel's establishment. The United States asserts that such a description fails to meet the specificity standard of Article 6.2 of the DSU. The United States argues that the European Communities asks the Panel to make findings that would apply to an indeterminate number of measures, which, according to the United States, the DSU does not allow.

7.32 The United States also points out that the European Communities seems to indicate that the 18 measures cover the application or continued application of the "zeroing" methodology in 18 cases. According to the United States, to the extent the European Communities is saying that it is challenging the application or continued application of zeroing in 18 cases (a description not found anywhere in its panel request), that "measure" lacks specificity. The United States argues that "[t]he [European Communities] cannot make a generalized reference to the application of zeroing in 18 broadly-defined cases without indicating the exact determinations where 'zeroing' was applied."[45]

7.33 The United States objects to the EC's argument asking the Panel to treat each duty as a free-standing measure. According to the United States, "the [European Communities] ignores the fact that, for any given importation, the antidumping duty assessed depends on a particular underlying administrative determination, whether that be an original investigation, assessment review, new shipper review, or changed circumstances review, while the continuation of that duty depends on an underlying sunset review."[46] The United States contends that "the [European Communities] must identify the specific determination leading to the particular application or continued application of an antidumping duty, and cannot merely refer to 'duty' in a general and detached way."[47] The United States finds inconsistency in the European Communities arguing on the one hand that it does not raise any "as such" claims in this case and on the other hand presenting the application of a duty as a self-standing measure.[48]

7.34 The United States argues that permitting the European Communities to submit claims in connection with an indeterminate number of measures would seriously prejudice the US right of defence in these proceedings. The United States also contends that the European Communities has to

[45] Second Written Submission of the United States, para. 23.
[46] (footnote omitted) Second Written Submission of the United States, para. 25.
[47] *Ibid*.
[48] Second Written Submission of the United States, para. 26.

comply with the requirements of the DSU regarding the identification of the specific measure at issue irrespective of whether failure to do so would prejudice the US due process rights since the DSU contains no such requirement.

(ii) European Communities

7.35 The European Communities disagrees with the US assertion that the EC's panel request refers to an indeterminate number of measures. The European Communities notes that, with regard to the continued application of the 18 duties, the EC's panel request identifies the measures at issue with adequate precision: "a duty rate based on the use of the zeroing methodology which is being applied against imports of a specific product from a specific country".[49] The European Communities argues that this description is consistent with the requirements of the DSU just as the description of the practice of "zeroing" was considered to be so by the Appellate Body in previous zeroing disputes. According to the European Communities, as long as the cases from which arose the 18 duties at issue are described in the EC's panel request by reference to the countries, products and duty levels concerned, the fact that reference is not made to the last proceeding where such duties were modified, is irrelevant.[50]

7.36 The European Communities notes, and disagrees with, the US point of view that measures challenged in WTO dispute settlement should either be a framework law, or a specific anti-dumping proceeding such as an investigation, a periodic review or a sunset review. According to the European Communities, as long as the content of the measure is properly described in the complaining Member's panel request, the form in which the measure manifests itself is irrelevant.[51]

7.37 The European Communities submits that, as elaborated in the WTO jurisprudence, a measure which is closely related to the measure identified in the complaining party's panel request also falls within a panel's terms of reference. Accordingly, measures introduced subsequent to the EC's panel request would fall in this Panel's terms of reference to the extent that they are related to the 18 anti-dumping duties specifically cited in such request.

7.38 The European Communities posits that the rationale behind the specificity requirement of Article 6.2 of the DSU is to protect the parties' due process rights in dispute settlement proceedings. It follows from the EC's argument that the United States has to show that the alleged lack of specificity with regard to the 18 duties at issue has prejudiced its due process rights. The European Communities contends, however, that the United States has failed to show such prejudice.

(b) Arguments of Third Parties

(i) Japan

7.39 Japan submits that the EC's panel request defines with sufficient clarity the measure at issue with regard to the 18 anti-dumping duties applied by the United States. Japan asserts that the practice of zeroing is applied in all proceedings pertaining to an anti-dumping duty, including duty assessment proceedings, changed circumstances reviews and sunset reviews. It follows that the application or continued application of the 18 anti-dumping duties at issue constitutes a measure for purposes of WTO dispute settlement. Japan recalls the US argument with regard to the implementation of the DSB recommendations and rulings in the past zeroing disputes that since the periodic reviews, found to be WTO-inconsistent, were superseded by subsequent periodic reviews, the United States did not have to take any step with regard to the implementation of such rulings and recommendations. Japan

[49] Second Written Submission of the European Communities, para. 53.
[50] Response of the European Communities to the US Request for Preliminary Rulings, para. 37.
[51] Second Written Submission of the European Communities, para. 55.

argues that this approach undermines the effectiveness of WTO dispute settlement and that the EC's description of the measure at issue in this dispute effectively precludes this possibility.

(c) Evaluation by the Panel

7.40 We recall that it is the EC's panel request that determines our terms of reference in these proceedings. Article 6.2 of the DSU stipulates that a panel request has to identify the *specific measures at issue* and provide a *brief summary of the legal basis* of the complaint. We note that the controversy regarding the EC's claim in connection with the continued application of the 18 anti-dumping duties at issue concerns the identification of the specific measures at issue. There is no disagreement between the parties regarding the inclusion in the EC's panel request of a brief summary of the legal basis of the complaint.

7.41 At the outset, we would like to address an argument raised by the European Communities, which concerns the burden of proof. The European Communities argues that the United States does not dispute that the measure identified by the European Communities exists, nor does it contest the precise content of such measure as described by the European Communities. The European Communities therefore contends that the US preliminary objection in this regard lacks merit.[52] We note, however, that the United States does object to the identification of the specific measures at issue and that is the very reason why it has raised this preliminary objection. Furthermore, we recall that in accordance with the rules governing the burden of proof which we have to apply in this case (*supra*, para. 7.6), it is for the European Communities to make a *prima facie* case before the burden shifts to the United States to rebut it.

7.42 The European Communities explicitly states that it is not raising any "as such" claims in this dispute.[53] That is, the European Communities is not challenging the zeroing methodology "as such", because, according to the European Communities, this has already been decided by the Appellate Body. All of the EC's claims, therefore, are to be considered as challenging particular instances of application of the zeroing methodology. There is no disagreement between the parties that the EC's claims regarding the 52 proceedings concern the application of the zeroing methodology in specific instances. The nature of the EC's claims regarding the continued application of the 18 duties, however, has not been made clear. The United States argues that the way this measure is described in the EC's panel request amounts to challenging an indeterminate number of measures and requests the Panel to find, on the grounds of lack of specificity, that the EC's claims in connection with the continued application of the 18 duties fall outside the Panel's terms of reference. The European Communities, however, contends that its description of the measures at issue is in compliance with the DSU since it identifies the countries and the products concerned in connection with each one of the 18 duties at issue.

7.43 The issue therefore is whether the continued application of the 18 duties at issue has been identified in the EC's panel request in a manner that meets the specificity standard set out under Article 6.2.

7.44 We note that the discussions between the parties in this regard partly focus on whether the EC's claims regarding the continued application of the 18 duties are "as such" or "as applied" claims. The European Communities argues that the measures at issue with regard to its claim regarding the continued application of the 18 duties are instances of application of the zeroing methodology, not the methodology "as such". According to the European Communities, in order to be subject to dispute settlement, a measure needs not be "a norm or instrument". The European Communities contends that

[52] Response of the European Communities to Question 1(a) from the Panel Following the First Meeting.

[53] First Written Submission of the European Communities, para. 2.

"the mere fact that ... the measure has a life stretching an indeterminate time into the future, is no bar to the measure being subject to dispute settlement".[54] The United States, for its part, recalls that the European Communities argues that it is not raising any "as such" claims in this case which, according to the United States, means that all of the EC's claims should be considered "as applied" claims. The United States argues that the EC's attempt to describe a duty as a free-standing measure creates, by the EC's own admission, some sort of ambiguous "as applied/as such" measure. According to the United States, it is not clear whether the European Communities is in fact making an "as such" claim.[55]

7.45 At the outset, we recall the Appellate Body's pronouncement that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[56] We note that the distinction between "as such" and "as applied" claims is not found in the text of the DSU. It has been developed in the jurisprudence. It is well known that some GATT panels, as well as WTO panels and the Appellate Body, have examined not only measures consisting of acts that apply to particular situations, but also those consisting of acts setting forth rules or norms that have general and prospective application.[57] Claims taking issue with measures of general and prospective application are generally called "as such" claims, whereas those targeting acts that apply to specific situations are called "as applied" claims.

7.46 In our view, the distinction between "as such" and "as applied" claims does not govern the definition of a measure for purposes of WTO dispute settlement, nor is this distinction intended to replace or override the requirements of Article 6.2 of the DSU as to how measures have to be identified in a panel request. In principle, the mere fact that a measure does not fall under either of these categories should not determine whether the identification of that measure conforms to the requirements of Article 6.2 of the DSU. Consequently, even if we refer to this distinction in our assessment of the issue before us, we shall refrain from attributing a decisive function to it. Rather, we shall base our assessment on the provisions of the DSU, Article 6.2 thereof in this instance, and evaluate the text of the EC's panel request in light of the cited provision.

7.47 With that in mind, we now turn to the EC's panel request. The EC's panel request identifies the specific measures at issue in this dispute in the following manner:

> "The measures at issue and the legal basis of the complaint include, but are not limited to, the following:
>
> The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure).
>
> In addition to these measures, the administrative reviews, or, as the case may be, original proceedings or changed circumstances or sunset review proceedings listed in

[54] Response of the European Communities to Question 3 From the Panel Following the First Meeting.

[55] Closing Statement of the United States at the First Meeting, paras. 11-13; Second Written Submission of the United States, para. 26.

[56] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3, para. 81.

[57] For a comprehensive citation of such panel and Appellate Body reports, see Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *Ibid.*, footnote 80.

> the Annex (numbered 1 to 52) with the specific anti-dumping orders and are also considered by the EC to be measures subject to the current request for establishment of the panel in addition to the anti-dumping orders."[58] (footnote omitted, emphasis added)

7.48 We note that the panel request, and the EC's submissions, take issue with two different sets of measures. First, the European Communities identifies 18 cases by reference to the country and the product involved and argues that the continued application of the duties calculated through zeroing in such cases violates the Anti-Dumping Agreement. Second, the European Communities challenges the use of zeroing in 52 specific anti-dumping proceedings (investigations, duty assessment proceedings and sunset reviews) that pertain to these 18 cases.

7.49 We note that the part of the EC's panel request challenged by the United States takes issue with the continued application of the 18 anti-dumping duties listed in the annex to the panel request, as calculated or maintained in the most recent proceeding pertaining to such duties. On its face, we find this description ambiguous, particularly because the panel request does not sufficiently distinguish between the continued application of the 18 duties and the use of zeroing in the 52 specific proceedings at issue. Clearly, the continued application of the 18 duties does not take issue with zeroing *per se* because, as the European Communities acknowledges, the zeroing methodology "as such" is not challenged in this dispute. Nor does it seem to take issue with specific proceedings, such as investigations, different types of reviews, where zeroing has allegedly been applied. Otherwise, there would have been no need to also challenge 52 specific proceedings that pertain to the same duties.

7.50 We recall the Appellate Body's pronouncement that any act or omission can, in principle, constitute a measure for purposes of WTO dispute settlement.[59] In our view, this statement clarifies that the concept of a measure for purposes of WTO law covers a wide range of acts or instruments. The fact remains, however, that in order to successfully raise claims against a measure, the complaining Member must in the first place demonstrate the existence and the precise content of such measure, consistently with the requirements of Article 6.2 of the DSU. Unless the measure is adequately identified in the complaining Member's panel request, therefore, that Member cannot raise claims in connection with that purported measure.

7.51 The European Communities argues that as long as its panel request identifies the measure at issue with reference to the country and the product concerned, such description would meet the requirements of Article 6.2 of the DSU. The European Communities cites the panel reports in *Argentina-Footwear* and *Canada-Wheat* to support the view that it is the identification of the measure at issue, not the exact description of the legal instrument in which the measure is found, that matters for purposes of Article 6.2 of the DSU.[60] As the European Communities notes, the issue in the cited two cases was whether Article 6.2 of the DSU required, in addition to the description of the specific measure at issue, a full description of the legal instrument in which the measure was found. In this regard, we see a significant difference between the issue presented in those cases and the one before us in this dispute. The issue in this case does not concern the description of the legal instrument that embodies the challenged measure. Rather, the issue here is the identification of the measure itself. Hence, we do not consider the references to *Argentina – Footwear* and *Canada – Wheat* pertinent.

7.52 The European Communities contends that measures that are subsequent or closely related to those identified in the complaining Member's panel request also fall within a panel's terms of

[58] WT/DS350/6, p. 3.
[59] *Supra*, note 56.
[60] Response of the European Communities to the US Request for Preliminary Rulings, paras. 37-38.

reference.[61] The European Communities provides examples from the jurisprudence in order to support this proposition. For instance, the European Communities cites the panel decision in *Japan – Film*. Regarding the specificity requirement of Article 6.2, that panel reasoned:

> "The question thus becomes whether the ordinary meaning of the terms of Article 6.2, i.e., that "the specific measures at issue" be identified in the panel request, can be met if a "measure" is not explicitly described in the request. To fall within the terms of Article 6.2, it seems clear that a "measure" not explicitly described in a panel request must have a clear relationship to a "measure" that is specifically described therein, so that it can be said to be "included" in the specified "measure". In our view, the requirements of Article 6.2 would be met in the case of a "measure" that is subsidiary or so closely related to a "measure" specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements -- close relationship and notice -- are inter-related: only if a "measure" is subsidiary or closely related to a specifically identified "measure" will notice be adequate. For example, we consider that where a basic framework law dealing with a narrow subject matter that provides for implementing "measures" is specified in a panel request, implementing "measures" might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2. Such circumstances include the case of a basic framework law that specifies the form and circumscribes the possible content and scope of implementing "measures". As explained below, this interpretation of Article 6.2 is consistent with the context and the object and purpose of Article 6.2, as well as past panel practice."[62] (emphasis added)
>
> "In our view, "measures" that are subsidiary or closely related to specified "measures" can be found to be "adequately identified" as that concept was applied in the *Bananas III* case."[63] (emphasis in original)

7.53 The United States argues that the EC's challenge to the application or continued application of duties related to all subsequent and previously unidentified proceedings is not the equivalent of the situation in *Japan – Film*, as the European Communities claims. According to the United States, the application or continued application of anti-dumping duties results from distinct legal proceedings leading to a final determination. Each proceeding, whether an original investigation, administrative review, or sunset review, involves different time periods, different entries of merchandise, and different information and data. The United States argues that this is not the equivalent of the situation in *Japan – Film*, which involved a challenge to subsequent regulations issued under a law of general application.[64]

7.54 We have two observations regarding the EC's reference to this panel report. First, the factual circumstances of *Japan – Film* were considerably different from those before us. In *Japan – Film*, a measure was identified in the complaining Member's panel request consistently with Article 6.2, and another measure which was closely related to the measure already identified in the panel request was raised in the subsequent panel proceedings. The issue in the present dispute, however, centres on whether the description of the measure in the EC's panel request meets the requirements of Article 6.2. Second, the measures that the panel in *Japan – Film* found to be closely related to the measures specifically raised in the complaining party's panel request were in existence during the

[61] *Ibid.*, para. 43.

[62] Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* ("*Japan – Film*"), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, para. 10.8.

[63] *Ibid.*, para. 10.10.

[64] Second Written Submission of the United States, paras. 21-22.

panel proceedings.[65] In other words, there was no disagreement regarding the existence of the subsequent measures. The issue was whether the subsequent measures were sufficiently related to those identified in the panel request such that they could properly be considered within the panel's terms of reference. The same applies to the measures challenged in *EC – Bananas III*[66] and *Argentina – Footwear*[67], also cited by the European Communities. In the dispute at hand, however, parties disagree as to the very existence of the measure identified in the EC's panel request, *i.e.*, the continued application of the 18 duties. We therefore do not consider the reasoning of the panel in *Japan – Film* to be relevant to the issue presented in these proceedings.

7.55 The European Communities argues that the measures to which the phrase "continued application of the 18 duties" refers, are duties. In this regard, a duty refers to "an anti-dumping duty on a particular product exported from the [European Communities] and imported into the [United States]"[68] which remains in place from imposition until termination. The European Communities describes the content of the duty as being duty rates calculated on the basis of zeroing. The European Communities provides an explanation of what zeroing is. The European Communities refers to the past Appellate Body reports on zeroing and contends that:

> "In *US – Zeroing (EC)* and in *US – Zeroing (Japan)*, the Appellate Body has accepted that both the EC and Japan have described the "precise content" in the context of the methodology itself. It necessarily follows that what the EC has described in each of the 18 measures – which is the same - also meets the "precise content" requirement."[69] (footnotes omitted, italic emphasis in original, underline emphasis added)

We note that the European Communities argues that the content of the specific measures at issue in connection with the continued application of the 18 duties is the same as the content of the measures addressed by the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*. This argument equates the continued application of the 18 duties at issue with the zeroing methodology "as such", addressed in the cited two prior disputes. Given the EC's clear statement that it is not challenging zeroing "as such" in this case, we find this proposition to be internally inconsistent and reject it.

7.56 The European Communities also asserts:

> "The "norm or instrument" in this context is the zeroing methodology "as such" – although it is not necessary to demonstrate that a "measure" is a "norm or instrument" in order for it to be subject to dispute settlement. The 18 measures are instances of the application of the zeroing methodology. In the view of the EC, in order for the 18 measures to be measures for the purposes of dispute settlement, they do not need to be characterised as "norms or instruments". However, they are as much "norms or instruments" as is, for example, a programme under the SCM Agreement. The mere fact that duties (or subsidies) vary over time; and that the measure has a life stretching

[65] *Ibid.*, paras. 10.12-10-19.

[66] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador* ("*EC – Bananas III (Ecuador)*"), WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:III, 1085, para. 7.27.

[67] Panel Report, *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear (EC)*"), WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575, para. 8.37.

[68] Response of the European Communities to Question 1(a) from the Panel Following the First Meeting.

[69] *Ibid.*

> an indeterminate time into the future, is no bar to the measure being subject to dispute settlement."[70] (emphasis added)

We note that the European Communities attempts to categorize the continued application of the 18 duties somewhere in between zeroing "as such" and zeroing "as applied". In principle, we agree with the EC's proposition that in order for the continued application of the 18 duties to constitute a measure, it need not constitute a norm or instrument. In our view, the title attributed to a measure has no bearing on whether it constitutes a measure for purposes of WTO dispute settlement. The fact remains, however, that the European Communities has to demonstrate the existence and the precise content of the purported measure. In this regard, we also do not consider pertinent the fact that the European Communities places the continued application of the 18 duties between an "as such" and an "as applied" claim. Such categorization in the abstract does not provide sufficient explanation regarding the existence and the precise content of the alleged measure. We also disagree with the analogy that the European Communities makes between the continued application of the 18 duties at issue and a subsidy programme. A subsidy programme may be identified through different means, including the relevant legal instruments, payments made by the governments, etc. In this case, however, the European Communities challenges the continued application of 18 duties, which, in and of itself, does not amount to the identification of a measure. We recall that zeroing "as such" and "as applied" in various types of anti-dumping proceedings may be, and has been, challenged in WTO dispute settlement. We note, however, that what the European Communities describes as a measure in these proceedings is the continued application of 18 duties, in isolation from any proceeding in which such duties have been calculated, allegedly through zeroing. As such, we do not consider this to represent a measure in and of itself.

7.57 Regarding the difference between the continued application of the 18 duties and the use of zeroing in the 52 anti-dumping proceedings identified in its panel request, the European Communities argues:

> "Finally, the Panel asks the EC to explain the difference between the 18 measures at issue and the 52 measures at issue. As noted above, the first set of measures disputed by the EC constitute the application or continued application of the zeroing methodology in the form of anti-dumping duties which are calculated with zeroing in the 18 cases referred to in the Annex – each of which has a specific US DOC reference number. The 52 measures at issue constitute documents pursuant to which the duty is first imposed, or varied and/or finally collected. There may be a partial overlap between the two sets of measures in the sense that the 52 measures may be regarded as specific documentary manifestations of, or instances of the application of, the 18 measures. However, the two sets of measures are different since the 18 measures are defined at a more general level than the 52 measures. As a result, the EC considers that findings concerning the 18 measures will have a broader impact than those concerning the 52 measures."[71] (emphasis added)

7.58 The European Communities acknowledges that there is some overlap between these two sets of measures. We recall that Article 6.2 of the DSU requires that the specific measures at issue be identified in the complaining Member's panel request. This obligation, in our view, applies to each and every measure regarding which the complaining Member considers to raise claims. In the dispute at hand, this means that if the European Communities wishes to raise claims in connection with the continued application of the 18 duties at issue, it has to, in the first place, identify that measure independently from other measures with regard to which it raises other claims. In the face of the EC's

[70] Response of the European Communities to Question 3 from the Panel Following the First Meeting.

[71] Response of the European Communities to Question 1(a) from the Panel Following the First Meeting.

acknowledgement that there is overlap between the continued application of the 18 duties and the 52 proceedings, we find illogical the EC's argument that the former is within the Panel's terms of reference.

7.59 In our view, another flaw in the EC's arguments regarding the continued application of the 18 duties at issue is that the European Communities seems to seek a remedy which would affect anti-dumping proceedings that the USDOC may conduct in the future. Indeed, the European Communities does not deny this fact:

> "The EC is not asking the Panel to make findings about "future measures", any more than a Member that seeks findings about an *SCM programme* is seeking findings about future instances of the application of such programme. Rather, the EC is seeking findings with respect to a measure that, by its own terms, has a life (that is, a period of time during which it is destined to be in force) that stretches into the future. That is no bar to the measure being the subject of dispute settlement."[72] (italic emphasis in original, underline emphasis added)

> "However, the two sets of measures are different since the 18 measures are defined at a more general level than the 52 measures. As a result, the EC considers that findings concerning the 18 measures will have a broader impact than those concerning the 52 measures."[73] (emphasis added)

We note that the remedy sought by the European Communities will affect the determinations that the USDOC might make in anti-dumping proceedings that may be conducted in the future. In other words, if granted, the findings sought by the European Communities will have an impact on measures that did not exist at the time of the establishment of the Panel, nor during the panel proceedings. In our view, Article 6.2 of the DSU, in principle, does not allow a panel to make findings regarding measures that do not exist as of the date of the panel's establishment. There may be exceptional cases where panels may consider to make findings on measures not identified in the complaining party's panel request if circumstances justify it. For that to happen, however, the new measure or measures have to constitute "a measure" within the meaning of Article 6.2 of the DSU and have to come into existence during the panel proceedings.

7.60 We note that the European Communities repeatedly refers to the US alleged failure to implement the DSB recommendations and rulings in the past zeroing cases. This suggests that the European Communities somehow links its claims regarding the continued application of the 18 duties at issue to the US alleged failure to implement the DSB recommendations and rulings in the past zeroing cases. The European Communities does not argue that the measures at issue in this dispute are measures taken to comply with the DSB recommendations and rulings in previous zeroing cases within the meaning of Article 21.5 of the DSU.[74] It, however, submits that the fact that the United States failed to implement the DSB recommendations and rulings in previous zeroing cases is relevant to the Panel's assessment of the EC's claims in this case:

> "From the perspective of the need for security and predictability, the fact that past Appellate Body Reports have already decided the issues before the Panel, and that the

[72] Response of the European Communities to Question 5(b) from the Panel Following the First Meeting.

[73] Response of the European Communities to Question 1(a) from the Panel Following the First Meeting.

[74] Response of the European Communities to Question 4(a) from the Panel Following the First Meeting.

> entire US defence is premised on rejecting those past Appellate Body Reports, is legally relevant to the Panel's assessment of all the EC claims."[75]

The European Communities does not, however, articulate how exactly the US alleged failure to implement the DSB recommendations and rulings in the past zeroing cases is legally relevant to the present dispute. In our view, each dispute settlement proceeding at the WTO is independent from others, except proceedings initiated under Article 21.5 of the DSU which are naturally linked to the relevant original proceedings. Under Article 21.5 of the DSU, a Member is entitled to bring a case against another Member that fails to comply with the DSB recommendations and rulings following an original proceeding.[76] The European Communities clearly points out that it does not see these panel proceedings as a forum where the alleged non-compliance in some past cases may be discussed. Yet, it argues, without convincing reasoning, that such non-compliance is somehow relevant to the Panel's evaluation of the EC's claims in this case. For the reasons that we have explained, this proposition lacks a legal basis.

7.61 On the basis of the foregoing considerations, we find that the European Communities failed to identify the specific measure at issue in connection with its claims regarding the continued application of the 18 anti-dumping duties at issue. Consequently, we find that such claims do not fall within our terms of reference in these proceedings.

7.62 The European Communities contends that the purpose of the specificity requirement embodied in Article 6.2 of the DSU is to protect the defendant's due process rights. Thus, in order to prevail in its request for a preliminary ruling with regard to the continued application of the 18 duties at issue, the United States has to show that the alleged imperfection in the EC's panel request has prejudiced the US due process rights. Since the United States has not shown such prejudice, the Panel should find the EC's claims in connection with the continued application of the 18 duties to be within its terms of reference. The European Communities cites the Appellate Body reports in *EC – Computer Equipment* and *Korea – Dairy*, and the panel report in *Canada – Wheat* to support its argument.[77] The United States disagrees with the EC's contention and maintains that neither Article 6.2 of the DSU nor any other provision of the WTO Agreement contains such a prejudice requirement. According to the United States, if the complaining Member's panel request fails to identify the specific measures at issue, claims in connection with such measures would fall outside a panel's terms of reference.[78]

7.63 We recall that a panel can only address claims that are raised in the complaining Member's panel request, consistently with the requirements of Article 6.2 of the DSU. We note that neither Article 6.2 of the DSU nor any other provision of the WTO Agreement supports the argument that the defendant has to show prejudice in cases where the complaining Member's panel request falls short of the requirements of Article 6.2. Such argument would undermine the due process objective embodied in Article 6.2 because it would allow the complaining Member to correct the inadequacies in its panel request, during panel proceedings.[79]

7.64 We note that the Appellate Body's statement in *EC – Computer Equipment*, which the European Communities cites, was made in the particular circumstances of that dispute. The main

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[75] Response of the European Communities to Question 4(a) from the Panel Following the First Meeting.

[76] Indeed, the European Communities used this option in the *US – Zeroing (EC)* dispute and initiated a proceeding against the United States under Article 21.5 of the DSU. See, WT/DS294/25.

[77] Response of the European Communities to the US Request for Preliminary Rulings, paras. 40-42.

[78] Second Written Submission of the United States, para. 28.

[79] Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* ("*Japan – DRAMs (Korea)*"), WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report, WT/DS336/AB/R, para. 7.9.

issue in that dispute concerned the meaning of a specific term that was used in the complaining Member's panel request. The Appellate Body noted that this term had a generic meaning in the relevant industry and that it had been used in the consultations between the parties prior to the filing of the complaining Member's panel request. On that basis, the Appellate Body concluded that because the defendant's right to defend itself had not been prejudiced by the alleged lack of clarity in the text of the panel request, the fundamental due process right had not been violated.[80]

7.65 In our view, the Appellate Body's reasoning in *Korea – Dairy* also related to the particular circumstances of that dispute. In that dispute, the Appellate Body addressed the issue of whether or not mere citation in a panel request of the relevant treaty articles would meet the requirements of Article 6.2 of the DSU, and reasoned that this issue should be assessed on a case by case basis. In resolving that issue in that particular dispute, the Appellate Body inquired whether the defendant's right to defend itself had been prejudiced by the mere citation of the relevant treaty articles in the complaining Member's panel request.[81]

7.66 We do not read the Appellate Body's reasoning in these two disputes to mean that Article 6.2 of the DSU contains a prejudice requirement. As far as the preliminary ruling made by the panel in *Canada – Wheat Exports and Grain Imports* is concerned, we note that the issue in that case was the kind of information that the complaining Member's panel request has to contain "in the absence of an explicit identification of a measure of general application by name".[82] We do not see anything in that ruling which would suggest that Article 6.2 should be interpreted as containing a prejudice requirement.

7.67 We therefore do not agree with the EC's argument that the United States has to demonstrate that the flaw in the EC's panel request has prejudiced its right to defend itself in these proceedings.

3. Inclusion of Ongoing Proceedings in the European Communities' Panel Request

(a) Arguments of the Parties

(i) United States

7.68 The United States points out that four of the measures identified in the EC's panel request were preliminary results of periodic or sunset reviews. Such preliminary results, in the US view, do not constitute "final action" within the meaning of Article 17.4 of the Anti-Dumping Agreement. The United States notes that Article 17.4 allows the initiation of dispute settlement proceedings with regard to provisional measures if certain criteria are met, and asserts that the European Communities has not shown that these criteria have been met in this case. The United States therefore requests the Panel to decide that these four preliminary determinations do not fall within its terms of reference.

(ii) European Communities

7.69 The European Communities acknowledges that four of the measures identified in its panel request, *i.e.*, three preliminary sunset determinations and one preliminary determination in a periodic review, did not constitute final measures. The European Communities contends, however, that,

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[80] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, para. 70.

[81] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 127.

[82] Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* ("*Canada – Wheat Exports and Grain Imports*"), WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report, WT/DS276/AB/R, DSR 2004:VI, 2817, para. 6.10.

whether preliminary or definitive, any measure adopted subsequent to the specific measures identified in the EC's panel request, falls within the Panel's terms of reference.

(b) Evaluation by the Panel

7.70 It is factually uncontested that four of the 52 measures identified in the EC's panel request were preliminary determinations made by the USDOC. These include three preliminary results of sunset reviews and one preliminary result of a periodic review. These four preliminary determinations are:

Type of Proceeding	Product and Country	Relevant Exhibits
Sunset review	Steel concrete reinforcing bars from Latvia A-449-804	EC-70
Periodic review	Certain hot rolled carbon steel flat products from the Netherlands A-421-807 (Period of Review: 1 November 2004 - 31 October 2005)	EC-59
Sunset review	Certain hot rolled carbon steel flat products from the Netherlands A-421-807	EC-77
Sunset review	Certain Pasta from Italy A-475-818	EC-78

7.71 The United States contends that the four preliminary determinations at issue are outside the Panel's terms of reference because they do not constitute final action within the meaning of Article 17.4 of the Anti-Dumping Agreement. The United States recalls the two conditions set out under Article 17.4 of the Agreement which have to be met in proceedings challenging preliminary determinations and argues that none of them were met by the European Communities with regard to the four preliminary determinations at issue. That is, the United States contends that the European Communities did not raise a claim against the preliminary determinations under Article 7.1 of the Agreement nor demonstrate a significant impact of those determinations.[83]

7.72 Article 17.4 of the Anti-Dumping Agreement provides:

> "If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB." (emphasis added)

7.73 Article 17.4 generally stipulates that a Member may challenge definitive measures imposed by other Members. It states that exceptionally a provisional anti-dumping measure may be challenged if it has a significant impact and if the complaining Member shows that the provisional measure was

[83] First Written Submission of the United States, footnote 69.

taken inconsistently with the provisions of Article 7.1 of the Agreement. Article 7.1 lays down three conditions for the imposition of a provisional anti-dumping measure.[84] Thus, the EC's claim regarding the four preliminary measures at issue may be accepted only if the European Communities proves that the conditions set out under Article 7.1 of the Agreement have not been met with regard to such measures. Although the European Communities generally argues that "the preliminary determinations carried out by the USDOC have an impact on the final duty level which may result from the latest proceeding"[85], it does not raise any claim under Article 7.1 in these proceedings. This indicates that the EC's claims regarding the four preliminary measures at issue are not within the Panel's terms of reference.

7.74 The European Communities cites the panel report in *Mexico – Corn Syrup* in support of its argument. We note, however, that the only claim regarding provisional measures in that case related to an alleged violation of Article 7.4 of the Agreement that sets the maximum duration of such measures. In other words, there was no allegation in *Mexico – Corn Syrup* regarding a violation of Article 7.1.[86] The panel in *Mexico – Corn Syrup* was of the view that "a claim regarding the duration of a provisional measure relates to the definitive anti-dumping duty".[87] This explains why the panel did not expect the complaining Member in that case to demonstrate the existence of the two conditions set out under Article 17.4 for challenging a provisional anti-dumping measure. Thus, the panel report in *Mexico – Corn Syrup* does not support the EC's position in this dispute.

7.75 In response to questioning, the European Communities contends that it is not challenging provisional measures within the meaning of Article 17.4 of the Anti-Dumping Agreement in this case. The EC's panel request describes the measure at issue as the continued application of anti-dumping duties resulting from the anti-dumping orders annexed to its panel request "as calculated or maintained in place pursuant to the most recent [anti-dumping proceedings]".[88] In the view of the European Communities, this description "comprises any subsequent measure adopted by the [United States], including preliminary determinations setting out the duty levels (wrongly calculated by applying zeroing) and insofar as those duties are still in place".[89] The European Communities contends that the Panel should take into consideration the specific circumstances of this dispute in resolving this issue. According to the European Communities, such specific circumstances include the nature of the zeroing methodology and the fact that the United States refuses to implement the DSB recommendations and rulings pertaining to past zeroing disputes.[90]

7.76 We note that the EC's response is internally inconsistent. On the one hand, the European Communities argues that the four preliminary measures have to be considered as "subsequent measures" to the general description of the measure in its panel request and therefore fall

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[84] Article 7.1 of the Agreement provides:

"Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and

(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation."

[85] Response of the European Communities to the US Request for Preliminary Rulings, para. 54.

[86] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – Corn Syrup*"), WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345, para. 7.48.

[87] *Ibid.*, para. 7.53.

[88] Response of the European Communities to Question 6 from the Panel Following the First Meeting.

[89] *Ibid.*

[90] *Ibid.*

within the terms of reference of the Panel. On the other hand, it contends that this dispute presents special circumstances with regard to the identification of the specific measures at issue and invites the Panel to take into consideration such circumstances.

7.77 Both arguments offered by the European Communities in this regard lack a legal basis in the Agreement. We are also of the view that the alleged special circumstances of this dispute cannot override the plain text of Article 17.4 which subjects the claims against provisional measures to certain conditions. We therefore conclude that the EC's claims regarding the four preliminary measures at issue are outside our terms of reference in these proceedings.

D. CONTINUED APPLICATION OF 18 ANTI-DUMPING DUTIES

1. Arguments of the Parties

(a) European Communities

7.78 The European Communities does not challenge the practice of zeroing "as such" because it argues that zeroing as such has already been condemned in previous cases. The European Communities challenges the continued application of the 18 duties stemming from the 18 cases listed in the annex to its panel request. According to the European Communities, in addition to the alleged WTO-inconsistency of applying zeroing in the calculation of dumping margins in various proceedings pertaining to these 18 cases, the continued application of the duties resulting from such proceedings itself constitutes a measure. The European Communities contends that these duties are applied at rates that exceed the real margins that would have been obtained without zeroing. The European Communities asserts that the continued application of these 18 duties is inconsistent with Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 because they reflect margins obtained through zeroing. The European Communities argues that for the same reasons that zeroing in the context of investigations, periodic reviews and sunset reviews is inconsistent with Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994, the continued application of the duties resulting from the application of zeroing is inconsistent with the same provisions.

7.79 The European Communities also argues that the continued application of these 18 duties is inconsistent with Article XVI:4 of the WTO Agreement. The EC's argumentation in this regard is two-fold. First, the European Communities submits that because the continued application of the 18 duties at issue violates Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994, it also violates Article XVI:4 of the WTO Agreement. This, according to the European Communities, indicates that the United States failed to ensure the consistency of its laws, regulations and administrative procedures with its WTO obligations. Second, the European Communities contends that by continuing to apply model and simple zeroing procedures – which are administrative procedures within the meaning of Article XVI:4 of the WTO Agreement – in proceedings initiated after the date of adoption of the first Appellate Body report finding zeroing to be WTO-inconsistent, the United States has violated its obligation under Article XVI:4 of the WTO Agreement.

(b) United States

7.80 The United States argues that the EC's claim under Article XVI:4 of the WTO Agreement depends on a finding of inconsistency in connection with the other claims that the European Communities raises. It suggests that since the United States has not acted inconsistently with the other WTO obligations cited by the European Communities, the Panel must find no violation of Article XVI:4 of the WTO Agreement. The United States also counters the EC's argument that the United States is in violation of Article XVI:4 of the WTO Agreement because it continues to apply

measures that have been found to be WTO-inconsistent by the WTO Appellate Body in some past disputes. In this regard, the United States recalls the Appellate Body's own pronouncement that Appellate Body and panel reports are only binding with respect to the resolution of the disputes that they concern.[91] In the view of the United States, the approach advocated by the European Communities would make Appellate Body and panel reports binding on all Members, a result that would have no basis in legal texts. The United States has not submitted arguments regarding the claims that the European Communities raised under Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 concerning the continued application of the 18 duties.

2. Arguments of Third Parties

(a) Japan

7.81 Japan notes that under US law, anti-dumping orders provide the legal basis for the imposition of anti-dumping duties following an investigation. The amounts of the duty may subsequently change depending on different types of reviews. Japan argues that pursuant to Article 6.2 of the DSU, such an order constitutes a measure susceptible to a challenge in WTO dispute settlement. Similarly, it constitutes "final action" within the meaning of Article 17.4 of the Anti-Dumping Agreement.

3. Evaluation by the Panel

7.82 We note that, except for the claim under Article XVI:4 of the WTO Agreement, the substantive legal basis of the EC's claims regarding the continued application of the 18 duties at issue does not differ from its claims with regard to the 52 measures imposed in investigations, periodic reviews or maintained following sunset reviews. In response to questioning, the European Communities argues that the Panel should refrain from applying judicial economy with regard to the claims in connection with the continued application of the 18 duties. Applying judicial economy with regard to the EC's claims concerning the continued application of the 18 duties at issue would, in the EC's view, constitute false judicial economy.[92] On the other hand, the European Communities states that if the Panel finds for the European Communities with regard to its claims concerning the continued application of the 18 duties, it may apply judicial economy with regard to the EC's claims regarding the use of zeroing in the 52 specific proceedings.

7.83 We recall our finding above (para. 7.61) that the EC's claims in connection with the continued application of the 18 duties at issue do not fall within our terms of reference in these proceedings. We therefore decline to address such claims.

E. ZEROING IN INVESTIGATIONS

1. Arguments of the Parties

(a) European Communities

7.84 The European Communities challenges the use of zeroing in four investigations. The European Communities develops its arguments on the basis of the specifics of one of these investigations, *Purified Carboxymethylcellulose from the Netherlands*, but argues that the same arguments also apply to the other three investigations. The European Communities argues that in the dumping calculations in the mentioned investigation, the USDOC used a methodology which the European Communities refers to as "model zeroing". Under this methodology, the USDOC

[91] First Written Submission of the United States, para. 159.
[92] Response of the European Communities to Question 2 from the Panel Following the First Meeting.

categorized the subject product into models, and made calculations for each model through the WA-WA method. In the aggregation of such model-specific calculations, however, the USDOC ignored the results where the WA export price exceeded the WA normal value. This, in the EC's view, inflated the margin of dumping for the product under consideration as a whole. According to the European Communities, the 14.88 per cent margin of dumping calculated by the USDOC, in *Purified Carboxymethylcellulose from the Netherlands*, would have been 12.15 per cent without model zeroing.

7.85 The European Communities submits that the USDOC acted inconsistently with Article 2.4.2 of the Agreement by using model zeroing in the four investigations at issue. According to the European Communities, the definition of dumping found in Article 2.1 of the Agreement and Article VI:1 of the GATT 1994 applies to the product under consideration as a whole, and not to a type, model or category of that product. Article 2.4.2 also requires dumping determinations to be made with regard to the product under consideration as a whole. Investigating authorities may categorize the product into models in the process of calculating the margin of dumping for the product under consideration as a whole. Such model-specific calculations, however, are not margins of dumping, but results that have to be used in the calculation of the margin of dumping for the product under consideration as a whole. The authorities, therefore, must take into consideration the results of all model-specific calculations in the calculation of the margin of dumping for the product under consideration as a whole. The USDOC acted inconsistently with the obligation set out under Article 2.4.2 of the Agreement by excluding the results of model-specific comparisons where the WA export price exceeded the WA normal value.

7.86 The European Communities also contends that model zeroing used by the USDOC in the four investigations at issue is inconsistent with Article 2.4 of the Agreement. The European Communities asserts that the requirement to carry out a fair comparison between the normal value and the export price pursuant to Article 2.4 constitutes an independent and overarching obligation. That is, the general obligation laid down in the first sentence of Article 2.4 is independent from the more specific obligations found elsewhere in that article. Thus, the obligation to make a fair comparison applies not only to price comparability but also to subparagraphs 2.4.1 and 2.4.2. According to the European Communities, model zeroing is inherently biased and unfair because it inflates the margin of dumping. As a methodological choice that systematically favours the interests of petitioners and prejudices the interests of exporters, model zeroing cannot be considered as allowing a fair comparison within the meaning of Article 2.4.

7.87 The European Communities also contends that the use of model zeroing in the four investigations at issue conflicted with the obligations set out under Articles VI:1 and VI:2 of the GATT 1994.

(b) United States

7.88 The United States acknowledges that the USDOC applied model zeroing in the four anti-dumping investigations at issue. The United States also recognizes that in *US – Softwood Lumber V*, the Appellate Body found the use of this type of zeroing to be inconsistent with Article 2.4.2 of the Agreement and that this reasoning is equally applicable to the EC's claim in these proceedings. The US acknowledgement, however, is limited to the EC's claim under Article 2.4.2 of the Agreement. The United States rejects other claims that the European Communities raises regarding zeroing in investigations. Specifically, the United States contests the EC's claims under Articles 2.1 and 2.4 of the Agreement because these are definitional provisions which do not impose independent obligations. The

United States asserts that a finding under Article 2.4.2 would suffice to resolve the EC's claim regarding the four investigations at issue.[93]

2. Arguments of Third Parties

(a) India

7.89 India notes that despite past panel and Appellate Body rulings that found zeroing to be inconsistent with Articles 2.4.2, 9.3, 11.2 and 11.3 of the Agreement, the United States continues to use this methodology in the calculation of dumping margins, with the exception of investigations where the WA-WA method is used. In India's view, zeroing inflates dumping margins, leads to a positive finding of dumping in cases where there would have been no dumping absent zeroing and taints the investigating authorities' evaluation of the impact of dumped imports. India therefore requests the Panel to reiterate the conclusion that the use of zeroing in connection with all comparison methodologies and all anti-dumping proceedings is WTO-inconsistent.

(b) Japan

7.90 Japan bases its arguments regarding the use of zeroing in investigations on the Appellate Body reports in the past zeroing disputes. Japan contends that Article 2.1 and the first sentence of Article 2.4.2 of the Agreement require investigating authorities to calculate dumping with respect to the product under consideration as a whole. The zeroing methodology applied by the USDOC in investigations fail to meet this requirement because in the aggregation of model-specific calculations it ignores the intermediate results where the export price exceeds the normal value. According to Japan, the comparison results pertaining to models of the product under consideration do not constitute margins of dumping. They are merely intermediate results that have to be aggregated in the calculation of the margin of dumping for the product under consideration as a whole. Hence, the USDOC's use of zeroing in investigations is inconsistent with the obligations set forth in Articles 2.1 and 2.4.2 of the Agreement.

7.91 Japan submits that the zeroing methodology that the USDOC uses in investigations inflates the margin of dumping by ignoring intermediate results where the export price exceeds the normal value. Hence it does not provide for an impartial, even-handed and unbiased dumping determination. It follows that the USDOC's dumping determinations in investigations are inconsistent with the fair comparison obligation found under Article 2.4 of the Agreement.

(c) Korea

7.92 Korea notes that the Appellate Body has found zeroing to be WTO-inconsistent in all anti-dumping proceedings and invites the Panel to reiterate this general finding. More specifically, Korea recalls that the Appellate Body has found the use of zeroing in investigations where the normal value and the export price are compared on a WA-WA basis to be inconsistent with Articles 2.4.2 and 2.4 of the Agreement. Korea invites the Panel to also find that the use of zeroing in investigations where the normal value and the export price are compared on a WA-WA basis is inconsistent with Articles 2.4.2 and 2.4 of the Agreement.

(d) Norway

7.93 Norway recalls that in the previous zeroing cases, the Appellate Body found zeroing to be inconsistent with the requirements of the Anti-Dumping Agreement. Although the doctrine of *stare decisis* does not apply in WTO dispute settlement, Norway argues that in the interest of certainty,

[93] First Written Submission of the United States, paras. 155-156.

foreseeability and equality before the law, panels and the Appellate Body should not depart from precedents without showing good reason. Norway submits that adopted reports create legitimate expectations among WTO Members and should therefore be followed by panels to the extent the issues are similar. Norway argues that this case does not present factual or legal arguments different from those in the past zeroing cases. The Panel should therefore not depart from the precedents in making its findings and recommendations.

7.94 Furthermore, Norway contends that adopted panel and Appellate Body reports affect the WTO Members' obligations within the meaning of Article XVI:4 of the WTO Agreement. According to Norway, although the DSB recommendations and rulings in a given case only affect parties to that dispute, such rulings and recommendations also explain the obligations of all Members in general. Hence, according to Norway, WTO Members have to take into consideration adopted panel and Appellate Body reports in adopting or maintaining their domestic laws and regulations.[94]

7.95 Norway notes the Appellate Body's findings regarding zeroing and considers that the prohibition in this regard is not limited to investigations and to the WA-WA methodology. In Norway's view, zeroing is prohibited in all anti-dumping proceedings and with regard to all comparison methodologies because: a) Article 2.1 requires dumping determinations to be made for the product under consideration as a whole and b) zeroing is contrary to the fair comparison requirement under Article 2.4.

7.96 With regard to WTO panels' task as treaty interpreters, Norway argues that the purpose of treaty interpretation is to reach "the one and only interpretation of a term".[95] According to Norway, panels in *US – Stainless Steel (Mexico)* and *US – Zeroing (Japan)* committed certain legal errors in their interpretation of the relevant treaty provisions. First, they did not base their interpretation of the terms "product" and "margin of dumping" on the relevant treaty provisions, as required by the principles laid down in Articles 31 and 32 of the Vienna Convention. Instead, they came up with their own interpretation, which they then considered as a permissible interpretation within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement. Second, these panels resorted to Article 17.6(ii) without first exhausting all possible means in order to achieve one possible interpretation for the legal provisions before them. Norway invites this Panel not to commit the same errors and to follow the persuasive reasoning of the Appellate Body that has found zeroing to be inconsistent in all anti-dumping proceedings and in connection with all types of comparison methodologies.

(e) The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

7.97 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM") argues that the definition of dumping under Article 2.1 of the Agreement applies to all anti-dumping proceedings, including duty assessment proceedings. The TPKM therefore asserts that the dumping determinations in such proceedings should also conform with the disciplines set forth under Article 2, including subparagraphs 2.4 and 2.4.2 thereof.

7.98 According to the TPKM, dumping has to be established with respect to the product under consideration as a whole. It follows that any calculation that omits some export transactions will be inconsistent with the Anti-Dumping Agreement. The TPKM contends that the term "investigation" under Article 2.4.2 does not relate solely to original investigations conducted under Article 5 of the Agreement. This expression does not have the same meaning in all instances where it appears in the Agreement. The TPKM argues that the term "investigation", as used under Article 2.4.2, refers to the investigative activity undertaken in all kinds of anti-dumping proceedings. According to the TPKM,

[94] Written Submission of Norway, para. 18.
[95] Oral Statement of Norway, para. 14.

the object and purpose of Article 2 would be undermined if Articles 2.4 and 2.4.2 were interpreted as being applicable to original investigations only.

7.99 The TPKM asserts that Article 2.4 of the Agreement contains an obligation to carry out a fair comparison between the normal value and the export price by taking into account the prices of all sales pertaining to the product under consideration. The authorities cannot disregard some of these transactions. The omission of certain export prices amounts to overcorrecting the injury caused by dumping and goes beyond the limits of the permission for resorting to anti-dumping measures. This obligation applies to all types of anti-dumping proceedings.

7.100 The TPKM concludes that the US application of the zeroing methodology in all anti-dumping proceedings under its law, including reviews, is inconsistent with Articles 2.1, 2.4, 2.4.2, 9.3, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement, as well as Articles VI:1 and VI:2 of the GATT 1994. The TPKM invites the Panel to follow the Appellate Body's jurisprudence and find zeroing to be WTO-inconsistent in all anti-dumping proceedings and in connection with all types of comparison methodologies.

(f) Thailand

7.101 Thailand submits that zeroing is inconsistent with both the letter and the spirit of the Anti-Dumping Agreement and Article VI of the GATT 1994. Zeroing either gives rise to a finding of dumping in cases where there is no dumping, or inflates the true margin of dumping. Thailand generally agrees with the European Communities with regard to the claims raised in this dispute. Thailand contends that this Panel should follow the reasoning of the Appellate Body enunciated in the past zeroing cases and find the measures at issue to be inconsistent with the Anti-Dumping Agreement. Otherwise, argues Thailand, the security and predictability that the dispute settlement mechanism is to provide to the multilateral trading system would be undermined. There is, in Thailand's view, no counterargument presented in this case that would justify a departure from the Appellate Body's jurisprudence on zeroing.

7.102 Thailand also disagrees with the US view that dumping may be determined with regard to a specific import transaction. Nor does Thailand agree with the proposition that the payment of the duty in a prospective normal value system constitutes final liability. Thailand argues that the calculation of the amount of the duty to be paid by an importer in the context of a prospective normal value system does not entail a calculation of a margin of dumping. It would therefore be illogical to compare the determination made in a duty assessment proceeding with the calculation of the duty to be paid in a prospective normal value system.

3. Evaluation by the Panel

7.103 The four investigations at issue are the following:

Product and Country Involved	**Relevant Exhibits**
Purified carboxymethylcellulose from Sweden USDOC Case No: A-401-808	EC-28
Purified carboxymethylcellulose from the Netherlands USDOC Case No: A-421-811	EC-26
Purified carboxymethylcellulose from Finland USDOC Case No: A-405-803	EC-29
Chlorinated Isocyanurates from Spain USDOC Case No: A-469-814	EC-30

7.104 The United States concedes that the USDOC applied model zeroing in these investigations. Furthermore, the United States acknowledges that the reasoning of the Appellate Body in *US – Softwood Lumber V*, which found model zeroing in investigations to be inconsistent with Article 2.4.2 of the Agreement, applies to the EC's claim at issue.[96] The United States has not submitted any argument to counter the EC's proposition that model zeroing is inconsistent with Article 2.4.2 of the Agreement.

7.105 Given the US acknowledgement that the Appellate Body's reasoning *US – Softwood Lumber V* regarding the WTO-compatibility with Article 2.4.2 of the Agreement of model zeroing in investigations is equally applicable with regard to the contested investigations in these proceedings, the issue of burden of proof becomes particularly important with regard to the assessment of the claim at issue. We recall that pursuant to the principles governing the burden of proof which we follow in these proceedings (*supra*, para. 7.6), it is for the complaining Member to make a *prima facie* case with regard to a claim that it asserts, before the burden shifts to the defendant to rebut such case. The United States does not contest the EC's claim under Article 2.4.2 against model zeroing in investigations. In our view, however, the US acknowledgement does not discharge the European Communities from its obligation to present a *prima facie* case regarding the alleged inconsistency with Article 2.4.2 of the Agreement of model zeroing in investigations.[97] Regardless of the US acknowledgement, therefore, we have to assess whether the EC's arguments are sufficient to make a *prima facie* case. It is only then that we can find that the United States acted inconsistently with its WTO obligations. In our view, our obligation to carry out an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as set forth in Article 11 of the DSU lends support to the approach that we are taking in this regard. With this in mind, we now proceed to assess the claim presented by the European Communities.

7.106 The European Communities argues that model zeroing in investigations is inconsistent with the obligation set forth under 2.4.2 of the Agreement because it precludes the investigating authorities from making a determination of dumping for the product under consideration as a whole. This occurs through the exclusion, from the ultimate calculation made for the product under consideration as a whole, of the results of model-specific comparisons where the WA export price exceeded the WA normal value. The European Communities also asserts that model zeroing in investigations is inconsistent with Article 2.4 of the Agreement because it represents a methodology that is inherently biased and unfair. Finally, the European Communities contends that model zeroing in investigations contradicts the obligations set forth under Articles VI:1 and VI:2 of the GATT 1994.

7.107 We consider it appropriate to commence our analysis with the alleged violation of Article 2.4.2 of the Agreement and then move on to the other allegations to the extent necessary to resolve the dispute. Article 2.4.2 provides:

[96] First Written Submission of the United States, paras. 155-156.

[97] We note that this very issue arose in the last two zeroing disputes and the panels reasoned that the defendant's acknowledgement regarding the WTO-inconsistency of the measure at issue did not discharge the complaining Member from its obligation to make a *prima facie* case. See, Panel Report, *United States – Anti-Dumping Measures on Shrimp from Ecuador* ("*US – Shrimp (Ecuador)*"), WT/DS335/R, adopted 20 February 2007, para. 7.9; Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* ("*US –Stainless Steel (Mexico)*"), WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report, WT/DS344/AB/R, para. 7.52.

"*Article 2*

Determination of Dumping

...

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." (emphasis added)

7.108 Article 2.4.2 permits the use of three different methodologies for dumping determinations in anti-dumping investigations. The first two, *i.e.*, the WA-WA and the transaction-to-transaction methodologies, are set out in the first sentence and the third, *i.e.*, the WA-T methodology, in the second sentence. The claim at issue concerns the use of the WA-WA methodology. The first sentence of Article 2.4.2 provides that in investigations where dumping determinations are based on the WA-WA methodology, the WA normal value has to be compared with the WA of prices of "all comparable export transactions". This, in our view, suggests that the authorities cannot exclude from their calculations any export transaction made during the relevant period of investigation. The European Communities articulates its claim under Article 2.4.2 in parallel to the reasoning of the Appellate Body in the past zeroing cases, including *US – Softwood Lumber V*. We recall the US acknowledgement that the Appellate Body's reasoning in *US – Softwood Lumber V* is equally applicable to the EC's claim under Article 2.4.2 in these proceedings.

7.109 In *US – Softwood Lumber V*, the Appellate Body started out by clarifying that Article 2.4.2 permits multiple averaging.[98] This means that the investigating authorities may categorize the subject product under different models, carry out a comparison on the basis of a WA normal value and a WA export price for each such model, and then aggregate such model-specific results in the calculation of the margin of dumping for the product under consideration as a whole. The Appellate Body opined that where the WA-WA methodology is used, Article 2.4.2 requires the investigating authorities to take into consideration the average of prices of all comparable export transactions.[99] The Appellate Body then moved on to the issue of whether this obligation was limited to model-specific comparisons or whether it also applied to the aggregation of such comparisons. In the view of the Appellate Body, this hinged upon the interpretation of the terms "dumping" and "margins of dumping" in the Anti-Dumping Agreement.[100] According to the Appellate Body, the definition of the term "dumping" under Article 2.1 refers to the product under consideration as a whole as defined by the investigating authorities in the relevant investigation. Furthermore, the phrase "[f]or the purpose of this Agreement" in Article 2.1 indicates that this definition of dumping applies throughout the Anti-Dumping Agreement, including in the context of Article 2.4.2. Thus, the Appellate Body came to the

[98] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875, para. 81.
[99] *Ibid.*, para. 86.
[100] *Ibid.*, para. 90.

conclusion that dumping can be found to exist only "for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product".[101]

7.110 The Appellate Body expressed the view that the obligation set forth under Article 2.4.2, to take into account the weighted average of prices of all comparable export transactions, applies not only to the model-specific comparisons, but also to their aggregation for purposes of establishing the margin of dumping for the product under consideration as a whole.[102] According to the Appellate Body, the results of model-specific comparisons are not margins of dumping within the meaning of Article 2.4.2, but rather constitute intermediate calculations that need to be taken into consideration in the calculation of the margin of dumping for the product under consideration as a whole.[103] Consequently, when authorities use multiple averaging in their dumping determinations in investigations, Article 2.4.2 requires the inclusion of all model-specific comparisons in the calculation of the margin of dumping for the product under consideration as a whole.

7.111 We agree with the Appellate Body's view that the phrase "all comparable export transactions" in Article 2.4.2 requires the authorities to take into consideration the WA of the prices of all comparable export transactions in the calculation of dumping margins in investigations where the WA-WA methodology is used. Model zeroing conflicts with this obligation because it excludes from the calculation of the margin of dumping for the product under consideration as a whole the results of model-specific comparisons where the WA export price exceeds the WA normal value. Thus, we find that model zeroing is inconsistent with the obligation set out under Article 2.4.2 of the Agreement. It follows that 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.[104]

7.112 Having found model zeroing in investigations to be inconsistent with the obligation set out under Article 2.4.2 of the Agreement, we need not, and do not, address the EC's claims under Article 2.4 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994.

F. ZEROING IN PERIODIC REVIEWS

1. Arguments of the Parties

(a) European Communities

7.113 The European Communities argues that the USDOC applied what the European Communities calls "simple zeroing" in 37 periodic reviews listed in the annex to the EC's panel request. The European Communities develops its arguments in this regard on the basis of the specifics of one of these periodic reviews, *Ball Bearings from Italy*, and points out that the same arguments also apply with regard to the remaining periodic reviews. In the periodic review at issue, the USDOC calculated assessment rates for the entries made during the period of review and the new cash deposit rate for future entries. In so doing, the USDOC used the WA-T methodology. Hence, the USDOC started its dumping calculations by making various comparisons between a WA normal value and individual export transactions. The results of these comparisons were then aggregated in order to obtain the overall WA dumping margin. In this aggregation, the USDOC ignored the results of comparisons where the export price exceeded the WA normal value. This, in the view of the European Communities, inflated the overall margin of dumping. In the periodic review of *Ball*

[101] *Ibid.*, para. 96.
[102] *Ibid.*, para. 98.
[103] *Ibid.*, para. 97.
[104] We would like to note that the views of the majority of the Panel regarding the Appellate Body's interpretation on the issue of "the product under consideration as a whole" are subject to the comments found in paras. 7.162-7.169 below.

Bearing from Italy, for instance, both margins calculated for the two respondents, 2.52 and 7.65 per cent, would have been negative had the USDOC not applied simple zeroing.

7.114 The European Communities submits that by using simple zeroing in the 37 periodic reviews at issue, the USDOC acted inconsistently with the obligations set out under Articles 2.1, 2.4, 2.4.2 and 9.3 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994. The European Communities argues that although Article 9.3 of the Agreement does not prescribe a specific method for the assessment of duties, as pointed out by the Appellate Body, the margin of dumping calculated for the product under consideration as a whole operates as a ceiling for the duty assessed under Article 9.3. In the view of the European Communities, simple zeroing applied by the USDOC in the 37 periodic reviews at issue lead to margins that were higher than the exporters' true margins because this method ignored the results of comparisons where the export price exceeded the WA normal value. Hence, according to the European Communities, the USDOC acted inconsistently with Articles 2 and 9.3 of the Agreement.[105]

7.115 The European Communities argues that, as reasoned by the Appellate Body, the fair comparison requirement embodied in Article 2.4 applies to duty assessment proceedings under Article 9.3 of the Agreement. The simple zeroing methodology used by the USDOC in periodic reviews is inherently biased and unbalanced. It systematically and inevitably results in a higher margin. It follows that simple zeroing in periodic reviews is inconsistent with Article 2.4 of the Agreement.

7.116 The European Communities characterizes all anti-dumping proceedings as an investigation and argues that Article 2.4.2 applies not only to original investigations, but to all anti-dumping proceedings, including periodic reviews. Hence, margins of dumping in periodic reviews have to be calculated consistently with the provisions of Article 2.4.2, *i.e.*, for the product under consideration as a whole.

7.117 The European Communities contends that the use of simple zeroing in the periodic reviews at issue was inconsistent with Article 2.4.2 of the Agreement, for two reasons. First, the European Communities argues that the USDOC acted inconsistently with Article 2.4.2 by using the third comparison methodology without observing the conditions laid down in the second sentence of Article 2.4.2. Second, the European Communities posits that the USDOC acted inconsistently with Article 2.4.2 by ignoring the results of intermediate comparisons where the export price exceeded the WA normal value.

7.118 Finally, the European Communities asserts that the USDOC acted inconsistently with Article 11.2 of the Agreement in the periodic reviews at issue. According to the European Communities, the calculation of the new cash deposit rate in a periodic review constitutes a review into whether the continued imposition of the duty is necessary within the meaning of Article 11.2. The European Communities argues that the effects of the calculation of the new cash deposit rates and the reviews under Article 11.2 are the same. The European Communities contends that the USDOC acted inconsistently with the obligation set out under Article 11.2 because it failed to determine whether the continued imposition of the duty was necessary to offset "dumping" within the meaning of Article 2, *i.e.*, as calculated for the product under consideration as a whole. Instead, the USDOC analyzed the need for the continued imposition of the duty against something that did not constitute "dumping" within the meaning of Article 2.

7.119 Regarding the Appellate Body report in *US – Stainless Steel (Mexico)*, the European Communities notes that the report once again confirms the WTO-inconsistency of simple zeroing in periodic reviews and invites the Panel to take the same approach.

[105] First Written Submission of the European Communities, para. 197.

(b) United States

7.120 The United States argues that a general prohibition on zeroing applicable in the context of periodic reviews cannot be reconciled with the interpretation articulated by the Appellate Body in *US – Softwood Lumber V*, wherein the Appellate Body found that zeroing was prohibited in the context of WA-WA comparisons because the phrase "all comparable export transactions" in Article 2.4.2 meant that dumping must be determined for the "product as a whole". The United States contends that the Appellate Body subsequently, erroneously, extended the concept of "product under consideration as a whole" beyond this narrow context and ruled that dumping cannot be determined for individual transactions. The United States invites the Panel to make its own objective assessment of the matter before it and to refrain from adopting the Appellate Body's reasoning that fails to accept a permissible interpretation of the relevant treaty provisions, inconsistently with the standard of review laid down in Article 17.6(ii) of the Anti-Dumping Agreement.

7.121 The United States asserts that Article 2.1 of the Agreement and Article VI:1 of the GATT 1994 contain definitional provisions that do not impose independent legal obligations. They are, however, important tools for the interpretation of the other relevant treaty provisions. The United States submits that dumping may occur in a single export transaction. There is no support in the GATT 1994 or the Anti-Dumping Agreement for the proposition that injurious dumping that occurs in a single transaction is mitigated by another transaction made at a non-dumped price. The United States finds support for this reading of the concept of dumping in the GATT practice as well as the negotiating history of the Uruguay Round Anti-Dumping Agreement. The United States submits that the Appellate Body in *US – Softwood Lumber V* interpreted the expression "all comparable export transactions" under Article 2.4.2 of the Agreement to mean that when multiple averaging is used in an investigation, the results of all comparisons have to be taken into account in the aggregation of such comparisons. Subsequently, however, the Appellate Body ruled that zeroing is prohibited whenever multiple comparisons are made.

7.122 According to the United States, the Agreement does not support the argument that the word "product" generally refers to the "product under consideration as a whole". The United States argues that in certain instances under the Anti-Dumping Agreement and the GATT 1994, the word "product" is used to refer to individual transactions, rather than the product under consideration as a whole. In the same vein, the United States argues that in a prospective normal value system, the word "product" necessarily refers to a single transaction.

7.123 The United States submits that the phrase "investigation phase" in Article 2.4.2 limits the application of this provision to investigations. Interpreting Article 2.4.2 as applying to duty assessment proceedings under Article 9.3 would, therefore, render the terms of Article 2.4.2, which expressly limit its application to investigations, *inutile*. The United States contends that numerous provisions in the Anti-Dumping Agreement, as well as previous panel and Appellate Body findings invalidate the contention that every anti-dumping proceeding, including duty assessment proceedings under Article 9.3, constitutes an investigation within the meaning of Article 2.4.2. The United States argues that because the application of Article 2.4.2 is limited to the investigation phase of the proceeding, the Anti-Dumping Agreement does not support a prohibition on zeroing within the context of Article 9 periodic reviews.

7.124 The United States also disagrees with the EC's assertion that Article 2.4.2 applies to periodic reviews by virtue of the cross-reference found in Article 9.3 to Article 2. According to the United States, this cross-reference is subject to the limitations that Article 2 itself contains. It follows that Article 2.4.2 does not apply to periodic reviews since its text limits its application to investigations. The United States notes that the European Communities implies that the USDOC should have shown that the conditions, laid down in the second sentence of Article 2.4.2, for the use of the asymmetrical third methodology were met before using it in periodic reviews. The

United States disagrees with this proposition because Article 2.4.2 itself limits its application to investigations. Furthermore, the United States submits that Article 9.4(ii) specifically allows the use of the WA-T methodology in duty assessment proceedings.

7.125 The United States submits that an interpretation that extends the prohibition on zeroing beyond the context of investigations where the WA-WA methodology is used would strip the second sentence of Article 2.4.2 of the Agreement of any meaning. More specifically, the United States contends that if zeroing is prohibited in all contexts, the exceptional WA-T methodology provided for in the second sentence of Article 2.4.2 would mathematically yield the same result as the WA-WA methodology. Such an approach would be inconsistent with the principle of effective treaty interpretation. In this regard, the United States notes that the European Court of First Instance approved zeroing in the context of the WA-T methodology based on the "mathematical equivalence" argument.

7.126 The United States argues that the EC's interpretation of the word "product" in the context of periodic reviews under Article 9.3 would render the prospective normal value systems retrospective. It would also preclude the achievement of the purpose of imposing an anti-dumping duty, *i.e.*, counteracting injury caused by dumping.

7.127 The United States contends that zeroing in periodic reviews is not inconsistent with Article 2.4 of the Agreement. According to the United States, the EC's claim under Article 2.4 is built on the presumption that the term "margin of dumping" as used under Article 9.3 cannot be interpreted to refer to individual transactions. Because Article 9.3 does not exclude such an interpretation, the EC's claim under Article 2.4 cannot be sustained. The United States also disagrees with the EC's proposition that zeroing is inherently unfair. There is, according to the United States, no support in the Agreement for this proposition. A method cannot be labelled as fair or unfair simply because it gives rise to a higher or lower margin of dumping. The United States argues that interpreting Article 2.4 as generally prohibiting zeroing would render the distinctions between WA-WA and WA-T methodologies found in Article 2.4.2 meaningless and would thus be inconsistent with the principle of effective treaty interpretation.[106]

7.128 Finally, the United States asserts that Article 11.2 does not apply to periodic reviews. A periodic review carried out under Article 9.3 of the Agreement does constitute a review of the continued need for the imposition of the anti-dumping duty. The United States argues that a review under Article 11.2 focuses on the continuation or recurrence of injury if the duty is removed, whereas a periodic review is simply about determining a varying duty rate.

7.129 Regarding the Appellate Body report in *US – Stainless Steel (Mexico)*, the United States submits that this report is "deeply flawed" and that this Panel should not follow the reasoning in it. More specifically, the United States contends that the Appellate Body's reasoning regarding the WTO-inconsistency of simple zeroing in periodic reviews lacks a legal basis. Furthermore, the United States asserts that the Appellate Body improperly attaches a binding effect to adopted Appellate Body reports. According to the United States, the drafters of the WTO Agreement had no such intention. In this regard, the United States recalls that the WTO Agreement empowers the Ministerial Conference and the General Council, not the Appellate Body, to provide authoritative interpretation of the provisions of the WTO Agreement. The United States also notes that Articles 3.2 and 19.2 of the DSU provide that the recommendations and rulings of the DSB, and the findings and recommendations of panels and the Appellate Body cannot add to, or diminish, the rights and obligations of WTO Members. The United States maintains that the obligation laid down in Article 11 of the DSU requires this Panel to carry out its own objective assessment of the matter before it. In this regard, the United States notes that the panel in *US – Stainless Steel (Mexico)*

[106] First Written Submission of the United States, para. 145.

concluded that the concern over a consistent line of jurisprudence should not override a panel's task to carry out an objective assessment through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law. The United States considers that an objective assessment should lead the Panel to depart from the Appellate Body's reasoning regarding the WTO-consistency of simple zeroing in periodic reviews.

2. Arguments of Third Parties

(a) Brazil

7.130 Brazil notes that despite numerous findings of inconsistency regarding the practice of zeroing, the United States continues to apply it. According to Brazil, rulings in the past zeroing cases against the United States have reaffirmed the WTO-inconsistency of this methodology. Brazil also notes that most of the arguments put forward by the United States in this case have been tested and rejected by panels and the Appellate Body. Brazil disagrees with the main arguments on which the US defence is based in this case. Brazil generally contends that the main concepts of Article 2 of the Agreement, *i.e.*, "product", "margins of dumping" and "fair comparison" apply to dumping determinations in all anti-dumping proceedings. In Brazil's view, the Agreement links the concept of "dumping" to "product", not to "transaction". Thus, there is no support in the Agreement for the US argument that dumping can be defined with respect to individual import transactions. Dumping is defined in relation to the product as a whole and this definition applies to all kinds of anti-dumping investigations, be it original investigations, review investigations or sunset investigations. Like "dumping", the concept of "margins of dumping" is also defined in relation to the product under consideration as a whole. The margin of dumping may not be properly established without taking into consideration results of all intermediate calculations made for the product under consideration as a whole. The margin of dumping established on the basis of all such intermediate calculations operates as a ceiling at which the resulting anti-dumping duty may be collected. In this regard, Brazil submits that the concepts of "dumping", "margins of dumping" and "product under consideration as a whole" are interlinked. Brazil also argues that zeroing runs counter to the fair comparison requirement of Article 2.4 of the Agreement because it results in artificially high margins of dumping and therefore makes a finding of dumping more likely.

7.131 Brazil disagrees with the US arguments regarding the last sentence of Article 2.4.2. This article lays down an exceptional methodology. This methodology, however, cannot run counter to the principles underlying the Anti-Dumping Agreement which, according to Brazil, do not endorse zeroing *per se*. Brazil also disagrees with the argument that because different anti-dumping proceedings have different purposes, they are not necessarily subject to the same disciplines. No matter what the purpose of each of these proceedings is, the bottom line for Brazil is that they all deal with some sort of dumping margin calculation and that calculation has to be carried out in accordance with the disciplines of Article 2 of the Agreement. Furthermore, Brazil notes that even assuming that these proceedings have different purposes, the flaws in the determinations made in one proceeding necessarily affect the determinations in subsequent proceedings.

7.132 Brazil does not find convincing the arguments presented by the United States regarding the negotiating history of the Agreement. According to Brazil, the main issue underlying this dispute is the US consistent failure to abide by the DSB rulings that have condemned zeroing. Brazil therefore invites the Panel to reiterate that zeroing is inconsistent with the Agreement in all anti-dumping proceedings and irrespective of the methodology applied.

(b) Japan

7.133 Japan bases its arguments regarding the use of zeroing in periodic reviews on the Appellate Body reports in the past zeroing disputes. Japan notes the chapeau of Article 9.3 of the Agreement

which provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". This, in Japan's view, parallels the text of Article VI:2 of the GATT 1994. It also reinforces the provision of Article 9.1 that the amount of the duty cannot be more than the margin of dumping. According to Japan, the cross-reference in Article 9.3 to Article 2 indicates that the authorities have to calculate the margin of dumping in administrative reviews with regard to the product under consideration as a whole. It follows that if the authorities decide to carry out intermediate comparisons in the course of their dumping determinations in such reviews, they have to take into account the results of all such comparisons in the calculation of the margin of dumping for the product under consideration as a whole. Japan argues that Article 6.10 of the Agreement precludes the calculation of margins of dumping for individual import transactions. It also requires that margins be calculated for foreign producers or exporters, not for importers. Japan considers that authorities may assess duties on the basis of import transactions as long as such assessment does not lead to a duty above the margin of dumping calculated for the product under consideration as a whole and with respect to the exporter or foreign producer at issue.

7.134 Japan disagrees with the US argument that Article 9.4(ii) of the Agreement which allows prospective normal value systems, lends support to the view that dumping margins may be calculated for individual import transactions. In this regard, Japan asserts that the concept of "margin of dumping" should not be confused with "amount of the duty". Members may apply different methods with regard to assessing the amount of the duty to be paid. The margin of dumping calculated in conformity with the disciplines of Article 2, however, operates as a ceiling on duty assessment. Hence, the duty assessed cannot go beyond the margin of dumping calculated for the product under consideration as a whole and with regard to the exporter or foreign producer at issue. Japan therefore concludes that the use of zeroing in periodic reviews is inconsistent with Articles 2.1 and 9.3 of the Agreement. Japan, however, does not take any position with regard to the alleged inconsistency of such zeroing with Articles 2.4.2 and 11.2 of the Agreement.

7.135 Japan argues that the use of zeroing in periodic reviews is also inconsistent with the fair comparison obligation under Article 2.4 of the Agreement because it leads to a margin in excess of the true margin of the relevant exporters or foreign producers.

7.136 Japan recalls that the Appellate Body is hierarchically superior to panels and that it has consistently held in the past cases that dealt with zeroing that such practice is WTO-inconsistent irrespective of the proceeding where it is used and the comparison methodology applied by the investigating authorities. Japan argues that the need to provide security and predictability to the multilateral trading system, set forth in Article 3.2 of the DSU, requires this Panel to follow the Appellate Body's reasoning. Japan recognizes that panels may, in exceptional circumstances, depart from the Appellate Body's reasoning, but argues that this dispute presents no such circumstances. Japan therefore contends that in order to discharge its obligation to carry out an objective examination of the matter before it, the Panel should rely on the Appellate Body's reasoning.

(c) Korea

7.137 Korea contends that Article 2.4 of the Agreement contains an obligation which is independent from the rest of Article 2. This obligation applies to all anti-dumping proceedings, including periodic reviews. According to Korea, a comparison that fails to take into consideration all export transactions cannot constitute fair comparison within the meaning of Article 2.4. Such a method, in Korea's view, leads to an unfair comparison. The use of zeroing by the USDOC in periodic reviews, therefore, is inconsistent with the fair comparison requirement embodied in Article 2.4, because it disregards the results of intermediate comparisons where the export price exceeds the normal value.

7.138 Korea further submits that the term "investigative phase" under Article 2.4.2 has a broad scope that covers periodic reviews. According to Korea, the word "investigation" within the meaning

of Article 2.4.2 refers to the inquiry carried out by the authorities, rather than to a particular segment of the proceedings. It follows that the use of the zeroing methodology in periodic reviews also conflicts with Article 2.4.2. Korea rejects the US arguments that purport to distinguish periodic reviews from investigations. Since both of these proceedings entail dumping margin calculations, they have to be subjected to the same legal disciplines. Korea therefore argues that the USDOC's margin calculations in periodic reviews is WTO-inconsistent both with regard to the final liability of importers and the new cash deposit rate for exporters or foreign producers.

7.139 Korea agrees with the EC's argument that Article 11.2 applies to periodic reviews and that the use of zeroing in such reviews also conflicts with the obligation set forth under the mentioned Article. Korea also argues that the use of zeroing in periodic reviews is inconsistent with Article 9.3 of the Agreement.

7.140 Regarding the relevance of past Appellate Body reports on the issue of zeroing, Korea contends that the Panel should follow the reasoning developed and repeated in such reports. This, in Korea's view, is critical with regard to maintaining the integrity of WTO dispute settlement. On this issue, Korea also draws attention to the fact that that the United States asserts that the Panel should refrain from following the Appellate Body's reasoning on zeroing, while at the same time citing Appellate Body's other reports in order to strengthen its legal arguments presented to the Panel.

(d) Mexico

7.141 Mexico generally agrees with the European Communities with regard to the relevance to these proceedings of past Appellate Body reports on the issue of zeroing. Mexico recalls the Appellate Body's reports that found zeroing "as such" to be WTO-inconsistent and argues that the position taken by the United States in this case frustrates the purpose of allowing "as such" claims in WTO dispute settlement, which is to eliminate the root of WTO-inconsistent behaviour. Mexico notes that the measures at issue in this case and the arguments presented by the United States are the same as those in the past zeroing cases and therefore invites the Panel to follow the Appellate Body's reasoning. This, in Mexico's view, would also be consistent with the Panel's obligation to carry out an objective examination of the matter before it, as required under Article 11 of the DSU. Mexico argues that not following the Appellate Body's reasoning in this case would undermine the need to provide security and predictability to the multilateral trading system as set forth under Article 3.2 of the DSU.

7.142 Mexico disagrees with the US assertion that the Appellate Body's legal reasoning in the past zeroing cases has shifted over time. According to Mexico, the Appellate Body's reasoning has been the same starting from the first zeroing case, *i.e.*, *EC – Bed Linen*. The Appellate Body based its reasoning on Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement which define "dumping", for purposes of all anti-dumping proceedings, with reference to the product under consideration as a whole. The Appellate Body recognized that the authorities could carry out multiple comparisons in the calculation of the margin of dumping but noted that the results of all such comparisons had to be taken into account in determining the final margin for the product under consideration as a whole. Furthermore, it held that it was exporters or foreign producers, not importers, that dumped. Finally, the Appellate Body opined that this would ensure consistency in anti-dumping proceedings in the sense that the definition of "dumped imports" would be the same for purposes of dumping and injury determinations. Mexico therefore disagrees with the US argument that the Appellate Body's reasoning is based on the phrase "all comparable export transactions" under Article 2.4.2 of the Agreement.

7.143 Mexico draws attention to the difference between duty collection systems and the calculation of margins of dumping. Mexico acknowledges that the Agreement provides discretion as to different duty collection systems that Members may adopt. Regardless of the system chosen, however, duties

collected continue to be subject to Article 9.3 of the Agreement which stipulates that duties cannot exceed the margin of dumping established under Article 2.

(e) Norway

7.144 Norway contends that the three comparison methodologies provided for under Article 2.4.2 of the Agreement constitute the only methods that may be used in all anti-dumping proceedings, including assessment reviews. Norway notes that Article 9.3 does not prescribe a methodology regarding duty assessment proceedings. According to Norway, however, the cross-reference to Article 2 should be interpreted to mean that the authorities have to observe the disciplines of Article 2 in their determinations in duty assessment proceedings. Furthermore, Norway asserts that Article 2.4.2 also applies to duty assessment proceedings. Norway agrees with the EC's proposition that the word "investigation" within the meaning of Article 2.4.2 does not refer to original investigations. Rather, it refers to the inquiry carried out by investigating authorities in different anti-dumping proceedings, including assessment proceedings. Limiting the scope of application of Article 2.4.2 to original investigations would, in Norway's view, lead to absurd results.

3. Evaluation by the Panel

(a) Relevant Facts

7.145 The European Communities provided copies of the USDOC's Issues and Decision Memoranda for 30 of the 37 periodic reviews at issue. The United States agrees that these memoranda show that simple zeroing was used in the relevant 30 periodic reviews.[107] The EC's claims regarding simple zeroing in periodic reviews concern the following 37 periodic reviews:

Number	Product and Country Involved	Period of Review	Relevant Exhibits
1	Steel Concrete Reinforcing Bars From Latvia USDOC No: A-449-804	1 September 2004 – 31 August 2005	EC-33
2	Steel Concrete Reinforcing Bars From Latvia USDOC No: A-449-804	1 September 2003 – 31 August 2004	EC-34
3	Steel Concrete Reinforcing Bars From Latvia USDOC No: A-449-804	1 September 2002 – 31 August 2003	EC-35&EC-81
4	Ball Bearings and Parts Thereof From Italy USDOC No: A-475-801	1 May 2004 – 30 April 2005	EC-31
5	Ball Bearings and Parts Thereof From Italy USDOC No: A-475-801	1 May 2003 – 30 April 2004	EC-36
6	Ball Bearings and Parts Thereof From Italy USDOC No: A-475-801	1 May 2002–30 April 2003	EC-37
7	Ball Bearings and Parts Thereof From Italy USDOC No: A-475-801	1 May 2001 – 30 April 2002	EC-38
8	Ball Bearings and Parts Thereof From Germany USDOC No: A-428-801	1 May 2004 – 30 April 2005	EC-39
9	Ball Bearings and Parts Thereof From Germany USDOC No: A-428-801	1 May 2003 – 30 April 2004	EC-40
10	Ball Bearings and Parts Thereof From Germany	1 May 2002 – 30 April 2003	EC-41

[107] Response of the United States to Question 1(b) From the Panel Following the Second Meeting.

Number	Product and Country Involved	Period of Review	Relevant Exhibits
	USDOC No: A-428-801		
11	Ball Bearings and Parts Thereof From Germany USDOC No: A-428-801	1 May 2001 – 30 April 2002	EC-42
12	Ball Bearings and Parts Thereof From France USDOC No: A-427-801	1 May 2004 – 30 April 2005	EC-43
13	Ball Bearings and Parts Thereof From France USDOC No: A-427-801	1 May 2003 – 30 April 2004	EC-44
14	Ball Bearings and Parts Thereof From France USDOC No: A-427-801	1 May 2002 – 30 April 2003	EC-45
15	Ball Bearings and Parts Thereof From France USDOC No: A-427-801	1 May 2001 – 30 April 2002	EC-46
16	Stainless Steel Bar From France USDOC No: A-427-820	1 March 2004 – 28 February 2005	EC-47&EC-82
17	Stainless Steel Bar From France USDOC No: A-427-820	1 March 2003 – 29 February 2004	EC-48&EC83
18	Stainless Steel Sheet And Strip In Coils From Germany USDOC No: A-428-825	1 July 2004 – 30 June 2005	EC-49
19	Stainless Steel Sheet And Strip In Coils From Germany USDOC No: A-428-825	1 July 2003 – 30 June 2004	EC-50
20	Stainless Steel Sheet And Strip In Coils From Germany USDOC No: A-428-825	1 July 2002 – 30 June 2003	EC-51
21	Stainless Steel Sheet And Strip In Coils From Germany USDOC No: A-428-825	1 July 2001 – 30 June 2002	EC-52
22	Stainless steel plate in coils From Belgium USDOC No: A-423-808	1 May 2003 – 30 April 2004	EC-53
23	Stainless steel plate in coils From Belgium USDOC No: A-423-808	1 May 2002 – 30 April 2003	EC-54
24	Ball Bearings and Parts Thereof From the United Kingdom USDOC No: A-412-801	1 May 2003 – 30 April 2004	EC-55
25	Ball Bearings and Parts Thereof From the United Kingdom USDOC No: A-412-801	1 May 2002 – 30 April 2003	EC-56
26	Stainless Steel Bar From Germany USDOC No: A-428-830	1 March 2004–28 February 2005	EC-57 & EC-84& EC-88&EC-89
27	Stainless Steel Bar From Germany USDOC No: A-428-830	2 August 2001–28 February 2003	EC-58&EC-85
28	Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands USDOC No: A-421-807 **(PRELIMINARY RESULTS)**	1 November 2004 – 31 October 2005	EC-59
29	Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands USDOC No: A-421-807	1 November 2002 – 31 October 2003	EC-60

Number	Product and Country Involved	Period of Review	Relevant Exhibits
30	Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands USDOC No: A-421-807	3 May 2001 – 31 October 2002	EC-61
31	Stainless Steel Bar From Italy USDOC No: A- 475-829	2 August 2001 – 28 February 2003	EC-62&EC86
32	Stainless Steel Sheet & Strip In Coils From Italy USDOC No: A-475-824	1 July 2002 – 30 June 2003	EC-63
33	Stainless Steel Sheet & Strip In Coils From Italy USDOC No: A-475-824	1 July 2001 – 30 June 2002	EC-64
34	Certain Pasta From Italy USDOC No: A-475-818	1 July 2004 – 30 June 2005	EC-65&EC-87
35	Certain Pasta From Italy USDOC No: A-475-818	1 July 2003 – 30 June 2004	EC-66
36	Certain Pasta From Italy USDOC No: A-475-818	1 July 2002 – 30 June 2003	EC-67
37	Certain Pasta From Italy USDOC No: A-475-818	1 July 2001 – 30 June 2002	EC-68

7.146 As far as the remaining seven periodic reviews are concerned, the European Communities initially did not submit copies of the USDOC's Issues and Decision Memoranda. Following the second meeting with the parties, the Panel asked the European Communities why the copies of such memoranda had not been submitted for the seven periodic reviews at issue and invited it, if it so wished, to do so. In response, the European Communities stated that the copies of the memoranda in connection with the seven periodic reviews at issue had not been submitted because, unlike those submitted in connection with the other 30 periodic reviews, the memoranda pertaining to the seven reviews did not contain any discussion on the issue of simple zeroing.[108] The European Communities attached to its response copies of the memoranda that belonged to the seven reviews. In addition, the European Communities submitted, along with its response to the Panel's question, copies of the two margin programmes used in one of the seven reviews, *i.e.*, *Stainless Steel Bar From Germany (Period of Review: 1 March 2004 – 28 February 2005)*.

7.147 With regard to the submission by the European Communities of the two margin programmes pertaining to the periodic review in *Stainless Steel Bar From Germany*, the United States argues that such submission runs counter to paragraph 14 of the Panel's Working Procedures because this constitutes new factual evidence which may only be submitted in the circumstances described in paragraph 14. The United States contends that the Panel gave the European Communities the opportunity to submit copies of the relevant Issues and Decision Memoranda, and argues that the submission of margin programmes fell outside the scope of such opportunity.[109]

7.148 Paragraph 14 of our Working Procedures provides:

> "Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of

[108] Response of the European Communities to Question 1(c) From the Panel Following the Second Meeting.

[109] Comment of the United States on the Response of the European Communities to Question 1(c) From the Panel Following the Second Meeting.

> rebuttals or answers to questions. Exceptions to this procedure will be granted upon a showing of good cause. The other party shall be accorded a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting."

Paragraph 14 provides that all factual evidence has to be submitted not later than during the Panel's first substantive meeting. However, it also contains certain exceptions. Thus, paragraph 14 allows for the submission of factual evidence after the first substantive meeting of the Panel: a) when this is necessary for purposes of rebuttals and answers to questions, or b) upon good cause shown. Paragraph 14 also stipulates that where additional factual evidence is submitted after the first substantive meeting, the other party shall be given an opportunity to comment on it. We disagree with the narrow interpretation presented by the United States regarding the language in our question to the European Communities. The question at issue reads in relevant parts:

> "Please explain the reason why the European Communities has not submitted a copy of the USDOC's Issues and Decision Memorandum in relation to 7 of the 36 Exhibits contained in the table above. You may, if you so wish, submit copies of the Memoranda pertaining to the mentioned 7 administrative reviews, along with your answers to these questions."[110]

The reason why we invited the European Communities to submit copies of the relevant Issues and Decision Memoranda pertaining to the seven periodic reviews at issue is because that was the document that the European Communities had submitted in connection with the other 30 reviews. We anticipated that the same memoranda pertaining to the seven reviews would also contain discussions regarding the methodology used in such reviews. We did not intend to limit the submission of evidence along with the EC's response to the question at issue to such memoranda.

7.149 We note that the European Communities submitted the additional factual information at issue along with its response to the Panel's question. We also note that the United States has had an opportunity to comment on the documents submitted along with the EC's response. We therefore disagree with the US view that the submission of the two calculation tables conflicted with paragraph 14 of our Working Procedures. In any event, as explained in para. 7.154 below, we have found that the two computer programmes submitted by the European Communities have not demonstrated that simple zeroing was used in the periodic review at issue.

7.150 We now turn to our assessment of the evidence submitted by the European Communities with regard to the seven periodic reviews in which the Issues and Decision Memoranda do not contain any discussion on the methodology used by the USDOC.

(i) Steel Concrete Reinforcing Bars From Latvia (Period of Review: 1 September 2002 – 31 August 2003)

7.151 In order to demonstrate that the USDOC used simple zeroing in this periodic review, the European Communities submitted, in Exhibit EC-35, the copy of the Federal Register where the Final Results of the USDOC's determinations were published, documents showing the standard computer programme that the USDOC used in this review, the application of that programme to the producer subject to this review and tables that show the results of the calculations with and without zeroing. We note that the Final Results published by the USDOC in the Federal Register do not mention whether simple zeroing was used in the review at issue. We also note that none of the other documents submitted by the European Communities were issued by the USDOC during the review at issue. The relevant parts of the programmes that were allegedly used in the review at issue contain

[110] Question 1(c) From the Panel Following the Second Meeting.

certain computer commands which do not necessarily show that the simple zeroing methodology was used by the USDOC. We do not consider that tables that allegedly contain results with and without zeroing necessarily show that simple zeroing was actually used in the periodic review at issue. The European Communities also submitted, in Exhibit EC-81, the copy of the USDOC's Issues and Decision Memorandum. This Memorandum, however, does not mention whether simple zeroing was applied. We therefore consider that the European Communities has failed to demonstrate as a matter of fact that simple zeroing was used by the USDOC in this periodic review.

(ii) Stainless Steel Bar From France (Period of Review: 1 March 2004 – 28 February 2005)

7.152 With regard to this periodic review, the European Communities submitted, in Exhibit EC-47, the copy of the Federal Register where the Final Results of the USDOC's determinations were published and, in Exhibit EC-82, the copy of the USDOC's Issues and Decision Memorandum. None of these two documents shows that simple zeroing was used in this review. We therefore consider that the European Communities has failed to demonstrate that simple zeroing was used by the USDOC in this periodic review.

(iii) Stainless Steel Bar From France (Period of Review: 1 March 2003 – 29 February 2004)

7.153 With regard to this periodic review, the European Communities submitted, in Exhibit EC-48, the copy of the Federal Register where the Final Results of the USDOC's determinations were published and, in Exhibit EC-83, the copy of the USDOC's Issues and Decision Memorandum. Neither of these documents demonstrates that simple zeroing was used in this review. We therefore consider that the European Communities has failed to demonstrate that simple zeroing was used by the USDOC in this periodic review.

(iv) Stainless Steel Bar From Germany (Period of Review: 1 March 2004 – 28 February 2005)

7.154 With regard to this periodic review, the European Communities submitted, in Exhibit EC-57, the copy of the Federal Register where the Final Results of the USDOC's determinations were published, the standard programme used by the USDOC in the margin calculations in this periodic review, and a table showing the results with and without zeroing. We note that the Final Results published by the USDOC in the Federal Register do not mention whether simple zeroing was used in the review at issue. The tables showing margin calculations with and without zeroing were not generated by the USDOC during the review at issue. The European Communities also submitted, along with its Response to Question 1(c) From the Panel Following the Second Meeting, Exhibits EC-88 and EC-89 containing two margin programmes used in this periodic review and Exhibit EC-84 containing the copy of the USDOC's Issues and Decision Memorandum. The documents containing the margin programmes were not generated by the USDOC during the review at issue. Nor is it readily discernable from these documents that the simple zeroing methodology was used in this periodic review. The USDOC's Issues and Decision Memorandum does not shed light on this issue either. We therefore consider that the European Communities has failed to demonstrate that simple zeroing was used by the USDOC in this periodic review.

(v) Stainless Steel Bar From Germany (Period of Review: 2 August 2001 – 28 February 2003)

7.155 With regard to this periodic review, the European Communities submitted, in Exhibit EC-58, the copy of the Federal Register where the Final Results of the USDOC's determinations were published, the standard programme used by the USDOC in the margin calculations in this review as well as two tables showing the results with and without zeroing. We note that the Final Results published by the USDOC in the Federal Register do not mention whether simple zeroing was used in the review at issue. The tables showing margin calculations with and without zeroing were not generated by the USDOC during the review at issue. Nor does the copy of the USDOC's Issues and

Decision Memorandum, submitted in Exhibit EC-85, demonstrate that simple zeroing was used. We therefore consider that the European Communities has failed to demonstrate as a matter of fact that simple zeroing was used by the USDOC in this periodic review.

(vi) Stainless Steel Bar From Italy (Period of Review: 2 August 2001 – 28 February 2003)

7.156 With regard to this periodic review, the European Communities submitted, in Exhibit EC-62, the copy of the Federal Register where the Final Results of the USDOC's determinations were published, a copy of the application of the USDOC's standard computer programme and a table showing the results of the calculations with zeroing. We note that the Final Results published by the USDOC in the Federal Register do not mention whether simple zeroing was used in the review at issue. We also note that the calculation table allegedly showing the results of calculations with zeroing was not produced by the USDOC. Nor does the copy of the USDOC's Issues and Decision Memorandum, submitted in Exhibit EC-86, demonstrate that simple zeroing was used. We therefore consider that the European Communities has failed to demonstrate that simple zeroing was used by the USDOC in this periodic review.

(vii) Certain Pasta From Italy (Period of Review: 1 July 2004 – 30 June 2005)

7.157 With regard to this periodic review, the European Communities submitted, in Exhibit EC-65, the copy of the Federal Register where the Final Results of the USDOC's determinations were published, a table that shows the application of the USDOC's computer programme to one of the exporters in this review and another table that allegedly shows the results of margin calculations without zeroing. We note that the Final Results published by the USDOC in the Federal Register do not mention whether simple zeroing was used in the review at issue. The calculation tables submitted by the European Communities were not produced by the USDOC during the periodic review at issue. Nor is it readily discernable from such tables that simple zeroing was used. None of them, in our view, shows that the simple zeroing methodology at issue in these proceedings was used by the USDOC in the review at issue. Nor does the copy of the USDOC's Issues and Decision Memorandum, submitted in Exhibit EC-87, show that simple zeroing was used. We therefore consider that the European Communities has failed to demonstrate that simple zeroing was used by the USDOC in this periodic review.

7.158 The European Communities has not shown that simple zeroing was used in the seven reviews discussed above. The Panel's findings regarding the use of simple zeroing in periodic reviews shall, therefore, not affect such reviews.[111] Furthermore, we recall our finding above (para. 7.77) that the preliminary determinations identified in the EC's panel request are not within our terms of reference. Hence, the periodic review on *Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands (Period of Review: 1 November 2004 – 31 October 2005)* (Exhibit EC-59) is not within our terms of reference. Consequently, our reasoning below regarding the use of simple zeroing in periodic reviews only applies to 29 of the 37 reviews challenged by the European Communities.

(b) Is Simple Zeroing in Periodic Reviews WTO-Inconsistent?

(i) Description of the Calculation Methodology Used By the USDOC in Periodic Reviews

7.159 We note that the parties do not disagree over the description of the calculation methodology used by the USDOC to calculate margins of dumping in periodic reviews. The United States has a retrospective duty assessment system. Under the US system, the anti-dumping duty imposed following an investigation does not constitute the final determination of liability for anti-dumping

[111] The shaded lines in the table in para. 7.145 above represent the periodic reviews in which the Panel considers that the European Communities has not demonstrated that simple zeroing was used.

duties on imports of the subject product into the United States. Rather, in the US system, an importer deposits a security in the form of a cash deposit at the time of importation. Subsequently, the importer may, on an annual basis, ask the USDOC to calculate the importer's final liability for anti-dumping duties on all the imports made during the previous year. Such a request may also be made by a domestic producer or a foreign exporter or producer. In such a periodic review, the USDOC carries out two calculations: it calculates the final liability for anti-dumping duties for the importer on its imports during the period under review, and it calculates a new cash deposit rate for each exporter's future entries. The first is an importer-specific calculation whereas the second is exporter-specific. Both calculations are based on normal value and export price data pertaining to the period under review.

7.160 The method used by the USDOC with regard to the calculation of these two margins is the same. The product under consideration is separated into model groups and a monthly WA normal value is determined for each model exported by each exporter subject to the review. Each export transaction is compared against the relevant monthly WA normal value. These comparisons are then aggregated, with the results of comparisons where the export price exceeds the WA normal value treated as zero. A WA margin of dumping is calculated for each exporter by dividing the aggregated total by the total value of exports, and this becomes the cash deposit rate for that exporter for the subsequent period. The calculation of the importer-specific assessment rate is similar. The USDOC compares the exporter-specific WA normal value for each model with the export price in each transaction involving that exporter's product by the importer. These comparisons are then aggregated, with the results of comparisons where the export price exceeds the WA normal value treated as zero. The aggregate total for all transactions is then divided by the total value of imports made by the importer. In other words, the numerator for the exporter's WA dumping margin for the period of review, *i.e.*, the future cash deposit rate, is the total of the comparisons where the normal value exceeds the export price and the denominator is the value of all exports from that exporter during the period of review. The numerator for the importer-specific assessment rate is the total of comparisons for all transactions where the normal value exceeds the export price for all imports by that particular importer, and the denominator is the total value of all imports by the importer.

7.161 If the final importer-specific duty calculated in a periodic review exceeds the original cash deposit, the importer has to pay the difference plus interest. When the opposite is the case, the difference is reimbursed with interest. Where no periodic review is requested, the initial cash deposit made at the time of importation is assessed as final duty.

(ii) Legal Analysis

7.162 The EC's claim regarding simple zeroing in periodic reviews raises a number of important issues of treaty interpretation. The first is whether dumping may be determined on the basis of an individual export transaction or whether it requires an aggregation of all export transactions made within the period of review. The European Communities argues that dumping can only be determined for the product under consideration as a whole, *i.e.*, that all export transactions pertaining to the product subject to a periodic review have to be taken into consideration in the calculation of the margin of dumping. According to the European Communities, simple zeroing in periodic reviews is inconsistent with Articles 2.1, 2.4, 2.4.2 and 9.3 of the Agreement because it precludes a dumping determination for the product under consideration as a whole. The United States disagrees and maintains that this proposition does not have a basis in the Agreement. According to the United States, it is a permissible interpretation of the Agreement that dumping may be determined for individual export transactions. We are inclined to agree with this conclusion, for the reasons stated most recently by the panel in *US – Stainless Steel (Mexico)* case.[112] We note, however, that the

[112] We recall that the WTO-consistency of simple zeroing in periodic reviews has been raised in three disputes so far, *i.e.* in *US – Zeroing (EC)*, *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)*. In all three

Appellate Body reversed the panel's findings in this regard. Drawing on its previous reasoning, the Appellate Body emphasized that dumping cannot be determined on the basis of individual export transactions. According to the Appellate Body, "if it were permissible to determine a separate margin of dumping for each individual transaction, several margins of dumping would exist for each exporter and for the product under consideration".[113] This, in the Appellate Body's view, cannot be reconciled with the interpretation and application of several provisions of the Agreement, including a determination of injury under Article 3, the acceptance of price undertakings under Article 8 and the conduct of reviews provided for under Articles 11.2 and 11.3.[114]

7.163 A second issue, related to the first, is whether dumping is necessarily an exporter-specific concept or whether it may also be determined for individual importers. The European Communities maintains that dumping is an exporter-specific concept. The United States, however, disagrees and asserts that this approach does not have a basis in the Agreement. We tend toward the view that dumping is not necessarily and exclusively an exporter-specific concept, finding the reasoning of the panel in *US –Stainless Steel (Mexico)* to be persuasive. That panel drew attention, *inter alia*, to the importer-specific nature of the payment of anti-dumping duties. According to the panel, the proposition that a margin of dumping can be determined for individual importers represents a permissible interpretation of the relevant treaty provisions within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement.[115] We note, however, that on this point also, the Appellate Body in *US – Stainless Steel (Mexico)* reversed the panel, reiterating that dumping necessarily is an exporter-specific concept. The Appellate Body reasoned that certain elements of the definitional provisions contained in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 compel the notion that dumping reflects the exporter's behaviour. The Appellate Body found contextual support for its interpretation in other provisions of the Agreement, including 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).[116] The Appellate Body also restated the overarching requirement of Article 9.3 that the level of anti-dumping duty cannot exceed the margin of dumping as established under Article 2 of the Agreement. The Appellate Body reasoned that dumping can only be determined for the exporter and in connection with the product under consideration as a whole, and considered that this definition of "dumping" applies throughout the Agreement. Therefore, the Appellate Body reasoned, the margin of dumping calculated in accordance with Article 2 establishes a ceiling for the total amount of anti-dumping duties that may be levied on the imports of the subject product. The Appellate Body concluded that there is "no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the *Anti-Dumping Agreement* for disregarding the results of comparisons where the export price exceeds the normal value when calculating the margin of dumping for an exporter."[117]

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disputes, panels found simple zeroing in periodic reviews to be permissible under the Anti-Dumping Agreement. All three panel reports were appealed and the Appellate Body reversed the panels on this issue in all three cases. We also note that in these cases the reasoning, respectively, of panels and the Appellate Body has generally been consistent on the legal issues concerning simple zeroing in periodic reviews. The panels and the Appellate Body have generally developed their reasoning based on previous reports. We note that the most recent dispute in which simple zeroing in periodic reviews was at issue, *US – Stainless Steel (Mexico)*, provides a comprehensive summary of the main legal issues and arguments raised by parties in disputes concerning this type of zeroing. For ease of reference, therefore, we have cited to the panel and the Appellate Body reports in *US – Stainless Steel (Mexico)*, which reflect these previous panel and Appellate Body reports, rather than citing *seriatim* all earlier reports reaching similar conclusions.

[113] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* ("*US – Stainless Steel (Mexico)*"), WT/DS344/AB/R, adopted 20 May 2008, para. 99.

[114] *Ibid.*

[115] Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, paras.7.124-7.128.

[116] Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, paras. 83-96.

[117] *Ibid.*, para. 103. The Appellate Body noted, *inter alia*, that if simple zeroing in periodic reviews were allowed under Article 9.3 of the Agreement, this would allow Members to circumvent the prohibition,

7.164 The United States argues that prohibiting simple zeroing in periodic reviews would favour importers with high margins *vis-à-vis* importers with low margins. We share these concerns and we note that the panel in *US – Stainless Steel (Mexico)* agreed with the US arguments in this regard.[118] The Appellate Body, however, reversed the panel, observing that the prohibition of simple zeroing in periodic reviews does not preclude Members from carrying out an importer-specific inquiry in determining liability for the collection of anti-dumping duties, as long as the duty collected does not exceed the exporter-specific margin of dumping established for the product under consideration as a whole.[119]

7.165 The United States directs our attention to the fact that a Group of Experts convened in 1960 to consider certain issues regarding the operation of Article VI of the GATT 1947. This Group, according to the United States, pointed out that the "ideal method" for the imposition of anti-dumping duties would be based on an importer-specific determination of dumping and injury.[120] In our view, the opinion presented in that report supports the conclusion that dumping could be determined for individual importers. The Appellate Body in *US – Stainless Steel (Mexico)*, however, rejected this argument, finding that interpretation of the Agreement in this regard does not necessitate an analysis of supplementary means of interpretation provided for under Article 32 of the Vienna Convention. Furthermore, the Appellate Body reasoned that the report does not clarify whether simple zeroing in periodic reviews is allowed under the Anti-Dumping Agreement because it only reflects the views of some of the negotiating parties well before the Anti-Dumping Agreement came into force.[121]

7.166 The United States asserts that Article 9.4 (ii) of the Agreement which provides for the prospective normal value systems, lends support to the proposition that dumping may be interpreted in relation to individual export transactions. We tend to agree with the proposition that the recognition in the Agreement of a prospective normal value system reinforces the argument that dumping may be determined on the basis of individual export transactions, and note that the panel in *US – Stainless Steel (Mexico)* also agreed with this point of view.[122] The Appellate Body, however, disagreed, stating that "the Panel has failed to distinguish between duty 'collection' at the time of importation, on the one hand, and determinations of the final duty liability of an importer and the margin of dumping for an exporter, on the other hand".[123] The Appellate Body highlighted the fact that the duty collected at the time of importation under a prospective normal value system does not represent the margin of dumping within the meaning of Article 9.3 and noted that such duty is subject to review under Article 9.3.2.[124]

7.167 The United States asserts that if the Agreement is interpreted in a way that generally prohibits zeroing, the third methodology provided for under the second sentence of Article 2.4.2 would yield the same mathematical result as the first methodology.[125] This, according to the United States and the

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under Article 2.4.2, on zeroing in investigations. According to the Appellate Body, "this means that the mere act of conducting a periodic review would introduce zeroing following imposition of the anti-dumping duty order". *Ibid.*, para. 109.

[118] Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, para. 7.146.

[119] Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 113.

[120] First Written Submission of the United States, para. 86.

[121] Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, paras. 128-132.

[122] Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, paras. 7.130-7.133.

[123] (footnote omitted) Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 120.

[124] *Ibid.*

[125] We recall that the text of Article 2.4.2 reads:

> "Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a

panel in *US – Stainless Steel (Mexico)*, would render the second sentence of Article 2.4.2 *inutile* and therefore run counter to the principle of effective treaty interpretation. On this issue, we tend to agree with the views expressed by the United States, as did the panel in *US – Stainless Steel (Mexico)*.[126] The Appellate Body dismissed this concern, noting that "if the determination of weighted average normal values was based on *different time periods*, dumping margin calculations under these two methodologies would yield different mathematical results".[127] The Appellate Body also reiterated its view that "[b]eing an exception, the comparison methodology in the second sentence of Article 2.4.2 (weighted average-to-transaction) alone cannot determine the interpretation of the two methodologies provided in the first sentence".[128] Furthermore, the Appellate Body reasoned that "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern".[129]

7.168 With regard to this last point, we note that the panel in *US – Stainless Steel (Mexico)* had pointed out:

> "This approach leaves certain questions unanswered. First, the Appellate Body has not pointed to any textual basis for the proposition that the export transactions to be used in the third methodology would necessarily be more limited than those in the first two methodologies. In light of the text of Article 2.4.2, it is not evident to us that dumping determinations in the third methodology could be limited to the subset of the export transactions that fall within the relevant price pattern. The second sentence of Article 2.4.2 simply mentions that the authorities may, under certain circumstances, compare prices of individual export transactions with the WA normal value. It does not mention in any way whether such comparison may, or has to, be limited to the subset of export transactions that fall within the relevant price pattern. Second, assuming that this proposition does in fact have a textual basis in the Agreement, the Appellate Body did not explain how the authorities would treat the remaining export transactions. If, for instance, what the Appellate Body meant is that the export transactions that do not fall within the relevant price pattern are to be excluded from dumping determinations, this would mean disregarding them. Given the Appellate Body's strongly expressed view that dumping has to be determined for the product under consideration as a whole and hence all export transactions pertaining to the product under consideration have to be taken into consideration by the authorities, we do not consider that this can be what the Appellate Body meant. Alternatively, if the Appellate Body meant that the authorities would use the WA-WA methodology with respect to the export transactions that do not fall within the relevant price pattern, and combine these results with the results obtained through the WA-T methodology for the prices that fall within the pattern, we note that such an approach would also lead to the same mathematical result as the WA-WA methodology. We therefore do not

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transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

[126] Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, paras. 7.130-7.133.

[127] (footnote omitted) Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 126.

We note that the Appellate Body's rationale in this regard rests on the use of different data and must logically yield a different mathematical result.

[128] (footnote omitted) Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 127.

[129] (footnote omitted) *Ibid.*

> consider that the Appellate Body's approach invalidates the mathematical equivalence problem."[130] (footnote omitted)

The panel in that case expressed the view that the Appellate Body's reasoning regarding the mathematical equivalence argument in earlier reports was not internally consistent. According to the panel, although the Appellate Body expressed the view that while using the third methodology the authorities would limit their dumping determinations to the subset of export transactions that fall within the relevant price pattern, it did not explain how the export transactions outside that pattern would have to be treated. We share the concern raised by that panel in this regard and note that the Appellate Body in *US – Stainless Steel (Mexico)* did not address this concern.

7.169 Having identified the issues raised by the EC's claim regarding simple zeroing in periodic reviews, and having reviewed the arguments of the parties and the reports of previous panels and the Appellate Body, we have generally found the reasoning of earlier panels on these issues to be persuasive.[131] We are, however, faced with a situation where the Appellate Body reports, adopted by the DSB, have consistently reversed the findings in the mentioned panel reports that simple zeroing in periodic reviews is not WTO-inconsistent. Therefore, before setting out any definitive findings on the claim before us, we turn to an important systemic question.

(iii) The Role of Jurisprudence

7.170 Given the consistent line of reasoning underlying the Appellate Body's conclusion regarding simple zeroing in periodic reviews, resolution of the EC's claim before us necessarily requires consideration of the role of adopted Appellate Body reports. We note that the net effect of adopted Appellate Body or panel reports is not directly addressed in the DSU or in any covered agreement. This issue, however, has arisen in past disputes and the Appellate Body has addressed it. In *Japan – Alcoholic Beverages II*, the Appellate Body opined:

> "Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, <u>they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.</u> In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*."[132] (footnote omitted, italic emphasis in original, underline emphasis added)

The Appellate Body made this statement in the context of assessing the importance of adopted GATT panel reports.[133] Its reasoning, however, also addresses the status of WTO panel reports. In its reasoning, the Appellate Body underlines the fact that adopted panel reports create legitimate expectations among WTO Members and opines that they should be taken into consideration by

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[130] Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, para. 7.139.

[131] We note, as the Appellate Body has recognized (Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 76), that Article 17.6(ii) of the Anti-Dumping Agreement allows for the possibility of more than one permissible interpretation of its provisions. We are of the view that the position of the United States, as reflected in the aforementioned panel reports, reflects at least one permissible interpretation of the relevant provisions of the Anti-Dumping Agreement. While the interpretation presented by the European Communities, and reflected in the Appellate Body reports on zeroing and the separate opinion of one Member of the Panel, (*infra* paras. 9.1-9.10), may also be a permissible interpretation, we do not believe that it is the only one.

[132] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 14.

[133] *Ibid.*, pp. 12-13.

subsequent panels where the legal issues are similar, noting however, that such reports are not binding outside the scope of the relevant dispute.

7.171 In the subsequent *US – Shrimp (Article 21.5 – Malaysia)* dispute, the Appellate Body extended this reasoning to adopted Appellate Body reports.[134] The Appellate Body endorsed the reference that the panel in that case made to the Appellate Body's report and pointed out that "[the Appellate Body] would have expected the [p]anel to do so".[135] Subsequently, in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body went further regarding the role of adopted Appellate Body reports and expressed the view that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[136]

7.172 The panel in *US – Stainless Steel (Mexico)* addressed the Appellate Body findings on the issue of simple zeroing in periodic reviews in reaching its conclusion. In reaching its conclusion, which did not follow these Appellate Body reports, the panel observed that although the DSU does not attribute a binding effect to adopted panel or Appellate Body reports, "the Appellate Body *de facto* expects them to do so to the extent that the legal issues addressed are similar".[137] The panel recalled and endorsed the view expressed by the panel in *US – Zeroing (Japan)* that "the concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it" as required under Article 11 of the DSU.[138]

7.173 On appeal, the Appellate Body recalled its previous findings in *Japan – Alcoholic Beverages II*, *US – Shrimp (Article 21.5 – Malaysia)* and *US – Oil Country Tubular Goods Sunset Reviews* and reiterated that "Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties".[139] Nonetheless, the Appellate Body noted, "[a]dopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes".[140] Furthermore, the Appellate Body pointed out, while enacting or modifying their national legislation, Members often take into consideration the interpretation of the covered agreements developed in such reports.[141] According to the Appellate Body, therefore, "the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system".[142]

7.174 In the view of the Appellate Body, the objective examination obligation that Article 11 of the DSU imposes on WTO panels is informed by the general provisions of Article 3 of the DSU, including paragraph 2 thereof which provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system".[143] According to the Appellate Body, ensuring "security and predictability" in the dispute settlement

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[134] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*"), WT/DS58/AB/RW, adopted 21 November 2001, para. 109.

[135] *Ibid.*, para. 107.

[136] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257, para. 188.

[137] (emphasis in original) Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, para. 7.105.

[138] *Ibid*.

[139] (footnote omitted) Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 158.

[140] *Ibid.*, para. 160.

[141] *Ibid.*

[142] *Ibid.*

[143] *Ibid.*, para. 157.

system, in turn, requires the development of a consistent body of case law and applying it to the same legal questions, absent cogent reasons.[144]

7.175 In addition, the Appellate Body underlined the hierarchical structure provided for in the DSU and opined:

> "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. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU."[145] (emphasis added)

The Appellate Body's views in this regard, particularly of the phrase "security and predictability", imply that the development of a consistent body of case law in order to clarify the rights and obligations of WTO Members is necessary. The Appellate Body pointed out that any panel report that fails to follow the case law developed through adopted panel and Appellate Body reports would undermine this important function of jurisprudence.

7.176 Furthermore, the Appellate Body held:

> "Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case."[146] (emphasis added)

In this part of its report, the Appellate Body expressed the view that the legal interpretation contained in adopted Appellate Body reports has implications that go beyond the specifics of the relevant dispute. That is, according to the Appellate Body, such interpretation has to be taken into consideration in interpreting the rights and obligations of WTO Members.

7.177 The Appellate Body expressed deep concern that the panel in *US – Stainless Steel (Mexico)* failed to follow the legal interpretation developed in the prior Appellate Body reports regarding simple zeroing in periodic reviews. According to the Appellate Body, "[t]he [p]anel's approach has serious implications for the proper functioning of the WTO dispute settlement system[]".[147] Nonetheless, although Mexico had asked the Appellate Body to find that the panel's failure to follow established Appellate Body reasoning on simple zeroing in periodic reviews was inconsistent with the obligation to carry out an objective examination, as required under Article 11 of the DSU, the Appellate Body declined to make such a finding, concluding that "the [p]anel's failure flowed, in essence, from its misguided understanding of the legal provisions at issue".[148]

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[144] *Ibid.*, para. 160.
[145] *Ibid.*, para. 161.
[146] *Ibid.*
[147] *Ibid.*, para. 162.
[148] *Ibid.*

7.178 In light of this recent report, we consider it necessary to review our obligations regarding decision-making. We therefore start with the general obligations on panels set out in Article 11 of the DSU, which provides in relevant part:

> "*Function of Panels*
>
> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

7.179 Clearly, the guiding principle for the work of this or any other panel is the injunction that a panel undertake an "objective assessment" with regard to both the facts and the law relevant to the dispute before it. Such an objective assessment does not, of course, occur in a vacuum. Other provisions of the DSU give context to this task. Important contextual elements which must be taken into account are found in Article 3.2 of the DSU, which provides:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." (emphasis added)

Thus, Article 3.2 establishes that the WTO dispute settlement system is intended to provide security and predictability to the multilateral trading system. In this regard, of particular relevance among the elements that the WTO dispute settlement system comprises are the consultations process, examination of facts and law by panels, appeal on issues of law, and disciplines on the implementation of DSB recommendations and rulings following a dispute, including recourse to proportioned retaliation. All of these elements operate together to provide security and predictability to the multilateral trading system. The Appellate Body suggests that security and predictability in the dispute settlement system *per se* is a purpose served by the development of a consistent body of case law based on panels following the reasoning of adopted Appellate Body reports.[149] We agree that security and predictability in the multilateral trading system may also be furthered by the development of consistent jurisprudence and applying it to the same legal questions, absent cogent reasons to do otherwise. In our view, it is obviously incumbent upon any panel to consider prior adopted Appellate Body reports, as well as adopted panel reports, and adopted GATT panel reports, in undertaking the objective assessment required by Article 11. Prior adopted reports form part of the GATT/WTO *acquis*, and, as stated by the Appellate Body, create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant.[150] However, we do not consider that the development of binding jurisprudence is a contemplated element to enable the dispute settlement system to provide security and predictability to the multilateral trading system.

7.180 Clearly, it is important for a panel to have cogent reasons for any decision it reaches, regardless of whether or not there are any relevant adopted reports, and whether or not the panel follows such reports. An essential part of a panel's task under Article 11 is to explain its objective assessment of the matter before it. Such explanation, as well as the reasons given, serve to ensure that

[149] *Ibid.*, para. 160.
[150] Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra*, note 132, p. 14.

panels do not add to or diminish the rights and obligations of Members, while at the same time furthering the goal of providing security and predictability to the multilateral trading system through the operation of the dispute settlement system. In our view, however, a panel cannot simply follow the adopted report of another panel, or of the Appellate Body, without careful consideration of the facts and arguments made by the parties in the dispute before it. To do so would be to abdicate its responsibilities under Article 11. By the same token, however, neither should a panel make a finding different from that in an adopted earlier panel or Appellate Body report on similar facts and arguments without careful consideration and explanation of why a different result is warranted, and assuring itself that its finding does not undermine the goals of the system.

7.181 As discussed above, we share a number of concerns raised by the panel in *US – Stainless Steel (Mexico)*, particularly with regard to the US mathematical equivalence argument. We recognize, however, that the Appellate Body in its report reversed the panel's findings and this report gained legal effect through adoption by the DSB. We note that this continues a series of consistent recommendations made by the DSB over the past several years following reports that addressed the same issues based largely on the same arguments.

7.182 In addition to the goal of providing security and predictability to the multilateral trading system, we recall that Article 3.3 of the DSU provides that "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Given the consistent adopted jurisprudence on the legal issues that are before us with respect to simple zeroing in periodic reviews, we consider that providing prompt resolution to this dispute in this manner will best serve the multiple goals of the DSU, and, on balance, is furthered by following the Appellate Body's adopted findings in this case.

(iv) Conclusion

7.183 Based on the foregoing considerations, we conclude that 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. Having found that 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, we decline to make findings with regard to the EC's claims under Articles 2.1, 2.4, 2.4.2 and 11.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

G. ZEROING IN SUNSET REVIEWS

1. Arguments of the Parties

(a) European Communities

7.184 The European Communities challenges the use of zeroing in 11 sunset reviews carried out by the USDOC. The European Communities elaborates its claims regarding the use of zeroing in sunset reviews, with reference to one specific sunset review, *Stainless Steel Sheet & Strip in Coils – Italy*, but argues that the same claims apply to the other sunset reviews at issue. The European Communities argues that as part of its sunset determinations, the USDOC relies on previously-calculated dumping margins. Hence, it relies on margins calculated through zeroing. In the sunset review of *Stainless Steel Sheet & Strip in Coils – Italy*, based on the existence of dumping in the original investigation and the subsequent reviews, which had been calculated through zeroing, the USDOC determined that dumping would likely continue or recur should the duty be terminated.

7.185 The European Communities notes that Article 11.3 of the Agreement does not define the word "dumping". The definition of dumping under Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, therefore, applies to sunset reviews. It follows that dumping margins used in sunset reviews must conform to the provisions of the Agreement, including Article 2. The European Communities asserts that the margins used by the USDOC in the sunset review at issue had been calculated inconsistently with Articles 2.1, 2.4 and 2.4.2 of the Agreement. For this reason, the sunset determination reached through the USDOC's reliance on these WTO-inconsistent margins is also inconsistent with the same provisions. Consequently, argues the European Communities, the USDOC also acted inconsistently with its obligations under Articles 11.1 and 11.3 of the Agreement.

(b) United States

7.186 The United States argues that the EC's claims regarding the use of zeroing in sunset reviews has to be rejected because "[t]he [European Communities] has not demonstrated that a calculation done in accordance with the EC's approach would result in zero or *de minimis* dumping margins in the cited cases, leading to a revocation of the order".[151]

2. Arguments of Third Parties

(a) Japan

7.187 Japan contends that sunset determinations are inconsistent with the disciplines of the Anti-Dumping Agreement to the extent they are based on past margins calculated through zeroing. Japan does not take any position with regard to the factual circumstances surrounding the sunset determinations challenged by the European Communities in these proceedings. Japan argues, however, that to the extent that the USDOC used past margins established through zeroing, it acted inconsistently with Articles 2.1, 2.4, 11.3 of the Anti-Dumping Agreement and VI:1 and VI:2 of the GATT 1994.

(b) Korea

7.188 In Korea's view, sunset reviews are the continuation of the previous anti-dumping proceedings and cannot be separated from them. It follows that to the extent that the USDOC in its sunset determinations relies on past margins calculated through zeroing, it violates the obligations set forth under Articles 2.4, 2.4.2, 11.1 and 11.3 of the Agreement.

(c) Norway

7.189 Norway recalls the relevant Appellate Body reports and submits that to the extent that the authorities in a sunset review rely on past dumping margins obtained through zeroing, such reliance taints their sunset determinations. Norway disagrees with the US argument that the European Communities has to demonstrate that a calculation without zeroing would result in zero or *de minimis* margins. According to Norway, the EC's obligation is to show a breach of Article 11.3 of the Agreement. It does not have to demonstrate what the past margins would have been without zeroing. Nor does the Panel have to make such a determination for the United States.

[151] First Written Submission of the United States, para. 154.

3. Evaluation by the Panel

(a) Relevant Facts

7.190 The EC's claims regarding the use of zeroing in sunset reviews concern the following 11 sunset reviews:

Number	Country and Product Involved	USDOC Final Determination	Relevant Exhibits
1	Steel Concrete Reinforcing Bars From Latvia USDOC No: A-449-804	72 FR 16767 5 April 2007 **(PRELIMINARY RESULTS)**	EC-70
2	Ball Bearings and Parts Thereof From Italy USDOC No: A-475-801	70 FR 58183 5 October 2005	EC-71
3	Ball Bearings and Parts Thereof From Germany USDOC No: A-428-801	70 FR 58183 5 October 2005	EC-72
4	Ball Bearings and Parts Thereof From France USDOC No: A-427-801	70 FR 58183 5 October 2005	EC-73
5	Stainless Steel Sheet And Strip In Coils From Germany USDOC No: A-428-825	69 FR 67896 22 November 2004	EC-74
6	Stainless steel plate in coils From Belgium USDOC No: A-423-808	69 FR 61798 21 October 2004	EC-75
7	Ball Bearings and Parts Thereof From the United Kingdom USDOC No: A-412-801	70 FR 58183 5 October 2005	EC-76
8	Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands USDOC No: A-421-807	72 FR 7604 16 February 2007 **(PRELIMINARY RESULTS)** **(ORDER REVOKED)**	EC-77
9	Stainless Steel Sheet & Strip In Coils From Italy USDOC No: A-475-824	69 FR 67894 22 November 2004	EC-69
10	Certain Pasta From Italy USDOC No: A-475-818	72 FR 5266 5 February 2007 **(PRELIMINARY RESULTS)**	EC-78
11	Brass Sheet & Strip From Germany USDOC No: A-428-602	71 FR 4348 26 January 2006	EC-79

7.191 We recall our finding above (para. 7.77) that the preliminary determinations identified in the EC's panel request fall outside our terms of reference in these proceedings. The three sunset reviews in the table above in connection with which the European Communities is challenging the USDOC's preliminary determinations, therefore, will not be affected by our findings regarding zeroing in sunset

reviews.[152] Our findings will only apply to eight of the 11 sunset determinations in the mentioned table.

(b) Legal Analysis

7.192 We note that the resolution of the EC's claim regarding the USDOC's determinations in the eight sunset reviews at issue raises two issues: (a) Can the authorities rely on past dumping margins obtained through zeroing, in making their determination regarding the likelihood of continuation or recurrence of dumping in a sunset review? and (b) Did the USDOC rely on past dumping margins obtained through zeroing in making its likelihood determinations in the sunset reviews at issue in these proceedings?

7.193 With regard to the first issue, we shall commence our analysis with the text of Article 11.3 of the Agreement. Article 11.3 reads:

> "Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review." (footnote omitted)

7.194 Article 11.3 provides that an anti-dumping duty shall terminate after five years from its imposition unless the authorities determine, before the expiry of the five-year period, that such termination would lead to continuation or recurrence of dumping and injury. It does not, however, clarify the nature of such determination. Specifically, it does not mention whether the authorities can rely on past dumping margins in determining whether the termination of the duty would lead to continuation or recurrence of dumping and injury. This particular issue has arisen in WTO dispute settlement and the Appellate Body has made findings on it. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body held that "authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination".[153] The Appellate Body also reasoned that the authorities are not required to calculate, or rely on, dumping margins in making their likelihood determination. If, however, they choose to do so, such margins have to conform to the disciplines embodied in Article 2 of the Agreement. Otherwise, the likelihood determination would

[152] The order in *Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands* (Exhibit EC-77) was revoked on 23 April 2007. The effective date of revocation was subsequently changed to 29 November 2006. See, Response of the United States to Question 2(d) from the Panel Following the Second Meeting. Both parties, in their Responses to Question 2(d) from the Panel Following the Second Meeting, expressed agreement that the Panel could, in principle, make findings on a revoked measure. The European Communities further stated that it would suffice if the Panel only made findings regarding this measure and not made recommendations. As stated in para. 7.77 above, the order at issue is not within our terms of reference because it is one of the four preliminary measures identified in the EC's panel request. We therefore need not, and do not, assess the issue of whether it would be appropriate to make findings and/or recommendations with regard to this revoked order.

[153] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 56, para. 111.

be inconsistent with Article 11.3 of the Agreement.[154] That is, reliance on WTO-inconsistent margins would, in the Appellate Body's view, taint the authorities' sunset determination.[155]

7.195 The Appellate Body also applied this reasoning in the subsequent *US – Zeroing (Japan)* dispute and held:

> "In the present case, the Panel found, as a matter of fact, that, in its likelihood-of-dumping determination, the USDOC relied 'on margins of dumping established in prior proceedings'. The Panel further found that these margins were calculated during periodic reviews 'on the basis of simple zeroing'."[156] (footnotes omitted)

> "We have previously concluded that zeroing, as it relates to periodic reviews, is inconsistent, as such, with Article 2.4 and Article 9.3. As the likelihood-of-dumping determinations in the sunset reviews at issue in this appeal relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they are inconsistent with Article 11.3 of that Agreement."[157] (footnote omitted, emphasis in original)

7.196 We find convincing the Appellate Body's reasoning that to the extent margins relied on in sunset determinations are WTO-inconsistent the resulting sunset determination is also rendered WTO-inconsistent. We have found model zeroing in investigations to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement, and simple zeroing in periodic reviews to be inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement (paras. 7.111 and 7.183, respectively). We shall, therefore, find that the USDOC's determinations in the eight sunset reviews at issue were inconsistent with the USDOC obligation under Article 11.3 of the Agreement, if we find that the USDOC in those determinations relied on margins obtained through model zeroing in prior investigations or simple zeroing in prior periodic reviews.

7.197 This brings us to the second issue that we have identified at the outset of our analysis, *i.e.*, whether the European Communities has demonstrated as a matter of fact that the USDOC relied, in the sunset reviews at issue, on prior margins obtained through zeroing.

7.198 The European Communities generally argues that in the sunset reviews at issue, the USDOC used zeroed margins from prior investigations and periodic reviews.[158] We note, however, that the European Communities builds its claim mainly on the use of margins obtained through model zeroing in the underlying investigations.[159] As the factual basis of this assertion, the European Communities submitted to the Panel copies of the Issues and Decision Memoranda issued by the USDOC in the sunset reviews at issue. The European Communities argues, and the United States acknowledges[160], that in the sunset reviews at issue, the USDOC used margins obtained in the underlying investigations. The European Communities recalls that on 22 February 2007, the United States formally changed its calculation methodology in investigations and abolished model zeroing. The European Communities contends that since the investigations from which the USDOC took margins

[154] *Ibid.*, para. 127.
[155] *Ibid.*
[156] Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/AB/R, adopted 23 January 2007, para. 184.
[157] *Ibid.*, para. 185.
[158] See, for instance, First Written Submission of the European Communities, paras. 242 and 263.
[159] See, for instance, Comments of the European Communities on the US Response to Question 2(a) from the Panel Following the Second Meeting.
[160] Response of the United States to Question 2(e) from the Panel Following the Second Meeting.

in the sunset reviews at issue were carried out before this date, it is clear that such margins were calculated through model zeroing.[161]

7.199 The mentioned policy change, published in the Federal Register, provides in relevant parts:

> "The Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons."[162]

7.200 The United States does not deny this policy change. Nor does it contest the EC's argument that the investigations at issue were carried out before the effective date of the mentioned policy change. It asserts, however, that "[s]uch a general statement ... does not provide specific evidence as to whether zeroing was employed in the margins relied upon in each of the challenged sunset reviews".[163] We disagree with the United States. We note that the European Communities has submitted copies of the Memoranda prepared by the USDOC, which show that the latter used margins obtained in the underlying investigations, carried out before the effective date of the USDOC's policy change regarding margin calculations in investigations. Thus, the European Communities has shown *prima facie* that the margins in the investigations at issue were obtained through model zeroing. The United States has not, however, submitted evidence to rebut this assertion. We therefore consider that the European Communities has demonstrated that in the eight sunset reviews at issue, the USDOC relied, either exclusively or along with margins obtained in prior periodic reviews, on margins obtained through model zeroing in prior investigations.

7.201 The United States posits that "[t]he [European Communities] has not demonstrated that a calculation done in accordance with the EC's approach would result in zero or *de minimis* dumping margins in the cited cases, leading to a revocation of the order".[164] The issue that the US argument raises is whether the impact of zeroing on the margins used by the USDOC in the sunset reviews at issue has any bearing on the consistency with Article 11.3 of the USDOC's sunset determinations. In our view, the impact of zeroing on the magnitude of margins obtained in the original investigations or periodic reviews is not relevant to the WTO-consistency of a subsequent sunset review where such zeroed margins are used. To the extent that a sunset determination is based on previous margins obtained through a methodology that is WTO-inconsistent, the resulting sunset determination would also become WTO-inconsistent.

7.202 Based on the foregoing, we find that the United States acted inconsistently with its obligations under Article 11.3 of the Agreement by relying, in the eight sunset reviews at issue, on margins obtained through model zeroing in prior investigations. Having found that the United States violated Article 11.3 of the Agreement in the sunset reviews at issue, we need not, and do not, make findings with regard to the EC's claims under Articles 2.1, 2.4, 2.4.2 and 11.1 of the Agreement.

VIII. CONCLUSIONS AND RECOMMENDATIONS

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

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[161] Response of the European Communities to Question 2(b) from the Panel Following the Second Meeting.

The United States argues that the EC's submission of new evidence, along with its Response to Question 2(b) from the Panel Following the Second Meeting, was inconsistent with Article 14 of our Working Procedures. Comment of the United States on the EC's Response to Question 2(b) from the Panel Following the Second Meeting. For the reasons that we have explained in paras. 7.147-7.149 above, we reject the US contention. In any event, we note that we have not relied on the information at issue in our report.

[162] Exhibit EC-90, p. 77722.

[163] Comment of the United States on the EC's Response to Question 2(b) from the Panel Following the Second Meeting.

[164] First Written Submission of the United States, para. 154.

(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.[165] 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 Communities] is even asking this Panel to start from the premise that there would be a dispute as to compliance".[166]

8.5 Article 19.1 of the DSU provides:

[165] Closing Statement of the European Communities at the Second Meeting.

[166] Comment of the United States on the EC's Response to Question 4 from the Panel Following the Second Meeting.

> "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[167], 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.[168] 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.

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.[169] The issue, therefore, is whether the relevant provisions of the

[167] 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.

[168] I would like to note that the approach described in footnote 112 above, also applies to my separate opinion.

[169] *Supra*, footnote 131.

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.[170]

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.

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

[170] 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.

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*.

ANNEX A

FIRST WRITTEN SUBMISSIONS BY THE PARTIES

Contents		Page
Annex A-1	First Written Submission of the European Communities	A-2
Annex A-2	First Written Submission of the United States	A-70
Annex A-3	Response to the United States' Request for Preliminary Rulings by the European Communities	A-116

ANNEX A-1

FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

TABLE OF CONTENTS

Page

I. INTRODUCTION 7
II. FACTS 8
A. ORIGINAL INVESTIGATIONS 8
1. Imposition of anti-dumping duties 8
2. Method of comparing normal value and export price 8
3. Model Zeroing 9
B. ADMINISTRATIVE REVIEWS 10
1. Calculation of Exporter-Specific Dumping Margins and Importer-Specific Assessment Rates 11
2. Method of comparing normal value and export price 12
3. Simple zeroing 12
C. SUNSET REVIEWS 13
D. MEASURES AT ISSUE 13
1. Continued application of anti-dumping duties which exceed the dumping margin which would result from the correct application of the *Anti-Dumping Agreement* 14
2. The zeroing methodology as applied in 52 anti-dumping proceedings, including original investigations, administrative review and sunset review proceedings 15
III. CLAIMS AND ARGUMENTS 15
A. ZEROING: A METHODOLOGY "AS SUCH" AND "AS APPLIED" PROHIBITED BY WTO RULES 16
1. Model Zeroing in Original Investigations 16
2. Simple Zeroing in Administrative Reviews 17
3. Zeroing in Sunset Reviews 18
4. Conclusions 19
B. ROLE OF THE PRECEDENT: VALUE OF THE APPELLATE BODY REPORTS 19
1. Introduction 20
2. Reliance on Previous Case-Law in National and International Legal Systems 21
(a) Principle of Consistency and Predictability of Jurisprudence 21
(b) Are decisions of higher courts binding on lower courts? 22
3. The WTO dispute settlement system 24

(a) Purpose of the WTO dispute settlement system: security and predictability 24
(b) The Appellate Body in the WTO dispute settlement system 24
4. Precedential value of case law of the Appellate Body 24
5. Precedential value of Appellate Body reports on zeroing 26
6. Conclusions 27
C. CONTINUED APPLICATION IN 18 ANTI-DUMPING MEASURES OF ANTI-DUMPING DUTIES AT A LEVEL IN EXCESS OF THE DUMPING MARGIN WHICH WOULD RESULT FROM THE CORRECT APPLICATION OF THE ANTI-DUMPING AGREEMENT 28
1. The Measures at Issue 28
2. Violation of Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 31
3. Violation of Article XVI:4 of the Agreement Establishing the WTO 31
4. Conclusions 33
D. THE ZEROING METHODOLOGY AS APPLIED IN 52 ANTI-DUMPING PROCEEDINGS, INCLUDING ORIGINAL INVESTIGATIONS, ADMINISTRATIVE REVIEW AND SUNSET REVIEW PROCEEDINGS 33
1. Original Investigations 33
1.1 Purified Carboxymethylcellulose – Netherlands (A-421-811) 33
(a) The Measure at issue 33
(b) Violation of Article 2.4.2 of the Anti-Dumping Agreement 35
(i) "Dumping" and "margins of dumping" are determined with respect to a product as a whole 35
(ii) The United States failed to establish the margin of dumping with respect to the product concerned as a whole 37
(c) Violation of Article 2.4 of the Anti-Dumping Agreement 38
(i) "Fair comparison": an independent and overarching obligation 38
(ii) "Fair comparison": a general obligation 39
(iii) Unfairness of the model zeroing comparison method used by the United States 39
(iv) Existing case-law confirms United States model zeroing unfair 40
(v) The United States failed to carry out a fair comparison 42
(d) Conclusions 42
1.2 Other Measures at Issue 42
1.3 Conclusions 42
2. Administrative Reviews 42
2.1 Ball Bearings from Italy (A-475-801) 43
(a) The measure at issue 43
(b) Violation of Articles 2.1, 2.4, 2.4.2 and 9.3 of the Anti-Dumping Agreement 44
(i) The duty must not exceed the margin of dumping as determined with respect to the product as a whole 45

(ii) *The duty must not exceed the dumping margin established in accordance with the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement* *46*

(iii) *Violation of Article 2.4.2 of the Anti-Dumping Agreement* *49*

(1) Interpretation of the term "the existence of margins of dumping during the investigation phase" 50

(2) Context of Article 2.4.2 of the Anti-Dumping Agreement 50

(3) Administrative reviews must comply with the requirements of Article 2.4.2 of the Anti-Dumping Agreement 51

(iv) *Conclusions* *52*

(c) Violation of Article 11.2 of the Anti-Dumping Agreement 52

(d) Conclusions 54

2.2 Other Measures at Issue 54

2.3 Conclusions 54

3. Sunset Reviews 54

3.1 Stainless Steel Sheet & Strip in Coils – Italy (A-475-824) 55

(a) The Measure at issue 55

(b) Violation of Articles 2.1, 2.4 and 2.4.2 of the Anti-Dumping Agreement 56

(i) *Dumping margins used in sunset reviews must be determined with respect to a product as a whole* *56*

(ii) *Dumping margins used in sunset reviews must conform to the disciplines of Article 2.4 of the Anti-Dumping Agreement* *57*

(c) Violation of Articles 11.1 and 11.3 of the Anti-Dumping Agreement 57

(d) Conclusions 58

3.2 Other Measures at Issue 59

3.3 Conclusions 59

IV. FINDINGS AND RECOMMENDATION REQUESTED 59

TABLE OF CASES

Short Title	Full Case Title and Citation
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2291
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EC – Tube and Pipe Fittings	*European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report, WT/DS219/AB/R, DSR 2003:VII, 2701
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R (4 October 1996), adopted 1 November 1996
US – OCTG Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (29 November 2004), adopted 17 December 2004
US – 1916 Act (EC)	Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593
US – 1916 Act (Japan)	Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted on 9 January 2004
US – Offset Act (Byrd Amendment)	Panel Report, United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (22 December 1999), adopted 27 January 2000

Short Title	Full Case Title and Citation
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, (22 October 2001) adopted 21 November 2001
US – Softwood Lumber V	*United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report, WT/DS264/AB/R, DSR 2004:V, 1937
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, 11 August 2004 adopted 31 August 2004, DSR 2004:V, 1875
US – Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006
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US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R and Corr.1, adopted 9 May 2006
US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, modified by Appellate Body Report, WT/DS294/AB/R
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, circulated to WTO Members 9 January 2007, adopted 23 January 2007
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, circulated to WTO Members 20 September 2006, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R

I. INTRODUCTION

1. The European Communities requests this Panel to rule on an issue which has been found repeatedly inconsistent with WTO rules in previous cases and, in respect of which, the United States has failed to comply with its obligations. Indeed, in recent years, the United States has been subject to intense WTO dispute settlement proceedings contesting the use of zeroing when calculating the margin of dumping for products in anti-dumping proceedings. In all cases, the Appellate Body has clearly interpreted the relevant provisions of the WTO Agreements finding that zeroing as such and as applied by the United States was inconsistent with WTO rules, in particular with the General Agreement on Tariffs and Trade of 1994 (GATT 1994) and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the *Anti-Dumping Agreement*).

2. In view of this consistent interpretation of the relevant provisions of the WTO Agreements, the European Communities has decided not to ask this Panel to rule again on the WTO inconsistency of the United States' zeroing methodology in original investigations and in review investigations "as such". The "as such" WTO inconsistency of the methodology has already been successfully established in *US – Zeroing (EC)* and in *US – Zeroing (Japan)*. Pursuant to Article 17.14 of the Dispute Settlement Understanding, the United States must be considered to have unconditionally accepted the Appellate Body's findings on "as such" zeroing. Since the "as such" practice applies to imports from all sources, the European Communities considers that its illegality *vis-à-vis* the European Communities (and all other WTO Members) is established. Consequently, the European Communities sees no purpose in having the same legal discussion about the same facts, given that the Dispute Settlement Body has already settled this matter.

3. The United States' violation of its obligations under the mentioned agreements has resulted in an excessive imposition and collection of anti-dumping duties as well as their unduly extension pursuant to sunset reviews in the 18 measures mentioned in the Annex to the Panel request.[1]

4. The European Communities regrets to have been compelled to bring this dispute settlement proceeding before the WTO. In light of the multiple panel and Appellate Body decisions that have already considered this issue and the numerous new dispute settlement proceedings that are still pending on the same issue, the European Communities would have expected compliance from the United States, *i.e.*, by eliminating the use of zeroing in all types of anti-dumping proceedings. Since this is not the case, the European Communities will outline in its First Written Submission the claims against the continued application of zeroing in the cases at issue. As the European Communities will explain below, the United States maintains anti-dumping duties at specific levels on the basis of a number of different criteria. First, pursuant to an original investigation, the United States establishes that dumping has occurred and that, therefore, anti-dumping duties can be imposed in the form of cash deposits required at the time of importation of the products. Second, pursuant to administrative review investigations, the United States adjusts the deposit rate and determines the amount of duties to be paid for any individual period. Third, pursuant to sunset review investigations, the United States looks into the likelihood of continuation or recurrence of dumping and injury in order to determine whether the duties should be revoked. The European Communities, thus, challenges the measure in the form of the continued imposition of anti-dumping duties.

5. Additionally, the European Communities contests the individual results of the different investigations carried out by the United States with respect to the 18 measures mentioned in the Annex to the Panel request, namely in 4 original proceedings, 37 administrative review proceedings and 11 sunset review proceedings.

[1] Exhibit EC-1 (Request for the Establishment of the Panel, WT/DS350/6).

II. FACTS

A. ORIGINAL INVESTIGATIONS

1. Imposition of anti-dumping duties

6. The imposition of anti-dumping duties in the United States in original investigations can be broadly described as follows. In order to determine whether the imposition of anti-dumping measures on known exporters of a product under investigation may be justified, the United States examines the existence and degree of dumping during a given investigation period. This determination is made by the United States Department of Commerce (USDOC) and is published in a Notice of Final Determination of Sales at Less Than Fair Value. The Notice of Final Determination of Sales at Less Than Fair Value sets out USDOC's assessment of the existence and degree of dumping. Following a Final Determination of Sales at Less Than Fair Value, USDOC generally orders the deposit of estimated anti-dumping duties.[2] The United States International Trade Commission (USITC) then determines whether the relevant United States industry was injured by reason of the dumped imports.

7. When USDOC finds dumping and USITC finds that such dumping caused injury to the domestic industry, USDOC issues a Notice of Antidumping Duty Order imposing anti-dumping duties.[3] That order directs customs to assess an anti-dumping duty equal to the amount by which the normal value of the merchandise exceeds the export price, once the administering authority receives satisfactory information upon which the assessment may be based.[4] The order also requires the deposit of estimated anti-dumping duties pending liquidation of future entries.[5] Entries of merchandise, the liquidation of which has been suspended, are subject to the imposition of anti-dumping duties under Section 731 of the Tariff Act.[6]

8. Thus, following the publication of an Anti-Dumping Order, duties are imposed and the amount of estimated anti-dumping duties must be deposited at the time of importation of the products covered by the order. However, the final assessment (*i.e.*, the final collection of the duties) does not take place immediately.

2. Method of comparing normal value and export price

9. In an original investigation, when comparing normal value and export price, USDOC in general uses a weighted-average to weighted-average or a transaction-to-transaction comparison method[7]; in most cases, USDOC has applied the average-to-average method.[8] The transaction-to-transaction method is only used in unusual situations, such as when there are very few sales and the merchandise sold in each market is identical or very similar or is custom-made.[9] Exceptionally, the investigating authority may compare a weighted-average normal value with individual export transactions, if there is a pattern of export prices that differ significantly among purchasers, regions or periods of time, and the administering authority explains why such differences cannot be taken into

[2] As last amended by the Uruguay Round Agreements Act (the "URAA") (the "Tariff Act"), Section 735(c), Exhibit EC-2 (Tariff Act – Title VII, particularly Sections 731 to 783).

[3] Tariff Act, Section 735(c)(2).

[4] Tariff Act, Section 736(a)(1).

[5] Tariff Act, Section 736(a)(3).

[6] Tariff Act, Section 736(b)(1).

[7] Tariff Act, Section 777A(d)(1)(A); see also Regulations on Anti-dumping and Countervailing Duty Proceedings adopted by USDOC (the "Regulations"), Sections 351.414 (b)(1) and (2), Exhibit EC-3 (Regulations).

[8] Regulations, Section 351.414(c).

[9] Regulations, Section 351.414(c).

account using a symmetrical method (a situation referred to in the Regulations as "targeted dumping").[10]

3. Model Zeroing

10. When calculating the magnitude of any margin of dumping in order to determine whether the imposition of anti-dumping duties in respect of imports from known exporters of a product under consideration may be justified, and if so what the appropriate amount of duty should be, the United States used a method commonly referred to as "model zeroing". The investigating authority, as well as determining the overall product scope of the proceeding[11], identifies those sales of sub-products or models in the United States considered comparable and includes such sales in an averaging group.[12] An averaging group consists of merchandise that is identical or virtually identical in all physical characteristics.[13] Each category of model or sub-product within the subject merchandise is assigned a control number (CONNUM).[14] A weighted-average-to-weighted-average comparison between normal value and export price is made within each averaging group.[15] The amount by which normal value exceeds export price is considered by the United States to be a "dumping margin"[16] or dumped amount (referred to by the United States as the Potential Uncollectible Dumping Duties, "PUDD").[17] If export price exceeds normal value (the margin is negative), the "dumping margin" or PUDD for that averaging group is considered to be zero.

11. The overall margin of dumping for the product is obtained by aggregating the multiple model-based comparisons and expressing the result as a percentage. USDOC calculates both the numerator and denominator for the fraction from which the overall percentage is derived. The numerator is the total amount of dumping by model and the denominator is the total value of all "comparable" export transactions. In adding up the comparison results by model to calculate the numerator under the model zeroing procedures, USDOC included solely the results for models with positive differences. All comparisons with negative differences are disregarded in the calculation of the numerator. Thus, for models with negative results, USDOC ignores the results of the comparison of normal value and export price. As a result, the total amount of dumping in the numerator is inflated by an amount equal to the excluded negative results.

12. The Standard Anti-Dumping Margin Program used by USDOC when carrying out the comparison between normal value and export price per model in original investigations contains the following lines of computer code, or code of substantially the same structure or effect:

```
PROC MEANS NOPRINT DATA = MARGIN;
WHERE EMARGIN GT 0;
VAR EMARGIN & MUSQTY USVALUE;
OUTPUT OUT = ALLPUDD (DROP=_FREQ_ _TYPE_)
SUM = TOTPUDD MARGQTY MARGVAL;
```

13. A detailed explanation of each element of these standard procedures is set out in Exhibit EC-5. In a nutshell, the Standard Zeroing Procedures separate those sales with positive margins (GT 0)

[10] Tariff Act, Section 777A(d)(1)(B); Regulations Section 351.414(f). See generally the 1997 edition of the Import Administration Anti-dumping Manual (the "Manual"), Exhibits EC-4.intro; EC-4.contents; and EC-4.1 to EC-4.20, in particular, Chapter 6, p. 7, second paragraph; Chapter 7, pp. 28 and 29.

[11] Tariff Act, Section 771(25).

[12] Regulations, Section 351.414(d)(1).

[13] Regulations, Section 351.414(d)(2).

[14] Manual, Chapter 4, pp. 8 and 9; Chapter 5, p. 9, second paragraph; Chapter 9, pp. 23 and 27.

[15] Regulations, Section 351.414(d)(1); Manual, Chapter 7, pp. 27 and 28; Chapter 9, pp. 23 and 27.

[16] The European Communities considers that this concept does not correspond to the term "margin of dumping" as used in, for example, Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*.

[17] Manual, Chapter 6, p. 9.

from sales with negative margins and subtotal the dumping amount ("TOTPUDD") for sales with positive margins only. The sum is kept in the dataset called "ALLPUDD", which is used to calculate the final margin of dumping.

14. The European Communities notes that, on 26 December 2006, the United States announced that it had partly implemented the DSB rulings and recommendations in *US – Zeroing (EC)* by changing the above described methodology, so as to abandon the use of zeroing.[18] The measures at issue in this dispute, however, have not been corrected, and remain tainted by the use of zeroing.

B. ADMINISTRATIVE REVIEWS

15. The United States has a retrospective assessment system under which final liability for anti-dumping duties is determined after merchandise is imported.[19] Under this system, an anti-dumping duty liability arises at the time of entry, but duties are not actually finally assessed at that time. Rather, the United States collects security in the form of a cash deposit at the time of entry, and determines the final amount of duties due on the entry at a later date, based on dumping margins during the period of time contemporaneous with the imports, as opposed to the original investigation period.

16. Specifically, each year during the anniversary month of the publication of an Anti-dumping Duty Order, a domestic interested party, a foreign government of the exporting/manufacturing country, an exporter or producer covered by an order, or an importer of the subject merchandise may request an "administrative review"[20] of the amount of duty.[21] Each month USDOC publishes in the Federal Register a "Notice of Opportunity to Request Administrative Review", informing interested parties that they may request an "administrative review" of the amount of duty, and listing those orders with an anniversary month corresponding to the month of publication of the "Opportunity Notice".[22] Following a request, USDOC promptly publishes in the Federal Register a notice of initiation, and sends to appropriate interested parties or other persons questionnaires requesting factual information, normally no later than 30 days after the date of publication of the notice of initiation. USDOC then conducts an investigation. Questionnaires request information on export sales, domestic sales and costs of production during the period of review.[23] USDOC determines the normal value and export price of the subject merchandise.[24] USDOC conducts, if appropriate, verifications; issues and publishes preliminary and final results in the Federal Register; and promptly instructs customs to assess anti-dumping duties. In general, preliminary results must be issued within 245 days after the last day of the anniversary month in which the request was made, and final results within a further 120 days, unless these periods are extended.[25] In case of judicial review, an injunction against

[18] US Notice on Zeroing in Original Investigations (Exhibit EC-6).

[19] Regulations, Sections 351.212 and 351.213.

[20] A "periodic review" is often referred to, by reference to the more general title of Section 751 of the Tariff Act, as an administrative review under Section 751(a)(1) of the Tariff Act, which reference is sometimes shortened to simply "administrative review", in accordance with the definition in Section 351.102(b) of the Regulations. Under the Tariff Act, however, the term "administrative review" encompasses all the types of reviews under Section 751 of the Tariff Act (including, for example, so-called new shipper reviews, changed circumstances reviews and five year reviews). In this submission, the European Communities will refer to "administrative review".

[21] Regulations, Section 351.213(b); Article 9.3.1 of the *Anti-Dumping Agreement*: "(…) a request for a final assessment of the amount of the anti-dumping duty has been made (…)".

[22] Manual, Chapter 18, p. 3.

[23] Manual, Chapter 18, p. 4. Chapter 4.

[24] Tariff Act, Section 751(a)(2)(A)(i).

[25] Regulations, Section 351.213(h); Article 9.3.1 of the *Anti-Dumping Agreement*: "(…) the determination (…) shall take place (…) normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made".

liquidation may be requested, in which case suspension of liquidation is continued.[26] Within USDOC the same team follows the same case from the original investigation through the "administrative review" process, in order to ensure consistency in the handling of the same case.[27]

17. The period of "review" will normally be 12 months. The first "administrative review" period will generally be longer, also extending back to the date on which provisional measures were first applied or liquidation was first suspended (that is, the withholding of appraisement within the meaning of Article 7 of the *Anti- Dumping Agreement*). The results of the first "administrative review" are, thus, the collection of the actual amount of duties and the establishment of a new deposit rate.[28]

18. Thus, if there is a "administrative review" pursuant to Section 751(a) of the Tariff Act, USDOC establishes final liability for the payment of anti-dumping duties in relation to the investigated period, which entails determining the extent to which there have been sales at less than fair value (that is, a margin of dumping) during the period of review by the investigated firm. By comparison, in particular, with the original investigation, the period of time from which the data used to calculate the (up-dated) margin of dumping are taken, and the period of time during which export transactions to be subject to the duty take place, will generally coincide. This temporal retrospective match for the purposes of final liability is the essential point and "basic purpose" of United States "administrative reviews".[29]

19. While, generally, the amount of duties to be assessed is determined in a "review" of the order covering a discrete period of time, if such a review is not requested, duties are assessed at the rate established in the completed "review" covering the most recent prior period, or, if no "review" has been completed, the deposit rate applicable at the time merchandise was entered.[30] Thus, if there is no "administrative review" for a particular firm, entries from that firm are assessed at the rate applicable to the time of entry.[31]

1. Calculation of Exporter-Specific Dumping Margins and Importer-Specific Assessment Rates

20. In administrative review investigations, the United States always calculates two types of margin: an overall "weighted average dumping margin" for each exporter and importer-specific assessment rates.

21. The overall weighted average dumping margin which is calculated using zeroing becomes the duty deposit rate that the United States applies to future entries of the product for the purpose of collecting estimated duties, until completion of the next review.

22. The importer-specific assessment rates are used by the United States to collect definitive anti-dumping duties for the review period. The amount of anti-dumping duties owed by each individual importer is calculated on the basis of comparisons between monthly exporter-specific "normal values" established on a weighted average basis and prices of individual export transactions. The total amount of dumping associated with each importer is then aggregated and expressed as a percentage of

[26] Manual, Chapter 18, pp. 6 and 7; Article 9.3.1 of the *Anti-Dumping Agreement*, footnote 20: "It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial proceedings".
[27] Manual, Introduction, p. 9.
[28] Regulations, Section 351.213(e).
[29] Manual, Chapter 18, p. 3.
[30] Regulations, Sections 351.212 and 351.213; Manual, Introduction, p. 7.
[31] Regulations, Section 351.212(a).

that importer's United States imports (the assessment rate). This assessment rate is then applied to imports during the period reviewed.[32]

23. The final anti-dumping duty liability for past entries and the new cash-deposit rate for future entries is calculated by USDOC and published in a Notice of Final Results of Anti-dumping Duty Administrative Reviews.

2. Method of comparing normal value and export price

24. In administrative review investigations, when comparing normal value and export price, the investigating authority normally uses the average-to-transaction method.[33] When normal value is based on the weighted average of sales of the foreign like product, the averaging of such prices will be limited to sales incurred during the contemporaneous month.[34]

3. Simple zeroing

25. In administrative review investigations, when calculating the magnitude of any margin of dumping, the United States uses a method commonly known as "simple zeroing". When comparing a weighted-average normal value with an individual export transaction, the amount by which normal value exceeds export price is considered to be the "dumping margin"[35] or amount for that export transaction.[36] If export price exceeds normal value (*i.e.*, when the margin is negative), the "dumping margin" or amount for that export transaction is considered to be zero.

26. The overall margin of dumping is calculated by combining the results of each comparison. The total dumping amount (excluding the negative amounts or treating them as zero) is expressed as a percentage of the total export price (including all export transactions). USDOC sums the price differences exclusively for those comparisons for which there was a positive dumping margin. All comparisons with negative differences are disregarded from the calculation of the numerator of the overall margin fraction. Thus, where there is a negative difference, USDOC ignores the results of the comparisons of export transactions and normal value. As a result, the sum total of dumping is inflated by an amount equal to the excluded negative differences.

27. The Standard Anti-Dumping Margin Program employed by USDOC in administrative reviews contains the following lines of computer code, or code of substantially the same structure or effect:

```
PROC MEANS NOPRINT DATA = MARGIN;
BY & USCLASS;
WHERE EMARGIN GT 0;
VAR WTDMRG WTDQTY WTDVAL;
OUTPUT OUT = ALLPUD (DROP = _FREQ_ _TYPE_)
SUM = TOTPUDD MARGQTY MARGVAL
```

28. A detailed explanation of each element of these standard procedures is provided in Exhibit EC-5. In short, the Standard Zeroing Procedures separate those transactions with positive margins (GT 0) from transactions with negative margins and subtotal the dumping amounts

[32] Regulations, Sections 351.212 and 351.213; Manual, Introduction, p. 7.
[33] Regulations, Section 351.414 (c)(2); Manual, Chapter 6, p. 7.
[34] Tariff Act, Section 777A(d)(2); Regulations, Section 351.414(e); Manual, Chapter 6, p. 7.
[35] The European Communities considers that this concept does not correspond to the term "margin of dumping" as used in, for example, Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*.
[36] Tariff Act, Section 751(a)(2)(A); Section 777A(d)(2).

("TOTPUDD") for transactions with positive margins only. The sum is kept in the dataset called "ALLPUDD", which is used to calculate the final dumping margin.

29. The importer is liable to pay the final anti-dumping duty, as it results from the administrative review proceeding. USDOC sends appraisement instructions to customs, determining an "assessment rate" and thus the final anti-dumping duty to be paid.[37]

C. SUNSET REVIEWS

30. In sunset review investigations, five years after publication of an anti-dumping duty order, USDOC and USITC, respectively, review whether revocation of the order "*would be likely to lead to continuation or recurrence of dumping (…) and of material injury*". USDOC may determine that dumping is likely to continue or recur if the anti-dumping order were revoked, notably because dumping has continued at levels above *de minimis* after the issuance of the order. To find that dumping has continued after the issuance of the order, USDOC relies on dumping margins calculated in the original investigation and/or in administrative review proceedings using zeroing. Although sunset reviews do not change the deposit rate for the amount of anti-dumping duty (this continues to be determined by the original order or most recent administrative review), USDOC is required to determine a duty rate that is "likely to prevail" in the event of revocation of the order and also to report this rate to the ITC.[38]

31. In most cases, USDOC considers that the dumping margin found in the original investigation should be considered as the rate likely to prevail in the event of revocation of the order, since this is the only margin that reflects the behaviour of an exporter or producer without the discipline of an order in place. USDOC may also consider that the dumping margin found in previous administrative reviews is the one which should be chosen for the purpose of the sunset review. In both cases, *i.e.*, original investigations or administrative reviews, dumping margins were calculated by using model or simple zeroing.

D. MEASURES AT ISSUE

32. Article 6.2 of the Dispute Settlement Understanding requires that the Panel request identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In the Panel request, the European Communities identified the specific measures at issue in the present dispute as follows:

> "The measures at issue and the legal basis of the complaint include, but are not limited to, the following:
>
> The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure).
>
> In addition to these measures, the administrative reviews, or, as the case may be, original proceedings or changed circumstances or sunset review proceedings listed

[37] Regulations, Section 351.212(b)(1).

[38] Section 752(c)(3) of the Tariff Act of 1930; Section 315.218(e)(2)(i) of USDOC's implementing regulation; and Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, Exhibit EC-7, Sunset Policy Bulletin, at para. II.B.

> in the Annex (numbered 1 to 52) with the specific anti-dumping orders and are also considered by the EC to be measures subject to the current request for establishment of the panel in addition to the anti-dumping orders.
>
> This includes the determinations in relation to all companies and includes any assessment instructions, whether automatic or otherwise, issued at any time pursuant to any of the measures listed in the Annex. The anti-dumping duties maintained (in whatever form) pursuant to these orders, and the administrative reviews, or, as the case may be, original proceedings and changed circumstances or sunset review proceedings listed in the Annex are inconsistent with the following provisions […]."

33. There are, thus, two sets of measures which the European Communities challenges in the present dispute.

34. First, the European Communities challenges the application or continued application of specific anti-dumping duties resulting from the 18 anti-dumping orders in the Annex to the Panel request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding, since these anti-dumping duties are calculated and are maintained in place at a level in excess of the dumping margin which would result from the correct application of the *Anti-Dumping Agreement*.

35. Second, the European Communities challenges the application of zeroing (*i.e.*, either using the model or simple zeroing technique) as applied in 52 anti-dumping proceedings, including original proceedings, administrative review proceedings and sunset review proceedings listed in the Annex to the Panel request.

1. Continued application of anti-dumping duties which exceed the dumping margin which would result from the correct application of the *Anti-Dumping Agreement*

36. The European Communities challenges in 18 specific anti-dumping measures[39] the application or continued application of anti-dumping duties which were calculated and are maintained in place pursuant to the most recent investigation at a level which exceeds the anti-dumping margin which would result from the correct application of the *Anti-Dumping Agreement*, *i.e.*, without zeroing.

37. In these 18 anti-dumping measures, USDOC has firstly determined in the original investigation proceedings the level of anti-dumping duties by applying model zeroing. In some of these cases, applying simple zeroing, USDOC has reviewed the anti-dumping duties pursuant to administrative reviews and/or maintained them in place pursuant to sunset reviews. In the latter, USDOC determined that dumping was likely to continue or recur if the anti-dumping order were revoked, notably because dumping has continued at levels above *de minimis* after the issuance of the order. To find that dumping has continued after the issuance of the order, USDOC relied on dumping

[39] The 18 anti-dumping measures are the following: Steel Concrete Reinforcing Bars from Latvia (US DOC No A-449-804); Ball Bearings and Parts Thereof from Italy (US DOC No A-475-801); Ball Bearings and Parts Thereof from Germany (US DOC No-A-428-801); Ball Bearings and Parts Thereof from France (US DOC No A-427-801); Stainless Steel Bar from France (US DOC No A-427-820); Stainless Steel Sheet and Strip in Coils from Germany (US DOC No A-428-825); Stainless Steel Plate in Coils from Belgium (US DOC No A-423-808); Ball Bearings and Parts Thereof from UK (US DOC No A-412-801); Stainless Steel Bar from Germany (US DOC No A-428-830); Certain Hot Rolled Carbon Steel Flat Products from the Netherlands (US DOC No A-421-807); Stainless Steel Bar from Italy (US DOC No A-475-829); Stainless Steel Sheet & Strip in Coils from Italy (US DOC No A-475-824); Certain Pasta from Italy (US DOC No A-475-818); Brass Sheet & Strip from Germany (US DOC No A-428-602); Purified Carbonxymethylcellulose from Sweden (US DOC No A-401-808); Purified Carbonxymethylcellulose from the Netherlands (US DOC No A-421-811); Purified Carbonxymethylcellulose from Finland (US DOC No A-405-803); Chlorinated Isocyanurates – Spain (US DOC No A-469-814).

margins calculated in the original investigation and in administrative review proceedings using zeroing. Regardless of whether duty rates were established pursuant to an original, administrative review or sunset review investigation, the anti-dumping duties were calculated and are maintained in place at a level exceeding a dumping margin which is consistent with the *Anti-Dumping Agreement*, since they have been determined using zeroing.

38. In short, in this case the European Communities is challenging the duty rates currently applied in the 18 anti-dumping measures concerned since the dumping margins were established in the original investigations and in their subsequent review proceedings by applying a comparison methodology which has already been found "as such" –and "as applied" by the United States in particular– inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 by the Appellate Body.

39. In terms of instruments in which they are embodied, the challenged measures refer for each of the 18 anti-dumping measures concerned to the Anti-Dumping Duty Orders as continued or modified pursuant to the any administrative review proceeding or, as the case may be, original proceeding or changed circumstances or sunset review proceedings (*i.e.*, any measure adopted by the United States affecting the duty levels with respect to the 18 measures at issue).

2. The zeroing methodology as applied in 52 anti-dumping proceedings, including original investigations, administrative review and sunset review proceedings

40. The European Communities also challenges the use of zeroing (either model or simple zeroing technique) as applied in 4 original investigations, 37 administrative review proceedings and 11 sunset review proceedings. The measures at issue cover:

- With respect to original investigations, the Final Determination and any amendments to the Final Determination. The Final Determination refers to the Issues and Decision Memorandum, which in turn refers to the "Margin Calculations", that is, the Calculation Memoranda and the Final Margin Program Log and Outputs for all the firms investigated. The measures at issue also include the Anti-dumping Duty Order and any amendments including the assessment instructions to which it likewise refers; and the ITC injury determination (on which the Anti-dumping Duty Order is in any event based).

- With respect to administrative review proceedings, the Notices of Final Results of Anti-dumping Duty Administrative Reviews, including any amendments, and including all the Issues and Decision Memoranda to which they refer, and all the Final Margin Program Logs and Outputs to which they in turn refer, for all the firms investigated and each of the assessment instructions issued pursuant to any of the Notices of Final Results.

- With respect to sunset review proceedings, the Continuation of Anti-dumping Duty Orders and any amendments including any assessment instructions; the Final Determination and any amendments to the Final Determination; the Issues and Decision Memorandum, which in turn refers to the "Margin Calculations", that is the Calculation Memoranda and the Final Margin Program Log and Outputs for all the firms investigated.

III. CLAIMS AND ARGUMENTS

41. The European Communities considers that the United States' repeated failure to comply with its obligations under the *Anti-Dumping Agreement* and the GATT 1994 is particularly flagrant, given that the Appellate Body has expressly condemned zeroing several times.

42. The European Communities will address first in its submission the main findings of the panels and, mainly, the Appellate Body in this regard. It will then examine the precedential value of

these reports in the WTO system and, in particular, the weight that the Panel should grant them when ruling in this dispute. Third, the European Communities will show that the continued imposition of duties in the 18 anti-dumping measures concerned by the United States is contrary to Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994 as well as Article XVI:4 of the Agreement Establishing the WTO (WTO Agreement), since the United States used zeroing when calculating the dumping margins in the original proceedings and in their subsequent review proceedings. Finally, the European Communities will show that the 4 original investigations, 37 administrative review proceedings and 11 sunset review proceedings covering the 18 anti-dumping measures concerned, are inconsistent with Articles 2.1, 2.4, 2.4.2, 9.3, 11.1, 11.2 and 11.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, since the United States used model or simple zeroing when calculating the dumping margins.

A. ZEROING: A METHODOLOGY "AS SUCH" AND "AS APPLIED" PROHIBITED BY WTO RULES

43. Zeroing has been contested several times in WTO dispute settlement proceedings in recent years. In all cases, the DSB has adopted the panel or Appellate Body Report finding this methodology inconsistent with the *Anti-Dumping Agreement* and the GATT 1994. In particular, the interpretation of the Appellate Body as to the use of zeroing when carrying out a weighted average-to-weighted average (W-W) comparison in original investigations as well as in cases on weighted average-to-transaction (W-T) comparisons in administrative review proceedings and in sunset review proceedings has remained constant, finding that they are inconsistent with the United States' international obligations pursuant to those Agreements.

44. In the following Sections, the European Communities will examine the main arguments and conclusions of the Appellate Body as regards the use of zeroing in the comparison methodologies applied in the original investigations and review investigations involved in this case.

1. Model Zeroing in Original Investigations

45. The use of zeroing by the United States in original investigations as described above has been found "as such" inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* by the Appellate Body. In *US – Zeroing (EC)*, the Appellate Body concluded that "the zeroing methodology, as it relates to original investigations in which the weighted-average-to-weighted average comparison method is used to calculate margins of dumping, is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*".[40] In doing so, the Appellate Body upheld the findings of the panel, which also relied on the consistent interpretation of Article 2.4.2 of the *Anti-Dumping Agreement* by the Appellate Body in previous cases.[41]

46. Indeed, the Appellate Body has also found the same methodology "as applied" by the United States inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* on multiple occasions. In particular, in *US – Lumber V*, Canada challenged an anti-dumping duty order issued by the United States in respect of Canadian softwood lumber, relating to an original investigation in which the weighted-average-to-weighted average comparison method was used to calculate margins of dumping. The panel had concluded that, by not taking into account *all* comparable export transactions in its zeroing practice in the original anti-dumping investigation at issue, the United States violated Article 2.4.2 of the *Anti-Dumping Agreement*.[42] On appeal, the Appellate Body addressed the question of "margins of dumping" in Article 2.4.2 of the *Anti-Dumping Agreement*. The Appellate Body referred to the text of Articles VI:1 and VI:2, second sentence, of the GATT 1994 and Articles 2.1, 9.2 and 6.10 of the *Anti-Dumping Agreement* to confirm its view that that dumping can be found to exist only "for the product under investigation as a whole, and cannot be

[40] Appellate Body Report, *US – Zeroing (EC)*, para. 222.
[41] Panel Report, *US – Zeroing (EC)*, paras 7.27 – 7.28.
[42] Appellate Body Report, *US – Softwood Lumber V*, paras 67-74.

found to exist only for a type, model, or category of that product".[43] In this regard, it said that the results of multiple comparisons at the sub-group level through "multiple averaging" are not "margins of dumping" within the meaning of Article 2.4.2 of the *Anti-Dumping Agreement*. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, the Appellate Body concluded that it is only on the basis of aggregating *all* these intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole.[44]

47. The Appellate Body considered some additional arguments made by the United States in this respect, but rejected them all. On the one hand, as regard the US argument based on the historical background of Article 2.4.2 of the *Anti-Dumping Agreement*, the Appellate Body stated that "[t]he material to which the United States refers does not, in our view, resolve the issue of whether the negotiators of the *Anti-Dumping Agreement* intended to prohibit zeroing", noting that the United States acknowledged that the materials do not constitute "*travaux préparatoire*". In any event, the Appellate Body stressed that it had concluded, based on the ordinary meaning of Article 2.4.2 read in its context, that zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology.[45] On the other hand, the Appellate Body rejected the United States' argument that, in finding that "zeroing" is prohibited under Article 2.4.2 of the *Anti-Dumping Agreement*, the panel failed to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*.[46]

48. On the basis of the above reasoning, the Appellate Body upheld the panel's finding that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of margins of dumping on the basis of a weighted average-to-weighted average comparison methodology incorporating the practice of "zeroing".[47]

49. Finally, it should be noted that both panels and the Appellate Body have always found the use of "zeroing" when a weighted average-to-weighted average comparison is used to calculate dumping margins inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[48]

50. In light of the above, it can be concluded that the use of "zeroing" when applying a weighted average-to-weighted average comparison methodology to calculate the dumping margin in original investigations is, as such, contrary to Article 2.4.2 of the *Anti-Dumping Agreement*. In this respect, as mentioned before, the European Communities notes that, on 26 December 2006, the United States acknowledged the inconsistency of the above described methodology with WTO rules.[49]

2. Simple Zeroing in Administrative Reviews

51. As described above, in administrative review proceedings, when calculating the magnitude of any margin of dumping for the purpose of assessing an importer's final liability for paying anti-dumping duties and any future exporter-specific cash deposit rate, the United States normally uses the weighted average-to-transaction method[50] and applies the so-called "simple zeroing" method.

[43] *Id*., paras 92-94.
[44] *Id*., paras 95-98.
[45] *Id*., paras 107-108.
[46] *Id*., paras 113-116.
[47] *Id.*, para.117.
[48] Appellate Body Report, *EC – Bed Linen*, para. 66; Panel Report, *EC – Pipe Fittings*, para. 7.216; and Panel Report, *US – Shrimp from Ecuador* (not appealed), paras 7.40 – 7.43.
[49] US Notice on Zeroing in Original Investigations (Exhibit EC-6).
[50] Regulations, Section 351.414 (c)(2); Manual, Chapter 6, p. 7.

52. The use of zeroing by the United States in administrative review proceedings as described above has been found "as such" inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by the Appellate Body. In *US – Zeroing (Japan)*[51], the Appellate Body first turned to Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 and disagreed with the panel's view, affirming again that "dumping" and "margins of dumping" can exist only at the level of a product.[52] In addition, the Appellate Body rejected the panel's consideration of Article 9, recalling its previous holding in *US – Zeroing (EC)*[53], *i.e.*, that the margin of dumping acts as a *ceiling* for the total amount of anti-dumping duties.[54]

53. The Appellate Body then considered issues related to the operation of "prospective" normal value systems, finding that "[u]nder any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a *ceiling* for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter". Thus, as with the United States' retrospective system, "[t]o the extent that duties are paid by an importer, it is open to that importer to claim a refund if such a ceiling is exceeded".

54. On this basis, the Appellate Body reversed the panel's finding that the United States does not act inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in administrative reviews.[55]

55. The Appellate Body then examined the issue of zeroing in administrative reviews under the "fair comparison" requirement of Article 2.4 of the *Anti-Dumping Agreement*. In this regard, the Appellate Body stated that the use of zeroing means that anti-dumping duties are collected in excess of the margin of dumping, a methodology which does not involve a "fair comparison".[56] As a result, the Appellate Body reversed the panel's findings that zeroing is not, as such, inconsistent with Articles 2.1, 9.1, and 9.2 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994.[57]

56. The Appellate Body also found that the use of zeroing "as applied" in administrative reviews, where the United States follows a weighted average-to-transaction comparison methodology, is inconsistent with Articles 2.1, 2.4, 9.1, and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT.[58]

3. Zeroing in Sunset Reviews

57. The Appellate Body has had the occasion to rule on the inconsistency of the use of zeroing in sunset review proceedings in measures adopted by the United States in *US – Zeroing (Japan)*. With regard to the specific sunset review determinations at issue, the Appellate Body recalled its previous reports according to which the terms "determine" and "review" in Article 11.3 of the *Anti-Dumping Agreement* require a reasoned conclusion "based on" positive evidence and a "sufficient factual basis". It noted in particular that it has previously decided that, when investigating authorities rely on past dumping margins in making their likelihood determination in a sunset review, these margins must be consistent with Article 2.4 of the *Anti-Dumping Agreement*.[59] The Appellate Body also noted that USDOC relied on past margins that were calculated during administrative reviews on the basis of

[51] Appellate Body Report, *US – Zeroing (Japan)*.
[52] *Id*., paras. 149-151.
[53] Appellate Body Report, *United States – Zeroing (EC)*, para. 130.
[54] Appellate Body Report, *US – Zeroing (Japan)*, paras. 152-156.
[55] *Id*., para. 166.
[56] *Id*., paras 167-169.
[57] *Id*., paras 170-171.
[58] Appellate Body Report, *US – Zeroing (Japan)*, paras 174 – 176; Appellate Body Report, *US – Zeroing (EC)*, para. 135.
[59] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127; and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 180.

"simple zeroing". Having previously concluded that zeroing in administrative reviews is inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, the Appellate Body found that the determinations in the sunset reviews at issue are inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

58. On this basis, the Appellate Body reversed the panel's finding that the United States acted consistently with Articles 2 and 11 of the *Anti-Dumping Agreement* when, in the sunset reviews at issue in that case, it relied on margins of dumping calculated in previous administrative review proceedings. The Appellate Body found instead that the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*.

59. Consequently, the Appellate Body has ruled that the use of zeroing in sunset reviews as applied by the United States is inconsistent with Articles 2.4, 9.3 and 11.3 of the *Anti-Dumping Agreement*.

4. Conclusions

60. From the interpretation of the relevant WTO provisions made by the Appellate Body in recent years, it is clear that the use of zeroing (*i.e.*, failure to offset the results of comparisons of normal value and export price to determine any margin of dumping), in the case of original investigations when using a weighted average-to-weighted average comparison method, in the case of administrative review proceedings when using a weighted average-to-transaction comparison method or in sunset review proceedings, has been found contrary to WTO rules several times in WTO dispute settlement proceedings.

61. This consistent interpretation of the rules clearly states that "dumping" and "margins of dumping" can be found to exist *only* in relation to that product *as a whole* as defined by that authority. They cannot be found to exist for only a type, model, or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the level of an individual transaction. Thus, it is clear that, when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, "margins of dumping". Rather, they are merely "inputs" that are to be aggregated in order to establish the margin of dumping for the product under investigation with respect to each exporter or producer.

B. ROLE OF THE PRECEDENT: VALUE OF THE APPELLATE BODY REPORTS

62. To the extent that panels and the Appellate Body have already analysed model and simple zeroing in several disputes and to the extent that, as explained above, the Appellate Body has found the zeroing methodology in weighted average-to-weighted average comparisons in original investigations, in weighted average-to-transaction comparisons in administrative reviews and in sunset reviews as being inconsistent with the *Anti-Dumping Agreement* and the GATT 1994, it is essential to examine, for the purpose of the present dispute –which actually covers the same issues– the role of precedents, *i.e.*, what is the value of previous panels and Appellate Body reports, in particular of previous Appellate Body reports.

63. In this respect, the European Communities submits that the Panel in this case should not deviate from the findings of previous Appellate Body reports clearly addressing the same matter and carrying out a consistent interpretation of the various provisions involved. Should the Panel wish to depart from previous rulings, this should be carefully considered and based on cogent reasons.

1. Introduction

64. In the WTO dispute settlement system, there is no doctrine of *stare decisis*, or binding judicial precedent, by which courts are bound by their previous decisions. The *stare decisis* doctrine which is traditionally recognised in common law jurisdictions is, therefore, not applied in the WTO dispute settlement system, and this is also generally so in all fields of public international law.[60]

65. This can be illustrated by the Statute of the International Court of Justice (ICJ), the highest judicial body of the United Nations, competent to deal with international law disputes between sovereign States that have accepted its jurisdiction. Article 38(1) of the ICJ's Statute sets out the law that this Court must apply. Although these provisions are expressed in terms of the function of the ICJ, they reflect the previous practice of arbitral tribunals and are generally regarded as the most complete statement of the sources of international law.[61] According to Article 38(1)(d), judicial decisions are (only) "subsidiary means for the determination of [international] law". Further, Article 59 of the ICJ Statute provides that "the decision of the Court has no binding force except as between the parties and in respect of that particular case".[62] These provisions indicate that there is not *stare decisis* in the ICJ.

66. Insofar as they reject the doctrine of binding judicial precedents, international courts and tribunals are said to closely resemble civil law jurisdictions. In a civil law tradition, lawmaking is considered as being a function of the legislature; contrary to common law judges, civil law judges' task is considered to be passive: they must implement legal rules contained mainly in various codes, laws and statutes.[63]

67. However, even if international law has no doctrine of *stare decisis* in the sense that judgments only bind the parties and only with respect to the case in which they are delivered, the absence of *stare decisis* has not prevented the development of case-law and reliance on such case-law in subsequent disputes. With respect to the ICJ, the Appellate Body noted that "*Article 59 [of the ICJ Statute] has not inhibited the development by the ICJ (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible*".[64]

68. Reliance on previous case-law actually flows from the necessity to ensure in any legal system security, consistency and predictability. Thus, even where previous decisions are not binding *per se*, reliance on previous case-law is necessary to ensure consistency of such case-law, in particular where case-law comes from higher courts or tribunals.

69. The European Communities submits that these principles of security, consistency and predictability –which apply in civil law systems and in other international courts and tribunals– also apply in the framework of the WTO dispute settlement system. These same principles imply that panels should rely on previous case-law, and primarily, when such case-law comes from the Appellate Body which is hierarchically superior to panels. The European Communities will explain below these principles as contained in national and international legal systems and their application to the WTO system.

[60] Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May, 2002) p. 510 (Exhibit EC – 8).
[61] Brownlie, *Principles of Public International Law*, (5th ed. 1988), p. 3 (Exhibit EC-9).
[62] ICJ Statute (Exhibit EC-10).
[63] Arnull, *the European Union and its Court of Justice* (2006), p. 623 (Exhibit EC-11).
[64] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages II*, footnote 30, p. 14.

2. Reliance on Previous Case-Law in National and International Legal Systems

(a) Principle of Consistency and Predictability of Jurisprudence

70. In all legal systems, there is a need for consistency and predictability in the case-law. This is probably the most important reason underpinning the *stare decisis* doctrine in common law systems. It is, however, generally admitted that there are limits to this doctrine. In common law systems, the highest courts treat previous decisions as "normally binding", but they reserve the right to depart from them in certain, narrowly defined, exceptional circumstances.

71. In civil law jurisdictions which do not recognise the principle of *stare decisis*, the highest courts will, however, as a matter of judicial policy and practice, follow their previous decisions. This is illustrated by the French[65] and Italian[66] legal systems.

72. The European Court of Justice (ECJ) which is a hybrid court –part constitutional court, part general national court of last instance– also pays specific attention to its earlier case-law.[67] The general position is that the ECJ is not bound by its previous decisions, but that it, in practice, does not often depart from them.[68]

73. As outlined above, the ICJ Statute makes clear that decisions rendered by the ICJ in a particular case between states cannot be binding on other states in dispute before the Court. However, even if, strictly speaking, the ICJ does not observe the doctrine of precedent (except however, in matters of procedure), there is no doubt that it strives to maintain consistency in its jurisprudence.[69] As Judge *Shahabuddeen* observed:

> "The desiderata of **consistency, stability and predictability**, which underlie **a responsible legal system**, suggest that the Court would not exercise its power to depart from a previous decision except with circumspection… **The Court accordingly pursues a judicial policy of not unnecessarily impairing the authority of its decisions**".[70] (emphasis added)

74. In the *Peace Treaties* case, Judge *Zoricic* adequately explained the value which the ICJ may attach to decisions of other international tribunals, including of the ICJ itself:

> " (…) it is quite true that no international court is bound by precedents. But there is something, which this Court is bound to take into account, namely the principles of international law. If a precedent is firmly based on such a principle, the Court cannot decide an analogous case in a contrary sense, so long, as the principle retains its value".[71]

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[65] David and De Vries, *The French Legal System* (1985), p. 113 et seq. discussed by Zweigert and Kötz, *op.cit.*, pp. 262-3 (Exhibit EC-12).

[66] Cappelletti et al., *The Italian Legal System: An Introduction* (1967), at p. 271 discussed by Zweigert and Kötz, *op. cit*., p. 263 (Exhibit EC-12).

[67] The EU judicial system is of a *sui generis* character. It consists of several instances, beginning with the European Court of Justice (ECJ), established in 1952. The ECJ was supplemented in 1988 with the Court of First Instance (CFI) which has jurisdiction over cases brought by private parties against decisions of EU institutions as well as over cases brought by member states against decisions of the European Commission: Rosas, "The European Court of Justice: sources of law and methods of interpretation" in *The WTO at Ten* (2006), p. 482 (Exhibit EC-13).

[68] *Id.*

[69] Brownlie, *op. cit.*, pp. 21 -22.

[70] Shahabuddeen, *Precedent in the World Court* (1996), p. 239 (Exhibit EC-14).

[71] *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, ICJ Rep 1950, p. 65 at p. 104, Judge Zoricic, Dissenting Opinion, quoted in Shahabuddeen, *op.cit.*, p. 237.

75. Seen in this light it is not surprising to note that the ICJ, like other (international) tribunals, frequently invokes previous decisions in order to support a decision in a particular case. This is not because previous decisions are regarded as precedents that would bind the Court as a matter of *stare decisis*. Previous decisions are invoked because they are a statement of what the Court regarded as "the correct legal position".[72]

76. The importance of previous decisions can also be found in other international tribunals or courts, including the International Tribunal for the Law of the Sea (ITLOS), the European Court of Human Rights (ECHR) and in International Criminal Tribunals.[73]

77. Formal rejection of the doctrine of *stare decisis* should not be confused with the interest that all legal systems have in maintaining continuity in jurisprudence. Whether as a matter of doctrine or practice, all legal systems place a high value on consistency, certainty and predictability of the jurisprudence, particularly as regards decisions rendered by the highest courts. Departures from previous decisions are carefully considered and require the identification of *cogent reasons* for doing so.

78. In cases where courts, in particular those dealing with international law, are not formally bound by their previous decisions, they will nevertheless consider themselves bound by the (international) law as authoritatively expressed in a decision.

79. A rule such as that expressed by Article 59 of the ICJ's Statute, quoted above, is concerned only with the notion that the decision, *qua* decision, binds only the parties to a particular case. However, it does not prevent the decision from being treated in a later case by the same court or tribunal as the *correct legal position.*

(b) Are decisions of higher courts binding on lower courts?

80. In common law systems, decisions of a higher court are binding on lower courts.[74] While, there is no doctrine of binding precedent in civil law jurisdictions, as a matter of practice, lower courts tend to follow the decisions of higher courts, even if there is rarely an explicit legal rule compelling a judge to follow the decisions of a higher court.

81. In the EU judicial system, the Court of First Instance (CFI) will normally uphold ECJ case-law. The CFI will follow the precedents set by the ECJ for two reasons. Firstly, as in the court systems of the EC Member States, the lower courts in the hierarchy accepts, as a general rule, the authority of precedents; secondly, the decision establishing the CFI was accompanied by a provision allowing appeal of CFI judgements to the ECJ on the grounds of "infringement of Community law".[75] The precedents set by the Court, of course, are part of Community law, so that where these are clear

[72] Shabuddeen, *op.cit.*, p. 236.

[73] Treves, "The International Tribunal for the Law of the Sea", in *The WTO at 10* (1996), p. 490 at 493 (Exhibit EC-15); Reid, *A Practitioner's Guide to the European Convention on Human Rights* (2nd ed. 2004), p. 51 (Exhibit EC-16); and Article 21(2) ICC Statute, which states as follows: "[T]he Court may apply principles and rules of law as interpreted in its previous decisions": Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002 (Exhibit EC-17).

[74] Kmiec, "The Origin and Current Meanings of "Judicial Activism"", Comment, *California Law Review*, October 2004, 1466-1467 (Exhibit EC-18).

[75] ECJ Statute, Article 58: "An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First instance" (Exhibit EC-19).

and consistent the lower court would regard itself as bound to follow them at risk of its decision being set aside on appeal.[76]

82. Similarly, in international legal systems where there are two or more hierarchical tribunals or courts, the general rule appears to be that decisions of the hierarchical higher body are followed by the hierarchical lower body, at least insofar as the *ratio decidendi*, legal principles or points of law are concerned. This is the case, *inter alia*, of the ECHR[77], the ICTY/ICTR[78], and the ICSID.[79]

83. The above survey of national and international legal systems shows that even if there is no doctrine of *stare decisis*, as a matter of judicial practice, all legal systems place a high value on consistency, certainty and predictability of jurisprudence which lead such courts and tribunals to follow previous decisions. Departures from previous decisions are carefully considered and require the identification of important reasons for doing so.

84. The above survey also demonstrates that even in legal systems where there is no doctrine of binding judicial precedents, lower courts follow, as a matter of practice, decisions of higher courts. This has probably to do with the fact that higher bodies generally have more limited functions centred around settling issues of law while lower bodies' tasks are usually centred around fact-finding and dealing with the merits of the cases. Further, a statement that a decision of a hierarchically higher body is binding on a lower body, will normally be confined to the legal principles involved, the *ratio decidendi*. Still, the *ratio decidendi* cannot be distinguished merely because the facts to which it is applied are different.

85. This does not imply that, in dealing with the merits of a particular dispute or case, there would be no scope whatsoever for lower bodies to develop the jurisprudence. However, departures from decisions taken by higher courts on issues of law must be carefully considered. There must be *cogent reasons* for a lower court or tribunal to depart from the legal positions taken by hierarchically superior courts. If the lower court or tribunal deviates from what the higher court has considered as the correct legal position its decision runs the risk of being struck down. This will be especially the case when the higher court has, through a series of decisions, endeavoured to create a consistent body of jurisprudence on a particular issue. A lower body may express a reasoned disagreement on legal principles with the higher body, but this will ultimately be for the consideration of the higher body.

86. The European Communities recognises that references to doctrines and practices followed in other legal systems, national or international, are not determinative of the authority of previous decisions –of the Appellate Body– in the WTO dispute settlement system. However, the European Communities believes that the same principles and concerns which constitute the basis of a practice in other legal systems to follow previous decisions, especially of higher courts, are present in the WTO dispute settlement system, taking into account in particular the characteristics of the WTO dispute settlement system and the place and functions of the Appellate Body in such a system.

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[76] Neville and Kennedy, *The Court of Justice of the European Communities* (2000), pp. 370-377 (Exhibit EC-20).

[77] Reid, *A Practitioner's Guide to the European Convention on Human Rights* (1st ed. 1998), p. 43 (Exhibit EC-21).

[78] ICTY, *Aleksovski Appeal Judgement*, Case No. IT-95-14/1-A, 24 March 2000, para. 113, pp. 47-48 (Exhibit EC-22).

[79] ICSID Secretariat Discussion Paper, *Possible Improvements of the Framework for ICSID Arbitration*, October 22, 2004; part VI and Annex, *Possible Features of an ICSID Appeals Facility*, paras. 5, 7, 9 (Exhibit EC-23); and Working Paper of the ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, 12 May 2005, para. 4 (Exhibit EC-24).

3. The WTO dispute settlement system

(a) Purpose of the WTO dispute settlement system: security and predictability

87. As set out in Article 3(2) of the Dispute Settlement Understanding, the main purpose of the dispute settlement system is to "*provide security and predictability to the multilateral trading system*". This is to be achieved by preserving the rights and obligations of Members under the covered agreements and by clarifying the existing provisions of those agreements in accordance with customary rules of international law. This has to be done without adding or diminishing the rights and obligations provided in the covered agreements.

88. It follows, according to the European Communities, that the most important function of the dispute settlement system is to provide *security and predictability* to Members and the system as a whole by detailing and interpreting the rules and outlining the rights and obligations of Members, so that they may act accordingly.

89. The importance of security and predictability as an object and purpose of the WTO dispute settlement system has been recognised in many panel and Appellate Body reports.[80]

(b) The Appellate Body in the WTO dispute settlement system

90. The task of the Appellate Body is to "hear appeals from panel cases".[81] To that extent, it occupies a superior position in the WTO dispute settlement system's hierarchy.

91. The Appellate Body's function is limited to hear appeals with respect to issues of law or legal interpretations developed by a panel in its report.[82] The Appellate Body cannot review issues of fact or factual findings. In that respect, the Appellate Body is somewhat similar to the French *Cour de Cassation*, the highest Supreme Court in France which can only deal with legal issues. The purpose is to ensure that the legal interpretation is consistent with the Agreements concerned.

92. The fact that the Appellate Body, unlike panels, is a permanent body composed of seven permanent members further supports the importance of the Appellate Body in ensuring the security and predictability of the multilateral trading system.

93. In light of the foregoing, it appears that the main function of the Appellate Body is, by its characteristics (*i.e.*, the fact that it is a permanent body, that it is superior in the hierarchy and that it can only deal with legal issues), to ensure consistency and coherence in the interpretation of the Agreements which can be examined under the dispute settlement system. In this sense, the Appellate Body provides for the correct interpretation of the relevant rules.

4. Precedential value of case law of the Appellate Body

94. As explained above, there is no *stare decisis* in the WTO dispute settlement system. Panels are therefore not, strictly speaking, bound by previous findings of the Appellate Body. However, *predictability and stability* require a consistent interpretation of the rules that carefully builds on previous decisions and avoids unconsidered departures from previous interpretations.

95. As a preliminary observation, it should be noted that the Appellate Body as well as panels regularly invoke previous decisions –in particular, decisions of the Appellate Body– in their reports even if not addressing the issue of the value of such reports.

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[80] See *e.g.*, Panel Report, *US – Section 301 Trade Act*, para. 7.75.
[81] Article 17.1 of the Dispute Settlement Understanding.
[82] Article 17.6 of the Dispute Settlement Understanding.

96. The issue of the value of adopted reports was first addressed by the Appellate Body in *Japan – Alcoholic Taxes on Beverages*, stating that:[83]

> "**Adopted panel reports** are an important part of the GATT *acquis*. They are often considered by subsequent panels. They **create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute**. However, they are not binding, except with respect to the resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the WTO Agreement". (emphasis added)

97. In *US – Shrimp Article(Article 21.5 – Malaysia)*, the Appellate Body confirmed that its finding in *Japan – Alcoholic Beverages* also applied to Appellate Body reports and explained that:[84]

> "The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. Nor are we surprised that the Panel made frequent references to our Report in *United States – Shrimp*. Indeed, we would have expected the Panel to do so. The Panel had, necessarily, to consider our views on this subject, as we had overruled certain aspects of the findings of the original panel on this issue and, more important, had provided interpretative guidance for future panels, such as the Panel in this case."

98. The foregoing supports the view that panels should follow previous case law from the Appellate Body. This is even more important where the issues raised are the same, as underlined by the Appellate Body in *US – OCTG Sunset Reviews*. In *US – OCTG Sunset Reviews*, the United States had appealed the panel's finding that considered the Sunset policy Bulleting to be a measure. On appeal, the United States challenged this finding, arguing that the panel erred in concluding that the SPB is a measure because such a conclusion does not result from "an objective assessment" consistent with Article 11 of the Dispute Settlement Understanding, in that the panel "did not explain why the findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, as to whether the SPB is a measure, 'would be persuasive given the factual record in this dispute'". The Appellate Body found that:[85]

> "Regarding the arguments presented by the United States relating to Article 11 of the DSU, we disagree with the United States that the Panel did not assess objectively whether the SPB is a measure. […] The Panel had before it exactly the same instrument that had been examined by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*; thus, it was appropriate for the Panel, in determining whether the SPB is a measure, to rely on the Appellate Body's conclusion in that case. **Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, <u>especially where the issues are the same</u>**. Although the Panel may have expressed itself in a concise manner, we find no fault in its analysis that could justify ruling that the Panel failed to observe its obligations under Article 11 of the DSU". (emphasis added)

99. In that case, the Appellate Body has thus clearly stated that panels are bound by the legal analysis of the Appellate Body. This is consistent with the purpose of the dispute settlement system which is to ensure the *security and predictability* of the multilateral trading system and the specific

[83] Appellate Body Report, *Japan – Alcoholic Taxes on Beverages II*, p. 14.
[84] Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia*), para. 107.
[85] Appellate Body Report, *United States – OCTG Sunset Reviews*, para. 188.

task of the Appellate Body, as a hierarchically superior body, which decides only on issues of law and legal interpretations.

100. In this respect, the European Communities submits that, as a result, panels should follow the findings of the Appellate Body to the extent that they relate to the same legal issues and legal interpretations. Panels should only depart from them should there be serious reasons and arguments to do so.

5. Precedential value of Appellate Body reports on zeroing

101. As mentioned in Section III.A, the issue of zeroing has been discussed and examined several times within the WTO dispute settlement system. Panels and the Appellate Body already examined several aspects of zeroing in previous disputes. In the context of these disputes, reference has often been made to previous findings of the Appellate Body.

102. For instance, in *US – Zeroing (Japan)*, the Appellate Body expressly referred to its reports in *US – Softwood Lumber V (Article 21.5)* to justify its conclusion that the use of zeroing in transaction-to-transaction methodology in the framework of original investigations was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*:[86]

> "We see no reason to depart from the appellate Body's reasoning in *US – Softwood Lumber V (Article 21.5 – Canada)*, which is which is in consonance with the Appellate Body's approach in the earlier case of *US – Softwood Lumber V* and is consistent with the fundamental disciplines that apply under the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, as highlighted above".

103. Likewise, in *US – Zeroing (EC)*, the panel noted that the calculation was identical in relevant respects to the zeroing methodology considered by the panels and Appellate Body in *EC – Bed Linen* and *US – Softwood Lumber V*. The panel said that it had carefully considered the arguments raised by the United States. However, it noted that these issues had already been examined by the Appellate Body in *US – Softwood Lumber V*. Noting that although previous Appellate Body decisions are not strictly speaking binding on panels, there is clearly an expectation that panels will follow such decision in subsequent cases raising issues that the Appellate Body has expressly addressed and concluded that it did not believe "it would be appropriate […] to depart from the Appellate Body's conclusion that when a margin of dumping is calculated on the basis of multiple averaging by model type, the margin of dumping for the product in question must reflect the results of all such comparisons, including weighted average export prices that are above the normal value for individual models".[87]

104. As regards the use of model zeroing in weighted average-to-weighted average comparisons in original investigations, the Appellate Body has found such practice to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*: first of all, in *EC – Bed Linen*, then in *US – Lumber V* and finally, in *US – Zeroing (EC)*. As noted by the panel in *US – Shrimp from Ecuador*:[88]

> "We further note that the Appellate Body Report in US – Zeroing (EC) also referred to its reasoning and finding in *US – Softwood Lumber V*. Thus, in our view, **there is now a consistent line of Appellate Body reports, from EC – Bed Linen to US – Zeroing (EC) that holds that "zeroing" in the context of the weighted average - to- weighted average methodology in original investigations is inconsistent with Article 2.4.2**". (emphasis added)

[86] Appellate Body Report, *US – Zeroing (Japan)*, para 121.
[87] Panel Report, *US – Zeroing (EC)*, para. 7.31.
[88] Panel Report, *US – Shrimp from Ecuador*, para. 7.40.

105. As far as the use of simple zeroing in administrative reviews is concerned, the Appellate Body also found in two cases (*US – Zeroing (EC)* and *US – Zeroing (Japan)* that such practice is inconsistent with the *Anti-Dumping Agreement*. In the second of these two cases, the Appellate Body referred to its previous findings in *US – Zeroing (EC)*.[89]

106. Therefore, the European Communities submits that, even if there is no *stare decisis* principle applicable in the WTO dispute settlement system and that the Panel is therefore entitled to depart from previous rulings made on the substantive issues raised in this proceeding, the Panel should not depart from previous rulings, in particular, given that:

- these are findings of the Appellate Body which is hierarchically superior and only dealing with issues of law;
- these findings have been repeated in several cases so that there is now a consistent line of interpretation; and
- especially, to the extent that the Appellate Body has already examined the arguments which could be raised by the defendant in this case.

6. Conclusions

107. The Appellate Body's rulings must, in the view of the European Communities, be regarded as commanding particular authority for panels. This is despite the fact that that there is no formal doctrine of *stare decisis* in the WTO dispute settlement system, and notwithstanding the fact that, according to the Article 17.14 of the Dispute Settlement Understanding, Appellate Body reports only bind parties to the dispute at issue.

108. Firstly, Appellate Body decisions should command appropriate respect with panels and parties to the proceedings as authoritative pronouncements on the law. Secondly, the system of "negative consensus" for adopting reports necessarily puts a high premium on the Appellate Body decision's correctness in the first place, since the error-correcting mechanisms cannot easily be invoked. Thirdly, because the Appellate Body is the hierarchically superior body, tasked with deciding on issues of law and legal interpretations, panels should follow Appellate Body decisions which constitute an authoritative interpretation of the law to be applied by the panel.

109. It is for those reasons that the European Communities submits that the Appellate Body has stated that, panel reports –and equally adopted Appellate Body reports– "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute".[90]

110. In light of the above, the European Communities submits that the Panel in this case should not deviate from the findings of previous Appellate Body reports clearly addressing the same matter (*i.e.*, the use of zeroing in original, administrative and sunset proceedings), carrying out a consistent interpretation of the various provisions involved, and concluding that the zeroing methodology, when aggregating the results of the comparison between normal value and export price, is inconsistent with WTO rules.

[89] Appellate Body Report, *US – Zeroing (EC)*, at para. 155.
[90] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14.

C. CONTINUED APPLICATION IN 18 ANTI-DUMPING MEASURES OF ANTI-DUMPING DUTIES AT A LEVEL IN EXCESS OF THE DUMPING MARGIN WHICH WOULD RESULT FROM THE CORRECT APPLICATION OF THE ANTI-DUMPING AGREEMENT

1. The Measures at Issue

111. The European Communities challenges in the 18 specific anti-dumping cases mentioned in the Annex to the Panel request the application or continued application of anti-dumping duties which were calculated and are maintained in place pursuant to the most recent administrative review, or as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level which exceeds the anti-dumping margin which would result from the correct application of the *Anti-Dumping Agreement*, *i.e.*, without zeroing.

112. The application or continued application of anti-dumping duties as described above is a measure which can be subject to assessment of conformity by the Panel. The Appellate Body affirmed in *US – Corrosion-Resistant Steel Sunset Review* that, in principle, any act or omission attributable to a WTO Member can be a "measure" of that Member for purposes of WTO dispute settlement proceedings, and that the concept of a measure within the meaning of the Dispute Settlement Understanding encompasses certain acts or instruments irrespective of their application in specific instances. The Appellate Body characterised such acts or instruments as "acts setting forth rules or norms that are intended to have general and prospective application" and "instruments of a Member containing rules or norms". Not allowing claims against instruments setting out rules or norms inconsistent with a Member's obligations would frustrate the objective of protecting the security and predictability to conduct future trade and lead to a multiplicity of litigation.[91]

113. The Appellate Body also pointed out that Article 17.3 of the *Anti-Dumping Agreement* contains no threshold requirement that a measure submitted to dispute settlement be of a certain type[92] and that the phrase "laws, regulations and administrative procedures" in Article 18.4 of the *Anti-Dumping Agreement* implies that "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings" can be challenged within the dispute settlement system.[93]

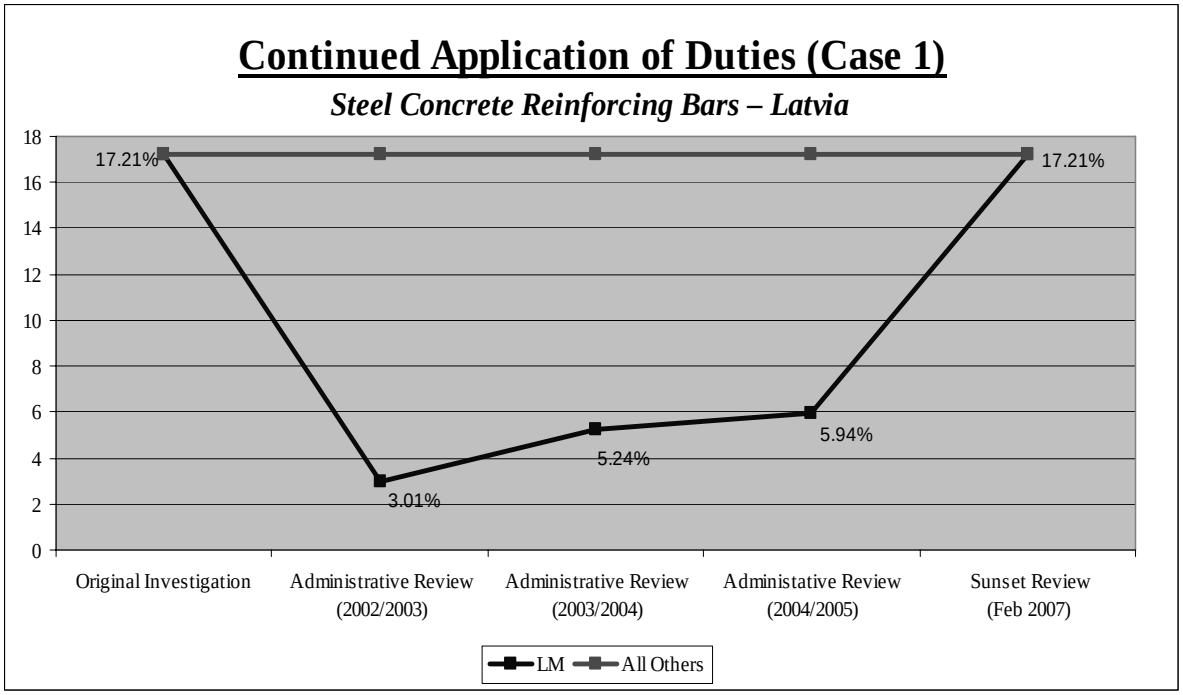
114. A measure can exist where there is evidence of a generally applicable rule or norm of prospective application, such as when there is a consistent practice that can only be explained by the existence of a general rule that is being applied. In *US – Zeroing (Japan)*, the Appellate Body confirmed that the US "zeroing procedures" under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different *manifestations of a single rule or norm*.[94]

115. The European Communities is thus not challenging the zeroing methodology "as such" since the WTO inconsistency of such a practice has already been established in previous disputes, in particular in *US – Zeroing (EC)* and in *US – Zeroing (Japan)*. Instead, the European Communities challenges the use of the zeroing methodology in 18 specific anti-dumping measures, in other words, with respect to 18 specific products originating in specific Member States of the EC. In this respect, the European Communities submits that, in addition to the violations of the relevant provisions of the *Anti-Dumping Agreement* and the GATT 1994 resulting from the use of zeroing in the specific administrative or sunset review proceedings, the application (since the original Anti-Dumping Order) and continued application by the United States of anti-dumping duties in the cases contained in the Annex to the Panel request at a level which exceeds a WTO consistent dumping margin is also a

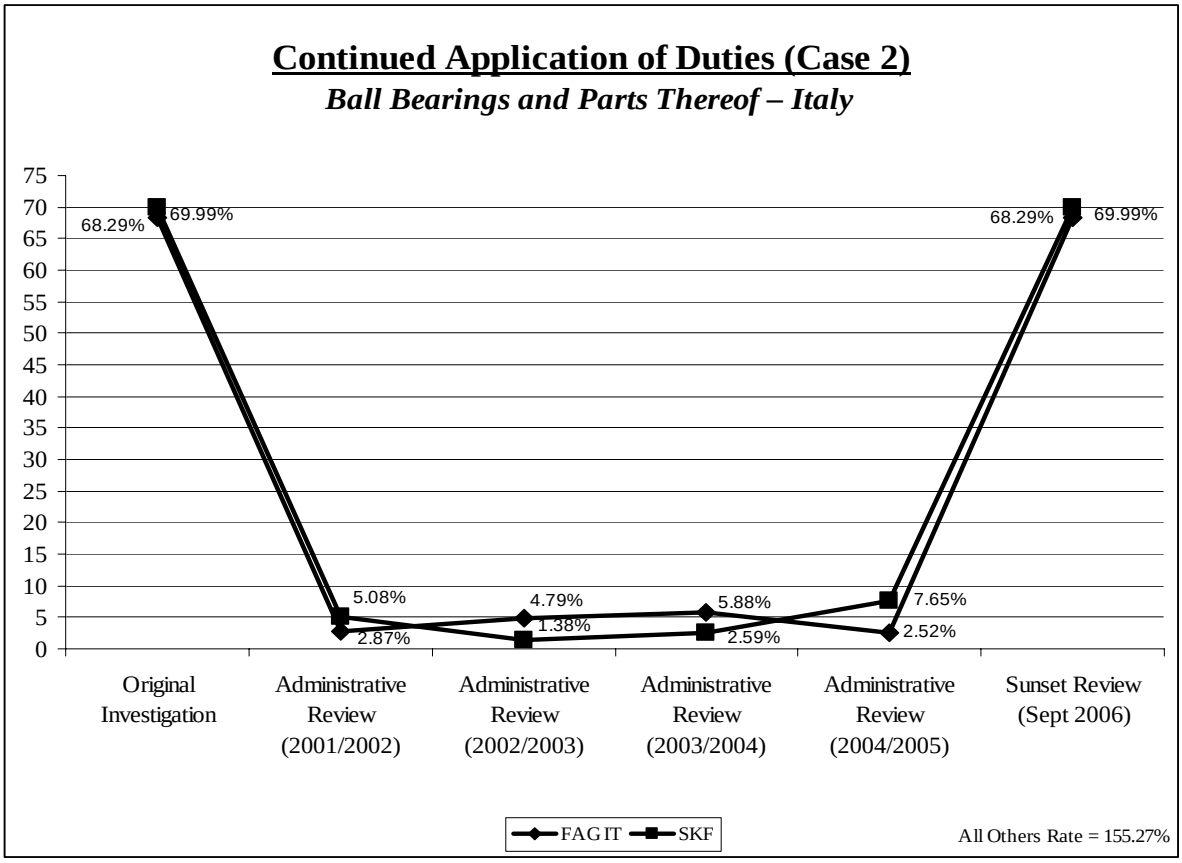
[91] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.
[92] *Id.*, para. 86.
[93] *Id.*, para. 87.
[94] Appellate Body Report, *US – Zeroing (Japan)*, at para 88.

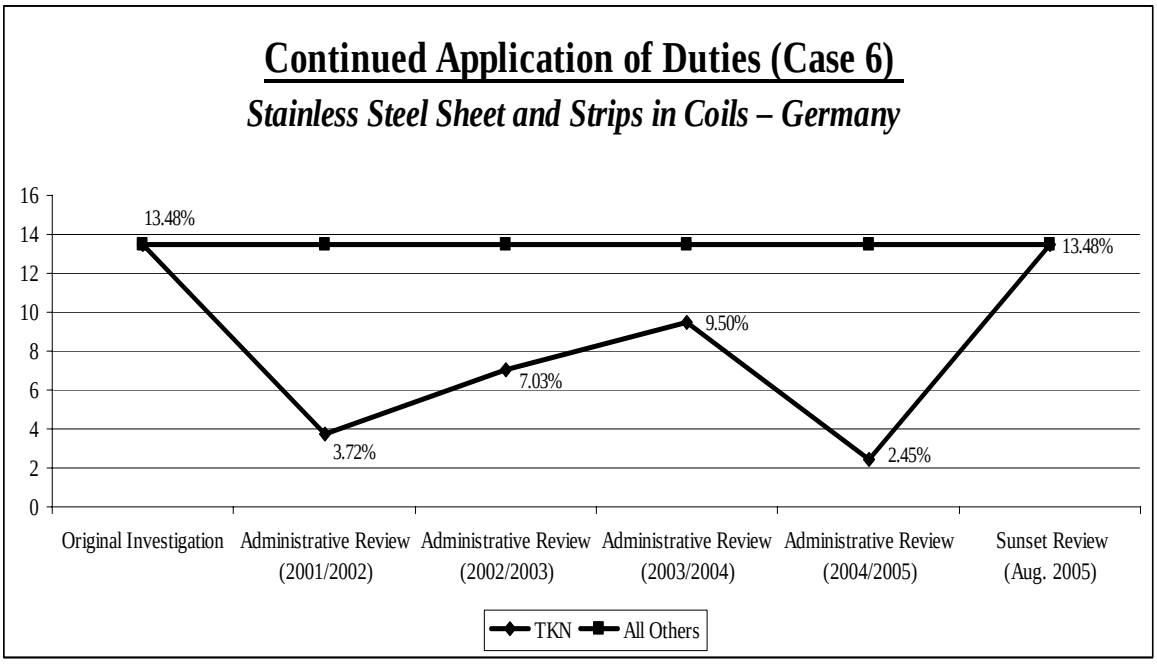
measure adopted by the United States which is equally inconsistent with the *Anti-Dumping Agreement* and the GATT 1994.

116. The following diagrams will serve to illustrate the position of the European Communities in this respect. In **Case 1** contained in the Annex to the Panel request, it can be observed that the United States first established a dumping margin in the original investigation (17.21 per cent) in a manner inconsistent with WTO rules, *i.e.*, by applying model zeroing. Imports of the product concerned were subject to securities (*e.g.*, cash deposits) as of the date of publication of the Anti-Dumping Order. Then, in subsequent administrative review proceedings, one company requested the review of its duties. In all of them, the United States calculated the margin of dumping by applying another methodology found inconsistent with WTO rules, *i.e.*, simple zeroing. This means that the United States retrospectively collected an incorrect amount of duties and established a new exporter-specific margin, subject to securities at the time of importation, with respect to that company for the following year. Once five years had passed, pursuant to a sunset review, the United States considered that dumping would likely recur in the future and established the new dumping margin level at the rate imposed in the original investigation. Once again, the United States imposed duties in a manner and levels contrary to WTO rules.



117. The same effect can be observed in all the cases mentioned in the Annex to the Panel request. For the sake of simplicity, the European Communities will refer to Cases 2 and 6 to show the same effect.





118. As can be seen, the European Communities is challenging the adoption of anti-dumping duties with respect to the 18 measures mentioned in the Annex to the Panel request insofar as the original duty levels and subsequent review levels are inconsistent with WTO rules, as a result of the use of zeroing by the United States.

119. Consequently, the European Communities submits that the 18 measures brought before the Panel are the duty rates applied in the 18 anti-dumping proceedings concerned. Since the dumping

margins where established in the original proceedings and in their subsequent reviews by applying a comparison methodology which has already been found "as such" and "as applied" inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 by the Appellate Body, the European Communities submits that the United States has infringed several provisions of the *Anti-Dumping Agreement* and the GATT 1994.

2. Violation of Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994

120. The European Communities submits that the continued application of anti-dumping measures in the 18 measures mentioned in the Annex to the Panel request, insofar as such duties have been calculated by using zeroing, are inconsistent with Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

121. For the sake of brevity, the European Communities will not here re-sate the arguments which respect to these violations, since these are identical to the arguments submitted by the European Communities in Section III.D below. Therefore, the European Communities refers the Panel to that Section in support of this claim, the arguments therein equally applying with respect to the present measures and claims.

3. Violation of Article XVI:4 of the Agreement Establishing the WTO

122. In addition to the violation of the relevant provisions of the *Anti-Dumping Agreement* and the GATT 1994, the European Communities also submits that the United States, by continuing the application anti-dumping duties with zeroing in the 18 measures contained in the Annex to the Panel request, has violated Article XVI:4 of the Agreement Establishing the WTO (WTO Agreement).

123. The European Communities notes that, normally, the determination of a breach of any provision of any WTO covered agreement gives automatically rise to a violation of Article XVI:4 of the WTO Agreement. This provision reads as follows:

> "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

124. As stated by the panel in *US – 1916 Act (Japan*):

> "[I]f a provision of an 'annexed Agreement' is breached, a violation of Article XVI:4 immediately occurs. GATT 1994 is one of the 'annexed Agreements' within the meaning of Article XVI:4. Since we found that provisions of Article VI of the GATT 1994 has been breached, we conclude that, by violating this provision, the United States violates Article XVI:4 of the WTO Agreement."[95]

125. Similarly, the panel in *US – 1916 Act (EC)* found that:

> "If Article XVI:4 has any meaning, it is that when a law, regulation or administrative procedure of a Member has been found incompatible with the WTO obligations of that Member under any agreement annexed to the WTO Agreement, that Member is also in breach of its obligations under Article XVI:4."[96]

[95] Panel Report, *US – 1916 Act (Japan)*, para. 6.287.
[96] Panel Report, *US – 1916 Act (EC)*, para. 6.223.

126. Since the use of model and simple zeroing in original investigation, administrative and sunset review proceedings violates Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, it follows that the United States has not ensured the conformity of its laws, regulations and administrative procedures with the obligations established in those WTO agreements. In this respect, the European Communities submits that the United States violated Article XVI:4 of the WTO Agreement.

127. In addition, the European Communities claims that the United States violated Article XVI:4 of the WTO Agreement insofar as this provision also establishes a clear obligation for all WTO Members to ensure the conformity of their existing laws, regulations, and administrative procedures with the obligations in the covered agreements.[97] This obligation becomes more evident in cases where an adopted DSB report has concluded that a specific law, regulation or administrative practice, as such and as applied in numerous cases, is contrary to several provisions of the *Anti-Dumping Agreement* and the GATT of 1994.

128. In this respect, the European Communities submits that the findings of the Appellate Body as adopted by the DSB in specific disputes create an independent international obligation for the losing party in that dispute to comply. As noted by John H. Jackson, "an adopted dispute settlement report establishes an international law obligation upon the Member its question to change its practice to make it consistent with the rules of the WTO Agreement and its annexes". According to Jackson, Article XVI:4 of the WTO Agreement "can serve as an important basis for the notion that the result of the DS procedure is to establish an international law obligation to comply with the results and applications made in the DS process".[98]

129. The objective of protecting *security and predictability* needed to conduct future trade would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations would remain in place despite the findings of an adopted DSB report declaring their inconsistency with WTO rules. It would also lead to a multiplicity of endless litigation. Thus, allowing claims against measures which are the result of the application of instruments or norms which have been found as such inconsistent with WTO rules serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated.

130. Moreover, in case Members ignore a clear ruling and refuse to change their laws or practices, it can be argued that a violation of the duty of *good faith* would arise. The principle of good faith requires a party to a treaty to refrain from acting in a manner which would defeat the object and purpose of the treaty as a whole or the treaty provision in question.[99]

131. The zeroing procedures invariably employed by USDOC in original investigation, administrative and sunset review proceedings mentioned in the Annex to the Panel request violate the obligations set forth in various provisions of WTO agreements. This has been the conclusion of the reports adopted by the DSB on 9 May 2006, with respect to *US – Zeroing (EC)* and on 23 January 2007, concerning *US – Zeroing (Japan)*. The European Communities considers that, at least as of the date of adoption of the first Appellate Body report declaring the zeroing procedures inconsistent with WTO rules, it became clear that the United States was obliged to comply with the recommendation to "bring the measure into conformity" with its obligations in the future. Most of the

[97] Appellate Body Report, *EC – Sardines*, at para. 213. A similar obligation is contained in Article 18.4 of the *Anti-Dumping Agreement*: "Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question".

[98] John H. Jackson, "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out", 98 *American Journal of International Law* 109 (2004), Exhibit EC-25.

[99] Panel Report, *US – Byrd Amendment*, at para 7.64.

cases mentioned in the Annex to the Panel request, as far as the latest dumping margin determination leading to the current anti-dumping duties is concerned, were issued after that date, thereby ignoring the obligation established in the adopted DSB reports.

132. Consequently, by maintaining and applying the model and simple zeroing procedures, which are administrative procedures not in conformity with various provisions of the *Anti-Dumping Agreement* and the GATT 1994, the European Communities submits that the United States failed to take all necessary steps to ensure it complies with its WTO obligations. Accordingly, the United States also violated its obligation under Article XVI:4 of the WTO Agreement.

4. Conclusions

133. In light of the above, the European Communities submits that the United States has failed to comply with its obligations pursuant to Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994 as well as Article XVI:4 of the WTO Agreement, by using zeroing when calculating dumping margins in the original proceedings and in their subsequent review proceedings mentioned in the Annex to the Panel request.

D. THE ZEROING METHODOLOGY AS APPLIED IN 52 ANTI-DUMPING PROCEEDINGS, INCLUDING ORIGINAL INVESTIGATIONS, ADMINISTRATIVE REVIEW AND SUNSET REVIEW PROCEEDINGS

134. The European Communities also submits that the 4 original investigations, 37 administrative review proceedings and 11 sunset review proceedings covering the 18 anti-dumping measures concerned are inconsistent with Articles 2.1, 2.4, 2.4.2, 9.3., 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994. Indeed, as the European Communities will show below, the United States used model or simple zeroing when calculating the dumping margins in those cases. The European Communities will address first the claims with respect to the original investigations concerned, to then continue with the arguments concerning administrative and sunset review proceedings.

1. Original Investigations

135. The European Communities considers that the United States has failed to comply with its obligations under the *Anti-Dumping Agreement* and the GATT 1994 with respect to the determinations carried out in the original investigations contained in the Annex to the request for establishment of the Panel (Cases XV to XVIII). The European Communities will describe below the main facts and findings made by the US in **Case XVI**, *Purified Carboxymethylcellulose – Netherlands (A-421-811), No. 50* (Exhibit EC-26), and the violations of the *Anti-Dumping Agreement* and the GATT resulting thereof. For the sake of simplicity, the European Communities will not repeat the same arguments with respect to the other three original investigations. The relevant sections of USDOC determination showing the use of model zeroing in the other cases will be mentioned instead.

1.1 Purified Carboxymethylcellulose – Netherlands (A-421-811)

(a) The Measure at issue

136. In the "Notice of Antidumping Duty Orders" published in the Federal Register[100], margins of dumping of 14.88 per cent (Noviant B.V.), 13.39 per cent (Akzo Nobel) and 14.57 per cent (all others) were calculated with respect to the period of investigation from 1 April 2003 to 31 March 2004 and the product concerned.

[100] Exhibit EC-26, Appendix I, pp. 28277 and 39735.

137. The application of the standard program and, thus zeroing, to *Noviant BV* is reflected in the program code as follows:[101]

```
PROC MEANS NOPRINT DATA = MARGIN;
  WHERE EMARGIN GT 0;
  VAR EMARGIN QTYU VALUE;
  OUTPUT OUT = ALLPUDD  (DROP = _FREQ_ _TYPE_)
       SUM = TOTPUDD MARGQTY MARGVAL;
RUN;
```

138. The application of zeroing is also reflected in the program log as follows:[102]

```
6934
6935  PROC MEANS NOPRINT DATA = MARGIN;
6936    WHERE EMARGIN GT 0;
6937    VAR EMARGIN QTYU VALUE;
6938    OUTPUT OUT = ALLPUDD  (DROP = _FREQ_ _TYPE_)
6939          SUM = TOTPUDD MARGQTY MARGVAL;
6940  RUN;

NOTE:  There were 243 observations read from the data set WORK.MARGIN.
    WHERE EMARGIN>0;
NOTE: The data set WORK.ALLPUDD has 1 observations and 3 variables.
NOTE: PROCEDURE MEANS used (Total process time):
    real time          0.01 seconds
    cpu time           0.02 seconds
```

139. The relevant tables containing the calculations with respect to *Noviant BV* show that zeroing was used in this case.[103] Indeed, on Page 22 the percentage of value with AD margins (63.3199) and the percentage of quantity with AD margins (69.1105) can be found. Thus, for the remaining transactions, no dumping was found and no offsets were provided. The final anti-dumping duty rate using zeroing was 14.8815.

140. The tables containing the calculations with respect to *Noviant BV* without zeroing show that, with the same data, the final anti-dumping margin would have been 12.1508 (*i.e.*, by taking 100 per cent of the transactions and offsetting positive and negative dumping margins found).[104]

141. Consequently, in this case, to determine the anti-dumping duties to be imposed as a result of the original investigation proceeding, USDOC calculated margins of dumping using a W-to-W comparison that included the standard model zeroing procedures. In aggregating the results of the multiple comparisons to obtain the overall weighted average dumping margin, only those comparisons for which there were positive results were taken into account. In this respect, USDOC disregarded any comparisons with a negative value. As a result, the sum total amount of dumping was inflated by an amount equal to the excluded negative values. Without zeroing, the results of those calculations would have been lower.

[101] Exhibit EC-26, Appendix III, p. 31 of the Program Code, Calculate overall margin.
[102] Exhibit EC-26, Appendix IV, p. 56 of the Program Log, Calculate overall margin.
[103] Exhibit EC-26, Appendix V.
[104] Exhibit EC-26, Appendix V, p. 23.

(b) Violation of Article 2.4.2 of the Anti-Dumping Agreement

142. The European Communities submits that the "model zeroing" method used by the United States in this case is not in conformity with its obligations contained in Article 2.4.2 of the *Anti-Dumping Agreement*.

143. As mentioned in Section III.A, several panels and the Appellate Body have repeatedly found inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*[105] the use of "model zeroing" in original investigations. In particular, in a recent case, *i.e.*, *US – Anti-Dumping Measure on Shrimp from Ecuador*, the panel, after explaining the Appellate Body's reasoning on this issue in *US – Softwood Lumber V*, affirmed that:

> We further note that the Appellate Body report in *US – Zeroing (EC)* also referred to its reasoning and findings in *US – Softwood Lumber V*. In our view, **there is now a consistent line of Appellate Body reports**, from *EC – Bed Linen to US – Zeroing (EC)* **that holds that "zeroing" in the context of the weighted average-to-weighted average methodology in original investigations (first methodology in the first sentence of Article 2.4.2) is inconsistent with Article 2.4.2**.[106] (emphasis added)

144. The European Communities submits that, following the findings of the Appellate Body in the above-mentioned disputes, the Panel in the present case should conclude on the same basis that zeroing in the context of the weighted average-to-weighted average methodology in original investigations is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

145. The European Communities also notes that the United States failed to contest the claim of inconsistency with Article 2.4.2 of the *Anti-Dumping Agreement* before the Appellate Body in *US – Zeroing (EC)* as well as before the panels in *US –Zeroing (Japan)*, and *US – Zeroing (Ecuador)*. In fact, USDOC has published a Notice indicating its intention to eliminate the use of zeroing in original investigations when comparisons are made on an average-to-average basis.[107]

146. Regardless of this, for the sake of completeness, the arguments supporting the claim that the United States failed to complied with Article 2.4.2 of the *Anti-Dumping Agreement* when using "model zeroing" in original investigations are explained and detailed below.

(i) "Dumping" and "margins of dumping" are determined with respect to a product as a whole

147. Article 2.4.2 of the *Anti-Dumping Agreement* provides that:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of **margins of dumping** during the investigation phase shall normally be established

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[105] See Panel Report, *EC – Bed Linen*, para. 6.119; Appellate Body Report, *EC – Bed Linen*, para. 66; Panel Report, *US – Lumber V*, para. 7.224; Appellate Body Report, *US – Lumber V*, para. 117; Panel Report, *US – Zeroing (EC)*, para. 7.32; Panel Report, *US – Shrimp from Ecuador*, para. 7.43.

[106] Panel Report, *US – Shrimp (Ecuador)*, para. 7.40.

[107] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 FR 77722 (USDOC) (27 December 2006) (final modification), stating that it is "modifying its methodology in antidumping investigations" to "no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons". *See* also *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations*, 72 FR 3783 (USDOC) (26 January 2007), stating that the effective date for implementation of this modification was 22 February 2007. In addition, on 9 April 2007 the United States publicly announced that it is implementing the WTO panel decision in *US – Zeroing (EC)* with respect to twelve original determinations disputed in that case (Exhibit EC-27).

> on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

148. Article 2.1 of the *Anti-Dumping Agreement* provides that:

> For the purpose of this Agreement, **a product** is to be considered as being **dumped**, i.e. introduced into the commerce of another country at less than its 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)

149. This definition reiterates the definition of "dumping" in Article VI:1 of the GATT 1994.[108] Thus, it is clear from Article 2.1 that "dumping" is determined in relation to a specific product as defined by the investigating authority. As noted by the Appellate Body, Article 2.1 of the *Anti-Dumping Agreement* makes "clear (…) that dumping is defined in relation to a product as a whole", and not in relation to a "type, model or category" of a product".[109] Given that Article 2.1 applies to the entire *Anti-Dumping Agreement* (since Article 2.1 clearly indicates that the definition included therein is laid down "for the purpose of this Agreement"), it also applies to Article 2.4.2 of the *Anti-Dumping Agreement* and, thus, "margins of dumping" under Article 2.4.2 must also be established for the product as a whole.[110]

150. Consequently, it flows from Article VI:1 of the GATT 1994 and Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* that "dumping" and "margin of dumping" can only exist with respect to the product as a whole and not with respect to a category, type or model of that product.

151. Other provisions in the *Anti-Dumping Agreement* also provide contextual support to this conclusion. First, Article VI:2 of the GATT 1994 provides that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount that the margin of dumping in respect of that product". Second, Article 9.2 of the *Anti-Dumping Agreement* also refers to the imposition of an anti-dumping duty with respect to *a product*. Third, Article 6.10 of the *Anti-Dumping Agreement* also states that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of *the product under investigation*". Thus, in light of these provisions, it clear that "dumping" and "margins of dumping" can only be defined with respect to a product and not with respect to a category, model or type of that product.

152. The necessity to determine margins of dumping for the product as a whole does not prevent, however, investigating authorities from calculating intermediate results with respect to various averaging groups. In other words, investigating authorities are entitled to calculate a dumping margin on the basis of multiple comparisons for sub-divisions of the product.[111] However, the results of these multiple comparisons at the sub-group level do not constitute "margins of dumping" within the

[108] Appellate Body Report, *US – Softwood Lumber V*, para. 92.

[109] Appellate Body Report, *US – Softwood Lumber V*, para. 93, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 126.

[110] Appellate Body Report, *US – Softwood Lumber V*, para. 93 and 96.

[111] *Id.*, para. 97.

meaning of Article 2.4.2 of the *Anti-Dumping Agreement* but only intermediate calculations.[112] It is only on the basis of aggregating all these intermediate values that an investigating authority can establish a margin of dumping for the product under investigation as a whole.[113]

153. As the Appellate Body pointed out in *US – Softwood Lumber V*, this analysis is not affected by the use of the plural "margins of dumping" in article 2.4.2 of the *Anti-Dumping Agreement*. Indeed, pursuant to Article 6.10 of the *Anti-Dumping Agreement* which provides that authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation, as soon as there are more than one producer or exporter in an investigation, there should be several dumping margins. Similarly, nothing precludes investigating authorities to investigate more than one country in a single proceeding.[114] For these reasons, a single proceeding may result in more than one margin of dumping. Therefore, the plural used in Article 2.4.2 of the *Anti-Dumping Agreement* with respect to margins of dumping has logic to it, independently from the fact that investigating authorities choose to calculate dumping on the basis of averaging groups.

154. This analysis is similarly unaffected by the use of the word "comparable" in Article 2.4.2 of the *Anti-Dumping Agreement*. From the moment the investigating authorities define the product under investigation and consider that it was sufficiently comparable to justify the calculation of a single dumping margin and the imposition of a singe duty, the investigating authority is not entitled to decide that certain models, namely those where the "export price" exceeded the "normal value", have ceased to become comparable.

155. Accordingly, in determining the existence of dumping, and in calculating the margin of dumping for the product as a whole, Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, together with Articles VI:1 and VI:2 of the GATT 1994, prohibit a Member from disregarding the results of any multiple comparisons undertaken by the authorities. As explained below, in the case at hand, the United States failed to comply with these requirements.

(ii) The United States failed to establish the margin of dumping with respect to the product concerned as a whole

156. In this case, the United States defined the product as follows: "all purified carboxymethylcellulose (CMC), sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off–white, non–toxic, odorless, biodegradable powder, comprising sodium CMC that has been refined and purified to a minimum assay of 90 per cent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross–linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by–product portion of the product to less than ten percent. The merchandise subject to this investigation is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 3912.31.00". The United States then decided to make "averaging groups" for the purpose of determining dumping and calculating the dumping margins for each exporter. The European Communities submits that while the United States was entitled to calculate dumping on the basis of multiple comparisons at sub-group levels, this could not be done in breach of the requirements of Article 2.4.2, namely to determine dumping margins for the product as a whole.

157. When combining the intermediate results calculated for each averaging group, in order to calculate the margin of dumping of the product under investigation, the United States disregarded

[112] *Id.*

[113] *Id.*, paras 93 and 99: "We see no basis, under the *Anti-Dumping Agreement*, for treating the very same sub-group transactions as "non-dumped" for one purpose and "dumped" for other purposes".

[114] Articles 3.3(a) and 6.10 of the *Anti-Dumping Agreement*.

those averaging groups for which the export price exceeded the normal value, thereby inflating the overall margin of dumping for the product concerned.[115]

158. For these reasons, the European Communities considers that the United States, once having defined the product subject to the anti-dumping proceeding, could not zero the negative intermediate results calculated for certain averaging groups. This is inconsistent with the obligation arising under Article 2.4.2 of the *Anti-Dumping Agreement*.

(c) Violation of Article 2.4 of the Anti-Dumping Agreement

159. The European Communities also submits that the United States failed to comply with the basic principle of *fair comparison* enshrined in Article 2.4 of the *Anti-Dumping Agreement* when applying model zeroing in the case at hand.

(i) "Fair comparison": an independent and overarching obligation

160. Pursuant to Article 2.1 of the *Anti-Dumping Agreement*, in order to determine whether dumping has occurred with respect to a given product, a comparison must be made between the normal value and export price of that product. Article 2.4 of the *Anti-Dumping Agreement* clarifies how this comparison must be made. It provides that:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

161. Thus, the first sentence of Article 2.4 requires that a fair comparison be made between the export price and normal value. This requirement under Article 2.4 to make a fair comparison between the export price and the normal value constitutes an *independent* and *overarching* obligation. In other words, the scope of the "fair comparison" requirement in Article 2.4 is not exhaustively determined by the remainder of the paragraph regarding the steps to be taken to carry out price comparability.[116] It means that the legal obligation created by the first sentence of Article 2.4 is independent from the other obligations created in the second and third sentences of Article 2.4 of the *Anti-Dumping Agreement*.

162. This interpretation is confirmed by the modification brought to that provision in the Uruguay Round *Anti-Dumping Agreement*. Indeed, the text of the Uruguay Round *Anti-Dumping Agreement* contains an important and significant innovation by comparison with the text of the previous Tokyo

[115] See Exhibit EC-26, Appendix IV (Program Log used in this case containing the zeroing line – WHERE EMARGIN GT 0).

[116] Panel Report, *US – Zeroing (EC)*, para. 7.2; and Appellate Body Report, *US – Zeroing (EC)*, para. 146.

Round Anti-Dumping Code, in which the equivalent or similar provisions to the first and second sentences of Article 2.4 of the Uruguay Round *Anti-Dumping Agreement* were contained in the same sentence.[117] In the Uruguay Round *Anti-Dumping Agreement*, however, the words "fair comparison (…) between the export price and the normal value" were lifted up and placed on their own in a new first sentence of Article 2.4. This change confirms that Article 2.4 contains and overarching and independent obligation to make a fair comparison.

(ii) "Fair comparison": a general obligation

163. The requirement pursuant to Article 2.4 to make a fair comparison between the export price and the normal value is not limited to the price comparability under paragraph 4 of Article 2. In other words, the "fair comparison" obligation constitutes a *general* obligation which applies not to only to price comparability under Article 2.4 but also to sub-paragraphs 2.4.1 and 2.4.2.

164. This is supported by the fact that Article 2.4.2 expressly indicates that the rule included therein is "subject to the provisions governing fair comparison in paragraph 4".

165. The general character of the "fair comparison" obligation has been underlined by the Appellate Body in *EC – Bed Linen*:

> "Article 2.4 sets forth **a general obligation** to make a "fair comparison" between export price and normal value. This is a general obligation, that, in out view, informs all of Article 2 but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparisons in [Article 2.4]."[118] (emphasis added)

(iii) Unfairness of the model zeroing comparison method used by the United States

166. The European Communities submits that the obligation imposed by Article 2.4 of the *Anti-Dumping Agreement* to conduct a fair comparison precluded the model zeroing comparison method used by the United States in this case.

167. The term "fair" is generally understood to connote impartiality, even-handedness or lack of bias.[119] However, the use of model zeroing under the weighted average-to-weighted average comparison methodology when aggregating the results of the "averaging groups" comparisons for purposes of calculating the "margins of dumping" is inherently biased.

168. The model zeroing comparison method involves an unfair comparison. By excluding the negative results of any comparisons from the aggregation of total dumping, the zeroing procedures overstate the total amount of dumping by an amount equal to the excluded negative values. As a result, the dumping margin is inflated. Moreover, in situations where the aggregate value of excluded negative results exceeds the aggregate value of the included positive results, the zeroing procedures produce a dumping determination where the product as a whole is not dumped. In consequence,

---

[117] Tokyo Round Anti-Dumping Code, Article 2.6, first sentence: "In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1 (b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time".

[118] Appellate Body Report, *EC – Bed Linen*, para. 59; see also Panel and Appellate Body Reports, *US – Zeroing (EC)*, paras 7.254- 7.255 and 146 respectively.

[119] According to the dictionary, fair means "just, unbiased, equitable, impartial, legitimate, in accordance with the rules of standards" and "offering an equal chance of success" (Shorter Oxford English Dictionary; 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol.1, p.915), quoted by the Appellate Body in *US – Lumber V (Article 21.5)*, para. 138.

USDOC conducts its investigation "in such a way that it becomes *more likely* that [it] will determine that" there is dumping.[120] By rendering a dumping determination more likely, and by systematically inflating the dumping margin, the zeroing procedures deprive the comparison of normal value and export price of even-handedness. Instead, the procedures systematically favour the interests of petitioners, and systematically prejudice the interests of exporters.

169. The use of model zeroing could even lead to a situation where dumping is found while there is in fact no dumping. In the case at hand, the dramatic effect which the inherently biased zeroing method used by the United States had on the outcome of the calculation for Noviant B.V. was an automatic increased in the duties by 2.73 per cent. The other exporting companies were also subject to the same calculation, leading to the same inflationary effect on the margins of dumping calculated.

170. Therefore, the method of zeroing which the United States employs is biased because when an exporter makes some sales above normal value and some sales below normal value, the use of zeroing will inevitably result in a margin higher than would otherwise be calculated. A methodological choice that systematically and inevitably results in a higher margin when there has been no change in pricing behaviour is inherently biased and unfair and is thus inconsistent with the *Anti-Dumping Agreement*.

(iv) Existing case-law confirms United States model zeroing unfair

171. The above-mentioned conclusions are confirmed by the findings of the Appellate Body in the *EC – Bed Linen* case:

> "Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value.[121]
>
> Furthermore, we are also of the view that a comparison between export price and normal value that does *not* fully take into account the prices of *all* comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2".[122]

172. They are further confirmed by the findings of the Appellate Body in *US-Carbon Steel from Japan*:

> "However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provision in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*.[123]
>
> It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood

[120] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.
[121] Appellate Body Report, *EC – Bed Linen*, para. 59.
[122] *Id.* para. 55.
[123] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 127.

> determination to be made in a sunset review under Article 11.3. Accordingly, we reverse the Panel's consequential finding, in paragraph 8(1)(d)(ii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4.[124]
>
> As explained above, if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too. Thus, the consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of USDOC's likelihood determination in the CRS sunset review. In the CRS sunset review, USDOC based its determination that "dumping is likely to continue if the [CRS] order were revoked" on the "existence of dumping margins" calculated in the administrative reviews. If these margins were indeed calculated using a methodology that is inconsistent with Article 2.4 – an issue that we examine below – then USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3".[125]

173. The Appellate Body went on to recall its findings in the *EC – Bed Linen* case, and 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 recognized 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**."[126] (emphasis added)

174. These conclusions were again confirmed by the panel in *US – Softwood Lumber V*, the issue before the panel being whether United States model zeroing was "consistent with the obligations imposed by Article 2.4.2 and the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*".[127] The Appellate Body in that case again found that:

> "[z]eroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as whole."

[124] *Id.*, para. 128.
[125] *Id.*, para. 130.
[126] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[127] Panel Report, *US – Softwood Lumber V*, paras 7.196.

175. Finally, the Appellate Body in *US – Zeroing (Japan)*, again, confirmed that the use of model zeroing in original investigations was, as such, inconsistent, *inter alia*, with the fair comparison principle enshrined in Article 2.4 of the *Anti-Dumping Agreement*.[128]

(v) The United States failed to carry out a fair comparison

176. The European Communities submits that, in the present case, the model zeroing methodology used by the United States involved an inherent bias that had the effect of inflating the margin of dumping. The determination in this case was therefore inconsistent with the obligation imposed on the United States by Article 2.4 of the *Anti- Dumping Agreement* to make a fair comparison between normal value and export price. The model zeroing method used by the United States was not fair within the meaning of Article 2.4 of the *Anti-Dumping Agreement*. It failed to duly reflect the actual prices of the export transactions that took place during the period of investigation, as it should have done once the United States had fixed the parameters of its investigation in terms of subject product.

(d) Conclusions

177. In light of the foregoing, the European Communities submits that the United States violated Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994 when using model zeroing in the original investigation proceedings mentioned in the Annex to the Panel request as Case XVI.

1.2 Other Measures at Issue

178. The European Communities submits that the other three original investigations contained in the Annex to the request for establishment of the Panel are inconsistent with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* on the basis of the same arguments mentioned above. For the sake of simplicity, the European Communities will not repeat the arguments mentioned before. Instead, in Exhibits EC-28 to 30, the relevant sections of the United States' determination showing the use of model zeroing are mentioned.

1.3 Conclusions

179. From the foregoing, the European Communities concludes that the United States violated Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994 when applying model zeroing in the 4 original investigation proceedings mentioned in the Annex to the Panel request.

2. Administrative Reviews

180. The European Communities considers that the United States has failed to comply with its obligations under the *Anti-Dumping Agreement* and the GATT 1994 with respect to the determinations carried out in the administrative review investigations contained in the Annex to the request for establishment of the Panel.

181. The European Communities will describe below the main facts and findings made by the United States in **Case II**, *Ball Bearings and Parts Thereof – Italy (A-475-801), No. 5* (Exhibit EC-31), and the violations of the *Anti-Dumping Agreement* and the GATT resulting thereof. For the sake of simplicity, the European Communities will not repeat the same arguments with respect to the other administrative review proceedings. The relevant sections of USDOC determination showing the use of simple zeroing will be mentioned instead.

[128] Appellate Body Report, *US – Zeroing (Japan)*, paras 146 and 147.

2.1 Ball Bearings from Italy (A-475-801)

(a) The measure at issue

182. In the "Final Results of Anti-Dumping Duty Administrative Reviews", Notice published in the Federal Register[129], margins of dumping of 7.65 per cent and of 2.52 per cent were calculated respectively for *SKF Italy* and for *FAG Italy*.

183. At point 1 of the Issues and Decision Memorandum, entitled "Offsetting of Negative Margins", USDOC states its position with regard to the respondent's arguments concerning zeroing. USDOC refers to its established practice. It explains that it considers itself directed by United States Statute to use the zeroing methodology. In particular, USDOC insists on the definition of "dumping margin" in Section 771(35)(A) of the Act which is the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise". According to USDOC, this means that a dumping margin exists only when normal value is greater than the export price or the Constructed Export Price (CEP). As no dumping margins exist with respect to sales where normal value is equal to or less than export or CEP, USDOC did not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. USDOC also considered that it had no obligation to act on the basis of Appellate Body reports in *US – Softwood Lumber* and *US – Zeroing (EC).*[130]

184. The application of the standard program and, thus simple zeroing, to *FAG Italy* was reflected in the Final Margin Program Log as follows:[131]

> MPRINT(US14_MARGINS): PROC MEANS NOPRINT DATA = MARGCALC;
> MPRINT(US14_MARGINS): **WHERE EMARGIN GT 0**;
> MPRINT(US14_MARGINS): VAR EMARGIN QTYU USVALUE;
> MPRINT(US14_MARGINS): WEIGHT WTFACT
> MPRINT(US14_MARGINS): OUTPUT OUT = ALLPUDD (DROP=_FREQ_ _TYPE_) SUM = TOTPUDD MARGQTY MARGVAL;
> MPRINT(US14_MARGINS): RUN;
> NOTE: There were [155] observations read from the data set WORK.MARGCALC.
> WHERE EMARGIN>0;
> NOTE: The data set WORK.ALLPUDD has [1] observations and [3] variables.
> NOTE: PROCEDURE MEANS used (Total process time):
> real time 0.01 seconds
> cpu time 0.02 seconds

185. In the Final Margin Program Log with respect to *SKF Italy*, the application of the standard program and, thus simple zeroing, was reflected as follows:[132]

> MPRINT(US14_MARGINS): PROC MEANS NOPRINT DATA = MARGCALC;
> MPRINT(US14_MARGINS): **WHERE EMARGIN GT 0**;
> MPRINT(US14_MARGINS): VAR EMARGIN QTYU USVALUE;
> MPRINT(US14_MARGINS): WEIGHT WTFACT
> MPRINT(US14_MARGINS): OUTPUT OUT = ALLPUDD (DROP=_FREQ_ _TYPE_) SUM = TOTPUDD MARGQTY MARGVAL;
> MPRINT(US14_MARGINS): RUN;
> NOTE: There were [ ] observations read from the data set WORK.MARGCALC.

[129] Exhibit EC-31, Appendix I.
[130] Exhibit EC-31, Appendix II, p. 11.
[131] Exhibit EC-31, Appendix III, p. 41.
[132] Exhibit EC-31, Appendix IV, pp. 43-44.

WHERE EMARGIN>0;
NOTE: The data set WORK.ALLPUDD has [ ] observations and [3] variables.
NOTE: PROCEDURE MEANS used (Total process time):
real time 0.00 seconds
cpu time 0.01 seconds

186. In both cases, when zeroing is not applied, the dumping calculations with respect to *FAG Italy* and *SKF Italy* show no dumping. In fact, the dumping margin would have been negative. The tables containing the calculations with respect to FAG Italy without zeroing show that, with the same data, the final anti-dumping margin would have been negative, -30.27 (*i.e.*, by taking 100 per cent of the transactions and taking account of all positive and negative instances of dumping found, no dumping took place).[133] By contrast, the use of zeroing in this case resulted in duties being imposed at 2.52 per cent.

187. Likewise, the tables containing the calculations with respect to *SKF Italy* without zeroing show that, with the same data, the final anti-dumping margin would have been negative, -4.00.[134] By contrast, the use of zeroing in this case resulted in duties being imposed at 7.65 per cent.

188. Consequently, in this case, to determine the anti-dumping duties to be collected for entries made during the period of review (*i.e.*, the assessment rate), and to determine the deposit rate for future entries, USDOC calculated margins of dumping using a W-to-T comparison that included the standard simple zeroing procedures. USDOC, therefore, made multiple comparisons between a weighted normal value and export price for a series of comparable individual export transactions. In terms of USDOC's standard simple zeroing procedures, in aggregating the results of the multiple transaction-based comparisons to obtain the overall weighted average dumping margin, only those comparisons for which there were positive results were taken into account. In other words, USDOC disregarded any comparisons with a negative value. As a result, the sum total amount of dumping was inflated by an amount equal to the excluded negative values. Without zeroing, the results of those calculations would have been negative for each of these two respondents, and no anti-dumping duties would have been assessed or collected.

(b) Violation of Articles 2.1, 2.4, 2.4.2 and 9.3 of the Anti-Dumping Agreement

189. The European Communities considers that, by using the simple zeroing methodology in the administrative review at issue, the United States acted in a manner inconsistent with Articles 2.1, 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement*. This is so because USDOC determination did not reflect the margin of dumping for the product as a whole. Rather, USDOC used, without justification, an asymmetrical method of comparison between normal value and export price. USDOC, therefore, did not comply with its obligation to ensure that the amount of the anti-dumping duty collected does not exceed the margin of dumping in accordance with Article 9.3 of the *Anti-Dumping Agreement*.

190. The administrative review concerned includes final retrospective assessments as provided for in Article 9.3.1 of the *Anti-Dumping Agreement*. It is therefore not disputed that such administrative review must be consistent with, *inter alia*, the relevant obligations set out in Article 9.3 of the *Anti-Dumping Agreement*, which provides that:

> "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."

[133] Exhibit EC-31, Appendices V and VII.
[134] Exhibit EC-31, Appendices VI and VIII.

191. Article 9.3 of the *Anti-Dumping Agreement* does not prescribe a specific methodology according to which the duties should be assessed. As noted by the Appellate Body in *US – Zeroing (EC)*:

> "In particular, a reading of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 does not suggest that final anti-dumping duty liability cannot be assessed on a transaction- or importer-specific basis, or that the investigating authorities may not use specific methodologies that reflect the distinct nature and purpose of proceedings governed by these provisions, for purposes of assessing final anti-dumping duty liability, provided that the total amount of anti-dumping duties that are levied does not exceed the exporters' or foreign producers' margins of dumping."[135]

192. However, although Article 9.3 of the *Anti-Dumping Agreement* does not prescribe a specific methodology according to which the duties should be assessed, it sets out a requirement regarding the amount of the anti-dumping duties to be assessed. As noted by the Appellate Body:

> "[I]nvestigating authorities are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping as established for that exporter. In other words, the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding".[136] (emphasis added)

193. Given that Article 9.3 explicitly refers to Article 2 of the *Anti-Dumping Agreement*, it must be ensured that the margins of dumping which operate as a *ceiling* for the amount of assessed anti-dumping duties are established in accordance with Article 2.[137]

(i) The duty must not exceed the margin of dumping as determined with respect to the product as a whole

194. As discussed above in Section III.D.1.1(b)(i), "dumping" and "margins of dumping" as defined in Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* are concepts that are strictly defined in relation to the "product" under investigation.[138] The terms "dumping" and "dumping margins" in the *Anti-Dumping Agreement*, therefore, apply to the product under investigation *as a whole* and do not apply to sub-group levels.[139] These definitions apply throughout the Agreement in each of the five types of anti-dumping proceeding (including original investigations and administrative reviews) and with respect to all comparison methodologies (*i.e.*, comparisons made on an average-to-average, transaction-to-transaction, and average-to-transaction basis).[140]

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[135] Appellate Body Report, *US – Zeroing (EC)*, para. 131.
[136] Appellate Body Report, *US – Zeroing (EC)*, para. 130.
[137] This is, in addition, consistent with the Appellate Body's finding in *US – Corrosion Steel Sunset Review* according to which "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins" (para. 127).
[138] Appellate Body Report, *US – Zeroing (Japan)*, para. 110.
[139] Appellate Body Report, *US – Softwood Lumber V*, para. 102.
[140] *Id.*, para. 93; and Appellate Body Report, *US – Zeroing (Japan)*, para. 115.

195. Investigating authorities may undertake multiple intermediate comparisons between a weighted average "normal value" and individual export transactions. However, the results of such multiple comparisons are not "margins of dumping" within the meaning of Article 9.3 of the *Anti-Dumping Agreement*. It is only on the basis of aggregating all these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole.[141]

196. The European Communities argues that the simple zeroing used by USDOC in the administrative review at issue did not allow for the calculation of the margin of dumping for the product as a whole. As explained before, USDOC disregarded the results of the intermediate comparisons when the export price exceeded the contemporaneous average normal value when calculating the overall margin of dumping for determining the new exporter-specific cash deposit and importer-specific assessment rates. By systematically disregarding intermediate price comparison results where the export price exceeds the normal value, the margin of dumping determined by USDOC only *partially* reflects the transactions under consideration and, therefore, fails to reflect the product as a whole.

197. Accordingly, in the administrative review at issue, the amount of duties assessed by USDOC exceeded the foreign producer's or exporter's margin of dumping for the product under consideration under Article 2. The European Communities submits that this directly violates the obligation to calculate the margin of dumping for the product as a whole and results in collections above the *ceiling* established pursuant to Article 2 of the *Anti-Dumping Agreement*, and inflated cash deposit rates, and are, therefore, inconsistent with Articles 2 and 9.3 of the *Anti-Dumping Agreement*.[142]

(ii) The duty must not exceed the dumping margin established in accordance with the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement

198. As a preliminary observation, it should be underlined, as noted by the Appellate Body, that one implication of the fact that the fair comparison is expressed in terms of a general and abstract standard is that this requirement is also applicable to proceedings governed by Article 9.3 of the *Anti-Dumping Agreement*.[143]

199. The European Communities submits that the simple zeroing method used by the United States in the relevant measures at issue results in the calculation of a margin of dumping, whether expressed as an amount or a percentage rate, that is unbalanced and inherently biased and, therefore, is inconsistent with the fair comparison requirement under Article 2.4 of the *Anti-Dumping Agreement*.

200. As mentioned before, the term "fair" is generally understood to connote impartiality, even-handedness or lack of bias.[144] Rather than being "fair", the use of simple zeroing in administrative reviews is inherently biased because when an exporter makes some sales above normal value and some sales below normal value, the use of zeroing will inevitably result in a margin higher than would otherwise be calculated. This increase in the margin is not attributable to any change in the pricing behaviour of the exporter. Rather, this increase is the direct result of the United States' decision to limit the numerator of its dumping calculation to those transactions with positive intermediate comparison results. A methodological choice that systematically and inevitably results in a higher

[141] Appellate Body Report, *US – Zeroing (EC)*, paras 126 and 132.
[142] *Id.*, para. 133; and Appellate Body Report, *US – Zeroing (Japan)*, para. 155.
[143] Appellate Body Report, *US – Zeroing (EC)*, para. 146.
[144] According to the dictionary, fair means "just, unbiased, equitable, impartial, legitimate, in accordance with the rules of standards" and "offering an equal chance of success" (Shorter Oxford English Dictionary; 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol.1, p. 915), quoted by the Appellate Body in *US – Lumber V (Article 21.5)*, at para. 138.

margin where there has been no change in pricing behaviour is inherently biased and unfair and, thus, inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.

201. These conclusions are confirmed if one considers the situation from the exporter's point of view. Having been made subject to an anti-dumping duty following the original investigation, an exporter will most likely wish to remedy this situation by increasing its prices so as to eliminate the margin of dumping as established during the original investigation. However, the removal of the original margin of dumping will not prevent the exporter from being subject to the further imposition of a duty following a United States "administrative review" of the amount of duty, unless the exporter actually increases its prices by *more than* the margin of dumping. This cannot be consistent with the general overarching principle that comparisons between normal value and export price be fair.

202. As mentioned in Section III.A.2 above, previous panels and Appellate Body reports have confirmed this interpretation of Article 2.4 of the *Anti-Dumping Agreement*. In *EC – Bed Linen*, the Appellate Body noted that:

> "Furthermore, we are also of the view that a comparison between export price and normal value that does *not* fully take into account the prices of *all* comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2".[145]

203. In *US – Carbon Steel from* Japan, the Appellate Body went on to recall its findings in the *EC – Bed Linen* case, and 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 recognized 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".[146] (*emphasis added*)

204. These conclusions were again essentially confirmed by the panel in *US – Softwood Lumber V*, the issue before the panel being whether United States model zeroing was "consistent with the obligations imposed by Article 2.4.2 and the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*"[147]. The Appellate Body in that case again found that:

> "[z]eroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as whole".[148]

[145] Appellate Body Report, *EC – Bed Linen*, para 55.
[146] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para 135.
[147] Panel Report, *US – Softwood Lumber V*, paras 7.196.
[148] Appellate Body Report, *US – Softwood Lumber V*, para 101.

205. Similarly, in *US – Lumber V (Article 21.5 – Canada)*, the Appellate Body concluded that the use of zeroing in the Section 129 Determination is inconsistent with Article 2.4:

> "The term "fair" is generally understood to connote impartiality, even handedness, or lack of bias. For the reasons stated below, we consider that the use of zeroing under the transaction-to-transaction comparison methodology is difficult to reconcile with the notions of impartiality, evenhandedness, and lack of bias reflected in the "fair comparison" requirement in Article 2.4.
>
> First, the use of zeroing under the transaction-to-transaction comparison methodology when aggregating the transaction-specific comparisons for purposes of calculating the "margins of dumping", distorts the prices of certain export transactions because export transactions made at prices above normal value are not considered at their real value. The prices of these export transactions are artificially reduced when zeroing is applied under the transaction-to-transaction comparison methodology. As the Appellate Body explained in the original dispute, "[z]eroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are".
>
> Secondly, the use of zeroing in the transaction-to-transaction comparison methodology, as in the weighted average-to-weighted average methodology, tends to result in higher margins of dumping. As the Appellate Body underscored in *US – Corrosion-Resistant Steel Sunset Review*, the use of zeroing:
>
> ... 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. ... 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.
>
> In sum, the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. This way of calculating cannot be described as impartial, even-handed, or unbiased. For this reason, we do not consider that the calculation of "margins of dumping", on the basis of a transaction-to-transaction comparison that uses zeroing, satisfies the "fair comparison" requirement within the meaning of Article 2.4 of the *Anti-Dumping Agreement*".[149]

206. Finally, in *US – Zeroing (Japan)*, the Appellate Body stated with respect to zeroing in administrative reviews that:

> "If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a "fair comparison" within the meaning of the first sentence of Article 2.4. This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2, as we have explained previously. Therefore, Panels and the Appellate Body have clarified that the use of model

[149] Appellate Body Report, *US – Lumber V (Article 21.5 – Canada)*, paras 139 to 142.

> zeroing in administrative reviews runs against the fair comparison obligation contained in Article 2.4 of the Anti-Dumping Agreement".[150]

207. The European Communities submits that, in the present case, the zeroing methodology used by the United States involved an inherent bias that had the effect of inflating (or super-inflating) the margin of dumping, and even of turning a negative margin into a positive one.[151] Indeed, the calculations with respect to *FAG Italy* with and without zeroing show that, with the same data, the final anti-dumping margin ranges from -30.27 to 2.52 per cent. A range from -4.00 to 7.65 per cent can be seen with respect to *SKF Italy*. The determination in this case was, therefore, inconsistent with the obligation imposed on the United States by Article 2.4 of the *Anti-Dumping Agreement* to make a fair comparison between normal value and export price.

208. Consequently, the simple zeroing method used by the United States in this case was not fair within the meaning of Article 2.4 of the *Anti-Dumping Agreement*.

(iii) Violation of Article 2.4.2 of the Anti-Dumping Agreement

209. The European Communities submits that by using the asymmetrical method of comparison of the second sentence of Article 2.4.2 and by using simple zeroing in the measure at issue, the United States breached Article 2.4.2 of the *Anti-Dumping Agreement*.

210. Article 2.4.2 of the *Anti-Dumping Agreement* provides that:

> "Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

211. Article 2.4.2 thus sets out three comparison methodologies that investigating authorities may use to calculate dumping margins. The first sentence of Article 2.4.2 provides for two comparison methodologies involving symmetrical comparisons of normal value and export price (weighted average-to-weighted average and transaction-to-transaction comparisons). Article 2.4.2 stipulates that these two methodologies "shall normally" be used by investigating authorities to establish margins of dumping. As an exception to the two normal methodologies, the second sentence of Article 2.4.2 sets out a third comparison methodology which involves an asymmetrical comparison between weighted average normal value and prices of individual export transactions. This methodology may only be used if the circumstances defined in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement* are met.

212. The European Communities will address below the issue of the application of Article 2.4.2 of the *Anti-Dumping Agreement* to all types of investigations undertaken pursuant to Article VI of the GATT 1994 and the *Anti-Dumping Agreement* in which margins of dumping are calculated or relied upon. In this respect, the European Communities submits that Article 2.4.2 of the *Anti-Dumping*

[150] Appellate Body Report, *US – Zeroing (Japan)*, at para. 168.
[151] Exhibit EC-31, Appendices V to VIII.

Agreement applies not only in the context of original investigation proceedings but also in the context of review proceedings, including "administrative reviews".

(1) Interpretation of the term "the existence of margins of dumping during the investigation phase"

213. Article 2.4.2 refers to the determination of the "existence of margins of dumping during the *investigation* phase" (emphasis added). The ordinary meaning of the word "investigation" indicates a systematic examination or inquiry or a careful study of or research into a particular subject.[152] According to the European Communities, what that particular subject is may be limited by the terms of a particular provision of the *Anti-Dumping Agreement*.

214. For instance, Article 5.1 of the *Anti-Dumping Agreement* refers to an investigation "to determine the existence, degree and effect of any alleged dumping" such as is conducted in an original investigation (emphasis added). The words in inverted commas would be redundant if the United States' previous assertions about the "limited" or special meaning of the word investigation would be correct. Similarly, Article 9.5 of the *Anti-Dumping Agreement* calls for an investigation into the existence and degree of dumping by a new shipper; Article 11.2 of the *Anti-Dumping Agreement* calls for an investigation into whether or not the continued imposition of the duty is necessary to offset dumping or whether injury would be likely to continue or recur if the duty were removed or varied; Article 11.3 of the *Anti-Dumping Agreement* calls for an investigation into whether or not the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury; and Article 9.3.1 of the *Anti-Dumping Agreement* calls for an investigation into the amount of anti-dumping duty that should be retrospectively assessed.

215. It is apparent that in all the above cases, and particularly when assessing the amount of duty to be paid under its system of retrospective assessment, an investigating authority is required to engage in a "systematic examination" or a "careful study". Article 2.4.2 of the *Anti-Dumping Agreement* contains no limiting language in that regard. To read any other limiting language –such as that found in Article 5.1 of the *Anti-Dumping Agreement*– into Article 2.4.2 of the *Anti-Dumping Agreement*, when there is simply no such language there, would thus be legally incorrect.

216. This good faith interpretation is confirmed by the ordinary meaning of all the terms in the phrase, considered in isolation and together, including the grammatical structure of the phrase, in its context and having regard to its object and purpose. It is also unequivocally confirmed by the preparatory work.

(2) Context of Article 2.4.2 of the Anti-Dumping Agreement

217. The application of Article 2.4.2 to all types of investigations in which margins of dumping are calculated or relied upon is supported by the context of Article 2.4.2 of the *Anti-Dumping Agreement*, in particular Article VI of the GATT 1994 as well as Article 9.3 of the Anti-Dumping Agreement.

218. Article 2.4.2 contains one direct link to other treaty terms: the term "margins of dumping" in Article 2.4.2 has a special defined meaning as provided for in Article VI:2 of the GATT 1994. Article VI:1 of the GATT 1994 defines the word "dumping" whilst Article VI:2 of the GATT 1994 defines the term "margin of dumping". Thus, whenever, the *Anti-Dumping Agreement* uses the word "dumping", that word has the special meaning given to the defined term "dumping" and whenever the *Anti-Dumping Agreement* uses the term "margin of dumping", that phrase has the special meaning given to the defined term "margin of dumping". Article 2.1 of the *Anti-Dumping Agreement*

[152] Investigation: "The action or process of investigating; systematic examination; careful research (…). An instance of this; a systematic inquiry; a careful study of a particular subject" (The New Shorter Oxford English Dictionary) (Exhibit EC-32).

implements the definition of "dumping". Similarly, Articles 2.1 to 2.4 of the *Anti-Dumping Agreement* implement the definition of "margins of dumping". There are not other provisions in the *Anti-Dumping Agreement* which concern themselves with how to calculate a margin of dumping.

219. Given that Article 2.4 implements the provisions of Article VI:2 of the GATT 1994 concerning "margins of dumping", it must necessarily apply across the Agreement. The term "margins of dumping" which has a precise definition in Article VI:2 of the GATT 1994 cannot have different meanings in the context of various investigations.

220. As noted by the Appellate Body in *US – Corrosion-Resistant Steel*, in the framework of sunset reviews under Article 11.3 –but this is equally applicable to administrative reviews– "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins".[153]

221. This is logical. If both Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* were limited to "original investigations", that would open up in the *Anti-Dumping Agreement* a vast loophole on the fundamental issue of how to calculate a margin of dumping. In addition, it would make the results of an original investigation effectively worthless. It would void entirely of content the overarching and independent obligation contained in Article 2.4. This would lead to absurd results, in particular in the context of the US anti-dumping system in which the results of retrospective assessments eclipse entirely the results of the original investigation. Indeed, suppose that as a result of an original investigation proceeding without zeroing, duties are imposed at 5 per cent. Assuming that the exporter made the same number of transactions at equal prices during the following year, the use of zeroing in the first administrative review proceeding would automatically inflate the dumping margin and the amount to be collected. In other words, this would thus allow the United States to re-introduce unlawful zeroing methodology by the "back door", in an administrative review conducted as soon as possible following the imposition of duties, the results of which would annul entirely the results of the original investigation proceeding.

222. Also, according to Article 9.3 of the *Anti-Dumping Agreement*, "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The reference to Article 2 must be taken to be a reference to the whole of Article 2. There is no exclusion of parts of Article 2 in that cross-reference. The cross-references in the *Anti-Dumping Agreement* clarify when they refer only to certain paragraphs or sub-paragraphs of an article or when they are restricted some way. This is not the case of the cross-reference in Article 9.3 to Article 2. This confirms that, in the context of Article 9.3, a "margin of dumping" is to be established by reference to the whole of Article 2, consistent with the use of the defined term "margins of dumping" in Article 2.4.2.

(3) Administrative reviews must comply with the requirements of Article 2.4.2 of the Anti-Dumping Agreement

223. In light of the above, the European Communities submits that the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 of the *Anti-Dumping Agreement* is not limited to original investigations but also to other investigation proceedings, *e.g.*, reviews. Indeed, there are five different types of anti-dumping proceedings expressly referred to in the text of the *Anti-Dumping Agreement*: original *proceedings* (see, for example, Article 5.9); changed circumstances *proceedings* (see, for example, Article 9.5 "normal (…) review proceedings"); sunset *proceedings* (see, for example, Article 9.5 "normal (…) review proceedings"); and assessment or refund *proceedings* (see, for example, Article 9.5 "normal (…) review proceedings"). Assessment proceedings under Article 9.3.1 or refund proceedings under Article 9.3.2 are therefore to be

[153] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

distinguished from original proceedings under Article 5. These different types of proceedings have different purposes and are not all subject to all the provisions of the *Anti-Dumping Agreement*.

224. However, all of these proceedings generally involve an investigation into something. In the case of Article 5, an investigation into the existence, degree an effect of any alleged dumping; in the case of Article 9.5 an investigation into the new comer's margin of dumping; in the case of Article 11.2, an investigation into whether or not changed circumstances warrant a variation of the duty; in the case of Article 11.3, an investigation into whether or not expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury; and in the case of Article 9.3, an investigation into the actual (contemporaneous) margin of dumping and final liability for payment of duties. Consistent with the definition of the term "margin of dumping" in Article VI:2 of the GATT 1994, as implemented in all of Article 2, and the cross-reference in Article 9.3 to all of Article 2, whenever an authority investigates or relies on a "margin of dumping" in any of these anti-dumping proceedings, that margin of dumping must be calculated in a manner consistent with Article 2, that is, for the product *as a whole*.

225. Consequently, as explained in Section III.D.1.1(b), since Article 2.4.2 of the *Anti-Dumping Agreement* prohibits the zeroing of negative intermediate results calculated for certain transactions, the United States also violated this provision in the administrative review proceeding at issue pursuant to Article 9.3 of the *Anti-Dumping Agreement*.

(iv) Conclusions

226. In light of the foregoing, the European Communities considers that, by using the simple zeroing methodology in the administrative review at issue, the United States violated Articles 2.1, 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement*, since USDOC's determination did not reflect the margin of dumping for the product as a whole.

(c) Violation of Article 11.2 of the Anti-Dumping Agreement

227. As mentioned in Section II.B.1, as a result of administrative reviews carried out by the United States, duties are collected with respect to a previous period of review (POR) and a revised estimated anti-dumping duty deposit rate is imposed with respect to future imports.

228. The European Communities argues that the United States re-investigation of the cash deposit rate, which is carried out in conjunction with the retrospective assessment proceeding, must also be consistent with the obligations set out in Article 11.2. That provision refers to the re-investigation of the margin of dumping calculated during the original proceeding. The European Communities considers that, if an investigating authority makes or relies on a dumping determination for the purposes of Article 11.2 of the *Anti-Dumping Agreement*, it is bound to establish any such dumping margin in conformity with the provisions of Article 2.4, including Article 2.4.2 of the *Anti-Dumping Agreement*. In this respect, Article 11.2 must be read in conjunction with the other provisions of the *Anti-Dumping Agreement*, including, necessarily, those that contain relevant definitions, such as Article 2, which defines dumping.

229. Article 11.2 of the *Anti-Dumping Agreement* states that:

> "The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[21] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were

> removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.
>
> [21] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article".

230. The focus of Article 11.2 of the *Anti-Dumping Agreement* is on reviewing the need to continue with the anti-dumping duty. The principle remains that insofar as the importing Member needs to consider margins of dumping in the course of an Article 11.2 review, or varies the anti-dumping duty as a result of an Article 11.2 review, the margin of dumping shall be established in accordance with the provisions of Article 2, and the amount of anti-dumping duty shall not exceed the margin of dumping so established.

231. The European Communities submits that the reassessment of a cash-deposit rate to be applied to future entries also constitutes a "review" of whether the continued imposition of the anti-dumping duty is necessary to counteract dumping that is causing injury.

232. The European Communities is of the view that "administrative reviews" carried out by the United States comprise two steps: first, the determination of the definitive amount of duties; and, second, the establishment of new exporter-specific deposit rates for future entries. In this respect, the first part would be covered by the provisions in Article 9.3 whereas the second part would fall under Article 11.2 of the *Anti-Dumping Agreement*.

233. Footnote 21 to the *Anti-Dumping Agreement*, in the context of Article 9.3.1, does not contradict this conclusion. This Footnote states that:

> "A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article [Article 11.2 *Anti-Dumping Agreement*]."

234. The European Communities would like to draw the Panel's attention to the words "by itself". Indeed, the collection of final duties pursuant to an administrative review falls under Article 9.3.1 of the *Anti-Dumping Agreement*, which calls for an investigation into the amount of anti-dumping duty that should be retrospectively assessed. This, *by itself*, does not constitute a "review" pursuant to Article 11.2 of the *Anti-Dumping Agreement*. By contrast, the imposition of new deposit rates for future entries after a reassessment of the dumping margin, something which is different from the collection of definitive duties, also amounts to a "review" of whether the continued imposition of the anti-dumping duty is necessary to counteract dumping that is causing injury.

235. In this respect, the European Communities wishes to add that the effects of reviews pursuant to Article 11.2 of the *Anti-Dumping Agreement* and the reassessment of deposit rates for future entries in administrative reviews are the same. Indeed, in administrative reviews[154], the United States fixes an up-dated period of review, gathers all necessary data about normal value and export price during that new period, re-calculate normal values and export prices, make a comparison and re-calculate a margin of dumping. In this sense, the Unites States reviews the current duty levels in light of the most recent data, assesses final liability for anti-dumping duties and imposes new deposit rates for future entries.

236. In this specific measure at issue, as mentioned in Section III.D.2.1, as a result of the unlawful zeroing method described in this submission, the margin of dumping determined by the United States

[154] See Section II.B above.

was not calculated in conformity with Article 2 of the *Anti-Dumping Agreement*, and particularly Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.

237. The United States also acted in this case in a manner inconsistent with its obligations under Article 11.2 of *the Anti-Dumping Agreement.* It failed to consider whether or not the imposition of the duty was necessary to offset "dumping" as defined in Article 2 of the *Anti-Dumping Agreement*. Rather, the United States sought to justify the continued imposition of the duty as necessary to offset something that did not constitute dumping within the meaning of Article 2 of the *Anti-Dumping Agreement*. Indeed, in the measure at issue, the calculation of the dumping margin without using zeroing would have resulted in a negative result (*i.e.*, no dumping).

(d) Conclusions

238. Therefore, the European Communities considers that United States has violated Articles 2.1, 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement* by using the simple zeroing methodology in the administrative review proceeding examined herein.

2.2 Other Measures at Issue

239. Exhibits EC-33 to EC-68 contain documents for the other cases, including generally, the Final Results, Issues and Decision Memorandum, Final Margin Program Log and Output, and margin calculation without zeroing. These documents generally demonstrate: that simple zeroing was used, that there were some negative intermediate margins –set to zero by USDOC; and the super-inflationary effect of simple zeroing.

240. The same unlawful zeroing method was used by the United States, to similar effect, in each of these cases. Accordingly, for the same reasons, in each of these cases, the United States acted inconsistently with the obligations imposed on it by Articles 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement*.

2.3 Conclusions

241. In light of the foregoing, the European Communities submits that the United States violated Articles 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT when using model zeroing in the administrative reviews included in the Annex to the Panel request.

3. Sunset Reviews

242. As mentioned in Section II.C, in sunset reviews, five years after publication of an anti-dumping duty order, USDOC and USITC review whether revocation of the order "would be likely to lead to continuation or recurrence of dumping (…) and of material injury".[155] In doing so, USDOC relies on dumping margins calculated in a prior original investigation or an administrative review as the basis for the review determination. Accordingly, USDOC necessarily relies on margins that are calculated using either the model or simple zeroing procedures, one of which is always a feature of USDOC's margin calculations.

243. The European Communities submits that, with respect to the sunset reviews contained in the Annex to the request for establishment of the Panel, the United States failed to comply with its obligations under the *Anti-Dumping Agreement* and the GATT 1994 by relying on dumping margins calculated in prior investigation proceedings using zeroing.

[155] Tariff Act, Section 751(c)(1).

244. The European Communities will describe below the main facts and findings made by the United States in **Case XII**, *Stainless Steel Sheet & Strip in Coils – Italy (A-475-824), No. 42* (Exhibit EC-69), and the violations of the *Anti-Dumping Agreement* and the GATT resulting thereof. For the sake of simplicity, the European Communities will not repeat again the same arguments with respect to the other 10 cases. The European Communities submits evidence of the reliance upon margins that were calculated using standard zeroing procedures in Exhibits EC-70 to EC-79.

3.1 Stainless Steel Sheet & Strip in Coils – Italy (A-475-824)

(a) The Measure at issue

245. In the Notice titled "Continuation of Antidumping Duty Orders on Stainless Steel Sheet and Strip in Coils from Germany, Italy, Japan, the Republic of Korea, Mexico, and Taiwan, and Countervailing Duty Orders on Stainless Steel Sheet and Strip in Coils from Italy and the Republic of Korea" published in the Federal Register[156], the United States decided in the course of the expedited sunset review that revocation of the anti-dumping duty order on stainless steel sheet and strip in coils from Italy would be likely to lead to continuation or recurrence of dumping at the following percentage weighted average percentage margins: 11.23 per cent, with respect to *ThyssenKrupp Acciai Speciali Terni, S.A.* (*TKAST*), and 11.23 per cent for all others.

246. The Decision Memorandum of the International Trade Administration dated 22 November 2004 (69 FR 67894) states in its Page 4 that: "After considering the dumping margins determined in the investigation and subsequent reviews, the Department determines that it is appropriate to report to the USITC for *TKAST* and "all others" the rates from the amended final determination because they are the only calculated rates that reflect the behaviour of companies without the discipline of the order. Therefore, we will report to the USITC the rates as published in the amended final determination, as listed in the next section".[157]

247. It can be observed that the duties imposed as a result of the sunset review investigation were identical to the duty levels as calculated in the original investigation, *i.e.*, 11.23 per cent (see *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order; Stainless Steel Sheet and Strip in Coils From Italy*, 64 FR 40567, of 27 July 1999).[158] It should therefore not be disputed that the United States, in accordance with its regulations, manual of proceedings, standard programs, etc, used model zeroing in original investigations, including this one.[159]

248. In the case at hand, the result of the program log in the original investigation proceeding shows that zeroing was used:[160]

[156] Exhibit EC-69, Appendices I and II.
[157] Exhibit EC-69, Appendix III.
[158] Exhibit EC-69, Appendix IV.
[159] Indeed, the European Communities will like to recall several statements made by the United States where it acknowledges the use of model zeroing in original investigations in the past (Exhibit EC-80).
[160] Exhibit EC-69, Appendix V.

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3813
3814
3815            ****************************************
3816            ***  CALCULATE OVERALL MARGIN.  ***
3817            ****************************************
3818
3819            PROC MEANS NOPRINT DATA = MARGIN;
3820                    VAR VALUE QTY;
3821                    OUTPUT OUT = ALLVAL (DROP = _FREQ_  _TYPE_)
3822                            SUM = TOTVAL TOTQTY;
3823            RUN;

NOTE:           The data set WORK.ALLVAL has 1 observations and 2 variables.
NOTE:           The PROCEDURE MEANS used 0.08 seconds.

3824
3825            PROC PRINT DATA = ALLVAL (
SYMBOLGEN:              Macro variable PRINTOBS resolves to 10
3825                                    OBS = &PRINTOBS);
3826                    TITLE3 "TOTAL VALUE AND QUANTITY OF U.S. SALES";
3827            RUN;

NOTE:           The procedure PRINT used 0.02 seconds.


3828
3829            PROC MEANS NOPRINT DATA = MARGIN;
3830                    WHERE EMARGIN GT 0;
3831                    VAR PCTEMARG;
3832                    OUTPUT OUT = MINMAX (DROP = _FREQ_  _TYPE_)
3833                            MIN = MINMARG MAX = MAXMARG;
3834            RUN;
```

249. The tables containing the results of the preliminary calculations show that, with zeroing, the dumping margin found for *TKAST* was 3.52461 whereas, with the same data but without zeroing, no dumping would have been found (-12.94723). The final determination without zeroing would have resulted in a negative dumping margin (-0.41), rather than 11.23 per cent.[161]

(b) Violation of Articles 2.1, 2.4 and 2.4.2 of the Anti-Dumping Agreement

(i) Dumping margins used in sunset reviews must be determined with respect to a product as a whole

250. In sunset reviews, pursuant to Article 11.3 of the *Anti-Dumping Agreement*, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be likely to lead to continuation or recurrence of *dumping*.

251. Article 11.3 of the *Anti-Dumping Agreement* does not define the word "dumping". However, the definition of dumping which is laid down in Article VI:1 of the GATT 1994 and in Article 2.1 of the *Anti-Dumping Agreement* applies to sunset reviews. Indeed, the words "for the purposes of this

[161] Exhibit EC-69, Appendices VI and VII.

Agreement" in Article 2.1 clearly indicate that the definition of dumping contained in that provision applies to the entire Agreement, including its Article 11.3. This interpretation is supported by the fact that Article 11.3 of the *Anti-Dumping Agreement* does not indicate, expressly or implicitly, that "dumping" has a different meaning in the context of sunset reviews than in the rest of the *Anti-Dumping Agreement*. As a result, in sunset reviews, the question for the investigation authorities is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping of the product subject to the duty (that is, to the introduction of that product into the commerce of the importing country at less than its normal value).[162]

252. As indicated above, Article 2.1 of the *Anti-Dumping Agreement* makes clear that dumping is defined in relation to a product as a whole and not in relation to a type, model or category of a product. Thus, if dumping margins are used in the likelihood-of-dumping determination in sunset reviews, they must be determined for the product as a whole.

(ii) Dumping margins used in sunset reviews must conform to the disciplines of Article 2.4 of the Anti-Dumping Agreement

253. In a sunset review, investigating authorities are not entitled to rely on dumping margins which are inconsistent with the *Anti-Dumping Agreement*, in particular with Article 2. In *US – Corrosion-Resistant Steel*, the Appellate Body clarified that:

> "Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins. As observed earlier, we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, **should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4**. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*".[163] (emphasis added)

254. Thus, if investigating authorities decide to rely on dumping margins calculated in original investigations or subsequent administrative review investigations, those margins must be calculated in a manner consistent with Article 2.4 of the *Anti-Dumping Agreement*.

255. The European Communities submits that to the extent that the dumping margins on which USDOC relied in this sunset review have been determined on the basis of zeroing, they are inconsistent with Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement*. Indeed, as mentioned before, the USDOC relied on the dumping margins published in the amended final determination as the only ones reflecting the behaviour of companies without the discipline of the order.[164] These had been calculated by using model zeroing.[165]

(c) Violation of Articles 11.1 and 11.3 of the Anti-Dumping Agreement

256. Articles 11.1 and 11.3 of the *Anti-Dumping Agreement* provide that:

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[162] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 109.
[163] *Id.*, para. 127.
[164] Exhibit EC-69, Appendix III, p. 4.
[165] Exhibit EC-69, Appendices V to VII.

> "11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."
>
> "11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review."

257. As highlighted by the Appellate Body in *US – Corrosion-Resistant Steel*, if a likelihood determination under Article 11.3 of the *Anti-Dumping Agreement* is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too and, thus, USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3 of the *Anti-Dumping Agreement*.

258. Even if an investigating authority does not rely on margins of dumping calculated since the original proceeding, it must still necessarily rely on the margin of dumping calculated in the original proceeding itself. That is because the terms "recur" and "continue" necessarily relate to something that not only is going to occur in the future, but which also occurred in the past. If there is nothing in the past, there is nothing that can recur or continue. Consequently, at least in the case where the use of zeroing in the original proceeding had the effect of creating a more than *de minimis* dumping margin, when in fact there was no dumping or only a *de minimis* amount of dumping, then the sunset measure will *by definition* be inconsistent with the *Anti-Dumping Agreement*.

259. On the basis of the foregoing, the European Communities submits that by relying in this sunset review on margins calculated in prior proceedings using model zeroing, USDOC did not comply with its obligations pursuant to Articles 2.1, 2.4 and 2.4.2 because these margins were not based on a fair comparison and not calculated for the product as a whole.[166] As a result, USDOC acted in breach of Article 11.3 of the *Anti-Dumping Agreement*. Also, because USDOC reviews conducted pursuant to these provisions are flawed, the United States failed to comply with the obligation in Article 11.1 of the *Anti-Dumping Agreement*.

260. These conclusions were also reached by the Appellate Body in *US – Zeroing (Japan)*. In that case, the Appellate Body noted that since USDOC relied on margins of dumping established in prior proceedings in its likelihood-of-dumping determination which were calculated during administrative reviews on the basis of simple zeroing and since such zeroing is inconsistent with Articles 2.4 and 9.3, the likelihood-of-dumping determinations in sunset reviews on the basis of those previous dumping margins are inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.[167]

(d) Conclusions

261. Therefore, the European Communities submits that the United States violated Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement* in the sunset review mentioned in the Annex to the Panel request as **Case XII**, *No. 42* when relying on margins of dumping calculated in prior investigations using the zeroing methodology.

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[166] *Id.*

[167] Appellate Body Report, *US – Zeroing (Japan)*, para. 184 – 187.

3.2 Other Measures at Issue

262. The European Communities submits that the other 10 sunset review proceedings contained in the Annex to the request for establishment of the Panel are inconsistent with Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement* on the basis of the same arguments mentioned above. For the sake of simplicity, the European Communities will not repeat these arguments. Instead, in Exhibits EC-70 to EC-79, the relevant sections of USDOC's determinations showing the use of zeroing are mentioned.

3.3 Conclusions

263. In light of the foregoing, the European Communities submits that the United States has violated Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement* in the sunset reviews mentioned in the Annex to the Panel request when relying on margins of dumping calculated in previous proceedings using the zeroing methodology.

IV. FINDINGS AND RECOMMENDATION REQUESTED

264. For the reasons stated above, the European Communities respectfully requests this Panel to make the following findings:

- The United States failed to comply with Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement since it continues applying duties which were calculated by using zeroing in the 18 anti-dumping measures mentioned in the Annex to the Panel request.

- The United States violated Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994 when applying model zeroing in the 4 original investigation proceedings mentioned in the Annex to the Panel request.

- The United States violated Articles 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT when using model zeroing in the 37 administrative review proceedings included in the Annex to the Panel request.
- The United States violated Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement* in the sunset review proceedings mentioned in the Annex to the Panel request when relying on margins of dumping calculated in prior investigations using the zeroing methodology.

265. The European Communities notes that, contrary to Article 4.2 of the Dispute Settlement Understanding, the United States has so far failed to give duly consideration to the European Communities' representations on this matter. In view of the obligations contained in Article 3 of the Dispute Settlement Understanding, in particular the obligation for WTO Members to engage in procedures in good faith in an effort to resolve dispute, the European Communities once again invites the United States to comply with its obligations under the WTO Agreements.

266. In order to make effective these obligations, the European Communities requests this Panel to recommend, pursuant to Article 19 of the Dispute Settlement Understanding, that the United States takes the steps necessary to bring its measures into conformity with the cited WTO provisions. In particular, in the view of the European Communities, the Panel should suggest that the United States cease using zeroing when calculating dumping margins in any anti-dumping proceeding with respect to the 18 measures mentioned in the Annex to the Panel request or any other. This recommendation will be appropriate to help promote the resolution of the dispute.

LIST OF EXHIBITS

EC-1	Request for Establishment of the Panel (DS350)
EC-2	Tariff Act 1930 (extract)
EC-3	Regulations (in three parts)
EC-4	Manual (by Chapter)
EC-5	Detailed Explanation of Computer Language
EC-6	US Notice on Zeroing in Original Investigations
EC-7	Sunset Policy Bulletin
EC-8	Waincymer, WTO Litigation: Procedural Aspects of Formal Dispute Settlement (Cameron May, 2002), p.510
EC-9	Brownlie, Principles of Public International Law (5th ed. 1988) pp. 3-5, pp. 20-21
EC-10	ICJ Statute
EC-11	Arnull, The European Union and its Court of Justice (2006) pp. 622-638
EC-12	Zweigert and Kötz, An Introduction to Comparative Law (3rd ed. 1988), pp. 256-265
EC-13	Rosas, "The European Court of Justice: sources of law and methods of interpretation", in The WTO at Ten (2006), pp. 482-489
EC-14	Shahabuddeen, Precedent in the World Court (1996), pp. 234-241
EC-15	Treves, "The International Tribunal for the Law of the Sea", in The WTO at 10, (1996), pp. 490-500
EC-16	Reid, A Practitioner's Guide to the European Convention on Human Rights (2nd ed. 2004), p. 51
EC-17	ICC Statute
EC-18	Kmiec, The Origin and Current Meanings of "Judicial Activism", Comment, California Law Review, October 2004, 1422-1477
EC-19	ECJ Statute
EC-20	Neville and Kennedy, The Court of Justice of the European Communities (2000), pp. 370-377
EC-21	Reid, A Practitioner's Guide to the European Convention on Human Rights (1st ed. 1998), p. 43

EC-22	International Criminal Tribunal for the former Yugoslavia: Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement 24 March 2000, pp. 41-48 and Declaration of Judge David Hunt
EC-23	ICSID Secretariat Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration", 22 October 2004
EC-24	ICSID Secretariat Working Paper, "Suggested Changes to the ICSID Rules and Regulations", 12 May 2005
EC-25	Jackson, "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out", 98 American Journal of International Law 109 (2004)
EC-26	[A-421-811] Purified Carboxymethylcellulose from the Netherlands (No. 50) Appendix I: Final USDOC Determination (70 FR 28275) and Final Order (70 FR 39734) Appendix II: USITC Determination (70 FR 39334) Appendix III: Program Code of Noviant BV Appendix IV: Program Log of Noviant BV Appendix V: Tables containing calculations with zeroing for Noviant BV Appendix VI: Tables containing calculations without zeroing for Noviant BV
EC-27	Issues and Decision Memorandum for the Final Results of the Section 129 Determinations (9 April 2007)
EC-28	[A–401-808] Purified Carboxymethylcellulose from Sweden (No. 49) Appendix I: USDOC Determination (70 FR 28278) Appendix II: USITC Determination (70 FR 39334) Appendix III: Final Order (70 FR 39734)
EC-29	[A–405-803] Purified Carboxymethylcellulose from Finland (No. 51) Appendix I: USDOC Determination (70 FR 39734) Appendix II: USITC Determination (70 FR 39334) Appendix III: Final Order (70 FR 28279)
EC-30	[A–469-814] Purified Carboxymethylcellulose from Spain (No. 52) Appendix I: USDOC Determination (70 FR 24506) Appendix II: USITC Determinations (70 FR 36205) Appendix III: Final Order (70 FR 36562) Appendix IV: Program Log of Aragonesas Delsa S.A.
EC-31	[A-475-801] Ball Bearings and Parts Thereof from Italy (No. 5) Appendix I: USDOC Determination (71 FR 400064) Appendix II: Issues and Decision Memorandum Appendix III: Program Logs of FAG Appendix IV: Program Logs of SKF Appendix V: Tables containing calculations with zeroing for FAG Appendix VI: Tables containing calculations with zeroing for SKF Appendix VII: Tables containing calculations without zeroing for FAG Appendix VIII: Tables containing calculations without zeroing for SKF
EC-32	Investigation, New Shorter Oxford English Dictionary

EC-33	[A-449-804] Steel Concrete Reinforcing Bars from Latvia (No. 1) Appendix I: Notice of Final Results (71 FR 74900) Appendix II: Issues and Decision Memorandum Appendix III: Program used with respect to LM Appendix IV: Program Log of LM Appendix V: Tables containing LM's calculations with zeroing Appendix VI: Tables containing LM's calculations without zeroing
EC-34	[A-449-804] Steel Concrete Reinforcing Bars from Latvia (No. 2) Appendix I: Notice of Final Results (71 FR 7016) Appendix II: Issues and Decision Memorandum Appendix III: Program used with respect to LM Appendix IV: Program Log of LM Appendix V: Tables containing LM's calculations with zeroing Appendix VI: Tables containing LM's calculations without zeroing
EC-35	[A-449-804] Steel Concrete Reinforcing Bars from Latvia (No. 3) Appendix I: Notice of Final Results (69 FR 74498) Appendix II: Program used with respect to LM Appendix III: Program Log of LM Appendix IV: Tables containing LM's calculations with zeroing Appendix V: Tables containing LM's calculations without zeroing
EC-36	[A-475-801] Ball Bearings and Parts Thereof from Italy (No. 6) Appendix I: Notice of Final Results (70 FR 54711) Appendix II: Issues and Decision Memorandum Appendix III: Program Log of FAG Italy Appendix IV: Program Log of SKF Italy Appendix V: Table containing calculations with zeroing for FAG Italy Appendix VI: Table containing calculations with zeroing for SKF Italy Appendix VII: Table containing calculations without zeroing for FAG Italy Appendix VIII: Tables containing calculations without zeroing for SKF Italy
EC-37	[A-475-801] Ball Bearings and Parts Thereof from Italy (No. 7) Appendix I: Notice of Final Results (69 FR 55574) + amendment (69 FR 62023) Appendix II: Issues and Decision Memorandum Appendix III: Program Log of SKF Italy Appendix IV: Program Log of FAG Italy Appendix V: Table containing calculations with zeroing for FAG Italy Appendix VI: Tables containing calculations without zeroing for FAG Italy Appendix VII: Tables containing calculations with zeroing for SKF Italy Appendix VIII: Tables containing calculations without zeroing for SKF Italy
EC-38	[A-475-801] Ball Bearings and Parts Thereof from Italy (No. 8) Appendix I: Notice of Final Results (68 FR 35623) Appendix II: Issues and Decision Memorandum Appendix III: Program Log for SKF Italy Appendix IV: Program Log for FAG Italy Appendix V: Table containing calculations with zeroing for FAG Italy Appendix VI: Table containing calculations without zeroing for FAG Italy Appendix VII: Tables containing calculations with zeroing for SKF Italy Appendix VIII: Tables containing calculations without zeroing for SKF Italy

EC-39 [A-428-801] Ball Bearings and Parts Thereof from Germany (No. 10)
Appendix I: Notice of Final Results (71 FR 40064)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Log of SKF Germany
Appendix IV: Program Logs of FAG Germany
Appendix V: Tables containing calculations with zeroing for FAG
Appendix VI: Tables containing calculations without zeroing for FAG
Appendix VII: Tables containing calculations with zeroing for SKF
Appendix VIII: Tables containing calculations without zeroing for SKF

EC-40 [A-428-801] Ball Bearings and Parts Thereof from Germany (No. 11)
Appendix I: Notice of Final Results (70 FR 54711)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Log of FAG Germany
Appendix IV: Program Log of SKF Germany
Appendix V: Table containing calculations with zeroing for FAG Germany
Appendix VI: Tables containing calculations with zeroing for SKF Germany
Appendix VII: Table containing calculations without zeroing for FAG Germany
Appendix VIII: Tables containing calculations without zeroing for SKF Germany

EC-41 [A-428-801] Ball Bearings and Parts Thereof from Germany (No. 12)
Appendix I: Notice of Final Results (69 FR 55574) + amendment (69 FR 63507)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Log of SKF Germany
Appendix IV: Program Log of FAG Germany
Appendix V: Table containing calculations with zeroing for SKF Germany
Appendix VI: Tables containing calculations without zeroing for SKF Germany
Appendix VII: Tables containing calculations with zeroing for FAG Germany
Appendix VIII: Tables containing calculations without zeroing for FAG Germany

EC-42 [A-428-801] Ball Bearings and Parts Thereof from Germany (No. 13)
Appendix I: Notice of Final Results (68 FR 35623)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Log of SKF Germany
Appendix IV: Program Log of FAG Germany
Appendix V: Table containing calculations with zeroing for SKF Germany
Appendix VI: Table containing calculations without zeroing for SKF Germany
Appendix VII: Table containing calculations with and without zeroing for FAG Germany

EC-43 [A-427-801] Ball Bearings and Parts Thereof from France (No. 15)
Appendix I: Notice of Final Results (71 FR 40064)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Logs of SKF France
Appendix IV: Tables containing calculations with zeroing for SKF France

Appendix V: Tables containing calculations without zeroing for SKF France

EC-44 [A-427-801] Ball Bearings and Parts Thereof from France (No. 16)
Appendix I: Notice of Final Results (70 FR 54711)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Log of SKF France
Appendix IV: Table containing calculations with zeroing for SKF France
Appendix V: Tables containing calculations without zeroing for SKF France

EC-45 [A-427-801] Ball Bearings and Parts Thereof from France (No. 17)
Appendix I: Notice of Final Results (69 FR 55574) + amendment (69 FR 62023)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Log of SKF France
Appendix IV: Program Log of SNR
Appendix V: Table containing calculations with zeroing for SKF France
Appendix VI: Table containing calculations without zeroing for SKF France
Appendix VII: Tables containing calculations with zeroing for SNR
Appendix VIII: Tables containing calculations without zeroing for SNR

EC-46 [A-427-801] Ball Bearings and Parts Thereof from France (No. 18)
Appendix I: Notice of Final Results (68 FR 35623) + amendment (68 FR 43712)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Code of SKF France
Appendix IV: Program Log of SKF France
Appendix V: Table containing calculations with zeroing for SFK France
Appendix VI: Tables containing calculations without zeroing for SKF France

EC-47 [A-427-820] Stainless Steel Bar from France (No. 20)
Appendix I: Notice of Final Results (71 FR 30873)

EC-48 [A-427-820] Stainless Steel Bar from France (No. 21)
Appendix I: Notice of Final Results (70 FR 46482)

EC-49 [A-428-825] Stainless Steel Sheet and Strip in Coils from Germany (No. 22)
Appendix I: Notice of Final Results (71 FR 74897)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Code of TKN
Appendix IV: Program Log of TKN
Appendix V: Tables containing calculations with zeroing for TKN
Appendix VI: Tables containing calculations without zeroing for TKN

EC-50 [A-428-825] Stainless Steel Sheet and Strip in Coils from Germany (No. 23)
Appendix I: Notice of Final Results (70 FR 73729)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Code of TKN
Appendix IV: Program Log of TKN
Appendix V: Tables containing calculations with zeroing for TKN
Appendix VI: Tables containing calculations without zeroing for TKN

EC-51 [A-428-825] Stainless Steel Sheet and Strip in Coils from Germany (No. 24)
Appendix I: Notice of Final Results (69 FR 75930)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Code of TKN
Appendix IV: Program Log of TKN
Appendix V: Tables containing calculations with zeroing for TKN
Appendix VI: Tables containing calculations without zeroing for TKN

EC-52 [A-428-825] Stainless Steel Sheet and Strip in Coils from Germany (No. 25)
Appendix I: Notice of Final Results (69 FR 6262)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Code of TKN
Appendix IV: Program Log of TKN
Appendix V: Tables containing calculations with zeroing for TKN
Appendix VI: Tables containing calculations without zeroing for TKN

EC-53 [A-423-808] Stainless Steel Plate in Coils from Belgium (No. 27)
Appendix I: Notice of Final Results (70 FR 72789)
Appendix II: Issues and Decision Memorandum

EC-54 [A-423-808] Stainless Steel Plate in Coils from Belgium (No. 28)
Appendix I: Notice of Final Results (69 FR 74495)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Log of U&A Belgium
Appendix IV: Tables containing calculations with zeroing for U&A Belgium
Appendix V: Tables containing calculations without zeroing for U&A Belgium

EC-55 [A-412-801] Ball Bearings and Parts Thereof from the United Kingdom (No.30)
Appendix I: Notice of Final Results (70 FR 54711)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Log of Barden/FAG
Appendix IV: Tables containing calculations with and without zeroing for Barden/FAG

EC-56 [A-412-801] Ball Bearings and Parts Thereof from the United Kingdom (No. 31)
Appendix I: Notice of Final Results (69 FR 55574)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Log of Barden/FAG
Appendix IV: Tables containing calculations with zeroing for Barden/FAG
Appendix V: Tables containing calculations without zeroing for Barden/FAG

EC-57 [A-428-830] Stainless Steel Bar from Germany (No. 33)
Appendix I: Notice of Final Results (71 FR 42802) + amendment (71 FR 52063)
Appendix II: Program Code of BGH
Appendix III: Tables containing calculations with and without zeroing for BGH

EC-58 [A-428-830] Stainless Steel Bar from Germany (No. 34)
Appendix I: Notice of Final Results (69 FR 32982)
Appendix II: Program Code of BGH
Appendix III: Tables containing calculations with zeroing for BGH
Appendix IV: Tables containing calculations without zeroing for BGH

EC-59 [A-421-807] Certain Hot–Rolled Carbon Steel Flat Products from the Netherlands (No. 35)
Appendix I: Notice of Final Results (72 FR 28676) + amendment (72 FR 34441)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Code of Corus Staal
Appendix IV: Program Log of Corus Staal
Appendix V: Tables containing calculations with zeroing for Corus Staal
Appendix VI: Tables containing calculations without zeroing for Corus Staal

EC-60 [A-421-807] Certain Hot–Rolled Carbon Steel Flat Products from the Netherlands (No. 36)
Appendix I: Notice of Final Results (70 FR 18366)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Code of Corus Staal
Appendix IV: Program Log of Corus Staal
Appendix V: Tables containing calculations with zeroing for Corus Staal
Appendix VI: Tables containing calculations without zeroing for Corus Staal

EC-61 [A-421-807] Certain Hot–Rolled Carbon Steel Flat Products from the Netherlands (No. 37)
Appendix I: Notice of Final Results (69 FR 33630) + amended Final Results (69 FR 43801)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Log of Corus Staal
Appendix IV: Program Log of Corus Staal and Program Log of the amended Final Results
Appendix V: Table containing calculations with zeroing for Corus Staal amended Final Results
Appendix VI: Tables containing calculations without zeroing for Corus Staal

EC-62 [A-475-829] Stainless Steel Bar from Italy (No. 39)
Appendix I: Notice of Final Results (69 FR 32984)
Appendix II: Program Log of Forini
Appendix III: Calculations with zeroing for Forini

EC-63 [A-475-824] Stainless Steel Sheet and Strip in Coils from Italy (No. 40)
Appendix I: Notice of Final Results (70 FR 7472) + Amended Final Results (70 FR 13009)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Code of TKAST
Appendix IV: Program Log of TKAST
Appendix V: Tables containing calculations with zeroing for TKAST
Appendix VI: Tables containing calculations without zeroing for TKAST

EC-64 [A-475-824] Stainless Steel Sheet and Strip in Coils from Italy (No. 41)
Appendix I: Notice of Final (68 FR 69382)
Appendix II: Issues and Decision Memorandum
Appendix III: Program Log of TKAST
Appendix IV: Tables containing calculations with zeroing for TKAST
Appendix V: Tables containing calculations without zeroing for TKAST

EC-65 [A-475-818] Certain Pasta from Italy (No. 43)
Appendix I: Notice of Final Results (72 FR 7011)
Appendix II: Program Log of Atar
Appendix III: Tables containing calculations with zeroing for Atar

EC-66 [A-475-818] Certain Pasta from Italy (No. 44)
Appendix I: Notice of Final Results (70 FR 71464)
Appendix II: Issues and Decision Memorandum
Appendix III: Table containing calculations without zeroing

EC-67 [A-475-818] Certain Pasta from Italy (No. 45)
Appendix I: Notice of Final Results (70 FR 6832)
Appendix II: Issues and Decision Memorandum
Appendix III: Table containing calculations without zeroing

EC-68 [A-475-818] Certain Pasta from Italy (No. 46)
Appendix I: Notice of Final Results (69 FR 6255) + amendment (69 FR 22761)
Appendix II: Issues and Decision Memorandum

EC-69 [A-475-824] Stainless Steel Sheet & Strip in Coils from Italy (No. 42)
Appendix I: Notice of Final Results (69 FR 67894)
Appendix II: Continuation Order
Appendix III: Issues and Decision Memorandum
Appendix IV: Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order (64 FR 40567)
Appendix V: Program Log of TKAST (Original investigation proceeding)
Appendix VI: Calculations with zeroing for TKAST (Preliminary Determination of Investigation)
Appendix VII: Calculations without zeroing for TKAST (Preliminary and Final)

EC-70 [A-449-804] Steel Concrete Reinforcing Bars from Latvia (No. 4)
Appendix I Notice of Final Results (72 FR 16767)
Appendix II Issues and Decision Memorandum
Appendix III Antidumping Duty Order (66 FR46777)
Appendix IV Program Log of LM (Original Investigation Proceeding)

EC-71 [A–475–801] Ball Bearings And Parts Thereof from Italy (No. 9)
Appendix I: Notice of Final Result (70 FR 58183) + Continuation Order (71 FR 54469)
Appendix II: Issues and Decision Memorandum
Appendix III: Original Order (54 FR 20903)

EC-72 [A-428-801] Ball Bearings and Parts Thereof from Germany (No. 14)
Appendix I: Notice of Final Results (70 FR 58183)
Appendix II: Continuation Order (71 FR 54469)

Appendix III: Issues and Decision Memorandum
Appendix IV: Original Order (54 FR No. 92, 15 May 1989)

EC-73 [A-427-801] Ball Bearings and Parts Thereof from France (No. 19)
Appendix I: Notice of Final Results (70 FR 58183)
Appendix II: Continuation Order (71 FR 54469)
Appendix III: Issues and Decision Memorandum
Appendix IV: Original Order (54 FR No. 92, 15 May 1989)

EC-74 [A–428–825] Stainless Steel Sheet and Strip in Coils from Germany (No. 26)
Appendix I: Notice of Final Results (69 FR 67896)
Appendix II: Continuation Order (70 FR 44886)
Appendix III: Issues and Decision Memorandum
Appendix IV: Original Order (64 FR 40557)

EC-75 [A–423–808] Certain Stainless Steel Plate in Coils from Belgium (No. 29)
Appendix I: Notice of Final Results (69 FR 61798)
Appendix II: Continuation Order (70 FR 41202)
Appendix III: Issues and Decision Memorandum
Appendix IV: Original Order (64 FR 27756)

EC-76 [A-412-801] Ball Bearings and Parts Thereof from the United Kingdom (No. 32)
Appendix I: Notice of Final Results (70 FR 58183)
Appendix II: Continuation Order (71 FR 54469)
Appendix III: Issues and Decision Memorandum
Appendix IV: Original Orders (54 FR No. 92, 15 May 1989)

EC-77 [A-421-807] Certain Hot–Rolled Carbon Steel Flat Products from the Netherlands (No. 38)
Appendix I: Notice of Preliminary Results (72 FR 7604)
Appendix II: Final Results and Revocation Order (72 FR 35220)
Appendix III: Issues and Decision Memorandum, Section 129 Determinations
Appendix IV: Issues and Decision Memorandums
Appendix V: Original Order (66 FR 50408) + amendment (66 FR 55637)

EC-78 [A-475-818] Certain Pasta from Italy (No. 47)
Appendix I: Notice of Final Results (72 FR 5266)
Appendix II: Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value (61 FR 38547)
Appendix III: Issues and Decision Memo for the Expedited Sunset Reviews of the Antidumping Duty Orders on Certain Pasta from Italy and Turkey; Final Results (66 FR 51015)
Appendix IV: Continuation of Countervailing and Anti-dumping Duty Orders: Pasta from Italy and Turkey, and Clad Steel Plate From Japan (66 FR 57703)

EC-79 [A- 428-602] Brass Sheet and Strips from Germany (No. 48)
Appendix I: Notice of Final Results (71 FR 4348)
Appendix II: Continuation Order (71 FR 16552)
Appendix III: Issues and Decision Memorandum
Appendix IV: Original Order (52 FR 35750)

EC-80	Statements made by the United States acknowledging the use of model zeroing in original investigations in the past

ANNEX A-2

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

TABLE OF CONTENTS

Page

TABLE OF REPORTS **72**

I. INTRODUCTION **75**

II. FACTUAL BACKGROUND **76**

A. THE ARTICLE 5 INVESTIGATION PHASE 76

B. THE ASSESSMENT PHASE 78

III. PROCEDURAL BACKGROUND **78**

IV. GENERAL PRINCIPLES **78**

A. BURDEN OF PROOF 78

B. STANDARD OF REVIEW 79

1. The Applicable Standard of Review is Whether the Authority's Measure Rests on a Permissible Interpretation of the AD Agreement **79**

2. The Panel Should Make an Objective Assessment of the Matter Before It and Not Add to or Diminish the Rights and Obligations Provided in the Covered Agreements **80**

V. ARGUMENT **82**

A. REQUEST FOR PRELIMINARY RULINGS 83

1. The EC Requested Establishment of the Panel on Measures Not Included in its Request for Consultations **84**

2. The EC May Not Expand the Panel's Terms of Reference by Including in its Request for Establishment of a Panel Specific Measures Not Included in its Request for Consultations **85**

3. The EC Requested Establishment of the Panel on Measures That Were Not Final at the Time of its Panel Request **89**

B. THE UNITED STATES METHODOLOGY FOR ASSESSING ANTIDUMPING DUTIES IS CONSISTENT WITH THE OBLIGATIONS IN THE AD AGREEMENT 90

1. Article 2.1 of the AD Agreement and Article VI of the GATT 1994 ..... **92**

2. Article 2.4.2 ..... **96**

3. Article 2.4.2, Second Sentence **100**

4. Article 9 ..... **102**

5. Article 2.4 ..... **108**

6. Article 11.2 Is Not Applicable to Article 9.3 Assessment Proceedings 110
C. THE EC'S CLAIMS WITH RESPECT TO SUNSET REVIEWS 111
D. THE EC'S CLAIMS WITH RESPECT TO INVESTIGATIONS 111
E. WTO AGREEMENT ARTICLE XVI:4 112
VI. CONCLUSION 114
LIST OF EXHIBITS 115

TABLE OF REPORTS

Short Form	Full Citation
Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Brazil – Aircraft (AB)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
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Egypt – Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted October 1, 2002
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Short Form	Full Citation
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Short Form	Full Citation
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US – Softwood Lumber Dumping (Article 21.5) (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada*, WT/DS264/RW, adopted 1 September 2006, as modified by the Appellate Body Report, WT/DS264/AB/RW
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I. INTRODUCTION

1. It is a fundamental principle of customary rules of interpretation of public international law that any interpretation must address the text of the agreement and may not impute into the agreement words and obligations that are not there.[1] Further, in settling disputes among Members, WTO dispute settlement panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements".[2]

2. The European Communities ("EC"), in asserting its claims for relief, relies heavily on prior Appellate Body reports, asserting that "the Panel should not depart from" prior Appellate Body reports. Although the EC acknowledges that there is no obligation for a panel to follow the reasoning of prior reports, the EC attempts to establish some legal threshold for departure from those prior reports. However, the rights and obligations of the Members flow, not from panels or the Appellate Body, but from the text of the covered agreements. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") plainly requires each panel to make its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements.

3. The EC's challenges, in this dispute, necessarily require that this Panel read an obligation into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), notwithstanding the fact that there is no textual basis for the obligations that the EC proposes. Namely, the EC seeks to read into the agreements an obligation to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same assessment proceedings exceed normal value. The position of the United States is that such an offset or credit need not be granted in the assessment phase of an antidumping proceeding.

4. And the actual situation is far different from the EC's claim that there is a "consistent" line of reasoning in past WTO panel and Appellate Body reports on the issue of offsets. Three WTO panels consisting of trade remedies experts have examined whether there is an obligation to provide offsets beyond the context of average-to-average comparisons in an investigation. In every case, the panel of experts determined that the customary rules of interpretation of public international law do not support a reading of the AD Agreement or the GATT 1994 that extends a zeroing prohibition beyond the use of average-to-average comparisons in an investigation.[3]

5. Nevertheless, the Appellate Body has adopted an interpretation of the AD Agreement that includes a general prohibition of zeroing. Using reasoning that has shifted from dispute to dispute, these Appellate Body reports have found, despite the contrary interpretation offered by the panels, that a general prohibition of zeroing reflects the only permissible interpretation of the AD Agreement. The EC's claims in this dispute rely entirely on that conclusion. The United States respectfully disagrees with the reasoning in these Appellate Body reports that the only permissible interpretation of the AD Agreement includes a general prohibition of zeroing. Accordingly the United States requests that this Panel refrain from adopting the Appellate Body's interpretation. Instead, the United States requests that this Panel remain faithful to the text of the AD Agreement and find that the United States' interpretation outside the context of average-to-average comparisons in investigations is permissible.

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[1] *India – Patents (AB)*, para. 45.

[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article 19.2; *see id*., Article 3.2.

[3] *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.65, 5.66, 5.77; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284.

6. As the United States will demonstrate, in order to accept the EC's arguments, one must suspend disbelief and pretend that assessment proceedings are investigations and that the alternative assessment methods contemplated by Article 9.3 of the AD Agreement do not exist.

7. As the United States will explain below, the provisions of the WTO agreements invoked by the EC do not require that an offset or credit be granted for "negative dumping" in assessment proceedings and do not require the use of the average-to-average or transaction-to-transaction method in assessment proceedings.

8. The EC's claims as to WTO inconsistency of the challenged sunset reviews should be rejected, as the EC has not demonstrated that a calculation done in accordance with the EC's approach would result in zero or *de minimis* dumping margins in the cited cases.

9. The EC's claim with respect to Article XVI:4 of the *Agreement Establishing the World Trade Organization* ("WTO Agreement") depends on a finding of inconsistency with provisions of the AD Agreement and GATT 1994, which the EC has not demonstrated. Consequently, there is no breach of Article XVI:4. The EC has further attempted to interpret Article XVI:4 in a novel manner that would significantly alter the nature of the WTO dispute settlement system and directly contradict the WTO Agreement. The EC's attempt should be rejected.

10. In addition, as set out below, the United States requests a preliminary ruling that the measures that were not subject of consultations but instead appeared for the first time in the EC's panel request fall outside of the scope of the Panel's terms of reference. Contrary to Articles 4.4., 4.7 and 6.2 of the DSU and Articles 17.3, 17.4 and 17.5 of the AD Agreement, the EC seeks to expand the matter in this dispute beyond the measures upon which consultations were requested. Moreover, insofar as the EC has added indeterminate measures, the Panel should find that they are outside of the Panel's terms of reference because they do not comply with the specificity requirement of Article 6.2 of the DSU.

II. FACTUAL BACKGROUND

11. The US antidumping duty law is designed to provide domestic producers with a remedy against injurious dumping. The US statute governing antidumping proceedings is the Tariff Act of 1930, as amended ("the Tariff Act"). The Tariff Act, consistent with the AD Agreement, provides for two distinct phases in antidumping proceedings. The first stage of the antidumping proceeding is the investigation phase. The US Department of Commerce ("Commerce") will determine whether dumping existed during the period of investigation by calculating an overall weighted average dumping margin for each foreign producer/exporter investigated. Separately, the US International Trade Commission ("ITC") determines whether an industry in the United States is materially injured by reason of the dumped imports.

12. If Commerce finds that dumping existed during the period of investigation, and if the ITC determines that a US industry was injured by reason of dumped imports, the investigation phase ends and the second phase of the antidumping proceeding – the assessment phase – begins. In the assessment phase, the focus is on the calculation and assessment of antidumping duties on specific entries by individual importers.

A. THE ARTICLE 5 INVESTIGATION PHASE

13. With respect to the investigation phase, US law provides that Commerce will normally use the average-to-average method for comparable transactions during the period of investigation.[4] US law also provides for the use of transaction-to-transaction comparisons[5] and, provided that there is

[4] 19 C.F.R. 351.414(c)(1) (Exhibit EC-3).
[5] 19 U.S.C. 1677f-1(d)(1)(A) (Exhibit EC-2).

a pattern of prices that differs significantly by region or time period, among other things[6], for use of the average-to-transaction method.[7]

14. In the investigation phase, Commerce must resolve the threshold question of whether dumping "exists" such that the imposition of an antidumping measure is warranted. Section 771(35)(A) of the Tariff Act defines "dumping margin", for the purposes of US law, as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise".[8] Thus, for purposes of US law, the "dumping margin" is the result of a specific comparison between an export price (or constructed export price) and the normal value for comparable transactions. When average-to-average comparisons are used, similar export transactions[9] are grouped together and an average export price is calculated for the comparison group which is compared to a comparable normal value. Some of these comparisons could result in dumping margins while other comparisons might result in no dumping margin.

15. Section 771(35)(B) of the Tariff Act defines "weighted average dumping margin" as the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer".[10] Thus, to calculate a single weighted average dumping margin for each foreign exporter/producer individually examined in an investigation, Commerce has summed the total amount of dumping found for each comparison group for that exporter/producer in the United States during the period of investigation. After 22 February 2007, in making average-to-average comparisons in investigations, Commerce intends to provide offsets for non-dumped comparisons that reduce the total amount of dumping found by the amount by which any comparison reflected an average export price in excess of normal value.[11] For example, Commerce did provide such offsets in the investigation of certain activated carbon from the People's Republic of China.[12]

16. Commerce then divides the aggregate amount from the sum of the comparison groups by the aggregate export prices of *all* US sales by the exporter/producer during the period of investigation to arrive at the "weighted average dumping margin".[13]

17. If the overall weighted average dumping margin for a particular exporter/producer is *de minimis*, the exporter/producer is excluded from any antidumping measure.[14] If the overall weighted average dumping margin for each exporter/producer is *de minimis*, the antidumping proceeding is terminated.[15] If Commerce and the ITC make final affirmative determinations of dumping and injury, respectively, then Commerce orders the imposition of antidumping duties (an "antidumping duty order" or, simply "order" in US parlance).[16] The issuance of an antidumping duty order completes the investigation phase.

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[6] This pattern commonly is referred to as "targeted dumping".

[7] 19 U.S.C. 1677f-1(d)(1)(B) (Exhibit EC-2).

[8] 19 U.S.C. 1677(35)(A) (Exhibit EC-2).

[9] Similarity of export transactions is generally determined on the basis of product characteristics. Therefore, comparison groups are commonly referred to as "models". However, other factors affecting price comparability are taken into account, *e.g.*, level of trade.

[10] 19 U.S.C. 1677(35)(B) (Exhibit EC-2).

[11] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (27 December 2006); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3,783 (26 January 2007) (Exhibit EC-6).

[12] *See Final Determination of Sales for Less Than Fair Value: Certain Activated Carbon from the People's Republic of China*, 72 Fed. Reg. 9,508 (2 March 2007) (Exhibit US-1).

[13] 19 U.S.C. 1677(35)(B) (Exhibit EC-2).

[14] 19 C.F.R. 351.204(e)(1) (Exhibit EC-3).

[15] 19 U.S.C. 1673d(c)(2) (Exhibit EC-2).

[16] 19 U.S.C. 1673e(a) (Exhibit EC-2).

B. THE ASSESSMENT PHASE

18. Unlike investigations, which are subject to a single set of rules, the AD Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment phase. There are two basic types of assessment systems – prospective and retrospective. In a prospective system, normal values or an *ad valorem* duty rate are established and applied to the merchandise subject to the antidumping measure upon importation on an entry-by-entry basis. While *ad valorem* systems apply duties to all subject imports, in prospective normal value systems, those imports for which the export price is greater than or equal to the normal value do not result in duty liability. However, no offset is provided on other transactions where the export price is below normal value.

19. The United States has a retrospective assessment system. Under the US system, an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Rather, the United States collects security in the form of a cash deposit at the time of entry, and determines the amount of duties due on the entry at a later date. Specifically, once a year (during the anniversary month of the orders) interested parties may request a review to determine the amount of duties owed on each entry made during the previous year.[17] Antidumping duties are calculated on a transaction-specific basis and are paid by the importer of the transaction, as in prospective duty systems. If the final antidumping duty liability ends up being less than the cash deposit, the difference is refunded. If no review is requested, the cash deposits made on entries during the previous year are automatically assessed as the final duties. To simplify the collection of duties calculated on a transaction-specific basis, the absolute amount of duties calculated for the transactions of each importer are summed up and divided by the total entered value of that importer's transactions, including those for which no duties were calculated. US customs authorities then apply that rate to the entered value of the imports to collect the correct total amount of duties owed.

III. PROCEDURAL BACKGROUND

20. This dispute began when the EC requested consultations on 2 October 2006.[18] On 9 October 2006, the EC filed a second request for consultations that included two additional administrative reviews.[19] The United States and the EC held consultations on 14 November 2006, and 28 February 2007.

21. On 10 May 2007, the EC requested the establishment of a panel.[20] On 4 June 2007, the Dispute Settlement Body established a panel pursuant to the EC's revised request.

IV. GENERAL PRINCIPLES

A. BURDEN OF PROOF

22. The AD Agreement imposes obligations on the authorities that they must satisfy, but the burden of proving that those obligations have not been satisfied is on the complaining party. In *US – Corrosion-Resistant Steel CVD*, the Appellate Body explained that the complaining party bears the burden of proof:

[17] The period of time covered by US assessment proceedings is normally twelve months. However, in the case of the first assessment proceeding following the investigation, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures.

[18] WT/DS350/1 (3 October 2006). The EC had originally filed a request for consultations on 22 September 2006, but discovered that it had omitted a measure. The EC withdrew that request on October 2 in favour of its 2 October 2006 request.

[19] WT/DS350/1 Add. 1 (11 October 2006).

[20] WT/DS350/6 (11 May 2007). As detailed below, the EC added additional measures that were not contained in its consultation request.

> [t]he complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:
>
> … it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence*. (emphasis added).[21]

23. Accordingly, the burden is on the EC to prove that US measures exist that are inconsistent with US obligations under the relevant covered agreement. The burden is not on the United States to prove that it acted in a WTO-consistent manner.

B. STANDARD OF REVIEW

1. The Applicable Standard of Review is Whether the Authority's Measure Rests on a Permissible Interpretation of the AD Agreement

24. Article 11 of the DSU defines generally a panel's mandate in reviewing the consistency with the covered agreements of measures taken by a Member. In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) with respect to an investigating authority's interpretation of provisions of the AD Agreement.[22] Article 17.6(ii) states:

> 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.

25. The question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is a permissible interpretation. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation". Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.[23]

26. The explicit confirmation that there are provisions of the AD Agreement that are susceptible to more than one permissible reading provides context for the interpretation of the AD Agreement. This provision reflects the negotiators' recognition that they had left a number of issues unresolved and that customary rules of interpretation would not always yield only one permissible reading of a given provision.

27. One panel recalled that "in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it".[24] Similarly in this case, it is useful to bear in mind that Article 17.6(ii) applies and there may be multiple permissible interpretations of particular provisions in the AD Agreement.

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[21] *US – Corrosion-Resistant Steel CVD (AB)*, paras. 156-157 (footnote omitted).
[22] *See EC – Bed Linen (Article 21.5) (AB)*, paras. 108, 114, and 118.
[23] *See Argentina – Poultry*, para. 7.341 and n. 223.
[24] *Argentina – Poultry*, para. 7.45 (stating that under Article 17.6(i), panels "may not engage in *de novo* review").

2. The Panel Should Make an Objective Assessment of the Matter Before It and Not Add to or Diminish the Rights and Obligations Provided in the Covered Agreements

28. Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. The Appellate Body has explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised.[25] Articles 3.2 and 19.2 of the DSU contain the fundamental principle that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the DSB, cannot add to or diminish the rights and obligations provided in the covered agreements.

29. The EC engages in a long discourse on the EC's particular view of municipal law, other legal systems and fora, and urges that the Panel should not "deviate" from prior Appellate Body reports addressing the issue of zeroing.[26] In essence, the EC is urging the Panel to rubber-stamp those prior reports that are favorable to the EC's position, to disregard those panel reports that demonstrate that the EC's position is contrary to the agreed text of the WTO agreements, and to ignore the Panel's obligations under Article 11 of the DSU to conduct an objective assessment of the matter before it. The EC, in relying so extensively on examples from outside the WTO dispute settlement context, highlights the fact that there is no support for its approach in the DSU, which governs the Panel's review of the consistency of the measures with the WTO Agreement. A panel is bound to make an objective assessment under Article 11 of the DSU, and must not make findings and recommendations that add to or diminish the rights and obligations in the covered agreements.

30. The EC erroneously argues that the "WTO inconsistency of . . . [zeroing] has already been established in previous disputes".[27] EC citations to evidence before separate panels and the Appellate Body do not permit the Panel to simply adopt those findings here without an objective assessment of the facts at issue. The panel in *US – Subsidies on Upland Cotton* rejected Brazil's request that the panel simply accept and apply the reasoning of a prior panel, as modified by the Appellate Body. In declining to do so, the panel stated that there was "no basis in the text of the DSU . . . for such incorporation by reference of claims and arguments made in a previous dispute nor for a quasi-automatic application of findings, recommendations and rulings from a previous dispute".[28]

31. Ironically, while arguing that a panel should follow the reasoning of prior panel and Appellate Body reports, the EC appears to have a starkly divergent view of the WTO dispute settlement system than prior panel and Appellate Body reports. The EC begins from a rather startling premise - it claims that the "main purpose" of the dispute settlement system is to "provide security and predictability to the multilateral trading system."[29] Users of the dispute settlement system could be forgiven for thinking that the main purpose of the dispute settlement system was to resolve disputes.

32. Furthermore, while prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members[30], this Panel is not bound to follow the reasoning set forth in any Appellate Body report. In this instance, the EC urges the Panel to follow prior Appellate Body

[25] *Guatemala – Cement I (AB)*, para. 73.

[26] *See* EC First Written Submission, paras. 63, 110. The EC appears to advocate that the Panel disregard its duty under Article 11 of the DSU when it asserts that the Panel should not depart from previous Appellate Body findings on zeroing "to the extent that the Appellate Body has already examined the arguments which could be raised by the defendant in this case". EC First Written Submission, para. 106. The Panel is required to make an "objective assessment" of this case, and cannot simply refuse to examine the arguments of the United States because the EC alleges that they are similar to those made in another dispute that was the subject of an adopted Appellate Body report.

[27] *See* EC First Written Submission, paras. 115.

[28] *US – Cotton Subsidies (Panel)*, paras. 735 - 739.

[29] EC First Submission, para. 87.

[30] *Japan – Alcohol Taxes (AB)*, para. 14.

findings in order to ensure the "security and predictability" referred to in Article 3.2 of the DSU.[31] However, read in its context in Article 3.2, the reference to security and predictability in Article 3.2 supports the opposite conclusion. The rights and obligations of the Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. In this regard, the "security and predictability" referred to in the first sentence of Article 3.2 results from the application of the correct interpretive approach set forth in the second sentence of Article 3.2 - the customary rules of interpretation of public international law - to the provisions of the WTO Agreement. A result which adds to or diminishes the rights or obligations of Members provided in the covered agreements is prohibited by the third sentence of Article 3.2 and is therefore the antithesis of the "security and predictability" referred to in the first sentence of Article 3.2. This conclusion does not change because the result in question had previously been reached by the Appellate Body.

33. Appellate Body reports should be taken into account only to the extent that the reasoning is persuasive. The Appellate Body itself has stated that its reports are not binding on panels.[32] While the reasoning in such reports may be taken into account, Members are free to explain why any reasoning or findings should *not* be taken into account.[33] Therefore, although the dispute settlement system serves to resolve a particular dispute, and to clarify agreement provisions in the context of doing so, neither panels nor the Appellate Body can issue authoritative interpretations that are binding with respect to another dispute.

34. The EC argues that the Appellate Body in *US – OCTG Sunset Reviews (AB)* "clearly stated that panels are bound by the legal analysis of the Appellate Body".[34] The Appellate Body in that case, however, merely said that it would expect panels to follow earlier conclusions where issues are the same, not that panels are legally bound by prior Appellate Body reports. The Appellate Body's statement does not represent the incorporation of the doctrine of *stare decisis* into the WTO dispute settlement system, nor could it.

35. The EC further asserts that "the Panel should not depart" from prior Appellate Body reports on zeroing because the Appellate Body occupies a "superior position" in the WTO hierarchy, is a "permanent body", and "provides for the correct interpretation of the relevant rules".[35] None of this is provided for in the DSU. Although the Appellate Body undeniably has an important role in the WTO dispute settlement system, panels also possess fundamental responsibilities under Articles 3.2, 11, and 19.2 of the DSU, and are not free to ignore them because one party refers to Appellate Body findings on a similar issue in another dispute. Panels must make an objective assessment of the matter, and must correctly apply the customary rules of interpretation of public international law, even when this requires a conclusion different from that reached in an earlier report.

36. In connection with reports dealing with "zeroing", the panel in *US – Zeroing (Japan)* appreciated that panels are not bound to apply reasoning and findings of the Appellate Body on the subject.[36] The panel, explaining why it departed from the Appellate Body reasoning on certain aspects of the zeroing claim, recognized that although Appellate Body reports should be taken into account when they are relevant to a dispute, "a panel is under an obligation under Article 11 of the

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[31] *See* EC First Written Submission, paras. 94, 99.

[32] *See US – Softwood Lumber Dumping (AB),* para. 111 (*citing Japan – Alcohol Taxes (AB) and US – Shrimp (Article 21.5) (AB)*). As the Appellate Body noted in *US – Softwood Lumber*, adopted reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute". *US – Softwood Lumber (AB)*, para. 111 (quoting *Japan – Alcohol Taxes (AB)*). Panels also have recognized that they are not bound by previous WTO panel reports. *See Argentina – Poultry*, para. 7.41 ("We note that we are not bound to follow rulings contained in adopted WTO panel reports.").

[33] *US – Softwood Lumber Dumping (AB),* n. 175.

[34] EC First Written Submission, para. 99.

[35] EC First Written Submission, paras. 90, 93, 106.

[36] The United States provides below specific analysis as to why previous Appellate Body reports are inapposite to this case.

DSU to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements...'".[37] Further, as the panel noted, "Article 3.2 of the DSU requires a panel 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' and provides that '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in covered agreements.'"[38]

37. Likewise, recently in *US- Shrimp AD Measure (Ecuador)*, the panel correctly stated that in accordance with its obligations under Article 11 of the DSU, it had to satisfy itself that Ecuador had established a *prima facie* case by presenting evidence and arguments to identify the measure being challenged and explaining the basis for the claimed inconsistency of zeroing with a WTO provision, despite the fact that the responding party did not contest the claims made by Ecuador.[39] The panel stated that:

> [T]he fact that the United States does not contest Ecuador's claims is not sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case.[40]

38. Lastly, the United States notes that the EC's claim that prior Appellate Body reports "constitute an authoritative interpretation of the law"[41] cannot be reconciled with Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization*, which confers the "exclusive authority to adopt interpretations" of the covered agreements upon the Ministerial Conference and the General Council.[42] Therefore, while the dispute settlement system serves to resolve a particular dispute, and to clarify Agreement provisions in the context of doing so, neither panels nor the Appellate Body have the "authority" to adopt interpretations that would be binding with respect to another dispute. The same flaw applies to the EC's novel argument concerning Article XVI:4 of the Marrakesh Agreement as well, as discussed further below.

V. ARGUMENT

39. The US argument is structured in the following manner. First, in Section A, the United States requests that the Panel make preliminary rulings regarding the scope of its terms of reference. As we demonstrate, the Panel should limit its terms of reference to those *final* measures that were first identified in the consultation request, and subsequently in the panel request. Moreover, the EC's additional measures, to the extent that they are deemed indeterminate, also are outside of the panel's terms of reference because they do not comply with the specificity requirement of Article 6.2 of the DSU.

40. In Section B, the United States responds to the EC's claims concerning assessment proceedings. The United States will demonstrate that for purposes of an assessment proceeding, there is no WTO requirement to offset "negative dumping" or use the average-to-average method or

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[37] *US – Zeroing (Japan) (Panel)*, para. 7.99 and n. 733.
[38] *US – Zeroing (Japan) (Panel)*, para. 7.99 and n. 733.
[39] *US – Shrimp AD Measure (Ecuador)*, paras. 7.10-7.11 (*quoting US – Gambling (AB)*, para. 141).
[40] *US – Shrimp AD Measure (Ecuador)*, para. 7.9.
[41] *See* EC First Submission, para. 108.
[42] The Appellate Body recognized this point in one of its earliest reports, when it noted that "Article IX:2 of the WTO Agreement provides: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Article IX:2 provides further that such decisions "shall be taken by a three-fourths majority of the Members". The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere". *Japan – Alcohol Taxes (AB)*, p. 13.

transaction-to-transaction method.[43] Therefore, the Panel should reject the EC's claims as to assessment proceedings.

41. In Section C, the United States refutes the EC's argument that Commerce's determinations in the challenged sunset reviews are inconsistent with AD Agreement Articles 11.1, 11.3, 2.1, 2.4 and 2.4.2. In Section D, the United States addresses the EC's "as applied" claim with respect to four original investigations. Finally, in Section E, the United States responds to the EC's claim with respect to Article XVI:4 of the WTO Agreement. Because the EC has not demonstrated inconsistency with provisions of the AD Agreement and GATT 1994, there can be no breach of Article XVI:4. The United States also will demonstrate that the EC's broad interpretation of Article XVI:4 would lead to a distortion of the WTO dispute settlement system, and should be rejected.

A. REQUEST FOR PRELIMINARY RULINGS

42. The United States requests a preliminary ruling that the measures appearing for the first time in the EC's panel request are not within the Panel's terms of reference. Contrary to Articles 4.4, 4.7, 6.2 and 7.1 of the DSU, and Articles 17.3, 17.4 and 17.5 of the AD Agreement, the EC seeks to expand the matter in this dispute beyond the measures upon which consultations were requested.[44]

43. First, among the 52 alleged measures (called "proceedings" by the EC) the EC specifically identifies in the Annex to its panel request, 14 are not within the Panel's terms of reference. These 14 specific alleged measures were not identified in the EC's consultation request and were not the subject of consultations; they therefore fall outside of the Panel's terms of reference.

44. Second, the EC adds in its panel request a claim against "[t]he continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders ... calculated or maintained in place pursuant to the most recent administrative review, or, as the case may be, original proceeding or changed circumstances or sunset review proceeding" in 18 enumerated cases.[45] The United States assumes that this request refers to the most recent measure included for each of the 18 cases listed in the Annex. To the extent that the EC's request does not refer to the most recent identified measure, but to any most recent measure, it refers to an indeterminate number of alleged measures. Indeterminate measures that are no where specifically identified would not fall within the Panel's terms of reference. Like the 14 alleged measures mentioned above, the EC did not identify the continued application of, or the application of the anti-dumping duties resulting from the 18 listed cases – either specifically or generally – in its consultation request.

45. Insofar as the EC's added measure concerning the application and continued application of antidumping duties is deemed indeterminate, the Panel should find that it is outside of the Panel's terms of reference because it does not comply with the specificity requirement of Article 6.2 of the DSU.

46. Finally, four of the newly alleged measures were preliminary results from on-going proceedings in which no final determination had been made at the time of the panel request. For this additional reason, the Panel should rule that these four on-going proceedings are not within its terms of reference.

[43] Or, put differently, that it is permissible under the WTO agreements to use the average-to-transaction method in assessment proceedings with respect to situations other than those involving "targeted dumping".

[44] *US – Shrimp (Article 21.5) (Panel)*, para. 5.6 ("We note that, as confirmed by the Appellate Body, a panel has the responsibility to determine its jurisdiction and that assessing the scope of its terms of reference is an essential part of this determination" (Citing *US – 1916 Act (AB)*, para. 54)).

[45] *See* WT/DS350/6 (11 May 2007) at para. 2; *see also* EC's First Submission, para. 111.

1. The EC Requested Establishment of the Panel on Measures Not Included in its Request for Consultations

(a) The Measures Contained in the EC's Original Consultation Request

47. The EC's consultation request of 2 October 2006, was explicitly limited to 38 specific measures.[46] Paragraph 2(b) of the consultation request refers to "*[t]he specific antidumping administrative reviews listed in Annex I* to the present request, and any assessment instructions issued pursuant to them..." (emphasis added). Annex I lists 33 specific administrative reviews, one of which was an on-going proceeding at the time of the consultation request.[47] Similarly, paragraph 2(c) of the consultation request describes the investigations covered by the consultation request as "[t]*he specific dumping determination in the original investigations listed in Annex III* to the present request, and any automatic assessment instructions issued pursuant to them..." (emphasis added). Annex III lists four specific final determinations of antidumping original investigations. Finally, paragraph 2(d) of the consultation request describes the single sunset review covered by the consultation request as "*[t]he specific Sunset review determination in the case listed in Annex II* to the present request" (emphasis added). Annex II lists one specific sunset review determination.

48. The EC's additional consultation request of 9 October 2006, to its initial consultation request added two administrative reviews to the annex of the original consultation request, one of which was an ongoing proceeding at the time of the addendum.[48] Accordingly, the EC identified a total of 38 specific measures and 2 on-going proceedings in its consultation request.

(b) The EC's Panel Request Explicitly Identifies Additional Alleged Measures that were not Identified in its Request for Consultations

49. In contrast to the consultation request, the EC's panel request identified 52 specific measures: the original 38 measures plus 14 additional alleged measures, including 7 final and 3 on-going additional sunset reviews[49], and 3 final and 1 on-going additional administrative reviews.[50] None of

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[46] *See* WT/DS350/1 (3 October 2006). Paragraph 2(a) of the consultation request of 2 October 2006 specifies as the subject of consultations: "The United States regulations, zeroing methodology, practice, administrative procedures and measures for determining the dumping margin in reviews mentioned under point 1(a) above and which the EC considers are inconsistent with several provisions of the *AD Agreement*, GATT 1994 and the Marrakech Agreement establishing the World Trade Organization". Paragraph 2 of the EC's panel request does not identify these same alleged measures.

[47] *See* WT/DS350/1 (3 October 2006) (identifying *Steel Concrete Reinforcing Bars from Latvia*, 71 Fed. Reg. 45,031 (Aug. 8, 2006) (preliminary results)).

[48] WT/DS350/1/Add. 1 (11 October 2006) (identifying *Stainless Steel Sheet and Strip in Coils from Germany*, 71 Fed. Reg. 45,024 (Aug. 8, 2004) (preliminary results)) (Exhibit EC-49).

[49] *Compare* WT/DS350/6 (11 May 2007), Annex, *with* WT/DS350/1 (3 October 2006), Annex; WT/DS350/1/Add.1 (11 October 2006), Annex. The additional sunset reviews include the final sunset review determinations: *Ball Bearings and Parts Thereof from Italy*, 71 Fed. Reg. 54,469 (Sept. 15, 2006) (Exhibit EC-71); *Ball Bearings and Parts Thereof from Germany*, 71 Fed. Reg. 54,469 (Sept. 15, 2006) (Exhibit EC-72); *Ball Bearings and Parts Thereof from France*, 71 Fed. Reg. 54,469 (Sept. 2006) (Exhibit EC-73); *Stainless Steel Sheet and Strip in Coils from Germany*, 70 Fed. Reg. 44,886 (Aug. 4, 2005) (Exhibit EC-74); *Stainless Steel Plate in Coils from Belgium*, 70 Fed. Reg. 41,202 (July 18, 2005) (Exhibit EC-75); *Ball Bearings and Parts Thereof from the United Kingdom*, 71 Fed. Reg. 54,469 (Sept. 15, 2006) (Exhibit EC-76); *Stainless Steel Sheet and Strip in Coils from Italy*, 70 Fed. Reg. 44,886 (Aug. 4, 2005) (Exhibit EC-69). The panel request also includes on-going sunset review determinations *Steel Concrete Reinforcing Bars from Latvia*, 72 Fed. Reg. 16,767 (April 5, 2007) (USITC had not yet determined injury at time of panel request) (Exhibit EC-70); *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 72 Fed. Reg. 7604 (16 Feb. 2007) (preliminary results) (Exhibit EC-77); and *Certain Pasta from Italy*, 72 Fed. Reg. 5266 (5 Feb. 2007) (USITC had not yet determined injury at time of panel request) (Exhibit EC-78).

[50] *Compare* WT/DS350/6 (11 May 2007), Annex, *with* WT/DS350/1 (3 October 2006), Annex; WT/DS350/1/Add.1 (11 October 2006), Annex. The additional final administrative review results are: *Steel*

these 14 alleged measures were referenced in the consultation request, and none were formally included in consultations.

50. The EC's panel request also added a new request that the panel review:

> The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure).[51]

51. The United States assumes that this additional request refers to the continued application of, or the application of, the specific anti-dumping duties for the most recent of the measures specifically listed for each of the 18 cases in the Annex. To the extent that the EC's request does not refer to the most recent identified measure, it refers to an indeterminate number of alleged measures in connection with the 18 cases. In this event, the EC would be challenging zeroing "as applied" in the calculation of antidumping duties under original investigations, and an indeterminate number of past administrative reviews, past changed circumstances reviews, and past sunset reviews. The new claim also would challenge the calculation of antidumping duties in an indeterminate number of current and/or future reviews that Commerce allegedly is concluding or will conclude at some point in the future.

52. With this additional request, the EC would be suggesting that there is some measure or are some measures, with respect to the orders, separate and apart from the particular determinations identified in its Annexes, that contain calculations of antidumping duties. The EC does not specifically identify any of these alleged measures. These alleged past and future measures to which the EC appears to allude were not formally a part of its consultation request, and were not included in request for consultations.

2. The EC May Not Expand the Panel's Terms of Reference by Including in its Request for Establishment of a Panel Specific Measures Not Included in its Request for Consultations

(a) Consultations Must be held Regarding a Specific Measure Before a Member may Refer that Measure to the DSB

53. A panel's terms of reference are determined by the complaining party's request for the establishment of a panel, which pursuant to Article 6.2 of the DSU, must "identify *the specific measures at issue*" (emphasis added). However, a Member may not request the establishment of a panel with regard to *any* measure; rather, it may only file a panel request with respect to a measure upon which the consultations process has run its course. Specifically, Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute".

Concrete Reinforcing Bars from Latvia, 71 Fed. Reg. 45,031 (Aug. 8, 2006) (identified as preliminary results in consultation request) (Exhibit EC-65); *Stainless Steel Sheet and Strip in Coils from Germany*, 71 Fed. Reg. 45,024 (Aug. 8, 2006) (identified as preliminary results in consultation request) (Exhibit EC-49); and *Certain Pasta from Italy*, 72 Fed. Reg. 7011 (14 Feb. 2007) (Exhibit EC-65). The additional on-going administrative review result is *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 70 Fed. Reg. 71,523 (11 December 2006) (preliminary results) (Exhibit EC-59).

[51] WT/DS350/6 (11 May 2007).

54. In turn, Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request "including identification of *the measures at issue* and an indication of the legal basis for the complaint" (emphasis added).

55. Thus, there is a clear progression between the measures discussed in consultations conducted pursuant to Article 4 of the DSU and the measures identified in the request to establish a panel which in turn, form the basis of the panel's terms of reference. Indeed, the Appellate Body in *Brazil – Aircraft* stated that:

> Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.[52]

Moreover, the Appellate Body has found that "as a general matter, consultations are a prerequisite to panel proceedings".[53]

56. These rules apply with equal force to disputes brought under the AD Agreement, and the AD Agreement itself clarifies further the relationship between consultations and panel requests.[54] Article 17.4 of the AD Agreement states that a Member may only refer "the matter" to the DSB following a failure of consultations to achieve a mutually agreeable solution, and final action by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings. In *Guatemala - Cement (AB)*, the Appellate Body explained that what constitutes the "matter" is the "key concept in defining the scope of a dispute that may be referred to the DSB under the *Anti-Dumping Agreement* and, therefore, in identifying the parameters of a panel's terms of reference in an anti-dumping dispute".[55] The Appellate Body analyzed the "matter" referenced in Articles 17.3 through 17.6 of the AD Agreement and found that the specific requirements in Article 6.2 of the DSU – identification of the specific measure at issue and the legal basis for the claim – define the "matter" and, accordingly, the panel's terms of reference.[56] The Appellate Body also found that the term "matter", has this same meaning in Article 17.3, relating to the request for consultations, and Articles 17.4 and 17.5, relating to the referral of a matter to the DSB and the request for the formation of a panel to examine the matter.[57]

57. Article 17.3 states that the consultations are to be held with the view of "reaching a mutually satisfactory resolution of *the matter*". Moreover, Article 17.4 provides that when "consultations pursuant to [Article17.3 of the AD Agreement] have failed to achieve a mutually agreed solution" and "final action has been taken", by the administering authorities, a Member "may refer *the matter* to the Dispute Settlement Body ("DSB")". And, under Article 17.5, the DSB "shall, at the request of the complaining party, establish a panel to examine *the matter*" (emphasis added). In all cases, *the matter* encompasses the specific measure or measures identified by the complaining party, and the legal basis for the complaint.

58. Articles 17.3, 17.4, and 17.5, along with Articles 4 and 6 of the DSU, therefore set forth a process by which a complaining party must request consultations on a specific matter before that

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[52] *Brazil – Aircraft (AB)*, para. 131.

[53] *Mexico – HFCS (Article 21.5) (AB)*, para. 58.

[54] Pursuant to DSU Article 1.2 and Appendix 2, in disputes arising under the AD Agreement, the provisions of the DSU "apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2", that is, Articles 17.4 through 17.7 of the AD Agreement. To the extent of any differences, which do not exist here, between the rules of the DSU and the AD Agreement, the special rules and procedures in Articles 17.4 to 17.7 would apply. *See* DSU, Article 1.2.

[55] *Guatemala – Cement I (AB)*, para. 70.

[56] *Guatemala – Cement I (AB)*, paras. 71-73.

[57] *Guatemala – Cement I (AB)*, para. 76.

matter may be referred to the DSB for the establishment of a panel. Moreover, pursuant to these provisions, a panel's terms of reference cannot include measures which were outside of the request for consultations.

59. Similar issues have arisen in a previous dispute. In *US – Import Measures on Certain EC Products*, the Appellate Body upheld the panel's finding that a particular action taken by the United States was not part of the panel's terms of reference, because the EC, while referring to that action in its panel request, had failed to request consultations upon it. In particular, the EC's request for consultations made reference to the increased bonding requirements levied by the United States as of 3 March 1999, on EC listed products in connection with the *EC Bananas* dispute, but *not* to US action taken on 19 April 1999, to impose 100 percent duties on certain designated EC products.[58] When the EC sought findings with respect to both the March 3rd measure *and* the April 19th action, the panel found that the March 3rd measure and April 19th action were legally distinct, and that the April 19th action did not fall within the panel's terms of reference.[59]

60. The Appellate Body upheld the Panel's finding. The Appellate Body found that because the consultation request did not refer to the April 19th action, and as the EC admitted at the oral hearing that the April 19th action "was not *formally* the subject of the consultations", it was not a measure in that dispute and fell outside the panel's terms of reference.[60]

(b) Because the EC's Panel Request Contained Measures That were not the Subject of Its Request for Consultations, these Additional Measures do not fall within the Panel's Terms of Reference

61. The EC's panel request explicitly introduced to the dispute 14 new administrative review and sunset review determinations. None of these alleged measures were a subject of the EC's consultation request.

62. The EC also requested establishment of a panel as to "the continued application of, or the application of the specific antidumping duties resulting" from the determinations in the 18 cases identified in the Annex to its panel request. The EC's request for consultations did not contain either a specific or general reference to these alleged measures.

63. The situation in this dispute resembles that in *US Import Measures*. As in that or any other dispute, the scope of the measures subject to referral to the DSB is delineated by the consultation request and, absent a request for consultations, a measure may not be placed before a panel. The EC's consultation request made no mention of any of the additional measures, and accordingly, these "measures" do "not fall within the Panel's terms of reference".[61]

64. Permitting the EC to request a panel with respect to measures on which consultations have not been held would also have dangerous systemic consequences for the WTO dispute settlement system. The very purpose of consultations and any practical utility that they provide would be completely undermined if a complainant could add completely new measures upon which no consultations had been held, to a request for the establishment of a panel. To allow a complaining party to have recourse to panel proceedings without having consulted on a measure would deny both parties the opportunity to attempt to settle their differences and resolve the dispute, contradicting the role stated in Article 3.3 of the DSU of the dispute settlement system in providing the "prompt settlement" of situations where one Member considers that its benefits under the covered agreements are being nullified or impaired by measures taken by another Member. It is also unclear how such an outcome

[58] *US – Certain EC Products (AB)*, para. 70.
[59] *US – Certain EC Products (AB)*, para. 82.
[60] *US – Certain EC Products (AB)*, para. 70.
[61] *US – Certain EC Products (AB)*, para. 70.

would advance the purpose of consultations; we note in this connection that Article 4.1 of the DSU calls on Members "to strengthen and improve the effectiveness of the consultation procedures employed by Members".

65. For these reasons, the United States respectfully requests the Panel to find that the 14 new alleged measures specifically identified in the EC's panel request, along with the "application and continued application of duties" relating to the 18 cases referenced in the EC's panel request, are not within this Panel's terms of reference.

(c) The EC's Reference to "18 Cases" Do Not Comport with the Specificity Requirements of Article 6.2

66. The EC in its panel request identified as additional "measures" "the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding".[62] The United States assumes that this request refers to the most recent of the measures specifically listed for each of the proceedings for each of 18 cases in the Annex. However, to the extent that the EC's request does not refer to the most recent identified measure, it refers to an indeterminate number of alleged measures.

67. A general reference to an indeterminate number of measures does not satisfy the requirement of Article 6.2 of the DSU that a panel request "identify the *specific measures* at issue" (emphasis added). Each measure that calculates and sets margins of dumping is a legally distinct measure. To challenge legally distinct measures, a Member must identify specifically each measure in its consultation and panel requests.[63] The EC did not comply with this requirement. Accordingly, neither these 18 cases nor any additional proceedings that flow from these 18 cases, beyond the measures specifically identified in both the consultation and panel requests, can be included within this Panel's terms of reference.[64]

68. Permitting the EC to expand the terms of reference to include the indeterminate measures not specifically identified would cause severe prejudice to the United States. Individual assessment proceedings relate only to certain named companies covered by the review proceeding. The EC, inasmuch as its challenge relates to certain enumerated proceedings, limits the application of its challenge to certain companies named in the Annex of its panel request. It is, however, conceivable that (1) companies other than those named in the EC's Panel Request, might have been reviewed in one or more of the particular segments being challenged, and (2) that the orders the EC identifies cover companies in addition to those the EC has identified. Thus, this raises the question of not only which proceedings the EC is challenging, but also whether the EC is limiting its challenge to only the companies named in the Annex of its panel request.

69. Because the United States has had no opportunity to consult with the EC with respect to these indeterminate number of alleged measures, it was unable to seek further clarity regarding the scope and effect of the measures the EC is challenging. Without prior consultations on specific measures, a Member cannot adequately respond to allegations brought by another Member. This inability causes prejudice to the United States when making its arguments before the Panel, and deprives the Panel of a full argument on the matter.

70. Moreover, in addition to lacking in clarity, any attempt by the EC to assert a broad, all encompassing challenge to "18 cases", and suggest that its claim covers any and all individual

[62] *See* WT/DS350/6 (11 May 2007).
[63] *See US – Certain EC Products (AB)*, para. 76.
[64] *See US – Certain EC Products (AB)*, para. 70.

proceedings which flow from these cases is untenable. By failing to identify specific measures at issue, the EC has failed to establish a *prima facie* case as to the orders in general, or to any proceeding that it has not specifically named. Original investigations and assessment reviews, even when pertaining to the same subject merchandise, are different processes which serve distinct purposes. The purpose of an investigation is to determine the existence, degree, and effect of any alleged dumping, while the purpose of an assessment review is to determine the amount of the duty to be assessed on previous imports of subject merchandise and the estimated dumping duty to be applied to future imports. A challenge and finding by a panel with respect to one administrative proceeding does not necessitate the same type of finding as to all proceedings that encompass the same subject merchandise.

71. The Appellate Body recognized in *US – Softwood Lumber CVD (21.5)(AB)* separate proceedings to be independent of each other and that they operate under their own timelines and procedures.[65] In that instance, the Appellate Body found the Section 129 determination and the first assessment review decision with respect to pass through to be linked because the administrative review referenced the WTO proceedings and findings.[66] However, by tailoring its finding to the narrow facts of that case, and by indicating that it did not intend its finding to be broadly applicable, the Appellate Body effectively conveyed that unless the particular facts dictate otherwise, each proceeding should be treated as its own measure.[67]

3. The EC Requested Establishment of the Panel on Measures That Were Not Final at the Time of its Panel Request

72. As mentioned above, four of the alleged measures identified in the panel request were preliminary results of assessment reviews.[68] They do not constitute "final action" within the meaning of Article 17.4 of the AD Agreement, and thus cannot serve as the basis for requesting establishment of a panel.

73. A matter may only be referred to a panel if "final action has been taken by the administering authority".[69] The EC, however, alerts the Panel that some of the matters it has referred to the DSB relate to proceedings that are not final by prominently disclosing in its panel request that the measures it challenges are "Final Results (*unless otherwise specified*)", and by identifying the one on-going administrative review and one of the on-going sunset reviews as "Preliminary results".[70] The EC also

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[65] *US – Softwood Lumber CVD Final (21.5) (AB)*, para. 88.

[66] *See US – Softwood Lumber CVD Final (Article 21.5) (AB)*, paras. 90-92.

[67] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 93.

[68] *See* WT/DS350/6, Annex: List of Cases (*identifying Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 70 Fed. Reg. 71,523 (December 11, 2006) (preliminary results) (*see* Exhibit EC-59); *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 72 Fed. Reg. 7604 (16 Feb. 2007) (preliminary results) (*see* Exhibit EC-77); *Steel Concrete Reinforcing Bars from Latvia*, 72 Fed. Reg. 16,767 (April 5, 2007) (USITC has not yet determined injury) (Exhibit EC-70); *Certain Pasta from Italy*, 72 Fed. Reg. 5266 (5 Feb. 2007) (USITC has not yet determined injury) (Exhibit EC-78). *See* WT/DS350/1 (3 October 2006) (*identifying Steel Concrete Reinforcing Bars from Latvia*, 71 Fed. Reg. 45,031 (8 Aug. 2006) (preliminary results) (Exhibit EC-33). *See* WT/DS350/1/Add. 1 (11 October 2006) (*identifying Stainless Steel Sheet and Strip in Coils from Germany*, 71 Fed. Reg. 45,024 (8 Aug. 2006) (preliminary results) (Exhibit EC-49).

[69] AD Agreement, Art. 17.4. A provisional measure may only be challenged when it " has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7". The EC has neither alleged nor demonstrated that these criteria have been met with respect to the preliminary results identified.

[70] WT/DS350/6, Annex: List of Cases (p.11) (emphasis added); *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 72 Fed. Reg. 7604 (16 Feb. 2007) (preliminary results) (*see* Exhibit EC-77); *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 70 Fed. Reg. 71,523 (11 Dec. 2006) (preliminary results) (*see* Exhibit EC-59).

omits from its panel request reference to the final ITC decisions and final orders in two of the sunset reviews because these proceedings also were on-going at the time the EC submitted its panel request. These four on-going proceedings challenged by the EC are not "final action[s] . . . taken by the administering authority of the importing Member to levy definitive anti-dumping duties".[71] To the contrary, at the time of the panel request, no decision had been made to levy definitive duties.[72] Indeed, it was entirely possible that no definitive anti-dumping duty would be levied, or would continue to be levied at all.

74. Submitting a request for establishment of a panel to review proceedings that are not final is not permitted by Article 17.4 of the AD Agreement. Nor are measures that are not yet in existence at the time of panel establishment within a panel's terms of reference under the DSU.[73] We respectfully request that the Panel find that the four on-going proceedings are not within its terms of reference.

B. THE UNITED STATES METHODOLOGY FOR ASSESSING ANTIDUMPING DUTIES IS CONSISTENT WITH THE OBLIGATIONS IN THE AD AGREEMENT

75. To the extent the EC challenges the WTO-consistency of the zeroing methodology as applied in assessment proceedings, as we demonstrate below, the EC's claims directly contradict the text of the AD Agreement. The methodology used by the United States to calculating antidumping duties in the assessment proceedings in question is WTO-consistent.

76. The AD Agreement provides no general obligation to consider transactions for which the export price exceeds normal value as an offset to the amount of dumping found in relation to other transactions at less than normal value. The exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation found in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a *weighted average normal value with a weighted average of prices of all comparable export transactions* . . . ".[74] This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation phase when using the average-to-average comparison methodology in Article 2.4.2.[75] There is no textual basis for the additional obligations that the EC would have this Panel impose.

77. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body specifically recognized that the issue before it was whether zeroing was prohibited under the average-to-average comparison methodology found in Article 2.4.2.[76] Thus, the report found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology".[77] The Appellate Body reached this conclusion by interpreting the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2 in an "integrated manner".[78] In other words, the term "all comparable export transactions" was integral to the interpretation that the multiple comparisons of average normal value and average export price for

[71] AD Agreement, Art. 17.4.

[72] *Steel Concrete Reinforcing Bars from Latvia*, 72 Fed. Reg. 16,767 (5 April 2007) (USITC has not yet determined injury) (Exhibit EC-70); *Certain Pasta from Italy*, 72 Fed. Reg. 5266 (5 Feb. 2007) (USITC has not yet determined injury) (Exhibit EC-78).

[73] *See, e.g, US – Subsidies on Upland Cotton (Panel)*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry (Panel)*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of the panel was not within the panels terms of reference).

[74] Emphasis added. *See US – Softwood Lumber Dumping (AB)*, paras. 82, 86, and 98.

[75] *US – Zeroing (Japan) (Panel)*, para. 7.213; *US – Zeroing (EC) (Panel)*, para. 7.197; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.65-5.66 and 5.77.

[76] *US – Softwood Lumber Dumping (AB)*, paras. 104, 105, and 108.

[77] *US – Softwood Lumber Dumping (AB)*, para. 108.

[78] *US – Softwood Lumber Dumping (AB)*, paras. 86 - 103.

averaging groups did not constitute an average-to-average comparison of all comparable export transactions unless the results of all such comparisons were aggregated. The obligation to provide offsets, therefore, was tied to the text of the provision addressing the use of the average-to-average comparison methodology in an investigation, and did not arise out of any independent obligation to offset prices.

78. The EC's argument that there is either a general prohibition of "zeroing", or one specifically applicable to the more particular context of assessment proceedings, cannot be reconciled with the interpretation articulated in *US – Softwood Lumber Dumping (AB)*, wherein the phrase "all comparable export transactions" in Article 2.4.2 meant that zeroing was prohibited in the context of average-to-average comparisons in investigations. If, as the EC seems to argue, there is a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the meaning ascribed to "all comparable export transactions" by the Appellate Body in that dispute would be redundant of the general prohibition of zeroing and therefore "inutile".

79. The need to avoid such redundancy was recognized in *US – Zeroing (Japan) (AB)* when the Appellate Body changed its interpretation of this phrase. In *US – Softwood Lumber Dumping (AB)*, "margins of dumping" and "all comparable export transactions" were interpreted in an integrated manner. The Appellate Body found that in aggregating the results of the model-specific comparisons, "all" comparable export transactions must be accounted for. Thus, the phrase necessarily referred to all transactions across all models of the product under investigation, *i.e.*, the product "as a whole". The textual reference "all comparable export transactions" was the basis for the Appellate Body to conclude that "product" must mean "product as whole" and margins of dumping may not be based on individual averaging group comparisons. The Appellate Body subsequently relied on this "product as a whole" concept, although in a manner detached from its underlying textual basis, in concluding that margins of dumping cannot be calculated for individual transactions.[79]

80. However, in *US – Zeroing (Japan) (AB)*, the Appellate Body reinterpreted "all comparable export transactions" to relate solely to all transactions within a model, and not across models of the product under investigation.[80] In doing so, the Appellate Body abandoned the only textual basis for its reasoning in *US – Softwood Lumber Dumping (AB)*.[81]

81. In making its own "objective assessment", however, this Panel must give particular consideration to the special standard of review for matters arising under the AD Agreement – that a Member's measure may not be found inconsistent with the obligations set forth in the AD Agreement if the measure is based on a permissible interpretation of the AD Agreement. Accordingly, for the reasons set forth below, the Panel should not adopt reasoning and conclusions from Appellate Body reports that reject a permissible interpretation of the AD Agreement.

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[79] *US – Zeroing (EC) (AB)*, paras. 126, 127; *US – Softwood Lumber Dumping (21.5) (AB)*, paras. 89, 114; *US – Zeroing (Japan) (AB)*, paras. 121, 122, 151.

[80] *US – Zeroing (Japan) (AB)*, para. 124 ("[T]he phrase 'all comparable export transactions' requires that each group include only transactions that are comparable and that no other transaction may be left out when determining margins of dumping under [the average-to-average comparison] methodology").

[81] The United States raised these points in its DSB statement and communication of 20 February 2007 (Exhibit US-2). *See also*, Communication from the United States, WT/DS294/16, and Communication from the United States, WT/DS294/18.

1. Article 2.1 of the AD Agreement and Article VI of the GATT 1994[82]

82. As an initial matter, Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 are definitional provisions that, "read in isolation, do not impose independent obligations".[83] Nevertheless, these definitions are important to the interpretation of other provisions of the AD Agreement at issue in this dispute. In particular, it is most significant that Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define "dumping" and "margins of dumping" so as to require that export transactions be examined at an aggregate level. The definition of "dumping" in these provisions references "product . . . introduced into the commerce of another country at less than its normal value". This definition describes the real-world commercial conduct by which a product is imported into a country, *i.e.*, transaction by transaction.[84] Thus, dumping is defined as occurring in the course of a commercial transaction in which the product, which is the object of the transaction, is "introduced into the commerce" of the importing country at an export price that is "less than normal value".

83. In addition, the term "less than normal value" is defined as when the "price of the product exported . . . is less than the comparable price . . . ".[85] Again, this definition describes the real-world commercial conduct of pricing such that one price is less than another price. The ordinary meaning of "price" as used in the definition of dumping is the "payment in purchase of something".[86] This definition "can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level".[87]

84. The "dumping" definition's description of the conduct that antidumping duties are intended to remedy provides strong contextual support for the interpretation of these provisions that permits an authority to examine dumping in relation to the particular conduct described, *i.e.*, individual import transactions. Thus, in the *US – Zeroing (Japan)* dispute, the panel correctly concluded that the definition of dumping itself "undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions".[88]

85. In other words, dumping – as defined under these provisions – may occur in a single transaction. There is nothing in the GATT 1994 or the AD Agreement that suggests that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. Indeed, the commercial reality is that the foreign producer or exporter itself exclusively enjoys the benefit of the extent to which the price of a non-dumped export transaction exceeds normal value.

86. In *US – Zeroing (Japan)*, the panel noted that "the record of past discussions in the framework of GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions".[89] Well before the recent debate about "zeroing" or "offsets", a Group of Experts convened to consider numerous issues with respect to the

[82] Because Articles 2.1 and 2.4 of the AD Agreement do not impose independent obligations, to the extent the EC is claiming that the challenged measures are inconsistent with "obligations" found in either 2.1 or 2.4, the EC fails to establish the existence of any obligations pursuant to these definitional provisions, and therefore, the EC's claims must necessarily depend on Article 2.4.2. If, however, the Panel elects not to follow the reasoning employed in prior Appellate Body findings (*see e.g., US – Zeroing (Japan) (AB)*, para. 140), and finds the application of zeroing in reviews inconsistent with Articles 2.1 and 2.4, then the Panel may exercise judicial economy and need not reach the EC's argument as to Article 2.4.2.

[83] *US – Zeroing (Japan) (AB)*, para. 140.

[84] *See US – Zeroing (EC) (Panel)*, para. 7.285.

[85] Article VI:1 of the GATT 1994, Article 2.1 of the AD Agreement.

[86] *New Shorter Oxford English Dictionary (1993)*, p. 2349.

[87] *US – Zeroing (Japan) (Panel)*, para. 7.106.

[88] *US – Zeroing (Japan) (Panel)*, para. 7.106.

[89] *US – Zeroing (Japan) (Panel)*, para. 7.107 and n.743.

application of Article VI of the GATT 1947. In this report, the Group of Experts considered that the "ideal method" for applying antidumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product concerned".[90]

87. Taking the same view, the panel in *US – Softwood Lumber Dumping (Article 21.5)* reasoned:

> In referring to a "determination . . . of . . . dumping . . . in respect of each single importation of the product concerned", the Group of Experts clearly envisaged the calculation of transaction-specific margins of dumping. This would suggest that the Group of Experts did not consider that there was anything in the definition of dumping set forth in Article VI of the GATT that would preclude the calculation of such transaction-specific margins.[91]

88. Thus, as the panel in *US – Zeroing (Japan)* found, "historically the concept of dumping has been understood to be applicable at the level of individual export transactions".[92]

89. It bears recalling that the AD Agreement was negotiated against the background of the Antidumping Code and the antidumping investigation methodologies of individual Contracting Parties under the Code. The methodology of not offsetting dumping based on comparisons where the export price was greater than normal value was examined by two GATT panels and was found to be consistent with the Antidumping Code.[93] In view of these findings, the Uruguay Round negotiators actively discussed whether the use of "zeroing" should be restricted.[94] The text of Article VI of the GATT 1947, however, did not change as a result of the Uruguay Round agreements.[95] The normal inference one draws from the absence of a change in language is that the drafters intended no change in meaning.[96]

90. The EC's claims in this dispute depend on a contrary interpretation of these provisions holding that "dumping" and "margins of dumping" apply to the product under investigation "as a whole" and do not apply to sub-group levels.[97] The EC claim depends on the reasoning set forth in the Appellate Body reports in *US – Zeroing (EC)* and *US – Zeroing (Japan)*[98], which rejected the notion that dumping may occur with respect to an individual transaction in the absence of the textual basis that was present in *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*. This interpretation relies on the term "product" as being solely and exclusively synonymous with the

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[90] *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, L/1141, adopted on 27 May 1960, BISD 9S/194, para. 7.

[91] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.64.

[92] *US – Zeroing (Japan) (Panel)*, para. 7.107.

[93] *See, e.g.*, *EC – Audiocassettes*, para. 360; *EC – Cotton Yarn*, para. 502.

[94] *See, e.g.*, *Communication from Japan*, MTN.GNG/NG8/W/30 (20 June 1988), item I.4(3), in which Japan expressed concern about a methodology wherein "negative dumping margins, i.e., the amount be which export price exceeds normal value, are ignored"; *Proposed Elements for a Framework for Negotiations: Principles and Objectives for Anti-dumping Rules, Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (Oct. 13, 1989), at item II.E.(d) (proposing that in calculating dumping margins "'negative' dumping should be taken into account, i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value"); *Communication from the Delegation of Hong Kong*, MTN.GNG/NG8/W46 (July 3, 1989), at 7.

[95] Similarly, the text of Article 2.1 of the AD Agreement mirrors the text of the Tokyo Round Antidumping Code.

[96] Instructive in this regard is *US – Underwear (AB)*, p. 17, in which the Appellate Body found that the disappearance in the *Agreement on Textiles and Clothing* of the earlier *Multi-Fibre Agreement* provision for backdating the operative effect of a restraint measure, "strongly reinforced the presumption that such retroactive application is no longer permissible". The corollary, however, is that when a provision is not changed, there is a presumption that behaviour that previously was permissible remains permissible.

[97] *See* EC First Submission, para. 194.

[98] EC First Submission, para. 195, fn. 141 and para. 197, fn. 142.

concept of "product as a whole". In particular, it denies that the ordinary meaning of the word "product" or "products" used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. However, as the panel report in *US – Zeroing (Japan)* explained, "[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis . . . ".[99]

91. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body reasoned that zeroing was not permitted in the context of "multiple averaging", on the basis of the phrase "all comparable export transactions", but did not explain how zeroing could be prohibited in the context of "multiple comparisons" generally. In contrast to *US – Softwood Lumber Dumping (AB)*, in *US – Zeroing (EC) (AB)* a new interpretation was embraced, such that the "product as a whole" concept led to the conclusion that zeroing is prohibited whenever "multiple comparisons" are made. The phrases "product as a whole" and "multiple comparisons" do not appear in the AD Agreement, but were derived from interpretations based on the phrase "all comparable export transactions", which appears only in connection with average-to-average comparisons in investigations. In considering this, the Panel in *US – Zeroing (Japan)* found:

> no explanation of this shift from the use of the "product as a whole" concept as context to interpret the term "margins of dumping" in the first sentence of Article 2.4.2 of the AD Agreement in connection with multiple averaging, on the one hand, to the use of this concept as an autonomous legal basis for a general prohibition of zeroing, on the other. In this regard, we note, in particular, that the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms "dumping" and "margins of dumping" cannot apply to a *sub-group* of a product logically leads to the broader conclusion that Members may not distinguish between *transactions* in which export prices are less than normal value and *transactions* in which export prices exceed normal value.[100]

Thus, the "product as a whole" concept as adopted does not support a claim that the challenged measures are inconsistent because of some general prohibition of zeroing present in all proceedings and under all comparison methods.

92. Examination of the term "product" as used throughout the AD Agreement and the GATT 1994 demonstrates that the term "product" in these provisions does not exclusively refer to "product as a whole". Instead, "product" can have either a collective meaning or an individual meaning. For example, Article 2.6 of the AD Agreement – which defines the term "like product" in relation to "the product under consideration" – plainly uses the term "product" in the collective sense. By contrast, Article VII:3 of the GATT 1994 – which refers to "[t]he value for customs purposes of any imported product" – plainly uses the term "product" in the individual sense of the object of a particular transaction (*i.e.*, a sale involving a specific quantity of merchandise that matches the criteria for the "product" at a particular price). Therefore, it cannot be presumed that the same term has such an exclusive meaning when used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994.

93. As the panel in *US – Softwood Lumber Dumping (Article 21.5)* explained, "an analysis of the use of the words product and products throughout the GATT 1994, indicates that there is no basis to equate product with "product as a whole". . . Thus, for example, when Article VII:3 of the GATT refers to "the value for customs purposes of any imported product", this can only be interpreted to

[99] *US – Zeroing (Japan) (Panel)*, para. 7.105 (*quoting US – Softwood Lumber Dumping (Article 21.5) (Panel)*, n.32).

[100] *US – Zeroing (Japan) (Panel)*, para. 7.101.

refer to the value of a product in a particular import transaction."[101] The panel detailed numerous additional instances where the term "product", as used in the AD Agreement and GATT 1994 do not support a meaning that is solely, and exclusively, synonymous with "product as a whole":

> To extend the Appellate Body's reference to the concept of "product as a whole" in the sense that Canada proposes to the T-T methodology would entail accepting that it applies throughout Article VI of GATT 1994, and the AD Agreement, wherever the term "product" or "products" appears. A review of the use of these terms does not support the proposition that "product" must always mean the entire universe of exported product subject to an anti-dumping investigation. For instance, Article VI:2 states that a contracting party "may levy on any dumped product" an anti-dumping duty. Article VI:3 provides that "no countervailing duty shall be levied on any product". Article VI:6(a) provides that no contracting party shall levy any anti-dumping or countervailing duty on the importation of any product...". Similarly, Article VI:6(b) provides that a contracting party may be authorized "to levy an anti-dumping or countervailing duty on the importation of any product". Taken together, these provisions suggest that "to levy a duty on a product" has the same meaning as "to levy a duty on the importation of that product". Canada's position, if applied to these provisions, would mean that the phrase "importation of a product" cannot refer to a single import transaction. In many places where the words product and products are used in Article VI of the GATT 1994, an interpretation of these words as necessarily referring to the entire universe of investigated export transactions is not compelling.[102]

Indeed, in a prospective normal value system, a duty is necessarily levied on an import basis, and not on a product as a whole basis.

94. In sum, the terms "product" and "products" cannot be interpreted in such an exclusive manner so as to deprive them of one of their ordinary meanings, in particular the "product" or "products" that are the subject of individual transactions. Therefore, the words "product" and "products" as they appear in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 cannot be understood to provide a textual basis for an interpretation that requires margins of dumping established in relation to the "product" must necessarily be established on an aggregate basis for the "product as a whole".

95. Likewise, examination of the term "margins of dumping" itself provides no support for the EC's interpretation of the term as solely, and exclusively, relating to the "product as a whole".[103] As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed:

> Article VI:2 of the GATT 1994 provides that, for the purposes of Article VI, "the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1" of Article VI. Paragraph 1 of Article VI defines dumping as a practice "by which products of one country are introduced into the commerce of another country at less than the normal value of the products" (emphasis supplied). ... Article VI:1 provides that "a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product in the exporting country" (emphasis supplied). In other words, there is dumping when the export "price" is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase "price difference", it would be

[101] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23, n. 36.
[102] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23.
[103] *See* EC First Submission, paras. 196.

> permissible for a Member to interpret the "price difference" referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that "price difference" as the "margin of dumping".[104]

Thus, the panel saw "no reason why a Member may not . . . establish the "margin of dumping" on the basis of the total amount by which transaction-specific export prices are less than the transaction-specific normal values".[105] Although the panel was examining margins of dumping in the context of the transaction-to-transaction comparison method in investigations under Article 2.4.2, its reasoning is equally applicable to margins of dumping established on a transaction-specific basis in an assessment proceeding under Article 9.3.

96. Additionally, the term "margin of dumping", as used elsewhere in the GATT 1994 and the AD Agreement, does not refer exclusively to the aggregated results of comparisons for the "product as a whole." As used in the Note Ad Article VI:1, which provides for importer-specific price comparison, the term "margin of dumping" cannot relate to aggregated results of all comparisons for the "product as a whole" because an exporter or foreign producer may make export transactions using multiple importers.

97. Similarly, the term "margin of dumping" as used in Article 2.2 of the AD Agreement would require the use of constructed value for the "product as a whole", even if the condition precedent for using constructed value under Article 2.2 relates only to a portion of the comparisons. The panel in *US – Softwood Lumber Dumping (21.5)* observed that this "would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2. . . . We are not convinced that the Appellate Body could have intended its *US – Softwood Lumber Dumping* findings to be applied in this manner.[106]

98. Nevertheless, the EC asserts that it is "only on the basis of aggregating . . . "intermediate values" . . . that an investigating authority can establish margins of dumping for the product under investigation as a whole".[107] In this regard, the reasoning of the Appellate Body reports relied upon by the EC is unpersuasive because it is contrary to the great weight of evidence indicating that the concepts of dumping and margin of dumping have long been understood as relating to individual transactions, as evidenced by the report of the Group of Experts, the reports of the GATT panels, the well-established practice of Members utilizing antidumping regimes, the negotiating history of the AD Agreement, as well as the ordinary meaning of the text the relevant provisions of the AD Agreement, the Antidumping Code, the GATT 1947 and the GATT 1994. Accordingly, Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define the terms "dumping" and "margin of dumping" such that export transactions must necessarily be examined at an aggregate level.

2. Article 2.4.2

99. The text and context of the relevant provisions of the AD Agreement, interpreted in accordance with customary rules of interpretation of public international law, do not support a general prohibition against zeroing that would apply in the context of assessment proceedings. The express terms of Article 2.4.2 limit its application to the "investigation phase" of a proceeding. To require the application of Article 2.4.2 to Article 9 assessment proceedings would read out of the AD Agreement

[104] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.27.
[105] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.28.
[106] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.62.
[107] EC First Submission, para. 195.

Article 2.4.2's express limitation to investigations. Such a result would be inconsistent with the principle of effectiveness, under which all the terms of an agreement should be given meaning.[108]

100. Article 2.4.2 provides as follows:

> Subject to the provisions governing fair comparison in paragraph 4 of this Article, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. (Emphasis added)

101. Other provisions of the AD Agreement also expressly limit their application to the investigation phase of an antidumping proceeding, and do not apply elsewhere. For instance, Article 5.1 refers to "an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated by or on behalf of a domestic industry". Similarly, Article 5.7 provides that evidence of dumping and injury must be considered simultaneously "in the decision whether or not to initiate an investigation" and "during the course of the investigation". Panels have consistently found that the references to "investigation" in Article 5 only refer to the original investigation and not to subsequent phases of an antidumping proceeding.[109] As the panel found in *US – Corrosion-Resistant Steel AD Sunset Review*:

> [T]he text of paragraph 8 of Article 5 refers expressly to the termination of an investigation in the event of *de minimis* dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews.[110]

102. The limited applicability of Article 2.4.2 could not be plainer. Article 2.4.2, by its very terms, is limited to the "investigation phase". Thus, the text leaves no doubt that the Members did not intend to extend these obligations to any phase beyond the investigation phase. Accordingly, a panel has already recognized that the application of Article 2.4.2 is expressly limited to the investigation phase of an antidumping proceeding. As the panel in *Argentina – Poultry* found:

> Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping "during the investigation phase".[111]

Thus, the ordinary meaning of the term "investigation phase," as it is used in the AD Agreement, does not include subsequent phases, such as assessment reviews.

103. Similarly, the panel in *US – Zeroing (EC)* conducted a thorough analysis of the text of the AD Agreement, finding that ""during the investigation phase" constitutes a unique limitation of scope of Article 2.4.2", which serves to contradict arguments that "during the investigation phase" has general meaning applicable to other parts of the AD Agreement.[112] In summation, the panel found:

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[108] *See, e.g., Japan – Alcohol Taxes (AB)*, sections G & H (discussing fundamental principle of effectiveness in treaty interpretation); *see also US – 1916 Act (AB)*, para. 123.

[109] *US – DRAMS AD*, para. 521, at footnote 519 ("investigation" means the investigation phase leading up to the final determination of the investigating authority); *EC – Bed Linen (Article 21.5) (Panel)*, para. 6.114 (Article 5.7 applies to investigations).

[110] *US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.70.

[111] *Argentina – Poultry*, para. 7.357.

[112] *US – Zeroing (EC) (Panel)*, para. 7.188; *see also id.*, paras. 7.146-7.188.

> First, the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 read in its ordinary meaning in the context of the *AD Agreement* as a whole means that Article 2.4.2 applies to the phase of the "original investigation" i.e. the investigation within the meaning of Article 5 of the *AD Agreement* as opposed to subsequent phases of duty assessment and review. Second, our interpretation of the meaning of this phrase as limiting the applicability of Article 2.4.2 to investigations within the meaning of Article 5 is also consistent with the distinction made between investigations and subsequent proceedings in various Appellate Body decisions. Third, alternative meanings suggested by the European Communities are implausible at best and deny this phrase any real function, in contradiction with principles of interpretation. Fourth, this interpretation is entirely consistent with different functions played by "original investigations" and duty assessment proceedings. . . .[113]

The panel in *US – Zeroing (EC)*, when making is own objective assessment of the facts before it, in accordance with the customary principles of international law, provided a thorough and solid review of the text and context of Article 2.4.2.[114] In this regard, we request that this Panel find persuasive the reasoning put forth by the panel in *US – Zeroing (EC)*.

104. The EC further argues that the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 is not limited to original investigations because all of the antidumping proceedings employed by Commerce "generally involve an investigation into something".[115] The text of the AD Agreement and prior panel and Appellate Body reports, however, do not support this argument.

105. Article 18.3 of the AD Agreement explicitly recognizes the difference between investigations, which may lead to the imposition of a measure, and "reviews" of existing measures. In *Brazil – Desiccated Coconut (AB)*, the Appellate Body, analyzing an identical distinction in Article 32.3 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), noted that the imposition of "definitive" duties (an "order" in US parlance) ends the investigative phase.[116] This distinction is also present in the substantive provisions of the AD Agreement.

106. The Appellate Body and prior panels have also consistently found that the provisions in the AD Agreement with express limitations to investigations are, in fact, limited to the investigation phase of a proceeding. In evaluating whether restrictions on cumulation in investigations were equally applicable to sunset reviews, the Appellate Body noted that Article 3.3 of the AD Agreement – like Article 2.4.2 – "plainly speaks to anti-dumping investigations . . . . It makes no mention of injury analyses undertaken in any proceeding other than original investigations . . . . [T]he text of Article 3.3 plainly limits its applicability to original investigations".[117] The Appellate Body's finding confirms the approach taken by prior panels. For example, the panel in *US – DRAMS AD* found that the term "investigation" means "the investigative phase leading up to the final determination of the investigating authority".[118]

107. The EC, citing the dictionary definition of "investigation", argues that Article 2.4.2 is applicable in all phases of antidumping proceedings because all proceedings necessarily involve a

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[113] *US – Zeroing (EC) (Panel)*, para. 7.220.
[114] *See US – Zeroing (EC) (Panel)*, paras. 7.220 and 7.6-7.7.
[115] EC First Submission, paras. 223-224.
[116] *Brazil – Desiccated Coconut (AB)*, p. 9. See, also, *US – Hot-Rolled Steel (AB)*, paras. 53, 61 (distinguishing between Article 21.2 reviews and the original determination in an investigation).
[117] *US – OCTG from Argentina (AB)*, paras. 294, 301.
[118] *US – DRAMS AD*, para. 6.87, footnote 519, discussing Article 5 of the AD Agreement.

"systemic examination or inquiry or a careful study of or research into a particular subject.[119] The panel in *US – Zeroing (EC)*, however, squarely rejected "that the decisive element regarding the interpretation of the scope of Article 2.4.2 is the word 'investigation' which has not been defined in the AD Agreement and which must therefore be interpreted strictly by reference to a dictionary definition".[120]

108. The consistency with which the Appellate Body and panels have recognized the distinctions between investigations and other segments of an antidumping proceeding is consistent with the distinct purpose of the investigation phase, which is to establish as a threshold matter whether the imposition of an antidumping measure is warranted. Other phases (such as Article 9 assessment proceedings or Article 11 sunset reviews) have different purposes. Whereas the purpose of an investigation is to determine whether a remedy against dumping should be provided, the purpose of an assessment proceeding is to determine the precise amount of that remedy.

109. It is further not accurate, as the EC infers in its submission, that a margin is "established" when Commerce performs a periodic review.[121] It would be more accurate to describe the three principal calculations performed in a periodic review as: (1) the calculation of margins of dumping for each export transaction; (2) the calculation of an assessment rate for each importer on the basis of the margins of dumping of the importer's transactions from each exporter/producer during the period examined; and (3) the calculation of a cash deposit rate for future entries of each exporter/producer on the basis of the margins of dumping of the exporter/producer's transactions during the period examined. In this regard, the provisions of US law relating to each calculation are: 19 U.S.C. 1675(a)(2)(A) (providing that Commerce shall determine the margin of dumping for each entry of the subject merchandise), and 19 U.S.C. 1675(a)(2)(C) (providing that the determination of the margin of dumping for each entry shall be the basis for the assessment of antidumping duties and for deposits of estimated duties (*i.e.*, the cash deposit)).

110. Finally, the limited application of Article 2.4.2 to the investigation phase is consistent with the divergent functions of investigations and other proceedings under the AD Agreement. The Appellate Body has already recognized that investigations and other proceedings under the AD Agreement serve different purposes and have different functions, and therefore are subject to different obligations under the Agreement.[122] Thus, contrary to the EC's apparent contention, the AD Agreement does not require Members to examine whether margins of dumping exist in the assessment phase.[123] Article 9 assessment proceedings are not concerned with the existential question of whether injurious dumping exists above a *de minimis* level such that the imposition of antidumping measures is warranted. That inquiry would have already been resolved in the affirmative in the investigation phase. Instead, Article 9, by its terms, focuses on the amount of duty to be assessed on particular entries, an exercise that is separate and apart from the calculation of an overall dumping margin during the threshold investigation phase of an antidumping proceeding.

111. The express limitation in Article 2.4.2 to the investigation phase is also consistent with the fact that the antidumping systems of Members are different for purposes of the assessment phase. The different methods used by Members include the use of prospective normal values, retrospective normal values, and prospective *ad valorem* assessment. If the requirements of Article 2.4.2 regarding comparison methods applied to the assessment of antidumping duties, this divergence of assessment systems would not be possible. For example, it is not possible to reconcile the prospective normal value system used by some Members with a requirement to use either the average-to-average or

[119] EC First Submission, para. 213.
[120] *US – Zeroing (EC) (Panel)*, para. 7.151.
[121] EC First Submission, para. 222.
[122] *See, e.g., US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 87.
[123] *See* EC First Submission, para. 222. ("This confirms that, in the context of Article 9.3, a 'margin of dumping' is to be established by reference to the whole of Article 2 . . .").

transaction-to-transaction method, because such systems compare weighted average normal values to individual export prices to assess dumping duties on individual transactions. Thus, to retain the flexibility in assessment systems reflected in Article 9, it is not only appropriate, but necessary, to limit the requirements of Article 2.4.2 to the investigation phase.

3. Article 2.4.2, Second Sentence

112. In addition, such a general prohibition of zeroing that applies beyond the context of average-to-average comparisons in investigations, would be inconsistent with the remaining text of Article 2.4.2, which provides for an alternative "targeted dumping" methodology that may be utilized in certain circumstances. The "targeted dumping" methodology was drafted as an exception to the obligation to engage in symmetrical comparisons in an investigation. By the terms of Article 2.4.2, it may be used "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods . . . ". When the investigating authority provides an explanation as to why these "differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison", it may then use the asymmetrical average-to-transaction comparison to establish the existence of margins of dumping during the investigation phase.

113. The mathematical implication of a general prohibition of zeroing, however, is that the targeted dumping clause would be reduced to inutility. That is because the targeted dumping methodology, provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons.[124] In this respect, a general zeroing prohibition would render the targeted dumping exception in Article 2.4.2 a complete nullity. Such an interpretation would be disfavoured under a key tenet of customary rules of treaty interpretation, namely that an "interpretation must give meaning and effect to all the terms of a treaty".[125]

114. In US – *Zeroing (EC)*, *US – Softwood Lumber Dumping (Article 21.5)* and *US – Zeroing (Japan)*, each of the panels recognized that the customary rules of interpretation of public international law precluded an interpretation that rendered the targeted dumping provision of Article 2.4.2 redundant.[126] The panel in *US – Zeroing (EC)* found that a general prohibition of zeroing that applied to the targeted dumping methodology "would deny the second sentence [of Article 2.4.2] the very function for which it was created".[127] The fact that, under a general zeroing prohibition, the average-to-average comparison method and the average-to-transaction comparison method would yield identical results was recognized by each of the panels.[128]

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[124] The reason for this is that, if offsetting is required, then all non-dumped sales (*i.e.*, negative values) will offset the margins on all of the dumped sales (*i.e.*, positive values). It makes no difference mathematically whether the calculation of the final overall dumping margin is based on comparing weighted-average export prices to weighted-average normal values or on comparing transaction-specific export prices to weighted-average normal values. In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.

[125] *US – Gasoline (AB)*, p. 23.

[126] *US – Zeroing (EC) (Panel)*, para. 7.266, *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.52, *US – Zeroing (Japan) (Panel)*, para. 7.127.

[127] *US – Zeroing (EC) (Panel)*, para. 7.266, *see also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.52 ("[A] general prohibition of zeroing . . . would deprive the second sentence of Article 2.4.2 of effect"); *US – Zeroing (Japan) (Panel)*, para. 7.127 ("If zeroing is prohibited in the case of the average-to-transaction comparison, the use of this method will necessarily always yield a result identical to that of an average-to-average comparison").

[128] *US – Zeroing (EC) (Panel)*, para. 7.266 ("In fact, under such an interpretation the alternative asymmetrical comparison methodology would as a matter of mathematics produce a result that was identical to that of the first average-to-average methodology"); *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.76 ("[A] prohibition of zeroing under the targeted dumping comparison methodology . . . would result in

115. Despite the findings *of fact* of the panels that the results of the targeted dumping methodology "will necessarily always yield a result identical to that of an average-to-average comparison",[129] under a general prohibition of zeroing, the Appellate Body has found this concern to be "overstated".[130] The Appellate Body has asserted that mathematical equivalence will occur only in "certain situations"[131] and represents "a non-tested hypothesis"[132] because "[the United States] has never applied the [targeted dumping] methodology, nor provided examples of how other WTO Members have applied this methodology".[133] These objections, however, are not persuasive. First, the panels have specifically addressed all of the situations under which it was argued that mathematical equivalence would not obtain and found these situations did not represent methodologies consistent with the AD Agreement.[134] The targeted dumping provision is rendered inutile if the only alternative methodologies that do not result in mathematical equivalence are, themselves, not consistent with the AD Agreement. Second, mathematical equivalence is not a "non-tested hypothesis" because the EC, a Member that actively utilizes this methodology is actually faced with this problem in administering its antidumping duty regime, as described in detail below.

116. In its most recent report to address this issue, the Appellate Body dismissed the redundancy caused by mathematical equivalence by concluding that it may be permissible to apply the targeted dumping methodology to a subset of export transactions.[135] The United States is unaware of any Member ever having done this, nor has any Member ever suggested it would administer its antidumping regime in this manner. The language of the AD Agreement says nothing about selecting a subset of transactions when conducting a targeted dumping analysis. The Appellate Body has drawn its conclusions about "zeroing" from its interpretation of "dumping" as relating to a "product", *i.e.*, a "product as a whole". The targeted dumping provision provides that when certain conditions are met, Members are permitted to compare average normal values to transaction-specific export prices. If the Appellate Body is correct that dumping may only be determined for the product as a whole (which the United States does not concede), there is no textual basis for inferring that the targeted dumping comparison methodology is an exception to that provision (which, as Article 2.1 provides, applies throughout the AD Agreement). The targeted dumping provision simply provides an exception to the average-to-average or transaction-to-transaction comparison requirement of the first sentence of Article 2.4.2. Consequently, the use of a subset of export transactions as a means of avoiding mathematical equivalency would also appear to be inconsistent with the AD Agreement.

117. This mathematical equivalency problem with the Appellate Body's recent interpretation of Article 2.4.2 cannot be ignored, particularly when Members such as the EC, are actively involved in administering antidumping duty regimes that apply the targeted dumping provision. Indeed, the redundancy that results from this mathematical equivalence appears to have already led the EC, attempting to reconcile the issue before its municipal tribunals, to advance an interpretation of the AD Agreement that is contrary to the interpretation the EC necessarily relies on in this dispute. Specifically, the Council of the European Union argued before the Court of First Instance that:

> the asymmetrical method, as compared with the first symmetrical method, makes sense only if the zeroing technique is applied. Without that mechanism, that method

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a margin of dumping mathematically equivalent to that established under W-W comparison methodology"); *US – Zeroing (Japan) (Panel)*, para. 7.127 n. 763 ("Mathematically, if zeroing is prohibited under the average-to-transaction method, the sum total of amount by which export prices are above normal value will offset the sum total of the amounts by which export prices are less than normal value").

[129] *US – Zeroing (Japan) (Panel)*, para. 7.127.

[130] *US – Softwood Lumber Dumping (Article 21.5) (AB)*, para. 100.

[131] *US – Zeroing (Japan) (AB)*, para. 133.

[132] *US – Softwood Lumber Dumping (Article 21.5) (AB)*, para. 97.

[133] *US – Softwood Lumber Dumping (Article 21.5) (AB)*, para. 97.

[134] *See, US – Zeroing (Japan) (Panel)*, paras. 7.127-7.137; *US – Zeroing (EC) (Panel)*, para. 7.266; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.33-5.52.

[135] *US – Zeroing (Japan) (AB)*, para. 135.

> would mathematically lead to the same result as the first symmetrical method and it would be impossible to prevent the non-dumped exports from disguising the dumping of the dumped exports.[136]

The Court agreed, finding that:

> as the Council pointed out in its written proceedings, the zeroing technique has proved to be mathematically necessary in order to distinguish, in terms of its results, the asymmetrical method from the first symmetrical method. In the absence of that reduction, the asymmetrical method will always yield the same result as the first symmetrical method . . . .[137]

Thus, in effect, the EC itself, a Member that has used the average-to-transaction comparison in investigations, when addressing this issue before domestic tribunals, agrees with the United States and the panel reports cited above, that a general prohibition of zeroing applied equally to both assessment proceedings and original investigations, would render the average-to-transaction comparison inutile.

118. The redundancy of the targeted dumping provision of Article 2.4.2 occurs as a consequence of any interpretation that results in a general prohibition of zeroing, whether derived from the definitional language of Article 2.1 of the AD Agreement and Article VI of the GATT 1994 or from the "fair comparison" requirement of Article 2.4 of the AD Agreement, or otherwise. Accordingly, the Panel should summarily reject any contention that zeroing is necessarily prohibited in all contexts under all comparison methodologies, including with respect to assessment proceedings. "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[138]

4. Article 9

119. For the reasons discussed above, an analysis of the text of Article 2.4.2 demonstrates that Article 2.4.2 does not apply to assessment proceedings. The EC, however, argues that Article 2.4.2 is nonetheless applicable to assessment proceedings by virtue of the cross reference in Article 9.3 to Article 2 of the AD Agreement.[139] Article 9.3 provides:

> The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

120. However, the general reference to Article 2 in Article 9.3 necessarily includes any limitations found in the text of Article 2. As discussed above, Article 2.4.2 by its own terms is explicitly limited to the investigation phase. The text of Article 9.3, therefore, does not support the EC's argument that the requirements of Article 2.4.2 apply in assessment proceedings.

121. The reference in Article 9.3 to Article 2 means that the amount of antidumping duty assessed may not exceed the amount of antidumping duty calculated in accordance with the general requirements of Article 2, such as making the various adjustments set forth in Article 2.4 necessary to provide a fair comparison. As the panel found in *Argentina – Poultry*:

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[136] Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006, para. 94 (Exhibit US-3). Notwithstanding making this argument before its municipal tribunals, the EC has taken a contrary position in WTO dispute proceedings. *See, e.g. Softwood Lumber Dumping (Article 21.5) (AB)*, para. 49 ("The European Communities rejects the 'mathematical equivalence' argument. . .").

[137] Ritek Corp., para. 109 (Exhibit US-3).

[138] *US – Gasoline (AB)*, p. 23.

[139] EC First Submission, para. 224.

> Article 9.3 does not refer to the margin of dumping established "under Article 2.4.2," but to the margin of dumping established "under Article 2". In our view, this means simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2. This is entirely consistent with the introductory clause of Article 2, which sets forth a definition of dumping "for the purpose of this Agreement . . . ". In fact, it would not be possible to establish a margin of dumping without reference to the various elements of Article 2. For example, it would not be possible to establish a margin of dumping without determining normal value, as provided in Article 2.2, or without making relevant adjustments to ensure a fair comparison, as provided in Article 2.4.[140]

122. The context of Article 9 also demonstrates that there is no basis in Article 9 to overcome the explicit language in Article 2.4.2, limiting its reach to investigations. As the panel found in *Argentina – Poultry*:

> [N]othing in the AD Agreement explicitly identifies the form that anti-dumping duties must take . . . . As the title of Article 9 of the AD Agreement suggests, Article 9.3 is a provision concerning the imposition and collection of anti-dumping duties. Article 9.3 provides that a duty may not be collected in excess of the margin of dumping as established under Article 2. The modalities for ensuring compliance with this obligation are set forth in sub-paragraphs 1, 2 and 3 of Article 9.3, each of which addresses duty assessment and the reimbursement of excess duties. The primary focus of Article 9.3, read together with sub-paragraphs 1-3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected.[141]

123. In other words, Article 9 contains certain procedural obligations applicable in assessment reviews. However, Article 9 does not prescribe methodologies for assessment proceedings such as those established in Article 2.4.2 for the investigation phase. Instead, Article 9 establishes time limits for conducting assessment proceedings, ensuring that respondent companies may obtain timely refund of any excess antidumping duties collected by a Member.[142]

124. Relying on its extension of Article 2.4.2 to assessment proceedings, the EC seems to suggest that the United States may only make "asymmetrical" comparisons in such proceedings when it finds that the prerequisites of Article 2.4.2 for "targeted dumping" have been met (*i.e.*, "a pattern of export prices which differ significantly among different purchases, regions, or time periods").[143] The EC's argument is without merit. Not only are the Article 2.4.2 restrictions on the investigation phase irrelevant in assessment proceedings, but Article 9 expressly provides for comparisons between weighted average normal values and individual export transactions in assessment proceedings, notwithstanding the EC's description of such comparisons as "asymmetrical". The EC is thus arguing that the Panel ignore the text of not just one, but two provisions of the AD Agreement.

125. Article 9.4(ii) explicitly provides for the calculation of antidumping duties, in the assessment phase, on the basis of a comparison of weighted average normal values and individual export prices, stating that the amount of duty shall not exceed:

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[140] *Argentina – Poultry*, para. 7.357.

[141] *Argentina – Poultry*, para. 7.355.

[142] Article 9.3.1 and Article 9.3.2, respectively, establish for retrospective and prospective assessment systems timetables with respect to the amount of time within which final liability for payment of antidumping duties is to be determined or refunds of any duty paid in excess of the margin of dumping are to made.

[143] EC First Submission, para. 211.

> where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers and the export prices of exporters or producers not individually examined.

This provision plainly indicates that there is nothing exceptional about assessing antidumping duties on the basis of comparisons of weighted average normal values with individual export prices.

126. In fact, the calculation of transaction-specific antidumping duties in assessment reviews has been found to be entirely consistent with the AD Agreement. In *Argentina – Poultry*, the panel found the Argentine prospective normal value assessment system to be fully consistent with the AD Agreement.[144] Under that assessment system, the authorities imposed duties on a transaction-by-transaction basis when particular export prices were below the weighted average normal value. The United States agrees with the EC's position in that case that:

> Article 9.3.1 envisages the possibility to collect duties on a retrospective basis, which, by definition, presupposes the possibility to calculate the dumping margins on the basis of data for individual shipments or for time-periods outside the investigation period.[145]

As the EC acknowledged in *Argentina – Poultry*, the AD Agreement does not specify the form which duties must take in assessment reviews. Moreover, the reference in Article 9.3 to Article 2 does not overcome the limiting language in Article 2.4.2 which, by its own terms, limits its obligations to "the investigation phase".

127. There is simply no textual basis in the AD Agreement for the EC's assertion that Article 9.3 requires the application of Article 2.4.2 in assessment proceedings. Article 9 of the AD Agreement relates, as its title indicates, to the imposition and collection of antidumping duties. In particular, Article 9.3 states that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". For the reasons set forth in detail above, the term "margin of dumping", as defined in Article 2.1 of the AD Agreement and Article VI of the GATT 1994, may be applied to individual transactions. This understanding of the term "margin of dumping" is particularly appropriate in the context of antidumping duty assessment. In the real world of administering antidumping regimes, the individual transactions are both the means by which less than fair value prices are established and the mechanism by which the object of the transaction (*i.e.*, the "product") is "introduced into the commerce of the importing country". Likewise, antidumping duties are assessed on individual entries resulting from those individual transactions. Therefore, the obligation set forth in Article 9.3 to assess no more in antidumping duties than the margin of dumping, is similarly applicable at the level of individual transactions.

128. The EC's apparent claim under Article 9.3 of the AD Agreement is that the amount of the antidumping duty has exceeded the margin of dumping established under Article 2.[146] This claim however necessarily depends upon whether the EC's preferred interpretation of the "margin of dumping", which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the AD Agreement. Under such a view, a Member breaches Article 9.3 by failing to provide offsets, because Members are required to calculate margins of dumping on an exporter-specific basis for the product "*as a whole*" and, consequently, a Member is required to aggregate the results of "*all*" "*intermediate comparisons*", including those for which the export price exceeds the normal value. The United States notes that the terms upon which such an interpretation rests are conspicuously absent from the text of both

[144] *Argentina – Poultry*, paras. 7.345-7.367.
[145] *Argentina – Poultry*, Annex C-2, para. 33.
[146] EC First Submission, para. 224.

Articles 2.1 and 9.3, and thus such an interpretation is not mandated by the definition of dumping contained in Article 2.1, as described in detail above.

129. As the panel in *US – Zeroing(EC)* correctly concluded, there is "no textual support in Article 9.3 for the view that the AD Agreement requires an exporter-oriented assessment of antidumping duties, whereby, if an average normal value is calculated for a particular review period, the amount of anti-dumping duty payable on a particular transaction is determined by whether the overall average of the export prices of all sales made by an exporter during that period is below the average normal value".[147] The Panel in *US – Zeroing (Japan)* similarly rejected the conclusion that the "margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value ...".[148]

130. In *US – Zeroing (Japan)*, the panel found that "there are important considerations specific to Article 9 of the AD Agreement that lend further support to the view that it is permissible . . . to interpret Article VI of the GATT 1994 and relevant provisions of the AD Agreement to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing".[149] In particular, the panel explained that such a requirement is inconsistent with the importer-and import-specific obligation to pay an antidumping duty:

> In the context of Article 9.3, a margin of dumping is calculated for the purpose of determining the *final liability for payment of anti-dumping duties* under Article 9.3.1 or for the purpose of determining *the amount of anti-dumping duty* that must be *refunded* under Article 9.3.2. An anti-dumping duty is paid by an importer in respect of a particular import of the product on which an anti-dumping duty has been imposed. An importer does not incur liability for payment of an anti-dumping duty in respect of the totality of sales of a product made by an exporter to the country in question but only in respect of sales made by that exporter to that particular importer. Thus, the obligation to pay an anti-dumping duty is incurred on an *importer*-and *import*-specific basis. Since the calculation of a margin of dumping in the context of Article 9.3 is part of a process of assessing the amount of duty that must be paid or that must be refunded, this importer- and import-specific character of the payment of anti-dumping duties must be taken into account in interpreting the meaning of "margin of dumping."[150]

131. Similarly, the panel in *US – Zeroing (EC)* explained:

> In our view, the fact that in an assessment proceeding in Article 9.3 the margin of dumping must be related to the liability incurred in respect of particular import transactions is an important element that distinguishes Article 9.3 proceedings from investigations within the meaning of Article 5. ... [I]n an Article 9.3 context the extent of dumping found with respect to a particular exporter must be translated into

[147] *US – Zeroing (EC) (Panel)*, para. 7.204 ("In our view, if the drafters of the AD Agreement had wanted to impose a uniform requirement to adopt an exporter oriented-method of duty assessment, which would have entailed a significant change to the practice and legislation of some participants in the negotiations, they might have been expected to have indicated this more clearly.").

[148] *US – Zeroing (Japan) (Panel)*, para. 7.199. The panel in *US – Zeroing (EC)* expressed essentially the same view. *US – Zeroing (EC) (Panel)*, paras. 7.204 - 7.207 and 7.220-7.223.

[149] *US – Zeroing (Japan) (Panel)*, para. 7.196.

[150] *US – Zeroing (Japan) (Panel)*, para. 7.198 - 7199 (emphasis in the original).

> an amount of liability for payment of antidumping duties by importers in respect of specific import transactions.[151]

132. The panel's understanding of Article 9.3 is, at a minimum, a permissible interpretation of the provision. Indeed, the EC's interpretation of "margin of dumping" as used in Article 9.3, if applied, would fundamentally alter the antidumping practices of numerous Members using this remedy and render many of these systems difficult, if not impossible, to administer. In particular, under the EC's interpretation of Article 9.3, antidumping duties would be prevented from fulfilling their intended purpose under Article VI:2 of the GATT 1994, because importers that contribute the most to injurious dumping would be favoured over other importers (and domestic competitors) that price fairly, and prospective normal value systems would be rendered retrospective, as described further below.

133. Although, as stated by the Appellate Body in *US – Zeroing (Japan)*, dumping involves differential pricing behaviour of exporters or producers between its export market and its normal value[152], dumping nevertheless occurs at the level of individual transactions. Moreover, the remedy for dumping provided for in Article VI:2 of GATT 1994, *i.e.*, antidumping duties, are applied at the level of individual entries for which importers incur the liability. In this way, the importer may be induced to raise resale prices to cover the amount of the antidumping duty, thereby preventing the dumping from having further injurious effect. If instead, the amount of the antidumping duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer, then the antidumping duty will be insufficient to have the intended effect. The importer of the dumped product would remain in a position to profitably resell the product at a price that continues to be injuriously dumped. For this reason, if the EC's interpretation of the margin of dumping is adopted as the sole permissible interpretation of Article 9.3, the remedy provided under the AD Agreement and the GATT 1994 will be prevented from addressing injurious dumping.

134. These concerns led the panel in *US – Zeroing (Japan)* to reject the same interpretation that the EC offers in this dispute. The panel observed that the implication of this interpretation was that Members with retrospective assessment systems "may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value".[153] The panel found that this result was not supported by the text of Article 9.3, which "contains no language requiring such an aggregate examination of export transactions in determining final liability for payments of antidumping duties . . . ".

135. It also follows that if a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the amount of dumping is greatest will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports. Indeed, even if one were not to impose duties on importers whose entries were not responsible for the finding of dumping, the importers buying at non-dumped prices would still be significantly disadvantaged because the importers buying at the dumped prices would still have a cost advantage, since the duties they pay on the dumped merchandise would be reduced by the amount by which the non-dumped merchandise exceeded normal value.

136. As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed, the perverse incentives created by providing offsets also arise in the context of prospective assessment systems:

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[151] *US – Zeroing (EC) (Panel)*, para. 7.201.
[152] *US – Zeroing (Japan) (AB)*, para. 156.
[153] *US – Zeroing (Japan) (Panel)*, para. 7.199.

> [An] obligation to take all (including non-dumped) comparisons into account in determining the margin of dumping for the product as a whole ... is illogical, as it would provide importers clearing dumped transactions with a double competitive advantage vis-à-vis other importers: first, they would benefit from the lower price inherent in a dumped transaction; second, they would benefit from offsets, or credits, "financed" by the higher prices paid by other importers clearing non-dumped, or even less-dumped, transactions.
> ...
> Again, this makes no sense in the context of a prospective normal value duty assessment system, because (as even Canada acknowledges) the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. And if other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers. We are unable to accept that the Appellate Body could have intended such absurd results to follow from its interpretation of the phrase "margins of dumping" in US - Softwood Lumber V.[154]

137. Further, the EC's interpretation of Article 9.3, requiring that antidumping duty liability be determined for the product "as a whole", is inconsistent with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment.[155] Article 9.4(ii) of the AD Agreement "expressly refers to the calculation of the liability for payment of antidumping duties on the basis of a prospective normal value system".[156] Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value.[157] For example, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payments of antidumping duties. The converse is also true. A liability for a dumped sale would be determined by comparing the price of individual export transaction with prospective normal value and the prices of other transactions have no relevance to this determination.[158] As the panel in *US – Zeroing (Japan)* found, "there is no textual support in Article 9 for the proposition that export prices in other transactions are of any relevance".[159]

138. Because in a prospective normal value system, liability for antidumping duties is incurred only to the extent that prices of individual export transaction are below the normal value, the panel in *US – Zeroing (Japan)* concluded, "the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transaction below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value".[160]

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[154] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.54-5.57.

[155] *See* EC First Submission, para. 194-195.

[156] *US – Zeroing (Japan) (Panel)*, para. 7.201.

[157] *US – Zeroing (Japan) (Panel)*, para. 7.201; *See also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53.

[158] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53 ("Under a prospective normal value duty assessment system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a prospective normal value . . . . In the context of such transaction-specific duty assessment, it makes no sense to talk of a margin of dumping being established for the product as whole, by aggregating the results of all comparisons, since there is only one comparison at issue.").

[159] *US – Zeroing (Japan) (Panel)*, para. 7.201.

[160] *US – Zeroing (Japan) (Panel)*, para. 7.205; *see also US – Zeroing (EC) (Panel)*, para. 7.206.

139. If in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, there is no reason why liability for payment of antidumping duties may not be similarly assessed on the basis of export prices less than normal value in the retrospective systems applied by the United States.[161]

140. Further, accepting the EC's interpretation that a Member must aggregate the results of *"all"* comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value systems, in order to take into account "*all*" of the exporters' transactions. The results of the retrospective review would be to determine antidumping duty liability on a retrospective basis. This result, however, is contrary to the very concept of the prospective normal value system. As the panel in *US – Zeroing (Japan)* explained, the "liability for payment of anti-dumping duties is final in prospective normal value system at the time of importation of a product".[162] In effect, prospective normal value systems will become retrospective, a conclusion also reached in a Canadian parliamentary report on potential changes to its prospective normal value system.[163] In that report and at its trade policy review, Canada expressed its view that in a prospective normal value system, each entry provides a margin of dumping.[164] If, in fact, Members had intended prospective normal value systems to have such reviews, one would have expected Members to have provided for this in explicit agreement language.

5. Article 2.4

141. The text of Article 2.4 requires that a "fair comparison shall be made between the export price and the normal value". The text of Article 2.4, however, does not resolve whether any particular assessment of antidumping duties exceeds the margin of dumping because the text of Article 2.4 does not resolve whether "dumping" and "margins of dumping" are concepts that apply to individual transactions. Nor does the text resolve whether, for purposes of assessing antidumping duty liability, a margin of dumping may be specific to each importer that is liable for payment of the antidumping duties. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is "fair" or "unfair". As the panel in *US – Zeroing (Japan)* noted, the "precise meaning of" the "fair comparison" requirement "must be understood in light of the nature of the activity at issue".[165] The panel

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[161] *US – Zeroing (Japan) (Panel)*, para. 7.208 ("We see no textual basis in Articles 9.3 and 9.4 for the view that if an authority assesses the amount of the anti-dumping duty on a retrospective basis by examining export transaction that have occurred during a certain period, it is obligated to take into account export prices above the normal value that it would not have been required to take into account if it had applied a prospective normal value system.").

[162] *US – Zeroing (Japan) (Panel)*, para. 7.205.

[163] Report on the Special Import Measures Act, House of Commons Canada, December 1996, http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/chap4e.html (Exhibit US-4) (hereinafter "SIMA Report"). *See also* Special Import Measures Act Self-Assessment Guide ("Normal Value - Export Price = Antidumping Duty (or Margin of Dumping"), http://www.cbsa-asfc.gc.ca/sima/self-e.html#12 (Exhibit US-5).

[164] *Id.*

[165] *US – Zeroing (Japan) (Panel)*, para. 7.155; *see also US – Zeroing (EC) (Panel)*, para. 7.260 ("[C]aution ... is especially warranted where as in the case of the first sentence of Article 2.4, a legal rule is expressed in terms of a standard that by its very nature is more abstract and less determinate than most other rules in the AD Agreement. The meaning of 'fair' in a legal rule must necessarily be determined having regard to the particular context within which the rule operates."); *see also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para.5.74 ("[W]e believe that a claim based on a highly general and subjective test such as "fair comparison" should be approached with caution by treaty interpreters. For this reason, any concept of "fairness" should be solidly rooted in the context provided by the *AD Agreement*, and perhaps the *WTO Agreement* more generally. As such there must be a discernible standard within the *AD Agreement*, and perhaps the *WTO Agreement*, by which to assess whether or not a comparison has been "fair" or "unfair". Thus, the fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison methodology A unfair if comparison methodology B were the applicable standard.

concluded that "the "fair comparison" requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context".[166]

142. Assessment of antidumping duties in the amount by which the normal value exceeded the export price on a transaction-specific basis, without providing an offset for non-dumped transactions does reflect a "fair comparison" made for each export transaction. The EC's assertion that the United States has assessed antidumping duties "in excess of the actual margin of dumping for the product" is predicated on the assumption that zeroing is prohibited – otherwise, the challenged assessments would reflect the correct magnitude of the margins of dumping.

143. The EC's claim of inconsistency with Article 2.4 adopts the reasoning set forth in the Appellate Body report in *US – Zeroing (Japan)*, finding that a methodology cannot be viewed as involving a "fair comparison" under Article 2.4 if the resulting assessments exceed the "margin of dumping established in accordance with Article 2".[167] The reasoning upon which the EC relies, however, is entirely consequential of the Appellate Body report's previous analysis of the term "margin of dumping". Indeed, the passage quoted by the EC makes plain that the rationale followed in the Appellate Body report was based on the *results* of the comparison methodology in relation to the previously interpreted "margin of dumping", rather than on any inherently unfair aspect of the comparison methodology itself. Therefore, this claim of "unfairness" depends not on the text of Article 2.4, but on whether it is permissible to interpret the term "margin of dumping" as used in Article 9.3 as applying to transactions.

144. As the panels in *US – Zeroing (EC)* and *US – Zeroing (Japan)* have concluded, it is permissible to interpret "margin of dumping" as used in Article 9.3 as applying to an individual transaction.[168] As a consequence, there is no obligation to aggregate transactions in calculating margins of dumping in an assessment proceeding, and there can be no obligation to offset the antidumping duty liability for a transaction to reflect the extent to which other transactions were not dumped. Therefore, if the Panel finds, as the prior panels have found, that it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction, then the challenged assessment will not exceed the margin of dumping and there will be no basis, according to the rationale adopted by the EC, for a finding of inconsistency with Article 2.4.

145. In addition, as mentioned above, an interpretation of Article 2.4 that gives rise to a general prohibition of zeroing also renders the second sentence of Article 2.4.2, the "targeted dumping provision", inutile.[169] The targeted dumping provision is an exception to the symmetrical comparison methodologies generally required by Article 2.4.2. It is not an exception to the fair comparison requirement of Article 2.4. Thus, an interpretation of Article 2.4 that generally prohibits zeroing in all contexts would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 without meaning.[170] A panel should not interpret provisions of the AD Agreement in such a way that its express provisions are rendered meaningless or superfluous.[171] As the Appellate Body has consistently found, "interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole

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If however, the *AD Agreement* were to permit either comparison methodology A or B, this would not be the case.").

[166] *US – Zeroing (Japan) (Panel)*, para. 7.158 (*quoting US – Zeroing (EC) (Panel)*, para. 7.261).
[167] EC First Submission, para. 206 (*quoting US – Zeroing (Japan) (AB)*, para. 168).
[168] *US – Zeroing (EC) (Panel)*, para. 7.201- 7.206; *US – Zeroing (Japan) (Panel)*, para. 7.194 - 7.199.
[169] *US – Zeroing (EC) (Panel)*, para. 7.266; *US – Zeroing (Japan) (Panel)*, para. 7.159.
[170] *Id*.
[171] *See US – Gasoline (AB)*, p. 23; *Japan – Alcohol Taxes (AB)*, p. 12; *Egypt – Rebar*, para. 7.277.

clauses or paragraphs of a treaty to redundancy or inutility".[172] An interpretation of Article 2.4 of the AD Agreement to require that dumping margins be offset by non-dumped transactions is therefore impermissible and must be rejected.

146. The EC also argues that the US assessment methodology is inconsistent with US obligations under Article 2.4 because it is "inherently biased" as opposed to the EC's preferred methodology.[173] But the EC can point to nothing in the text of the Agreement to support its contention that a methodology can be designated as "fair" or "unfair" within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down.

147. Moreover, the EC's claim that the US assessment methodology necessarily results in higher antidumping duties than would a so-called "symmetrical" comparison is incorrect. A simple example illustrates this point. Assume that the export price for a particular transaction is 9, and that there are two corresponding home market transactions, one at 8 and one at 10. Assume also that both home market transactions are comparable to the export transaction, but that the transaction at 10 is the most comparable. Under a transaction-to-transaction method, the transaction at 10 would be used for normal value, resulting in a dumping amount of 1 (10-9 = 1). However, under the so-called "asymmetrical" average-to-transaction method, the two home market transactions would be averaged, resulting in a normal value of 9 and, in turn, a dumping amount of zero (9-9 = 0).

148. Under the average-to-transaction comparison method used by the United States, no antidumping duties would be assessed in this situation, because the export price – 9 – is not less than the weighted average normal value – 9. However, under a transaction-to-transaction comparison method – a "symmetrical" comparison method explicitly permitted in investigations pursuant to Article 2.4.2 – the United States would be permitted to assess $1 in antidumping duties for this transaction. Consequently, there is no inherent bias associated with the US assessment method.

149. Moreover, the EC has not offered any argument as to how an offset to antidumping duties assessable on one entry as a result of a distinct entry having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under the rubric of Article 2.4. The focus of Article 2.4 is on the selection of comparable transactions and the making of appropriate adjustments to those transactions so as to render them comparable. Even as described by the EC, an offset requirement would be applied to the *results* of comparisons, and would not pertain to the comparisons themselves.[174] Consequently, it falls clearly outside the scope of Article 2.4.

150. Finally, the EC's attempt to use the "fair comparison" reference in Article 2.4 to nullify the express limitation in Article 2.4.2 is inconsistent with principles of treaty interpretation and, for that reason, should be rejected by the Panel.

6. Article 11.2 Is Not Applicable to Article 9.3 Assessment Proceedings

151. The determination of such a rate in an assessment proceeding conducted pursuant to Article 9.3 of the AD Agreement does not constitute a review of the continued necessity of the antidumping duty and, thus, is not subject to the obligations of Article 11.2. The EC's argument that reviews pursuant to Article 11.2 of the AD Agreement and the reassessment of deposit rates for future entries in future reviews are "the same"[175] is not supported by the plain language of Article 11.2 of the AD Agreement.

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[172] *US – Gasoline (AB)*, p. 23; *see also Japan – Alcohol Taxes (AB).* p. 12; *US – Underwear (AB)*, p. 16.

[173] EC First Submission, para. 200.

[174] EC First Submission, para. 207.

[175] EC First Submission, para. 235.

152. Article 11.2 allows interested parties to request a review to determine "whether the injury would be likely to continue or recur if the duty were removed or varied". Therefore, an Article 11.2 review is focused on the continuation or recurrence of injury if the duty were varied, rather than on a determination of a varying duty rate. The EC cites footnote 21 in support of its position; however, footnote 21 simply states that a determination of liability for payment of antidumping duties made pursuant to Article 9.3 does not, by itself, constitute a review under Article 11.2. This statement supports the position that assessment proceedings conducted under Article 9.3 of the AD Agreement are not subject to the obligations of Article 11.2. Furthermore, footnote 22 to the AD Agreement, provides that in a retrospective system, a finding in a proceeding conducted pursuant to Article 9.3 that no duty is to be levied does not by itself require termination of the duty. Neither of these provisions supports the EC's view that a determination of the amount of antidumping duty to be assessed on specific import transactions determined in assessment proceedings relates to the inquiry called for by Article 11.2 as to whether injury would likely continue or recur if the duty were removed or varied.

C. THE EC'S CLAIMS WITH RESPECT TO SUNSET REVIEWS

153. The EC argues that the United States' determinations in the challenged sunset reviews are inconsistent with Articles 11.1 and 11.3 of the AD Agreement because when making its determinations that removal of the antidumping duty would likely lead to a continuation or recurrence of dumping, the United States relied on margins that were calculated in "proceedings using model zeroing", and therefore "did not comply with its obligations pursuant to Articles 2.1, 2.4 and 2.4.2 because these margins were not based on a fair comparison and not calculated for the product as a whole".[176]

154. The EC's argument, however, should be rejected. The EC has not demonstrated that a calculation done in accordance with the EC's approach would result in zero or *de minimis* dumping margins in the cited cases, leading to a revocation of the order.

D. THE EC'S CLAIMS WITH RESPECT TO INVESTIGATIONS

155. With respect to the four investigations properly before the Panel, upon which the EC did request consultations, and continues to challenge[177], the United States acknowledges that Commerce did not provide offsets for non-dumped transactions when calculating the margins of dumping using the average-to-average comparison methodology during the investigation phase. The United States recognizes that in *US – Softwood Lumber Dumping* the Appellate Body found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with Article 2.4.2, by interpreting the terms "margins of dumping" and "all comparable export transactions" as used in Article 2.4.2 in an integrated manner. (*See US – Softwood Lumber Dumping (AB)*, paras. 62-117). The United States acknowledges that this reasoning is equally applicable with respect to the claims for these four investigations.

156. The United States, however, continues to contest the EC's challenges that extend beyond Article 2.4.2 with respect to these four investigations. Specifically, the United States contests any claims of WTO inconsistency as to Articles 2.1 and 2.4 of the AD Agreement, and hereby incorporates arguments contained in Section B.[178] Because Articles 2.1 and 2.4 of the AD Agreement do not impose independent obligations, to the extent the EC is claiming that the challenged investigations are inconsistent with Articles 2.1 or 2.4, the EC has failed to establish the existence of

[176] EC First Submission, para. 259.

[177] Cases XV, XVI, XVII and XVIII of the EC's Panel Request.

[178] Paragraph 177 of the EC's First Submission allege that the four, named investigations in its Annex only violate Articles 2.4 and Articles 2.4.2, however, the EC also cites Article 2.1 in support of its argument. *See* EC First Submission, paras 149, 155, 160.

any obligations pursuant to these definitional provisions, and thus, the EC's challenge must depend on Article 2.4.2. Therefore, a finding by the Panel on the narrow issue of Article 2.4.2 is sufficient to resolve this matter.

E. WTO AGREEMENT ARTICLE XVI:4

157. The EC's first claim with respect to Article XVI:4 of the WTO Agreement depends on a finding of inconsistency with provisions of the AD Agreement and GATT 1994.[179] As one panel recognized, there is no "independent" basis for a claim under Article XVI:4.[180] For the reasons set out above demonstrating that the United States has not acted inconsistently with the provisions of either the AD Agreement or the GATT 1994, the EC's claim with respect to Article XVI:4 should be rejected.

158. The EC also attempts to demonstrate a breach of Article XVI:4 by relying on a novel, expansive and erroneous interpretation of that provision.[181] It argues that "the findings of the Appellate Body as adopted by the DSB in specific disputes create an independent international obligation for the losing party in that dispute to comply".[182] Because the DSB has adopted Appellate Body reports holding zeroing inconsistent with provisions of the covered agreements, the EC asserts that the United States is under a continuing obligation to comply, and has not done so for certain determinations that were issued after the adoption of at least the first report finding zeroing to be inconsistent with the Antidumping Agreement.[183] In fact, the EC overlooks the fact that the determinations listed in the Annex to its panel request were issued before the expiration of the "reasonable period of time to comply" in both *US – Zeroing (EC)* and *US – Zeroing (Japan)*. It is unanswered why the EC would like the Panel to impose a greater obligation on the United States than the DSU itself imposed.

159. The EC's expansive interpretation of Article XVI:4 should be rejected. The idea of a continuing "independent international obligation" arising from adopted reports cannot be reconciled with the long-standing rule that Appellate Body and panel reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[184] (Again, there is a certain irony in the EC's position – asserting that findings in prior disputes are binding on this Panel while at the same time ignoring findings from prior disputes when they conflict with the EC's position in this dispute.) The EC's interpretation finds no support in the text of the covered agreements. For each individual dispute, the DSU provides the mechanism to determine compliance by the Member concerned with the DSB's adopted recommendations and rulings, and, in cases of non-compliance, to authorize the suspension of concessions in the absence of an agreement on compensation.[185]

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[179] As the EC acknowledges, the determination of a breach of a provision of any covered agreement gives rise to a breach of Article XVI:4 of the WTO Agreement. *See* EC First Written Submission, paras. 123-25 (*citing US – 1916 Act (Japan) (Panel)* and *US – 1916 Act (EC) (Panel)*).

[180] *See US – OCTG from Mexico (Panel)*, para. 7.189. The panel in that dispute also found that there can be no independent breach of Article 18.4 of the AD Agreement, which requires that "[e]ach Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question".

[181] *See* EC First Written Submission, para. 128.

[182] EC First Written Submission, para. 128. The EC references an international law journal article in support of its interpretation of Article XVI:4. *See* EC First Written Submission, paras. 128. The rights and obligations of Members, however, are found in the text of the covered agreements, and not in articles written by a private individual.

[183] *See* EC First Written Submission, paras. 131-132. It is ambiguous which report the EC considers first in time, but it cites just *US – Zeroing (EC)* and *US – Zeroing (Japan)* in paragraph 131, making *US – Zeroing (EC)* the first report to be adopted of the two.

[184] *US – Softwood Lumber Dumping (AB)*, para. 111 (*quoting Japan – Alcohol Taxes (AB)*).

[185] *See* DSU, Arts. 21, 22.

160. The EC is advocating that the Panel adopt an approach which would distort the WTO's dispute settlement system to the detriment of the "security and predictability" of the multilateral trading system referred to in Article 3.2.[186] Under the EC's reading of Article XVI:4, a complaining party could identify a Member's measures that are allegedly similar to those that already have been found inconsistent in adopted Appellate Body reports, and claim non-compliance with the findings in the adopted reports. Allowing such a claim would completely flout the DSU's provisions on compliance and on not adding to or diminishing rights of Members, and would make adopted reports binding on all Members, despite their non-binding status outside of the original dispute.

161. The rationales offered by the EC do not justify its reading of Article XVI:4. The EC asserts that allowing claims based on the enforcement of adopted panel reports would serve to eliminate a "multiplicity of endless litigation".[187] Policy arguments based on speculative concerns about the number of future cases, however, cannot trump the language of the DSU, which establishes the rules for adjudicating individual disputes and dealing with issues of non-compliance in each separate dispute. The EC is free to raise its arguments in the context of the ongoing efforts of Members to amend the DSU, but this Panel must apply the DSU as it currently is written.

162. Furthermore, the EC's argument would transform panel and Appellate Body findings into authoritative interpretations of the covered agreements with effect beyond the particular parties to a particular dispute. But Article IX of the Marrakesh Agreement is explicit - neither a panel nor the Appellate Body has the authority to render interpretations of the covered agreements. Members conferred that authority exclusively upon the Ministerial Conference and the General Council. Accordingly, the EC's proposed interpretation of Article XVI:4 fails on this basis alone.

163. The EC also appears to argue for an expansive reading of Article XVI:4 as a means to deter or sanction breaches of "the duty of *good faith*".[188] However, panels are not tasked with determining, nor are they authorized to determine, whether Members have complied with a public international law principle of "good faith"; rather they must determine whether a Member's measure is consistent with the covered agreements. The covered agreements do not provide for an obligation of "good faith" to be considered in connection with the substantive obligations set forth therein, nor would it be constructive for panels to engage in examining whether a Member's breach resulted from a good faith reading or otherwise.[189] Indeed, the Appellate Body has noted that "[n]othing . . . in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it therefore has not acted in good faith".[190] It is worth noting that the Appellate Body made this statement in the context of *reversing* the panel finding cited by the EC for the proposition that panels may in fact find that a Member has acted in bad faith.

164. Panels are subject to clear and unequivocal limits on their mandate: they may clarify "existing provisions" of covered WTO agreements and may examine the measures at issue in light of

[186] "Security and predictability" results from the application of the correct interpretive approach set forth in the second sentence of Article 3.2 of the DSU – the "customary rules of interpretation of public international law" – to the provisions of the WTO Agreement. The proper interpretation ensures that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the DSB, do not "add to or diminish the rights and obligations provided in the covered agreements". The EC's reading of Article XVI:4 would be antithetical to the "security and predictability" that a proper interpretation of the covered agreements brings to the world trading system.

[187] EC First Written Submission, para. 129.

[188] EC First Written Submission, para. 130.

[189] The EC later in its submission asserts that Article 3 of the DSU contains an "obligation for WTO Members to engage in procedures in good faith in an effort to resolve dispute [sic]." EC First Written Submission, para. 265. However, the EC is not alleging a breach of this provision of the DSU, nor would there be any basis for it to do so.

[190] *US – Offset Act (Byrd Amendment) (AB)*, para. 298.

the relevant provisions of the covered WTO agreements.[191] The Appellate Body is confined to review "issues of law covered in the panel report and legal interpretations developed by the panel".[192] Nowhere in Appendix 1 to the DSU, which defines the covered agreements for purposes of the DSU, is there listed an international law principle of good faith. Nor does the WTO Agreement distinguish between a breach of an agreement in good faith and a breach in bad faith – in either case it would be a breach of the Agreement and would have the consequences provided in the Agreement. The EC's invocation of the "duty of good faith" cannot justify its expansive reading of Article XVI:4.

VI. CONCLUSION

165. As set forth above, the United States respectfully requests that the Panel grant the US preliminary objections and reject the EC's "as applied" claims regarding assessment proceedings, sunset reviews, and investigations.

[191] *See* DSU, Arts. 3.2, 7.1.
[192] DSU, Art. 17.6.

LIST OF EXHIBITS

US-1 Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 Fed. Reg. 9508 (2 March 2007).

US-2 Communication by the United States of 20 February 2007 (WT/DS322/16).

US-3 Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006.

US-4 Report on the Special Import Measures Act, House of Commons Canada, December 1996, http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/chap4e.html.

US-5 Special Import Measures Act Self-Assessment Guide ("Normal Value - Export Price = Antidumping Duty (or Margin of Dumping"), http://www.cbsa-asfc.gc.ca/sima/self-e.html#12.

ANNEX A-3

RESPONSE TO THE UNITED STATES' REQUEST FOR PRELIMINARY RULINGS BY THE EUROPEAN COMMUNITIES

TABLE OF CONTENTS

Page

I. INTRODUCTION 118

II. ALL MEASURES DESCRIBED IN THE PANEL REQUEST WERE ALREADY IDENTIFIED IN THE CONSULTATION REQUEST 118

A. CONTINUED EXISTENCE AND APPLICATION OF ZEROING AS THE MATTER CONCERNED 118

B. SPECIFIC MEASURES NOT INCLUDED IN THE REQUEST FOR CONSULTATIONS ARE ALSO COVERED 120

C. CONCLUSIONS 124

III. THE PANEL REQUEST IDENTIFIES A CONCRETE NUMBER OF MEASURES 124

A. THE PANEL REQUEST IDENTIFIES 18 ANTI-DUMPING PROCEEDINGS AS MEASURES 125

B. THE PANEL REQUEST ADEQUATELY INFORMS THE UNITED STATES OF THE CHALLENGED MEASURES 125

C. SUBSEQUENT MEASURES ADOPTED BY THE UNITED STATES WITH RESPECT TO THE 18 MEASURES INCLUDED IN THE PANEL REQUEST ALSO FALL WITHIN THE PANEL'S TERMS OF REFERENCE 126

D. CONCLUSIONS 127

IV. THE PRELIMINARY DETERMINATIONS INCLUDED IN THE PANEL REQUEST FALL WITHIN THE TERMS OF REFERENCE 127

A. PRELIMINARY DETERMINATIONS ARE SUBSEQUENT MEASURES INCLUDED IN THE PANEL REQUEST 128

B. THE PRELIMINARY DETERMINATIONS ARE RELATED TO THE ANTI-DUMPING PROCEEDINGS FALLING WITHIN THE TERMS OF REFERENCE 128

C. CONCLUSIONS 129

V. FINAL REMARKS 129

TABLE OF CASES

Short Title	Full Case Title and Citation
Argentina – Footwear	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS46/AB/R
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997
Canada - Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS70/AB/R
Canada – Wheat	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
Chile – Agricultural Products (Price Band)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207/AB/R
EC – Bananas III	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification Of Certain Computer Equipment*, WT/DS62,67,68/AB/R/, adopted 22 June 1998
Korea – Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998
Mexico – Definitive Anti-Dumping Measures on Beef and Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, adopted 20 December 2005
Measures – HFCS	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1. Following your fax dated 17 September 2007, the European Communities provides below its reply to the request for preliminary rulings made by the United States. As will be explained below, the European Communities considers that (1) it does not seek to expand the matter in this dispute beyond the measures upon which consultations were held; (2) the matter subject to review by this Panel has been determined precisely in the request for establishment of the Panel; and (3) all measures contained in the Panel request fall within the Panel's terms of reference.

2. In particular, the European Communities submits that the consultations and the request for establishment of the Panel gave the United States adequate notice of the scope of the matters and claims asserted by the European Communities in conformity with Articles 4.4, 4.7, 6.2 and 7.1 of the Dispute Settlement Understanding and Articles 17.3, 17.4 and 17.5 of the *Anti-Dumping Agreement*. Moreover, the measures subject to this dispute were precisely identified in the Panel request in accordance with the requirements of Article 6.2 of the Dispute Settlement Understanding. Finally, all the challenged measures fall within the Panel's terms of reference. Therefore, the European Communities requests the Panel to reject the United States' request for preliminary ruling entirely.

II. ALL MEASURES DESCRIBED IN THE PANEL REQUEST WERE ALREADY IDENTIFIED IN THE CONSULTATION REQUEST

3. The United States argues that the measures contained in the request for consultations relate to 38 specific measures and 2 on-going original proceedings, whereas the Panel request refers to 52 specific measures, *i.e.*, the original 38 measures plus 14 additional allegedly new measures, including 7 final and 3 on-going additional sunset review proceedings, and 3 final and 1 on-going additional administrative review proceedings.[1] The United States reached this conclusion by referring to the anti-dumping proceedings mentioned in the Annexes of the request for consultations and Panel request respectively. In light of this, the United States considers that, since consultations did not take place on these additional 14 specific measures, they should be excluded from the terms of reference of this Panel.

4. As explained below, the European Communities considers that all measures described in the Panel request were already identified in the request for consultations.

A. CONTINUED EXISTENCE AND APPLICATION OF ZEROING AS THE MATTER CONCERNED

5. The European Communities submits that the matter subject to this dispute was clearly stated since the very beginning in the request for consultations. Indeed, the title of this case showed to the United States that the European Communities wanted to consult on the "*continued existence and application of the zeroing methodology*" as the matter concerned.

6. Moreover, the first paragraph of the request for consultations also clearly refers to the application of zeroing as the matter concerned, and then identifies specific anti-dumping proceedings where the United States used this methodology when calculating dumping margins on products imported from the European Communities. In particular, the request for consultations states that:

> "The European Communities request consultations with the United States (…) with regard to the practice and methodologies for calculating dumping margins involving the use of zeroing, and the application of zeroing in certain specified anti-dumping measures."

[1] First Written Submission by the United States, para. 49.

7. Then, the request for consultations describes how the United States applies zeroing in original investigation, administrative review and sunset review proceedings and includes references to anti-dumping proceedings where this methodology was used, resulting in higher duties being in place.

8. Following this logic, section 2 of the request for consultations refers to several matters as subject to discussion:

> "(a) The United States regulations, zeroing methodology, practice, administrative procedures and measures for determining the dumping margin (…)"; (b) The specific anti-dumping administrative reviews listed in Annex I to the present request, and any assessment instructions issued pursuant to them in which the United States applied the regulations, zeroing methodology, practice, administrative procedures and measures described under point 1(a) above (…); (c) The specific dumping determination in the original investigations listed in Annex III to the present request, and any automatic assessment instructions issued pursuant to them, in which the United States applied the zeroing methodology described under point 1(b) above (…); (d) The specific Sunset review determination in the case listed in Annex II to the present request. The United States relied in its determination on dumping margins that were calculated in the original investigation and in administrative reviews using the methodology described under point 1(a) above."

9. The Annexes to the request for consultations identify precisely the measures where the United States applied the contested methodology by providing information on the specific anti-dumping proceedings concerned. In particular, the Annexes mention, *inter alia*, the product and country subject to anti-dumping duties in the United States.

10. The request for establishment of the Panel follows a similar structure as the one described above and, thus, does not expand the scope of the matter subject to consultations. The title still refers to the "continued existence and application of zeroing methodology". Likewise, the scope of the Panel request states that:

> "The European Communities hereby requests that a panel be established by DSB (…) with regard to an "as such" measure or measures providing for the practice or methodologies for calculating dumping margins involving the use of zeroing, and the application of zeroing in certain specified anti-dumping measures maintained by the United States."

11. Since the WTO inconsistency of the zeroing methodology had already been established in previous cases, the Panel request notes that "*the European Communities does not ask the Panel to rule on the WTO inconsistency of this practice*". However, the European Communities described the matter as follows:

> "The United States uses this practice or methodology in calculating dumping amounts or dumping margins, and in setting and collecting anti-dumping duties. The level of such anti-dumping duties is set in original proceedings, revised in administrative review proceedings or changed circumstances proceedings, and the need for the continued application of anti-dumping duties is decided in sunset review proceedings. In the latter DOC may determine that dumping is likely to continue or recur if the anti-dumping order were revoked, notably because dumping has continued at levels above *de minimis* after the issuance of the order. To find that dumping has continued after the issuance of the order, DOC relies on dumping margins calculated in the original proceeding and in administrative review proceedings using zeroing. The EC has identified in the annex to this request a

> number of anti-dumping orders where duties are set and/or maintained on the basis of the above-mentioned zeroing practice or methodology with the result that duties are paid by importers either in excess of the dumping margin which would have been calculated using a WTO consistent methodology or are paid when no such duty would have resulted from the use of a WTO-consistent methodology."

12. In other words, as it was the case in the request for consultations, the European Communities still refers to the use of zeroing by the United States in several anti-dumping proceedings as the subject matter of this dispute. Then, when describing the measures at issue, the Panel request refers to:

> "The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure).
>
> In addition to these measures, the administrative reviews, or, as the case may be, original proceedings or changed circumstances or sunset review proceedings listed in the Annex (numbered 1 to 52) with the specific anti-dumping orders and are also considered by the EC to be measures subject to the current request for establishment of the panel in addition to the anti-dumping orders.
>
> This includes the determinations in relation to all companies and includes any assessment instructions, whether automatic or otherwise, issued at any time pursuant to any of the measures listed in the Annex."

13. Again, the Panel request mentions the continued application of anti-dumping duties at a level in excess of the anti-dumping margin which would result from the correct application of the *Anti-Dumping Agreement*, *i.e.*, without zeroing. Then, the Panel request includes in its Annex 18 measures, derived from 18 original anti-dumping orders, including 52 anti-dumping proceedings, *i.e.*, 4 original proceedings, 37 administrative review proceedings and 11 sunset review proceedings. As was the case in the request for consultations, those 18 measures are described by reference to the product concerned originating from a particular country.

14. As can be seen, both the request for consultations and the Panel request describe the matter concerned in a similar manner. Therefore, due process has been respected since the United States obtained adequate notice of the scope of the matter and claims asserted by the European Communities.[2]

B. SPECIFIC MEASURES NOT INCLUDED IN THE REQUEST FOR CONSULTATIONS ARE ALSO COVERED

15. The United States points out in its First Written Submission that the Panel request contains 14 additional measures which were not raised during consultations, including 10 sunset review proceedings and 4 administrative review proceedings.[3]

16. Even if some of the specific anti-dumping proceedings which were listed in the request for the establishment of a Panel were not included expressly in the Annexes to the request for consultations,

[2] Panel Report, *Canada – Aircraft*, (WT/DS70/R), paras 9.12-9.31; Panel Report, *Korea – Vessels* (WT/DS273/R), at para. 9; and Appellate Body Report, *US – Zeroing (Japan)* (WT/DS322/AB/R), paras 89-95.

[3] First Written Submission by the United States, para. 61.

the European Communities submits that those measures were also covered and that the United States had enough notice of the matter subject to dispute.

17. The European Communities argues that, according to the relevant case-law on Articles 4 and 6 of the Dispute Settlement Understanding, there is no need that the specific measures that are the subject of the request for consultations and those which are the subject of the Panel request be identical, as long as they involve essentially the same matter, *i.e.*, the application of zeroing methodologies when calculating the dumping margins in the specific anti-dumping proceedings with respect to a particular product originating from one specific country.

18. In *Brazil – Aircraft*, on appeal, Brazil argued that the Panel erred in finding that certain regulatory instruments relating to PROEX referred to in the Panel request were properly before the Panel. Specifically, Brazil claimed that because those instruments came into effect in 1997 and 1998, after consultations were held between Canada and Brazil, they had not been the subject of consultations and, therefore, could not properly be before the Panel. The Panel had ruled as follows on this issue:[4]

> "(…) [W]e recall that Brazil and Canada consulted 'regarding certain export subsidies granted under the Brazilian *Programa de Financiamento ás Exportações* (PROEX) to foreign purchasers of Brazil's EMBRAER aircraft', and that the request for establishment of a Panel relates to 'export subsidies under PROEX'. ***We consider that the consultations and request for establishment relate to what is fundamentally the same 'dispute', because they involve essentially the same practice***, *i.e.*, the payment of export subsidies under PROEX. Under these circumstances, and notwithstanding the fact that both the authorizing legal instrument and certain other legal instruments relating to the administration of the PROEX interest equalization regime changed or were only introduced subsequent to the last consultations, we cannot say that Canada has failed to comply with the requirements of Article 4.7 of the DSU" (*emphasis added*).

19. The Appellate Body upheld the Panel's finding. In doing so, the Appellate Body said that:[5]

> "We note that Brazil and Canada consulted about 'certain export subsidies granted under the Brazilian *Programa de Financiamento às Exportações* (PROEX) to foreign purchasers of Brazil's Embraer aircraft', and that the request for the establishment of a Panel also relates to 'the payment of export subsidies through interest rate equalization and export financing programmes under PROEX'. We have been advised by Brazil that the regulatory instruments that came into effect in 1997 and 1998, after the consultations had taken place, and that relate to the administration of PROEX, did not change the essence of that regime.
>
> In our view, Articles 4 and 6 of the DSU, as well as paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a Panel. Under Article 4.3 of the *SCM Agreement*, moreover, the purpose of consultations is 'to clarify the facts of the situation and to arrive at a mutually agreed solution'.
>
> ***We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific***

[4] Panel Report, *Brazil – Aircraft* (WT/DS46/R), para. 7.11.
[5] Appellate Body Report, *Brazil – Aircraft* (WT/DS46/AB/R), paras 130-132.

> ***measures identified in the request for the establishment of a Panel***. As stated by the Panel, '[o]ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a Panel'. We are confident that the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that were referred to the DSB for the establishment of a Panel. We emphasize that the regulatory instruments that came into effect in 1997 and 1998 did not change the essence of the export subsidies for regional aircraft under PROEX" (*emphasis added*).

20. Similarly, in *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, the Appellate Body emphasised the purpose of consultations in finding that, with respect to the measures at issue, Articles 4 and 6 of the Dispute Settlement Understanding do not "require a precise and exact identity" between the request for consultations and the Panel request, provided that the "essence" of the challenged measures has not changed.[6] Previously, the Panel in the same case had confirmed that:[7]

> "In our view, ***[Articles 4.5 and 4.7 of the DSU and Article 17.4 of the Anti-Dumping Agreement] do not in any way require a complete identity between the scope of the request for consultations and the request for establishment, nor do they, in our view, limit the scope of the request for establishment to the exact scope of the request for consultations***. While we read these provisions to require that Members should attempt to find a mutually agreed solution on the 'matter' in dispute through consultations, this, in our view, only requires that request for consultations relate to the same subject matter as the request for establishment of a panel. In sum, and provided the request for establishment concerns a dispute on which consultations have been requested, there is no need for the matter (*i.e.* the specific measures at issue and the legal basis of the complaint) as identified in the request for establishment to be identical to the matter on which consultations were requested."

21. Therefore, in light of the above case-law, it can be concluded that there is no need for identity between the specific measures that were the subject of the request for consultations and those subject of the Panel request provided that they involve essentially the same matter.

22. In the present case, the 14 allegedly new measures included in the Panel request refer to the same matter raised during consultations, *i.e.*, the use of zeroing when calculating the dumping margins in the specific anti-dumping proceedings with respect to the same products originating from the specific countries listed therein. Consequently, the specific measures not mentioned by the United States would also fall within the matter of this dispute.

23. In any event, it should be added that the inclusion of new measures which amount to an extension or a modification of measures previously mentioned in the request for consultations do not affect the consistency of the panel request with the consultations carried out between the parties. In *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (DS 207)*, in the context of the extension of a safeguard measure not foreseen in the request for consultations, the Panel dealt with this issue as follows:[8]

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[6] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice* (WT/DS295/AB/R), para. 138; and Panel Report, *Canada – Aircraft* (WT/DS70/R), para 9.12.

[7] Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice* (WT/DS295/AB/R), para. 7.41.

[8] Panel Report, *Chile – Agricultural Products (Price Band)* (WT/DS207/R), para. 7.119.

> "[T]he 'extensions' are not distinct measures, but merely continuations in time of the definitive safeguard measures. As a result, we consider that the definitive safeguard measures were not terminated before the request for establishment, but, rather, that their duration was simply extended at that time. Thus, we need not further consider Chile's argument that we lack the authority to make findings in respect of the definitive measures on the grounds that they have expired. ***For the same reason, we also consider the fact that the extension was not mentioned in the request for consultations irrelevant for the determination of our jurisdiction: pursuant to Article 4.4 of the DSU, Argentina had to, and did, identify the definitive safeguard measures in its request for consultations***. The fact that the duration of the identified measures was extended by Chile after the request for consultations cannot affect Argentina's compliance with Article 4.4 of the DSU."

24. In line with this case-law, the European Communities argues that the requirement of consistency between the request for consultations and the Panel request, as established by Articles 4.4 and 6.2 of the Dispute Settlement Understanding, is still met in case where there is no identity between the specific measures that were the subject of the request for consultations and those which are the subject of the Panel request as long as they involve essentially the same matter. In this sense, the extension or modification of the measures mentioned in the Panel request are also covered by the request for consultations.

25. The 14 additional measures mentioned by the United States have a direct relationship with the measures listed in the request for consultations. As mentioned before, the Annexes to the request for consultations identified the measures, *inter alia*, by reference to the product and exporting country subject to anti-dumping duties as a result of the most recent proceeding (*i.e.*, original proceeding, administrative or sunset reviews). The additional measures contained in the Panel request refer to modifications or implementations of the original anti-dumping orders with respect to the same products and countries already discussed in the context of consultations.

26. The request for establishment of the Panel contains some measures which were adopted or initiated after consultations were requested[9], but they refer to the identical products and countries already mentioned in the Annex to the request for consultations.

27. The request for establishment of the Panel also refers to sunset review measures not included in the request for consultation[10] which were very close to the date of request for consultations (they are dated 15 September 2006, where the request was filed on 2 October 2006), or relate to the continuation of measures which were covered by an administrative review mentioned in the request for consultations.

28. Finally, two proceedings[11] listed in the Annex to the request for the establishment of a panel which the United States pretend to be new measures were in fact already listed in the Annex to the request for consultations even if the request for consultations only referred to the preliminary results of these proceedings.

29. Therefore, in light of the above, the European Communities submits that the 14 allegedly new measures mentioned by the United States were covered by the request for consultations since they relate to the same matter, i.e., the use of zeroing when calculating the dumping margins in the specific anti-dumping proceedings with respect to a particular product from a specific country, and have a

[9] Three sunset review proceedings (proceedings No 4, 38 and 47) and four administrative review proceedings (proceedings No 1, 22, 35 and 43).

[10] Proceedings No 9, 14, 19, 26, 29, 32 and 42.

[11] Proceedings No 1 and 22.

direct relationship with the measures mentioned in the Annexes to the request for consultations, since they imply extensions (in the case of sunset reviews), modifications (in administrative reviews) or implementations (*i.e.*, definitive collection in the case of administrative reviews) of the anti-dumping duties consulted upon.

C. CONCLUSIONS

30. From the foregoing, the European Communities submits that both the request for consultations and the Panel request describe the matter concerned in a similar manner. To the extent that the measures covered in the Panel request were based on the same zeroing methodology already targeted in the consultations request and the same anti-dumping proceedings (described by reference to products and countries concerned), this is sufficient to comply with the requirements of Articles 4 and 6 of the Dispute Settlement Understanding and their mirroring provision in Article 17 of the *Anti-Dumping Agreement*. Moreover, since the 14 allegedly new measures had a direct relationship with the measures identified in the Annexes to the request for consultations (by reference to the same products and countries subject to anti-dumping duties), the European Communities consider that all the measures fall within the matter of this dispute.

III. THE PANEL REQUEST IDENTIFIES A CONCRETE NUMBER OF MEASURES

31. The United States argues that the Panel request refers to an indeterminate number of measures that were not specifically identified and, thus, would not fall within the Panel's terms of reference pursuant to Article 6.2 of the Dispute Settlement Understanding.

32. In particular, the United States points out that the Panel request identified as "measures" the following:

> "[T]he continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding."

33. The United States then assumes that this request refers to the most recent of the measures specifically listed for each of the 18 anti-dumping cases in the Annex. However, to the extent that the request does not refer to the most recent identified measure, but to any most recent measure, the United States argues that it refers to an indeterminate number of alleged measures.

34. Finally, the United States notes that, because it did not have opportunity to consult with the European Communities with respect to this indeterminate number of alleged measures, it was unable to seek further clarity regarding the scope and effect of the challenged measures.

35. The European Communities submits that this claim is unfounded. As stated in *Canada – Aircraft*[12], the consistency of a party's request for the establishment of a panel in accordance with Article 6.2 of the Dispute Settlement Understanding should be judged exclusively in light of the specificity of the request for establishment, and not in light of the specificity of the party's earlier request for consultations. The European Communities submits that the Panel request precisely identifies the measures subject to this dispute.

[12] Panel Report, *Canada – Aircraft*, (WT/DS70/R), para. 9.32.

A. THE PANEL REQUEST IDENTIFIES 18 ANTI-DUMPING PROCEEDINGS AS MEASURES

36. The European Communities considers that the Panel request contains a clear list of the measures which fall within the Panel's terms of reference. In particular, its Annex identifies 18 anti-dumping proceedings, by product and country concerned, mentioning the relevant places where the measures were published in the United States, and the duty rates imposed. The identification of the original anti-dumping order imposing duties on the product from the country concerned is thus followed by all instances where the measures at hand, *i.e.*, the duties imposed on the basis of zeroing methodologies, have been modified. In this respect, when the Panel request refers to the continued application of duties determined using zeroing methodologies as a result of the original anti-dumping orders in the 18 cases contained in the Annex, the measures subject to the Panel's terms of reference are properly defined.

37. The fact that the Panel request does not enumerate the last modification of the duties with respect to the 18 anti-dumping proceedings as published in the United States is irrelevant insofar as the measures have been determined by reference to the products, countries concerned, and duty levels. In this sense, the Panel in *Argentina – Footwear* found that it is the identification of the measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for the purposes of Article 6.2 of the Dispute Settlement Understanding:[13]

> "[W]e consider that the EC's request primarily and unambiguously identifies the provisional and definitive measures (rather than only the cited resolutions and promulgations as such). In our view, it is the identification of these measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for purposes of Article 6.2 of the DSU. Therefore, we consider that it is ***the provisional and definitive measures in their substance rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference***. In our view, this is consistent with the Appellate Body's findings in the *Guatemala - Cement* case" (*emphasis added*).

38. Likewise, in *Canada – Wheat*[14] the Panel noted that, by its terms, Article 6.2 of the Dispute Settlement Understanding does not require that panel requests explicitly specify measures of general application (*i.e.*, laws and regulations) by name, date of adoption, etc. The Panel found that the fact that the United States had not specified the relevant laws or regulations by name, date of adoption, etc, did not necessarily render the panel request inconsistent with Article 6.2 of the Dispute Settlement Understanding.

39. Thus, the European Communities submits that the measures falling within the Panel's terms of reference were sufficiently identified in the Annex to the Panel request.

B. THE PANEL REQUEST ADEQUATELY INFORMS THE UNITED STATES OF THE CHALLENGED MEASURES

40. Moreover, it cannot be argued that the wording used in the Panel request leaves the United States unaware of the measures which are subject to this dispute. Indeed, the purpose of the specificity requirement in Article 6.2 of the Dispute Settlement Understanding is to guarantee the

[13] Panel Report, *Argentina – Footwear*, (WT/DS121/R), para. 8.40.
[14] Panel Report, *Canada – Wheat*, (WT/DS276/R), para. 19.

rights of the parties to a due process. In this sense, the Appellate Body in *EC – Computer Equipment*[15] noted that:

> "We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities in the course of the panel proceedings. ***As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel***" (*emphasis added*).

41. Similarly, the Panel in *Canada – Wheat*[16] found that:

> "whether sufficient information is provided on the face of the panel request will depend, as noted above, on whether the information provided serves the purposes of Article 6.2, and in particular its due process objective, as well as the specific circumstances of each case, including the type of measure that is at issue."

42. In this respect, the European Communities argues that the United States has failed to show that the Panel request is so flawed that the defending party's rights of defence are prejudiced, and maintains that the United States cannot demonstrate that any imperfections in the Panel's request for establishment rise to this level.

C. SUBSEQUENT MEASURES ADOPTED BY THE UNITED STATES WITH RESPECT TO THE 18 MEASURES INCLUDED IN THE PANEL REQUEST ALSO FALL WITHIN THE PANEL'S TERMS OF REFERENCE

43. Finally, the European Communities notes that subsequent measures, subsidiary or closely related to the specified measures, have been accepted as proper identification of the measures falling within the Panel's terms of reference in accordance with Article 6.2 of the Dispute Settlement Understanding.

44. The Panel in *EC – Bananas III* found that the object and purpose of the specificity requirement of Article 6.2 of the Dispute Settlement Understanding is to ensure the clarity of panels' terms of reference, which pursuant to Article 7 of the Dispute Settlement Understanding are typically determined by the panel request, and to inform the respondent and potential third parties of the scope of the complaining party's claims (*i.e.*, the "measures" challenged and the WTO provisions invoked by the complaining party).[17] As long as Article 6.2 is interpreted to require any measure challenged to be specified in the panel request or to be subsidiary or closely related to the specified measures, the object and purpose of Article 6.2 are satisfied.[18]

45. In *EC – Bananas III*, the "basic EC regulation at issue" was identified in the request for establishment of the Panel. In addition, the request referred in general terms to "subsequent EC legislation, regulations and administrative measures (...) which implement, supplement and amend [the EC banana] regime". The Panel found that for purposes of Article 6.2 this reference was sufficient to cover all European Communities legislation dealing with the importation, sale and

[15] Appellate Body Report, *EC – Computer Equipment* (WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R), para. 70.

[16] Panel Report, *Canada – Wheat*, (WT/DS276/R), para. 20.

[17] Panel Report, *EC –Bananas III*, (WT/DS27/R), para. 7.35; Appellate Body Report, *EC – Bananas III*, (WT/DS27/AB/R), para. 142; Appellate Body Report, *Brazil – Desiccated Coconut* (WT/DS22/AB/R), para. 22.

[18] Panel Report, *Japan – Film* (WT/DS44/R), para. 10.9.

distribution of bananas because the measures that the complainants were contesting were "adequately identified", even though they were not explicitly listed.[19] The Appellate Body agreed that the panel request contained sufficient identification of the measures at issue to fulfil the requirements of Article 6.2 of the Dispute Settlement Understanding.[20]

46. Implementing measures which are not expressly mentioned in the Panel request also fall within the Panel's terms of reference. In *Argentina – Footwear*, the Panel noted that:[21]

> "We further recall that the *Japan – Film* Panel considered certain measures which had not been listed in the Panel request to be within its terms of reference because they were 'implementing measures' based on a basic framework law, specifically identified in the Panel request, which specified the form and circumscribed the possible content and scope of such implementing measures. ***From this we infer that a legal act not explicitly listed in a Panel request but which has a direct relationship to a measure that is specifically described therein, can be said to be sufficiently identified to satisfy the requirements of Article 6.2***. In this respect, we agree with the *Japan – Film* Panel's statement that the requirements of Article 6.2 could be met in the case of a legal act that is subsidiary to or so closely related to a measure specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party" (*emphasis added*).

47. Therefore, any subsequent measure, in other words, any anti-dumping proceeding, modifying the duty levels established in the Panel request with respect to the original anti-dumping orders mentioned in the Annex would be closely related to the measures identified therein and, thus, would fall under the Panel's terms of reference in accordance with Article 6.2 of the Dispute Settlement Understanding. In this respect, the European Communities considers that the Panel request identifies precisely the measures which are covered in this dispute.

D. CONCLUSIONS

48. From the foregoing, the European Communities submits that the United States' claim is unfounded since the Panel request identifies the specific measures subject to this dispute, including any subsequent modification of the measures (*i.e.*, the duty levels) described therein with respect to the products and countries concerned.

IV. THE PRELIMINARY DETERMINATIONS INCLUDED IN THE PANEL REQUEST FALL WITHIN THE TERMS OF REFERENCE

49. The United States argues that four of the 14 allegedly new measures were preliminary results from on-going proceedings in which no final determination had been made at the time of the Panel request. For this additional reason, the United States considers that these four on-going proceedings are not within the Panel's terms of reference, since Article 17.4 of the *Anti-Dumping Agreement* does not permit for the establishment of a Panel to review proceedings that are not final.[22]

[19] Panel Report, *EC – Bananas III*, (WT/DS27/R), para. 7.27.
[20] Appellate Body Report, *EC – Bananas III*, para. 140.
[21] Panel Report, *Argentina – Footwear*, para. 8.35.
[22] First Written Submission by the United States, para. 72.

A. PRELIMINARY DETERMINATIONS ARE SUBSEQUENT MEASURES INCLUDED IN THE PANEL REQUEST

50. The European Communities submits that this argument should be rejected. As explained before, the Panel request describes as the matter concerned the continued application of specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in its Annex "as calculated or maintained in place pursuant to the most recent [anti-dumping proceedings]". In other words, it comprises any subsequent measure adopted by the United States, including preliminary determinations setting out the duty levels (wrongly calculated by applying zeroing) and insofar as those duties are still in place.

51. As mentioned before, subsequent measures adopted by the United States with respect to the anti-dumping proceedings contained in the Annex to the Panel request fall within the Panel's terms of reference. In order to avoid repetition, the European Communities refer this Panel to the arguments mentioned in Section II.C above.

52. Therefore, the European Communities considers that any act or decision taken by the United States with respect to the duties in place, even if it is not final, is covered by the Panel's terms of reference.

B. THE PRELIMINARY DETERMINATIONS ARE RELATED TO THE ANTI-DUMPING PROCEEDINGS FALLING WITHIN THE TERMS OF REFERENCE

53. In addition, the European Communities note that challenges to administrative decisions in anti-dumping proceedings (even if they are not final in the sense that duties have not been imposed), which are related to the imposition of duties have been admitted in previous cases. For instance, in *Mexico – HCFS*,[23] the Panel noted the following:

> "A claim regarding the period for which a provisional measure was applied does not, at first glance, constitute a challenge to the definitive anti-dumping duty in this dispute. However, we consider that the United States' claim under Article 7.4 of the AD Agreement is nevertheless ***related to*** Mexico's definitive anti-dumping duty. In this regard, we recall that, under Article 10 of the AD Agreement, a provisional measure represents a basis under which a Member may, if the requisite conditions are met, levy anti-dumping duties retroactively. At the same time, a Member may not, except in the circumstances provided for in Article 10.6 of the AD Agreement, retroactively levy a definitive anti-dumping duty for a period during which provisional measures were not applied. Consequently, because the period of time for which a provisional measure is applied is generally determinative of the period for which a definitive anti-dumping duty may be levied retroactively, we consider that a claim regarding the duration of a provisional measure relates to the definitive anti-dumping duty.
>
> (…) In our view, it would be incorrect to interpret Article 17.4 of the AD Agreement in a manner which would leave Members without any possibility to pursue dispute settlement in respect of a claim alleging a violation of a requirement of the AD Agreement" (*emphasis added*).

54. The four on-going proceedings contained in the Panel request refer to one administrative review[24] and three sunset reviews.[25] In all cases, as shown in the European Communities' First

[23] Panel Report, *Mexico – HCFS*, (WT/DS132/R), paras 7.53-7.54.
[24] Proceeding No. 35.
[25] Proceedings No. 4, 38 and 47.

Written Submission, a final determination by the USDOC has been issued where dumping margins have been calculated by applying zeroing. In this respect, the European Communities is challenging the duties already in place with respect to three cases[26] and any administrative step leading to the modification or collection of the duty level with respect to the measures identified in the Panel request. The preliminary determinations carried out by the USDOC have an impact in the final duty level which may result from the latest proceeding and, thus, fall within the Panel's terms of reference.

C. CONCLUSIONS

55. From the foregoing, the European Communities submits that the United States' claim is unfounded since the preliminary determinations identified in the Panel request are related to the anti-dumping proceedings enumerated in its Annex and, therefore, fall within the Panel's terms of reference.

V. FINAL REMARKS

56. In light of the above, the European Communities submits that the United States' request for a preliminary ruling should be rejected entirely.

57. Firstly, the European Communities considers that the request for consultations and the request for establishment of the Panel gave the United States adequate notice of the scope of the matters asserted by the European Communities in conformity with Articles 4.4, 4.7, 6.2 and 7.1 of the Dispute Settlement Understanding and Articles 17.3, 17.4 and 17.5 of the *Anti-Dumping Agreement*. In any event, the United States has not proven how the description of the measures contained therein has affected its rights to a due process.

58. Secondly, the measures subject to this dispute were precisely identified in the Panel request in accordance with the requirements of Article 6.2 of the Dispute Settlement Understanding. Contrary to what the United States argues, the Panel request clearly identifies 18 anti-dumping proceedings, by reference to products and countries concerned, where duties are in place at a level higher than it should be, since the United States applied zeroing when calculating the dumping margins.

59. Finally, all the challenged measures, including the preliminary determinations by the USDOC fall within the Panel's terms of reference.

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[26] Proceedings No. 35 and 38 relate to anti-dumping proceedings with respect to the same product and country concerned.

ANNEX B

THIRD PARTIES' WRITTEN SUBMISSIONS

Contents		Page
Annex B-1	Third Party Written Submission of Japan	B-2
Annex B-2	Third Party Written Submission of the Republic of Korea	B-23
Annex B-3	Third Party Written Submission of Norway	B-29
Annex B-4	Third Party Written Submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	B-42
Annex B-5	Third Party Written Submission of Thailand	B-48

ANNEX B-1

THIRD PARTY WRITTEN SUBMISSION OF JAPAN

TABLE OF CONTENTS

Page

TABLE OF CASES CITED **3**

TABLE OF ABBREVIATIONS USED IN THIS SUBMISSION **4**

I. INTRODUCTION AND EXECUTIVE SUMMARY **5**

II. THE ZEROING PROCEDURES **6**

III. THE ZEROING PROCEDURES USED BY THE USDOC IN THE MEASURES CHALLENGED BY THE EC ARE INCONSISTENT WITH THE OBLIGATIONS ESTABLISHED BY THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994 ..... **7**

A. THE GOVERNING LEGAL PRINCIPLES 7

1. Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 **7**

2. Second Sentence of Article 2.4.2 of the *Anti-Dumping Agreement* **11**

3. Article 2.4 of the Anti-Dumping Agreement **13**

B. ZEROING AS USED BY THE USDOC IN ORIGINAL INVESTIGATIONS IS INCONSISTENT WITH ARTICLES 2.1, 2.4.2 AND 2.4 OF THE ANTI-DUMPING AGREEMENT 14

1. Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* **14**

2. Article 2.4 of the Anti-Dumping Agreement **15**

C. ZEROING AS USED BY THE USDOC IN PERIODIC REVIEWS IS INCONSISTENT WITH ARTICLES 2.1, 2.4, AND 9.3 OF THE ANTI-DUMPING AGREEMENT 16

1. Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* **16**

2. Article 2.4 of the Anti-Dumping Agreement **19**

D. ZEROING AS USED BY THE USDOC IN SUNSET REVIEWS IS INCONSISTENT WITH ARTICLES 2.1, 2.4, AND 11.3 OF THE ANTI-DUMPING AGREEMENT 20

E. THE ANTI-DUMPING ORDERS CHALLENGED BY THE EC ARE ALSO INCONSISTENT WITH ARTICLES 2.1, 2.4, 2.4.2, 9.3 AND 11.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES VI:1 AND VI:2 OF THE GATT 1994 21

IV. CONCLUSION **22**

TABLE OF CASES CITED

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EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion - Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, modified by the Appellate Body Report, WT/DS244/AB/R, DSR 2004:I, 85
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – OCTG Sunset Reviews (Mexico)	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted 20 February 2007
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

TABLE OF ABBREVIATIONS USED IN THIS SUBMISSION

Abbreviation	Description
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC	European Communities
FWS	First Written Submission
GATT 1994	*General Agreement on Tariffs and Trade 1994*
PNV	Prospective normal value
T-to-T comparison	Transaction-to-transaction comparison
USDOC	United States Department of Commerce
W-to-T comparison	Weighted average-to-transaction comparison
W-to-W comparison	Weighted average-to-weighted average comparison

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this dispute, the EC presents a series of claims against the United States' continued use of the so-called "zeroing" procedures in calculating margins of dumping in a large number of anti-dumping proceedings. Japan welcomes the opportunity to make this third party submission to the Panel because of its systemic interest in the proper interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Anti-Dumping Agreement*") as regards zeroing.

2. Without prejudice to the issues that Japan may address in its oral statement, Japan's written submission will address the prohibition on zeroing when used in the types of anti-dumping proceedings identified by the EC.

3. The operation of zeroing in the measures at issue is no different from the operation of zeroing considered in previous disputes. The USDOC conducts multiple comparisons, either comparing a weighted average normal value with a weighted average export price ("W-to-W") or a weighted average normal value with an individual export price ("W-to-T"). Specifically, the United States used the W-to-W comparison method in the measures at issue resulting from investigations, and it used the W-to-T method in the periodic reviews. In all these measures, to determine the overall amount of "dumping", the USDOC aggregated the multiple comparison results. Under the zeroing procedures, the USDOC summed solely the positive comparison results, ignoring all the negative comparison results. In other words, the USDOC disregarded – or treated as "zero" value – the negative comparison results for export transactions which the USDOC itself deemed to be comparable.[1]

4. The consequences of zeroing in the measures at issue are precisely the same as the consequences of zeroing addressed in previous disputes. *First*, by excluding all negative comparison results, the USDOC makes a "dumping" determination that disregards an entire category of the export transactions making up the "product" – namely, those transactions that generate the negative comparison results. "Dumping" is, therefore, *not* determined for the "*product*" as defined by the investigating authority, but for a sub-part of it.

5. In *EC – Bed Linen*, *US – Softwood Lumber V*, *US – Zeroing (EC)*, *US – Softwood Lumber V (Article 21.5 – Canada)*, and *US – Zeroing (Japan)*, the Appellate Body ruled that a partial determination of this type is inconsistent with the definition of "dumping" in Article 2.1 of the *Anti-Dumping Agreement*, and Article VI of the GATT 1994, because it is *not* made for the "'*product' as a whole*".[2] The Appellate Body also ruled that this definition of "dumping" "*applies to the entire [Anti-Dumping] Agreement*", including all the provisions governing reviews.[3] By applying the zeroing procedures in the measures at issue, the United States failed to comply with this definition because the amount of "dumping" is determined in reviews for a sub-part of the product, not for the "product" as a whole.

6. *Second*, zeroing means that an affirmative "dumping" determination is much more likely to be made than not.[4] The reason is that the positive comparison results *included* in the determination relate to export transactions with prices that are *lower* than normal value; in sharp contrast, the *excluded*

[1] *See* EC First Written Submission, paras. 6-29.

[2] Appellate Body Report, *EC – Bed Linen*, para. 53; Appellate Body Report, *US – Softwood Lumber V*, para. 99; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 87 and 89; Appellate Body Report, *US – Zeroing (Japan)*, para. 115.

[3] Appellate Body Report, *US – Zeroing (Japan)*, para. 109; Appellate Body Report, *US – Softwood Lumber V*, para. 93; *and* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 109 and 126.

[4] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 140 to 142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

negative results relate to export transactions with prices *higher* than normal value. The export transactions selected for inclusion in the determination, therefore, relate to the sub-part of the product that is the most likely to generate an affirmative dumping determination.

7. As a result, zeroing can produce a "dumping" determination where, in fact, the product as a whole is not dumped.[5] The exclusion of negative comparison results also "inflates" the amount of any "dumping" determination that is made.[6]

8. Thus, zeroing systematically prejudices the interests of foreign producers and exporters because the negative comparison results that are favourable to them are purposefully set aside by the USDOC. As a result, the Appellate Body has held that the zeroing procedures with these effects involves an "inherent bias" and "distortion" in the comparison of export price and normal value.[7] This is the very antithesis of the "fair comparison" required by Article 2.4 of the *Anti-Dumping Agreement*.

9. For these reasons, the United States' zeroing procedures, and anti-dumping measures adopted using these procedures, have been found to be incompatible with Articles 2.4 and 2.4.2, 9.3, 9.5 and 11.3 of the *Anti-Dumping Agreement* in a series of previous disputes.[8]

10. In the current dispute, the United States' defence consists entirely of a lengthy repetition of arguments that have been made in previous disputes. Indeed, the United States makes no new arguments whatsoever. Each of the United States' arguments has, therefore, been refuted by the complainants and third parties in previous disputes, and rejected by the Appellate Body.

11. The heart of the United States' objection is that the text of the *Anti-Dumping Agreement* does not support the Appellate Body's interpretation that the terms "dumping" and "margin of dumping" must be defined in relation to the investigated "product" as a whole. It is common for parties to disputes to believe firmly that their own interpretation of the covered agreements is properly rooted in the text of those agreements. Yet, the purpose of WTO dispute settlement is to allow the Dispute Settlement Body – acting through panels and, ultimately, the Appellate Body – to resolve disputes by clarifying the meaning of the text on a multilateral basis. In Article 3.2 of the DSU, Members have also underscored that dispute settlement serves to promote the "security and predictability" of the multilateral trading system. Japan does not consider that these ends would be served if the Panel were to reject the Appellate Body's previous rulings on zeroing, which are based on the text of the covered agreements, and have been consistently rendered.

12. Therefore, for the reasons that led the Appellate Body to find, in previous disputes, that the United States' zeroing measures are WTO-inconsistent, Japan urges the Panel to uphold the European Communities' ("EC") claims that the measures at issue are inconsistent with the *Anti-Dumping Agreement* because of the United States' use of zeroing.

II. THE ZEROING PROCEDURES

13. Japan generally agrees with the EC's detailed description of the zeroing procedures as used by the USDOC in various types of anti-dumping proceedings, its use in conjunction with different

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[5] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 140 to 142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[6] Appellate Body Report, *EC – Bed Linen*, para. 55; Appellate Body Report, *US – Softwood Lumber V*, para. 101; *and* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[7] *See* Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 140 to 142; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 134 to 135; *and* Appellate Body Report, *EC – Bed Linen*, para. 55.

[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 190; Appellate Body Report, *US – Zeroing (EC)*, para. 263; Appellate Body Report, *US – Softwood Lumber V*, para. 183.

comparison methodologies (W-to-W, transaction to transaction ("T-to-T"), and W-to-T), and the computer programming language used by the USDOC to implement the zeroing methodology.[9] Japan notes that the United States has not contested the EC's description of these matters.

III. THE ZEROING PROCEDURES USED BY THE USDOC IN THE MEASURES CHALLENGED BY THE EC ARE INCONSISTENT WITH THE OBLIGATIONS ESTABLISHED BY THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994

A. THE GOVERNING LEGAL PRINCIPLES

13. The legal principles governing the WTO-inconsistency of the zeroing procedures have been thoroughly canvassed by the Appellate Body in past WTO disputes, and are well established by now. Two general provisions of the *Anti-Dumping Agreement* – Article 2.1 (in conjunction with Article VI:1 of the GATT 1994) and Article 2.4 – establish the relevant obligations. Both of those provisions apply to the various types of anti-dumping proceedings (original investigations, periodic reviews, and sunset reviews) involved in the measures challenged by the EC in this dispute. In original investigations, investigating authorities are required to determine "margins of dumping", under Article 2.4.2, in a manner that is consistent with the definition of "dumping" in Article 2.1 and Article VI:1. Similarly, the authorities must make a "fair comparison" of export price and normal value pursuant to Article 2.4. The obligations imposed by Articles 2.1 and 2.4 apply to periodic reviews and sunset reviews through the operation of these provisions and Articles 9.3 and 11.3, respectively.

1. Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994

15. As the United States accepts, the analysis of the zeroing issue begins with the concepts of "dumping" and "margins of dumping", as defined in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.[10] Article 2.1 has particular importance among the "agreed disciplines" set out in Article 2 for determining "dumping" and "margins of dumping"[11], because it provides a definition of "dumping":

> *For the purpose of this Agreement, a product* is to be considered as being *dumped*, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price … for the like product when destined for consumption in the exporting country. (Emphasis added)

16. This definition reiterates the definition of "dumping" in Article VI:1 of the GATT 1994[12], which states that, in relevant part:

> … a *product* is to be considered as being introduced into the commerce of an importing country at less than its normal value [i.e. dumped], if the *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.)

17. The text of both these provisions refers to the dumping of "a *product*". In addition, they state that dumping of "*a product*" occurs when "*the* [export] *price of the product*" is less than "*the*

[9] EC First Written Submission, paras. 6-31.
[10] United States' First Written Submission ("FWS"), para. 90.
[11] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.
[12] Appellate Body Report, *US – Zeroing (Japan)*, para. 109; *and* Appellate Body Report, *US – Softwood Lumber V*, para. 92.

comparable *price* … for *the like product*". The text, therefore, defines "dumping" in terms of the difference between two prices, each one an *aggregate* price for "the product". The "dumping" determination is, therefore, made by reference to a single, overall price difference for the product.[13] As the Appellate Body held,

> . . . "dumping" and "margins of dumping" can be found to exist only in relation to [the] product as defined by [the] authority. They cannot be found to exist for only a type, model or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the *level* of an individual transaction.[14]

18. Thus, whether or not the investigating authority decides initially to make multiple comparisons at the sub-product level, the wording of Article 2.1 and Article VI emphasizes that "dumping is defined in relation to a product".[15] In *EC – Bed Linen (Article 21.5 – India)*, in confirming that "dumping" is determined for the "product", and not individual transactions, the Appellate Body agreed with the United States that import transactions "need not be separated into two categories – dumped and non-dumped transactions".[16] This is because a "dumping" determination is made in respect of a single category pertaining to the "product" as a whole.

19. On the basis of this interpretation of Article 2.1 and Article VI:1, the Appellate Body further found that

> . . . if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value.[17]

Thus, "it is only on the basis of aggregating all these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole".[18]

20. This interpretation of the terms "dumping" and "margin of dumping" is supported by Article 6.10 of the *Anti-Dumping Agreement*, which requires, as a rule, that the investigating authority determines "an *individual* margin of dumping for *each* known exporter or producer of *the product* under investigation".[19] Similar language appears in Articles 6.10.2 and 9.5.

21. Thus, for each individually examined producer or exporter, the text of the *Anti-Dumping Agreement* expressly contemplates the determination of only a *single* margin of dumping *for the product*. As stated by Article 2.1, this language underscores that a single, overall dumping determination is made for the product as a whole on the basis of aggregate price comparisons, even if multiple intermediate comparisons are undertaken at the sub-product level. In contrast, this language cannot support the view that "dumping" and the "margin of dumping" can be determined for *each and every* transaction or model, as the United States contends. Otherwise, if every transaction- or model-

[13] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.
[14] Appellate Body Report, *US – Zeroing (Japan)*, para. 115. Underlining added.
[15] Appellate Body Report, *US – Softwood Lumber V*, para. 93. *See also* Appellate Body Report, *US – Zeroing (Japan)*, paras. 109, 115.
[16] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 143 and footnote 177.
[17] Appellate Body Report, *US – Zeroing (EC)*, para. 127. Underlining added. *See also* Appellate Body Report, *US – Softwood Lumber V*, para. 98.
[18] Appellate Body Report, *US – Zeroing (Japan)*, para. 122.
[19] *See* Appellate Body Report, *US – Softwood Lumber V*, footnote 158, citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 118.

specific comparison constituted a "margin of dumping", there would be multiple margins – one for each transaction or model – and not "an *individual* margin of dumping" for "the product".

22. Finally, as noted above, Article 2.1 sets forth a definition of "dumping" that applies "[f]or the purpose of this Agreement". In light of these words, and absent any other definition of "dumping", the Appellate Body has held that the definition in Article 2.1 "applies to the entire Agreement"[20], and it expressly rejected the notion that the terms "dumping" and "margins of dumping" could have "different meanings under different provisions of the *Anti-Dumping Agreement*".[21] Therefore, a uniform definition of "dumping" relating to the product as a whole applies throughout the *Anti-Dumping Agreement*, and to the different types of anti-dumping proceedings that are conducted pursuant to the *Agreement*.[22]

23. Having set forth the Appellate Body's interpretation of the terms "dumping" and "margins of dumping" – which Japan has shown is based in the text of the *Agreement* – Japan now addresses specific arguments raised by the United States to support its argument that "dumping" in Article 2.1 and Article VI:1 need not be defined in relation to the "product" as a whole.

24. *First*, the United States appears to argue that the meaning of the treaty terms "dumping" and "margins of dumping" must be based on "real-world commercial conduct" in the marketplace, where prices are often determined for individual transactions.[23] This argument is without foundation. First, as a commercial matter, it is by no means evident that companies engaging in "real-world commercial conduct" develop their market strategies and assess their relative positions in the marketplace by reference to individual transactions. Thus, it is likewise not evident that the concept of "dumping" should be construed in such a narrow and short-sighted manner. Second, the fact that prices may be set on a transaction-specific basis does not mean that, as a matter of law, the words "product", "dumping" and "margin of dumping" have a transaction-specific ordinary meaning under the *Vienna Convention*. As Japan has explained, the text of the *Anti-Dumping Agreement* requires that a comparison be made of *aggregate* prices for the "product" to arrive at a *single* margin of dumping for each foreign producer or exporter. Moreover, as the United States knows, investigating authorities, including the USDOC, routinely aggregate prices for multiple transactions into a single price for a product. As a result, there is no necessity to determine margins for individual transactions simply because prices can be transaction-specific.

25. Moreover, the Appellate Body has explained that the requirement to determine "dumping" and "margins of dumping" for the product as a whole "is in consonance with *the need for consistent treatment of a product in an anti-dumping investigation*".[24] This consistent treatment of the product as a whole serves important purposes in anti-dumping proceedings. A dumping determination has a series of regulatory consequences that affect the product as a whole. For example, on the basis of a dumping determination, the investigating authority: decides whether to terminate an investigation into the "product" under Article 5.8; determines that all entries of the product are dumped and treats them as such for the purposes of an injury determination under Article 3; and, imposes an anti-dumping duty "*on the product*" under Articles 9.2 and 9.5, and Article VI:2. By defining "dumping" in relation to a product as a whole, the *Anti-Dumping Agreement* ensures parallelism between the scope of a dumping determination and the scope of the regulatory consequences the determination entails.

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[20] Appellate Body Report, *US – Softwood Lumber V*, paras. 93 and 99; Appellate Body Report, *US – Zeroing (EC)*, para. 125; *and* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 126 and 127.

[21] Appellate Body Report, *US – Zeroing (Japan)*, para. 151.

[22] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

[23] US FWS, paras. 82 and 83.

[24] Appellate Body Report, *US – Softwood Lumber V*, para. 99.

26. Thus, the fact that prices may be determined in the marketplace for individual transactions is not the sole consideration that motivated WTO Members. Instead, mindful of the product-wide consequences of a dumping determination, the Members settled upon treaty text that defines "dumping" in relation to the "product" as a whole.

27. *Second*, the United States argues that *Ad* Article VI:1 "provides for importer-specific comparisons" and, as a result, "the term "margin of dumping" cannot relate to aggregated results of all comparisons for the "product as a whole" ".[25] This interpretation of *Ad* Article VI:1 is incorrect. *Ad* Article VI:1 does not provide a definition of either "dumping" or "margins of dumping". Nor does it provide that margins are calculated for individual transactions. Rather, it addresses the *price* that may be used for certain export transactions in the process of calculating the margin of dumping. The *Ad* Article does not purport to alter the requirement in Article 2.1 and Article VI:1 that dumping, and margins of dumping, are determined for a "product". Instead, consistent with these provisions, the term "margin of dumping" in the *Ad* Article can, and must, be read to refer to the margin for the "product".

28. *Third*, the United States relies on Article 2.2 of the *Anti-Dumping Agreement*, arguing that a product-wide definition of dumping "would require the use of constructed [normal] value for the "product as a whole"".[26] The Appellate Body rejected this argument in *US – Softwood Lumber V (Article 21.5 – Canada)*.[27] It held that an authority may sub-divide the product for purposes of conducting intermediate comparisons on a model-specific basis. In so doing, it may assess whether the conditions in Article 2.2 for construction of normal value are met on a model-specific basis, and it may conduct intermediate comparisons on that basis under Article 2.4.2.[28] However, whether or not normal value is constructed for some or all models under Article 2.2, the results of the intermediate comparisons must all be aggregated to determine "dumping" on a product-wide basis to meet the definition in Article 2.1.

29. *Fourth*, the United States relies on certain historical arguments in support of its argument that zeroing is permissible. It refers, in particular, to the following: the second report of a Group of Experts from 1960; two GATT panel reports; and the negotiating history of the *Anti-Dumping Agreement*.[29] The United States made virtually the same arguments in previous disputes. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body dismissed these arguments as follows:

> The same historical materials submitted in these Article 21.5 proceedings were also raised by the United States before the Appellate Body in the original [*Softwood Lumber V*] dispute. The Appellate Body stated in response that "[t]he material to which the United States refer[red] does not ... resolve the issue of whether the negotiators of the *Anti-Dumping Agreement* intended to prohibit zeroing". The Appellate Body noted that, "[i]n any event", it had "concluded, based on the ordinary meaning of Article 2.4.2 read in its context, that zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology". In our view, the historical materials referred to by the Panel and the United States are of limited relevance. The Group of Experts Report dates back to 1960. Both pre-WTO panel reports examined the issue under the provisions of the *Tokyo Round Anti-Dumping Code*, which did not contain a provision equivalent to Article 2.4.2 of the *Anti-Dumping Agreement*. The latter Agreement entered into force in 1995, as part of the Uruguay Round results, long

[25] US FWS, para. 96.
[26] US FWS, para. 97.
[27] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 104.
[28] Appellate Body Report, *US – Softwood Lumber V*, paras. 82 and 97.
[29] US FWS, paras. 86 and 89.

> after the 1960 Group of Experts Report and after the panels referred to by the United States and the Panel had been established. Furthermore, one of the two panel reports was not adopted. Finally, the negotiating proposals referred to by the United States are inconclusive and, in any event, reflected the positions of some, but not all, of the negotiating parties. In sum, the historical materials do not provide any additional guidance for the question whether zeroing under the transaction-to-transaction comparison methodology is consistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[30]

30. In sum, although the United States believes that the negotiations produced an outcome permitting zeroing, nothing in the text shows that the Membership "as a whole" agreed to this view. Instead, the Members agreed to wording that – in light of the text, context, and object and purpose – shows that "dumping" and "margins of dumping" are defined in relation to the "product" as a whole, and that definition renders zeroing WTO-inconsistent.

2. Second Sentence of Article 2.4.2 of the *Anti-Dumping Agreement*

31. As it has done in previous disputes, the United States attaches particular importance to the second sentence of Article 2.4.2. In particular, it contends that a "general prohibition of zeroing" would be "inconsistent" with the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*[31], and specifically would "reduce to inutility" the comparison methodology authorized by that sentence.[32] The United States made this argument, without success, in *US – Zeroing (EC)*, *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Zeroing (Japan)*.

32. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body rejected Panel's conclusion (and the United States' argument) that the prohibition of zeroing would render the second sentence of Article 2.4.2 inutile. *First*, it noted that the United States has never applied the methodology authorized by the second sentence, so the argument as to "mathematical equivalence" between the W-to-W and W-to-T comparisons "rests on an untested hypothesis".[33]

33. *Second*, the Appellate Body noted that the methodology authorized in the second sentence is an "exception" to the methodologies authorized in the first sentence, and as such, the second sentence "alone cannot determine the interpretation of the two methodologies provided in the first sentence …".[34] Because the second sentence constitutes an exception, the requirements that attach to determinations made under the first sentence do not apply under the second sentence.

34. *Third*, the Appellate Body noted that "there is considerable uncertainty regarding how precisely the third methodology [i.e. the methodology in the second sentence] should be applied", because it has never been invoked, and the United States could not provide details regarding how this never-used methodology would work. The Appellate Body held that the uncertainties regarding the application of the W-to-T methodology "undermine the Panel's reasoning based on the 'mathematical equivalence' argument".[35]

35. The Appellate Body noted that Japan and others have "suggested that the weighted average-to-transaction methodology could be applied only to the pattern of exports transactions that have

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[30] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 121. Footnotes omitted.
[31] US FWS, para. 112 ff.
[32] US FWS, para. 113.
[33] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.
[34] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.
[35] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 98.

prices that differ significantly among different purchasers, regions, or time periods".[36] The United States indicated to the Appellate Body that its use of W-to-T comparison method would be limited to the export transactions making up the "pricing pattern", and that W-to-W comparisons would be conducted for the remaining export transactions. However, "the United States failed to explain how precisely the results of the two comparison methodologies would be combined".[37]

36. *Finally*, the Appellate Body agreed with the arguments of Japan and others that "mathematical equivalence" does not necessarily arise when using the W-to-T and W-to-W comparisons without zeroing because, in various circumstances, different outcomes would obtain. Thus, it concluded:

> One part of a provision setting forth a methodology is not rendered *inutile* simply because, in a specific set of circumstances, its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision.[38]

37. Rather, applying the proper test for inutility, the Appellate Body found that "[i]t has not been proven that in all cases, or at least in most of them, the two methodologies would produce the same results".[39] The Appellate Body, therefore, found that the concerns regarding "mathematical equivalence" were unwarranted.[40]

38. In *US – Zeroing (Japan)*, the Appellate Body also rejected a similar argument advanced by the United States. After recalling its analysis from *US – Softwood Lumber V (Article 21.5 – Canada)*[41], summarized above, the Appellate Body added that the second sentence of Article 2.4.2 does not provide contextual support for a finding that zeroing is permissible because, "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology [under the second sentence] to the prices of export transactions falling within the relevant pattern".[42] On this interpretation, absent zeroing, a comparison based on this sub-set of transactions would not produce the same outcome as a W-to-W comparison under the first sentence. There is, therefore, no need to permit zeroing under the second sentence in order to avoid the inutility of the second sentence.

39. The United States now dismisses the Appellate Body's finding in *US – Zeroing (Japan)* by noting that (1) it is "unaware of any Member ever having done this" or suggesting this (i.e. limiting the W-to-T comparison to export transactions making up the pricing pattern), and (2) "[t]he language of the AD Agreement says nothing about selecting a subset of transactions when conducting a targeted dumping analysis".[43]

40. As to the United States' first point, the United States' own regulations recognize that, in a situation that may involve "targeted dumping", the W-to-T comparison set forth in the second sentence of Article 2.4.2 is confined to the export transactions making up the pricing pattern. Specifically, the regulations state that where "there is targeted dumping in the form of export prices … that differ significantly among purchasers, regions, or periods of time" "*the Secretary*

[36] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 98. *See also* Japan's Third Participant's Submissions in *US – Zeroing (EC)*, paras. 187 to 194, and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 52 to 61, which set forth in detail Japan's interpretation of the second sentence of Article 2.4.2. Japan adopts those passages into this submission.

[37] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 98.

[38] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

[39] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

[40] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 100.

[41] Appellate Body Report, *US – Zeroing (Japan)*, para. 133.

[42] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

[43] US FW Submission, para. 116.

normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping … ."[44] Thus, at least one Member – the United States – agrees with the Appellate Body that the W-to-T comparison method under the second sentence is confined to the transactions making up the relevant pricing pattern.

41. In reply, the United States has argued in previous disputes that it would combine the W-to-T method with a W-to-W method on the transactions outside the pricing pattern. Although the United States is free to do so, this approach is not compelled by the text of the *Anti-Dumping Agreement*. Under Article 2.4.2, each comparison method provides an independent basis for determining margins of dumping. Further, as described in paragraph 0, the Appellate Body noted that the United States has failed to demonstrate how it would combine the results of a W-to-T and W-to-W comparison methods.

42. In any event, the United States' argument misses the point. The interpretive issue is what type of W-to-T comparison is required by the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. The United States' regulations follow the Appellate Body's interpretation that this comparison is confined to the export transactions making up the relevant pricing pattern. The fact that the United States chooses, additionally, to conduct a W-to-W comparison does not alter the nature of the W-to-T comparison.

43. The United States' second point – that the Appellate Body's ruling lacks textual basis – ignores that the Appellate Body based its interpretation on the language of the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. In particular, the Appellate Body relied on the phrase "pattern of export prices which differs significantly among different purchasers, regions or time periods". To give meaning to these words, the Appellate Body held that the comparison must focus on the transactions that fall within the pattern, and not transactions that are outside it. It is, therefore, the United States that seeks to ignore the text of the *Anti-Dumping Agreement*.

44. For these reasons, Japan submits that the United States' argument regarding mathematical equivalence is unwarranted. Properly interpreted, absent zeroing, a W-to-W comparison under the first sentence of Article 2.4.2 and a W-to-T comparison under the second sentence of that provision do not necessarily produce identical outcomes. As the Appellate Body found in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Zeroing (Japan)*, the general prohibition of zeroing does not render the second sentence of Article 2.4.2 inutile.

3. Article 2.4 of the Anti-Dumping Agreement

45. Regarding Article 2.4 of the *Anti-Dumping Agreement*, the first sentence of this Article obliges an investigating authority to conduct a "*fair* comparison" of normal value and export price. Under Article 2.4, the process by which investigating authorities compare – that is, establish the "price difference" between – normal value and export price for a product, must not be biased, lack even-handedness, favour particular interests or outcomes, or otherwise distort the facts, in particular to the detriment of exporters or foreign producers.[45] Moreover, the "fair comparison" requirement set forth in the first sentence of Article 2.4 is understood to be an "overarching" obligation that is independent of the specific obligations described in the remaining sentences of the Article, and which applies to the price comparability provisions of Article 2 generally.[46]

46. In previous zeroing disputes, the Appellate Body has observed that an "inherent bias"[47] infects the zeroing procedures – the very antithesis of fairness. It is not surprising, therefore, that the

[44] USDOC Anti-dumping regulations, 19 C.F.R. § 351.414(f)(2). Emphasis added. Exhibit EC-3.
[45] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 193, 196.
[46] Appellate Body Report, *US – Zeroing (EC)*, para. 146.
[47] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

Appellate Body stated that a comparison methodology that includes the use of zeroing "is *not* a "fair comparison" between export price and normal value, as required by Articles 2.4 and 2.4.2".[48] This statement was initially made in an evaluation of "model zeroing" used under the W-to-W comparison methodology, but the Appellate Body subsequently held in the T-to-T situation:

> [T]he use of zeroing under the T-T comparison methodology distorts the prices of certain export transactions because the "prices of [certain] export transactions [made] are artificially reduced". In this way, "the use of zeroing under the [T-T] comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely".[49]

In *US – Zeroing (Japan)*, the Appellate Body concluded that the use of the zeroing procedures in any comparison methodology cannot be considered "impartial, even-handed, or unbiased", and that it therefore is "inconsistent with the fair comparison requirement of Article 2.4".[50]

47. As noted above, the obligations established in Articles 2.1 and 2.4 of the *Anti-Dumping Agreement*, as well as Articles VI:1 and VI:2 of the GATT 1994, apply to all three of the types of anti-dumping proceedings involved in the measures challenged by the EC – i.e., original investigations, periodic reviews, and sunset reviews.[51] In the remainder of this submission, Japan reviews the application of the obligations set forth in the *Agreement* and the GATT 1994 to the individual types of proceedings.

B. ZEROING AS USED BY THE USDOC IN ORIGINAL INVESTIGATIONS IS INCONSISTENT WITH ARTICLES 2.1, 2.4.2 AND 2.4 OF THE ANTI-DUMPING AGREEMENT

48. Japan agrees with the EC that the USDOC's use of the zeroing procedures in original investigations has been found to be inconsistent with Article 2.4 and 2.4.2 of the *Anti-Dumping Agreement*. Japan will only briefly survey this issue, because the United States in recent WTO disputes has ceased defending the USDOC's use of the zeroing methodology in original investigations, at least in the situation in which the W-to-W comparison methodology is employed.[52] Further, in late 2006 the USDOC published a notice implementing the DSB's recommendations and rulings in *US – Zeroing (EC)* by abandoning the use of zeroing in that situation.[53]

1. Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*

49. The Appellate Body has explained that the first sentence of Article 2.4.2 provides for two comparison methodologies (W-to-W and T-to-T) that "shall normally" be used by an investigating authority to determine the existence and margin of dumping.[54] Regardless of the comparison methodology or type of zeroing employed by the USDOC ("model" or "simple", in the terminology

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[48] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135. Original emphasis. *See also* Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 140 to 142; *and* Appellate Body Report, *EC – Bed Linen*, para. 55.

[49] Appellate Body Report, *US – Zeroing (Japan)*, para. 146, quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142.

[50] Appellate Body Report, *US – Zeroing (Japan)*, para. 146.

[51] *See supra* para. 0.

[52] *See* Appellate Body Report, *US – Zeroing (Japan)*, para. 99; *and* Panel Report, *US – Shrimp (Ecuador)*, para. 7.25.

[53] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, Federal Register, vol. 71, at 77722 (USDOC) (27 December 2006), Exhibit EC-6.

[54] Appellate Body Report, *US – Zeroing (Japan)*, para. 118. As discussed above, the second sentence of Article 2.4.2 permits the use of a third (W-to-T) comparison methodology in original investigations if certain conditions are satisfied.

used by the EC[55]), the authority's obligation to determine the margin of dumping under Article 2.4.2 by (i) aggregating the results of all intermediate comparisons, and (ii) in doing so, incorporating the results of all of the intermediate comparisons (including those whose export prices are greater than normal value), applies with equal force. This obligation arises from both the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, as well as Article 2.1[56], which, as noted above, defines "dumping" in terms of "a product" – i.e., for all transactions of the product under investigation.

50. The USDOC fails to meet these requirements by incorporating zeroing into the calculation of dumping margins. Under the zeroing procedures, the USDOC conducts multiple comparisons at the sub-product level for all export transactions that it finds to be comparable, but in determining the amount of dumping, the USDOC sums exclusively the positive comparison results, systematically ignoring the negative comparison results. In consequence, the USDOC fails to determine an amount of dumping for the product as a whole.

51. The multiple comparison results do not express an amount of "dumping", nor are they "margins of dumping" within the meaning of the *Anti-Dumping Agreement* and the GATT 1994. In the words of the Appellate Body, each comparison is merely an "intermediate calculation" and each comparison result is merely an "intermediate value".[57] As the Appellate Body stated in *US – Softwood Lumber V*:

> 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.[58]

52. Indeed, after noting that "model zeroing" had already been found to be inconsistent with Article 2.4.2 in *US – Zeroing (EC)* when used in W-to-W comparisons, the Appellate Body in *US – Zeroing (Japan)* went on to explain that (simple) zeroing in T-to-T comparisons is likewise inconsistent.[59] Accordingly, it has been established that the USDOC's use of zeroing in original investigations, regardless of the comparison methodology, is inconsistent with the obligations established in Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*.

2. Article 2.4 of the Anti-Dumping Agreement

53. As to Article 2.4, the USDOC's zeroing procedures operate uniformly in all anti-dumping proceedings, and therefore the zeroing procedures at issue in the investigations that are the subject of this dispute produce the same prejudicial effects previously described by the Appellate Body. Thus, the USDOC has conducted multiple comparisons in these investigations, and in determining the amount of dumping the USDOC has summed solely the positive comparison results, systematically ignoring the negative results. The zeroing methodology, therefore, has resulted in an overstatement of the amount of dumping by an amount equal to the excluded negative values.

54. As a result, again like the zeroing measures considered in previous disputes, in situations where the value of the *excluded* negative results *exceeds* the value of the *included* positive results, the zeroing methodology produces a dumping determination that would not arise, absent zeroing. Moreover, the level of any dumping margin is necessarily inflated by the value of the excluded negative comparison results. Accordingly, the zeroing procedures as used in the original investigations that are the subject of the current dispute cannot be considered "impartial, even-handed,

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[55] *See* EC First Written Submission, paras. 10, 25.

[56] Appellate Body Report, *US – Zeroing (EC)*, para. 126; *and* Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 92.

[57] Appellate Body Report, *US – Softwood Lumber V*, para. 97.

[58] Appellate Body Report, *US – Softwood Lumber V*, para. 98. Original emphasis.

[59] Appellate Body Report, *US – Zeroing (Japan)*, para. 123.

or unbiased", and the measures resulting from those investigations are, therefore, "inconsistent with the fair comparison requirement of Article 2.4".[60]

55. Japan notes that the United States' defence under Article 2.4 is based, in important part, on its view that "dumping" and "margins of dumping" are not defined in relation to the "product" as a whole.[61] However, for the reasons set forth already, the United States' arguments on the meaning of these terms are incorrect, and not based on the text of the *Anti-Dumping Agreement*.

C. ZEROING AS USED BY THE USDOC IN PERIODIC REVIEWS IS INCONSISTENT WITH ARTICLES 2.1, 2.4, AND 9.3 OF THE ANTI-DUMPING AGREEMENT

1. Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*

56. Regarding zeroing's inconsistency with the *Anti-Dumping Agreement* when employed in periodic reviews, the starting point of the analysis is Article 9.3, which governs those reviews. The *chapeau* of Article 9.3 states: "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". This requirement parallels the language of Article VI:2 of the GATT 1994, which provides that, "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product". It also reflects the rule in Article 9.1 that the amount of duty can be no more than the margin of dumping.

57. As a discipline on the "magnitude" of the duty imposed[62], the rule that the maximum amount of anti-dumping duty cannot exceed the "margin of dumping" reflects the "*overarching principle*" in Article VI of the GATT 1994 and Article 11.1 of the *Anti-Dumping Agreement* that duties may be imposed solely "*to the extent necessary* to counteract *dumping*" during the time period covered by the review.[63]

58. On the basis of this treaty text, the Appellate Body held that "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding".[64] In other words, the "margin of dumping" and the amount of the duty imposed are independent concepts, with the magnitude of the former serving as a constraint on the total amount of the latter.

59. The express reference to Article 2 in the *chapeau* of Article 9.3 includes, among others, Article 2.1, which, as noted above, sets forth a definition of "dumping" that applies "[f]or the purpose of this Agreement". In *US – Zeroing (EC)*, relying on these textual cross-references, the Appellate Body made an explicit interpretive connection between the "product as a whole" requirement of Article 2.1 and dumping determinations in periodic reviews under Article 9.3:

> We note that Article 9.3 refers to Article 2. It follows that, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established "for the product as a whole".[65]

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[60] Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[61] US FWS, para. 143.
[62] Appellate Body Report, *US – Carbon Steel*, para. 70.
[63] Appellate Body Report, *US – OCTG Sunset Reviews (Mexico)*, para. 115.
[64] Appellate Body Report, *US – Zeroing (EC)*, para. 130. Original emphasis. *See also* Appellate Body Report, *US – Zeroing (Japan)*, para. 155.
[65] Appellate Body Report, *US – Zeroing (EC)*, para. 127, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 99.

60. Accordingly, if, in a periodic review, the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not permitted to take into account the results of only some of the multiple comparisons, while disregarding others.[66] Thus, for purposes of these reviews, the investigating authority must aggregate all multiple comparisons to establish a margin of dumping for the "product" under investigation as a whole. It is required to compare the anti-dumping duties collected on all entries of the subject merchandise from a given exporter or foreign producer with that exporter's or foreign producer's margin of dumping for the product as a whole, to ensure that the total amount of the former does not exceed the latter.[67]

61. The Appellate Body also rejected the United States' argument – reiterated in this dispute[68] – that, in a periodic review, "dumping" and "margins of dumping" can be determined on an importer - or import-specific basis. In doing so, the Appellate Body relied in part on Article 6.10 of the *Anti-Dumping Agreement* as context, which requires an authority to calculate "an individual margin of dumping for each known exporter or producer concerned of the production under investigation". Article 6.10, therefore, precludes the calculation of a margin of dumping for each individual import transaction, and it also requires that margins be calculated for exporters and foreign producers, not importers.[69]

62. This interpretation is consistent with the principles underlying the imposition of anti-dumping duties under the *Anti-Dumping Agreement* and the GATT 1994. As the Appellate Body explained in *US – Zeroing (Japan)*: "The concept of dumping relates to the pricing behaviour of exporters or foreign producers; it is the exporter, not the importer, that engages in practices that result in situations of dumping".[70] And in *US – Zeroing (EC)*, it stated:

> Establishing margins of dumping for exporters or foreign producers is consistent with the notion of dumping, which is designed to counteract the foreign producer's or exporter's pricing behaviour. Indeed, it is the exporter, not the importer, that engages in practices that result in situations of dumping. For all of these reasons, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, margins of dumping are established for foreign producers or exporters.[71]

63. As it has done in previous disputes, the United States objects to the Appellate Body's interpretation that margins of dumping are determined for foreign producers or exporters. It alleges that this interpretation disturbs the conditions of competition between different importers that import goods from a single foreign producer or exporter.[72] However, as the Appellate Body has previously explained, the United States' misgivings are misplaced. Although *margins of dumping* are established for foreign producers or exporters for the product as a whole, Members can assess anti-dumping *duties* on "a transaction- or importer-specific basis", "provided that the total amount of anti-dumping duties that are levied does not exceed the exporters' or foreign producers' margins of dumping".[73] Subject to this proviso, Members enjoy discretion to apportion liability appropriately among importers to avoid disturbing competitive conditions. Furthermore, there is no question of the authorities being

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[66] Appellate Body Report, *US – Zeroing (EC)*, para. 127, quoting Appellate Body Report, *US – Softwood Lumber V*, para. 99.

[67] Appellate Body Report, *US – Zeroing (EC)*, para. 132.

[68] US FWS, paras. 130 to 136.

[69] Appellate Body Report, *US – Zeroing (EC)*, para. 128. *See also* Appellate Body Report, *US – Zeroing (Japan)*, para. 112.

[70] Appellate Body Report, *US – Zeroing (Japan)*, para. 156. Citation omitted.

[71] Appellate Body Report, *US – Zeroing (EC)*, para. 129.

[72] US FWS, paras. 132 and 135.

[73] Appellate Body Report, *US – Zeroing (EC)*, para. 131.

obliged to refund to importers an amount that exceeds the duties initially paid in the event that export price is higher than normal value for the product as a whole.[74]

64. In the context of periodic reviews, the United States also argues that Members using a prospective normal value ("PNV") system are entitled to assess duties on the basis of a transaction-specific margin of dumping.[75] Thus, it says, the same entitlement to make transaction-specific assessments should be afforded to users of retrospective systems. This argument has also been dismissed by the Appellate Body.

65. The argument confuses two distinct concepts – the "*amount* of anti-dumping *duty*" imposed under Article 9 and the "*margin* of *dumping*" determined under Article 2. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body held that "the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties".[76]

66. In response to this same argument, the Appellate Body explained further in *US – Softwood Lumber V (Article 21.5 – Canada)* that, under Article 2, the margin of dumping is first established during the investigation phase; when an anti-dumping order has been imposed, Articles 9.1 and 9.2, and Article VI:2, allow duties to be collected in appropriate amounts not exceeding the margin of dumping (determined either during the investigation or a subsequent review); and, the amount of duties imposed may be reviewed under Article 9.3 in light of the margin of dumping determined for the review period.[77] However, the manner in which a Member chooses to impose and collect duties under Article 9 – retrospectively or prospectively – does not alter the uniform definition of "dumping" in Article 2.1 and Article VI:1. Accordingly, as the Appellate Body held in *US – Zeroing (EC)* and *US – Zeroing (Japan)*:

> *Under any system of duty collection*, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter.[78]

67. The United States makes a similar argument that Article 9.4(ii) of the *Anti-Dumping Agreement* authorizes Members using a PNV system to determine margins of dumping on a transaction-specific basis.[79] This argument, again, conflates the distinct concepts of the "amount of anti-dumping *duty*" that may be imposed under Article 9.4 and the "*margin* of *dumping*" determined under Article 2. Article 9.4 does *not* set forth any rules on the definition or determination of *"margins of dumping"* that could justify zeroing. Instead, Article 9.4, and Article 9.4(ii) in particular, establishes rules on the *imposition of duties* that apply to non-sampled producers precisely where *no individual margin is determined*.[80] As the Appellate Body held, rules, such as Article 9.4, governing the imposition of dumping *duties* "do not have a bearing on" the rules governing the determination of dumping *margins*.[81]

68. The United States' arguments on PNV systems are, therefore, misplaced, and do not justify the use of zeroing.

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[74] Appellate Body Report, *US – Zeroing (EC)*, footnote 234.
[75] US FWS, paras. 137 ff.
[76] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 124.
[77] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 112.
[78] Appellate Body Report, *US – Zeroing (Japan)*, para. 162; Appellate Body Report, *US – Zeroing (EC)*, para. 130.
[79] US FWS, para. 137.
[80] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 125.
[81] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 124 and 125.

69. Japan turns now to consider the periodic reviews at issue. As described in the EC's first written submission, in periodic reviews, the USDOC calculates: (1) a margin of dumping for each *exporter* that becomes the duty deposit rate for all entries of the product exported to the United States by that exporter until the completion of the next review; and (2) an *importer*-specific assessment rate based on the total amount of dumping attributable to each importer, which determines that importer's liability for the review period.[82] In both cases, the United States applies the zeroing procedures as part of its dumping determination.

70. In light of its interpretation of Article 9.3 and Article VI:2, in conjunction with other relevant provisions including Article 2.1 and Article VI:1, the Appellate Body in *US – Zeroing (EC)* found that, because the USDOC "systematically disregarded" negative comparison results under the zeroing procedures, "the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared".[83] Accordingly, the zeroing procedures, and reviews based on them, were found to be inconsistent with Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

71. For the same reasons, Japan submits that the periodic review measures at issue are inconsistent with Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994. Japan takes no position on the consistency of zeroing in periodic reviews with Articles 2.4.2 and 11.2 of the *Anti-Dumping Agreement*.

2. Article 2.4 of the Anti-Dumping Agreement

72. Regarding the inconsistency of zeroing with the "fair comparison" obligation of Article 2.4 in the context of periodic reviews, as the *chapeau* of Article 9.3 states, margins of dumping in such reviews must be established consistently with Article 2, including Article 2.4. Accordingly, periodic reviews are subject to the same "fair comparison" requirement as original investigations, which prohibits the use of the zeroing methodology in the calculation of margins of dumping.

73. The Appellate Body expressly reached that conclusion in *US – Zeroing (Japan)*, in which it stated,

> If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a "fair comparison" within the meaning of the first sentence of Article 2.4. This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2, as we have explained previously.[84]

74. Accordingly, Japan agrees with the EC's argument that the zeroing procedures used by the USDOC to calculate margins of dumping in the periodic reviews that are the subject of this dispute render those reviews inconsistent with the obligations set forth in Article 2.4, as well as Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*.

75. Japan notes, again, that the United States defence under Article 2.4 is based, in important part, on its view that "dumping" and "margins of dumping" are not defined in relation to the "product" as a

[82] EC First Written Submission, paras. 20-22.
[83] Appellate Body Report, *US – Zeroing (EC)*, para. 133.
[84] Appellate Body Report, *US – Zeroing (Japan)*, para. 168. Footnotes omitted.

whole.[85] However, for the reasons set forth already, the United States' arguments on the meaning of these terms are incorrect, and not based on the text of the *Anti-Dumping Agreement*.

D. ZEROING AS USED BY THE USDOC IN SUNSET REVIEWS IS INCONSISTENT WITH ARTICLES 2.1, 2.4, AND 11.3 OF THE ANTI-DUMPING AGREEMENT

76. It is by now well established that the results of sunset reviews are inconsistent, as applied, with the obligations established by the *Anti-Dumping Agreement*, to the extent that they are based upon prior determinations that are themselves obtained through the use of the zeroing methodology.[86]

77. *First*, in sunset reviews, the investigating authority determines whether termination of a duty would be likely to lead to continuation or recurrence of "*dumping*" and injury. The Appellate Body has already ruled that, with respect to sunset reviews, "the word 'dumping' as used in Article 11.3 has the meaning described in Article 2.1".[87] The Appellate Body also held that, if a sunset determination is made in reliance on a margin of dumping determined in earlier proceedings, the margin must have been determined consistently with Article 2. Otherwise, the reliance upon the earlier margin that is inconsistent with Article 2 "taints" the subsequent sunset determination.[88]

78. *Second*, regarding the obligations established by Article 2.4 of the *Anti-Dumping Agreement*, according to the Appellate Body, the requirement of a "fair comparison" involves "a *general* obligation" that "informs *all of Article 2* …".[89] These requirements apply whenever an authority determines the existence or amount of "dumping", whether in original investigations or review proceedings.

79. This conclusion is borne out by the Appellate Body's reasoning in *US – Corrosion-Resistant Steel Sunset Review* and its conclusions in *US – Zeroing (Japan)*. In *US – Corrosion-Resistant Steel Sunset Review*, Japan claimed that a sunset determination violated Article 11.3 because the USDOC had relied on dumping margins calculated using zeroing in a periodic review.[90] The Appellate Body opined that:

> … should investigating authorities choose to rely upon dumping margins in making their likelihood determination [under Article 11.3], the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in *two particular* administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*.[91]

Zeroing creates just such "legally flawed" margins, because they are calculated in a manner inconsistent with Article 2.4.

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[85] US FWS, para. 143.

[86] Appellate Body Report, *US – Zeroing (Japan)*, para. 183; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[87] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 126.

[88] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 127 and 130; *see also* Appellate Body Report, *US – Zeroing (Japan)*, para. 183.

[89] Appellate Body Report, *EC – Bed Linen*, para. 59. Emphasis added.

[90] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 116; Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.150 and 7.155.

[91] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127. Underlining added. *See also* Appellate Body Report, *US – Zeroing (Japan)*, paras. 183-185.

80. Because of the flawed basis on which the USDOC rested its determinations in the sunset reviews at issue in *US – Zeroing (Japan)*, the Appellate Body explained:

> We have previously concluded that zeroing, as it relates to periodic reviews, is inconsistent, as such, with Articles 2.4 and 9.3. As the likelihood-of-dumping determinations in the sunset reviews at issue in this appeal relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they are inconsistent with Article 11.3 of that Agreement.[92]

81. Japan does not know the factual details underlying the USDOC's "likelihood" determinations in the sunset reviews challenged by the EC in this dispute. However, the same principles apply here as described in the preceding paragraphs. To the extent that the USDOC relied on margins of dumping determined in original investigations and periodic reviews using the zeroing procedures, those margins were "legally flawed" and cannot constitute a proper foundation for a determination in a sunset review. As a result, the challenged sunset reviews are tainted by the same legal flaws that infected the margins of dumping from earlier proceedings on which the USDOC relied. The United States, therefore, violated Articles 2.1, 2.4 and 11.3 of the *Anti-Dumping Agreement*, as well as Articles VI:1 and VI:2 of the GATT 1994.[93]

E. THE ANTI-DUMPING ORDERS CHALLENGED BY THE EC ARE ALSO INCONSISTENT WITH ARTICLES 2.1, 2.4, 2.4.2, 9.3 AND 11.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES VI:1 AND VI:2 OF THE GATT 1994

82. Japan notes that, in addition to challenging certain investigations, periodic reviews, and sunset reviews, the EC also challenges certain United States anti-dumping orders ("Orders"). In United States law, these Orders provide the legal basis for the imposition of anti-dumping duties following an investigation in which it is established that the conditions for the imposition of anti-dumping duties are met. The amount of definitive duties imposed under an Order is varied over time by, among others, periodic reviews, and the life of an Order is extended by subsequent sunset reviews. In Japan's view, these Orders are measures that may be challenged in WTO dispute settlement.

83. It is settled that, under Article 6.2 of the DSU, a measure may be any act that is attributable to a WTO Member.[94] An Order is undoubtedly an act of the United States.

84. In terms of Article 17.4 of the *Anti-Dumping Agreement*, in disputes under the *Anti-Dumping Agreement*, a Member must challenge one of three types of measure. One of these measures is "final action … to levy definitive anti-dumping duties". In Japan's view, Orders constitute, among others, the final action by which the United States imposes definitive anti-dumping duties. Indeed, it is these Orders that provide the initial, and the on-going, legal basis for the imposition of definitive duties. As a result, the Orders may be challenged in WTO dispute settlement under the *Anti-Dumping Agreement*. The past practice of Members in challenging US anti-dumping actions does not alter the legal status of Orders as "final action" that may be challenged under Article 17.4.

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[92] Appellate Body Report, *US – Zeroing (Japan)*, para. 185. Footnote omitted.

[93] Having found the sunset reviews in *US – Zeroing (Japan)* to violate Article 11.3 of the *Anti-Dumping Agreement*, the Appellate Body exercised judicial economy and stated that it did not "consider it necessary to rule on whether the same sunset review determinations are also inconsistent with Articles 2.1 and 2.4 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994". Appellate Body Report, *US – Zeroing (Japan)*, para. 187. However, Japan submits that because the violations of Article 11.3 are premised on underlying violations of Articles 2.1 and 2.4 (as well as Articles VI:1 and VI:2 of the GATT 1994), a finding of a violation of Article 11.3 leads *a fortiori* to the conclusion that those provisions have been violated as well.

[94] Appellate Body Report, *US – Zeroing (Japan)*, para. 74; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

IV. CONCLUSION

85. Japan submits the following:

(1) the use of the zeroing procedures in the original investigations identified by the EC renders those investigations, and the anti-dumping Orders resulting from them, inconsistent with, *inter alia*, Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, and Article VI:1 of the GATT 1994;

(2) the use of the zeroing procedures in the periodic reviews identified by the EC renders those measures, and the continuation of the relevant anti-dumping Orders, inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994; and

(3) to the extent that, in the sunset reviews identified by the EC, the USDOC relied on margins of dumping calculated in prior proceedings (investigations or periodic reviews) in which the zeroing methodology had been employed, those sunset reviews, and the continuation of the relevant anti-dumping Orders, are inconsistent with Articles 2.1, 2.4, and 11.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994.

86. Japan therefore supports the EC's conclusion that the measures at issue in this dispute are inconsistent with the *Anti-Dumping Agreement* and the GATT 1994.

ANNEX B-2

THIRD PARTY WRITTEN SUBMISSION OF THE REPUBLIC OF KOREA

I. INTRODUCTION

1. This third party submission is presented by the Government of the Republic of Korea ("Korea") with respect to certain aspects of the first written submissions by the European Communities (the "EC") dated 20 August 2007 and by the United States dated 12 September 2007, respectively, in *United States – Continued Existence and Application of Zeroing Methodology (DS350)*.

2. Korea has systemic interests in the interpretation and application of provisions of Articles 2.4, 2.4.2, 9.3, 11.1, 11.2 and 11.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), which lay out legal guidelines for investigating authorities of the Members in calculating dumping margins in an anti-dumping investigation or a subsequent review. Therefore, Korea reserved its third party rights pursuant to Article 10.2 of Understanding on Rules and Procedures Governing the Settlement of Dispute. Korea appreciates this opportunity to present its view to the Panel.

3. The EC challenges, as applied, a wide range of zeroing practices adopted by the United States Department of Commerce ("USDOC"). The challenged measures consist of two groups; the first group includes 18 instances of continued application of anti-dumping duty orders as a result of erroneous dumping margin calculation because of zeroing, and the second group includes 52 instances of utilization of zeroing either in original investigations, administrative reviews or sunset reviews. In Korea's view, this dispute catalogues all possible variations of the distortive nature of the zeroing practice maintained by the United States.

4. Korea therefore generally supports the arguments raised by the EC in its first written submission. Rather than covering all the arguments, however, Korea will address in this submission certain critical issues in Korea's view to assist the panel in reaching a decision.

II. LEGAL ARGUMENTS

A. AS THE APPELLATE BODY HAS CONSISTENTLY FOUND, "ZEROING" MUST BE PROHIBITED IN ALL ANTI-DUMPING PROCEEDINGS INCLUDING ORIGINAL INVESTIGATIONS, ADMINISTRATIVE REVIEWS, AND SUNSET REVIEWS

5. First of all, Korea notes that in *US – Zeroing (Japan)*, the most recent decision relating to zeroing, in which the Appellate Body exercised a comprehensive review of all aspects of the zeroing practice under the AD Agreement, the Appellate Body unequivocally held that zeroing in *all* respects violates relevant provisions of the AD Agreement.[1] Korea requests the Panel to reiterate in this dispute that "zeroing" must be prohibited in *all* anti-dumping proceedings.

6. As a matter of fact, even before *US – Zeroing (Japan)* the Appellate Body has held on a number of occasions that "zeroing" is inconsistent with the requirements of the AD Agreement. It has

[1] *See United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (adopted 23 January 2007) ("*US – Zeroing (Japan)*"), at paras. 137-138, 147, 166, 167-169, 177, 186-187.

consistently indicated that "zeroing" should be condemned as unfair and prohibited in *both* the original investigations and reviews.[2]

7. Given the long history of zeroing disputes at the WTO involving the USDOC, as with any other Member, Korea also would like to observe the final compliance from the United States, *i.e.*, the USDOC's complete elimination of the zeroing practice in all types of anti-dumping proceedings.[3] This dispute, therefore, provides the Panel with an important opportunity to pronounce again that zeroing must be prohibited in all contexts of anti-dumping proceedings, so that the United States could accelerate its internal procedure to completely abolish the practice.

B. "ZEROING", AS USED IN ORIGINAL INVESTIGATIONS, VIOLATES ARTICLES 2.4 AND 2.4.2 OF THE AD AGREEMENT

8. Furthermore, there is an ample body of precedents, where panels and the Appellate Body found that the zeroing practice used in an average-to-average comparison in an original investigation (that is, the first methodology in the first sentence of Article 2.4.2 of the AD Agreement) violates Article 2.4.2 of the AD Agreement.[4] In Korea's view, therefore, the Panel could easily render its determination on this issue in the present dispute.

9. In *Bed Linen*, the Appellate Body relied on both Article 2.4 and Article 2.4.2 in finding "zeroing" to be inconsistent with the requirements of the AD Agreement. The Appellate Body first addressed the requirements of Article 2.4.2, and found that by "zeroing" the models with negative dumping margins, the EC effectively failed to take into account the prices of some export transactions when calculating the overall dumping margin for the product *as a whole* and that the EC instead discounted these prices, thereby inflating the dumping margin. As a result, the Appellate Body concluded that the EC did not establish the existence of margins of dumping for the product at issue on the basis of *all* export transactions, as required by Article 2.4.2.[5]

10. The Appellate Body then turned to the "fair comparison" requirement of Article 2.4, and held that a comparison between export price and normal value that does not take into account *all* transactions does not constitute a "fair comparison" between export price and normal value, as

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[2] *See European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Appellate Body, WT/DS141/AB/R, adopted 1 March, 2001; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS244/AB/R, adopted 15 December 2003; *United States – Final Dumping Determination on Softwood Lumber from Canada*, Report of the Appellate Body, WT/DS264/AB/R, adopted 11 August 2004.

[3] *See the First Written Submission of the European Communities* dated 20 August 2007 ("EC First Written Submission"), at para. 4.

[4] *See, e.g.*, Panel Report, *US – Zeroing (Japan)*, para. 7.86; Appellate Body Report, *US – Softwood Lumber V*, para. 117; Panel Report, *US – Softwood Lumber V*, para. 7.224 and 8.1(a)(i); Panel Report, *US – Zeroing (EC)*, paras. 7.31-32; Appellate Body Report, *EC – Bed Linen*, paras. 46-66.

[5] *Id.* In *EC – Bed Linen*, the Appellate Body found that:

> Under [the weighted average] method, the investigating authorities are required to compare the weighted average normal value with the weighted average prices of *all* comparable export transactions…. By "zeroing" the negative dumping margins, the European Communities did *not* fully take into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than they were. This, in turn, inflated the result form the calculation of the margin of dumping…
>
> *Id.* para. 55.

required by Articles 2.4 and 2.4.2.[6] The Appellate Body's subsequent decision in *Japanese Steel Sunset Review* reaffirmed that "zeroing" was inconsistent with both Articles 2.4 and 2.4.2.[7] In *Canadian Lumber*, the Appellate Body based its analysis solely on the language of Article 2.4.2 — and its requirement that the calculation of dumping margins on an average-to-average basis must consider "*all* comparable export transactions".[8] Then the Appellate Body concluded again that "zeroing" is inconsistent with Article 2.4.2.

11. In these precedents, the Appellate Body has noted the inherent bias of "zeroing" that generally inflates the margins calculated and can, in some instances, find that dumping exists where there is none, and consequently found that "zeroing" is inconsistent with the "fair comparison" requirements of Articles 2.4 and 2.4.2 of the AD Agreement.[9] Thus, the Appellate Body's precedents as noted above collectively evidence that "zeroing", which the United States has consistently used for calculating dumping margins in original investigations, is inconsistent with the requirements of the AD Agreement and, therefore, must be prohibited.

12. In this dispute, therefore, Korea requests the Panel to determine that the zeroing practice of the USDOC as applied to listed original investigations against EC products constitutes violations of Articles 2.4 and 2.4.2 of the AD Agreement.

C. THE PERIODIC REVIEW UNDER ARTICLE 9.3 IS ALSO GOVERNED BY THE PRINCIPLES OF ARTICLES 2.4 AND 2.4.2 AND THUS ZEROING IN THE PERIODIC REVIEWS VIOLATES ARTICLE 9.3 AND SUBSEQUENTLY ARTICLE 11.2

13. The "fair comparison" requirement of Article 2.4 is an overarching and independent obligation, which applies to *all* dumping calculations, and "zeroing" in administrative reviews, therefore, constitutes violation of the obligation.

14. Article 2.4 of the AD Agreement provides that "[a] fair comparison shall be made between the export price and the normal value". Article 2.4 thus establishes an overarching and independent obligation to make a fair comparison between normal value and export price. Korea is of the view that a comparison of the text of the current AD Agreement to the corresponding provision of the Tokyo Round Anti-dumping Code suggests that the "fair comparison" requirement of the first sentence of Article 2.4 was intended to be independent of the provisions in the subsequent sentences of Article 2.4.

15. Under the Tokyo Round Code, the "fair comparison" requirement was set forth as an introductory clause to a sentence describing the mechanics of the comparison. Thus, the first sentence of Article 2.6 of the Tokyo Round Code stated:

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[6] *See id.*

[7] The Appellate Body held that:

> In *EC – Bed Linen*, we upheld the finding of the panel that the European Communities acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by using a "zeroing" methodology in the anti-dumping investigation at issue in that case. We held that the European Communities' use of this methodology "inflated the result from the calculation of the margin of dumping". We also emphasized that a comparison such as that undertaken by the European Communities in that case is not a "fair comparison" between export price and normal value as required by Articles 2.4 and 2.4.2.

Japanese Steel Sunset Review, Report of the Appellate Body, para. 134.

[8] *See United States – Final Lumber AD Determination*, Report of the Appellate Body, paras. 86-87.

[9] *See EC – Bed Linen*, Report of the Appellate Body. para. 55.

> ***In order to effect a fair comparison*** between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1 (b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.[10] (emphasis added)

16. Because of this structure, there was, arguably, some ambiguity concerning whether the "fair comparison" language of the Tokyo Round Code constituted an independent requirement, or simply an introductory explanation.

17. In the AD Agreement, however, the words are phrased in a different manner. The words "fair comparison … between the export price and the normal value" were taken out of the sentence describing the mechanics of the comparison, and instead set out in an independent new first sentence of Article 2.4. As such, the AD Agreement no longer describes methodologies that must be used "in order to effect a fair comparison". Instead, the AD Agreement contains a separate and explicit command that a "fair comparison shall be made".

18. One could argue that the drafters of the AD Agreement presumably would not have made this change without a particular purpose. Consequently, Korea supports the interpretation that the first sentence of Article 2.4 of the AD Agreement was intended to provide an overarching and independent obligation, that goes beyond the obligations to make "due allowances" described in the other sentences of Article 2.4. The language is unambiguous and clearly establishes an independent obligation.

19. In Korea's view, therefore, not only the historical context of Article 2.4, but also the language of that provision confirms that the fair comparison requirement is an overarching and independent obligation that the investigating authorities must observe *whenever* dumping margins are calculated.

20. Korea submits that, barring targeted dumping, a comparison between normal value and export price that does not fully take into account *all* export transactions cannot and does not result in the calculation of a dumping margin for the product *as a whole*, and is therefore not a fair comparison within the meaning of the first sentence of Article 2.4. "Zeroing" makes the investigating authority methodically fail to take into account *all* export transactions for the product *as a whole*, and therefore inevitably leads to an "unfair comparison". Korea thus submits that the "fair comparison" requirement of Article 2.4 – which applies to all dumping calculations – provides an independent ground for finding "zeroing" to be inconsistent with the AD Agreement.

21. Having said that, to the extent that a dumping margin is effectively calculated, the "fair comparison" obligation must equally apply to administrative reviews. By adopting the zeroing methodology in administrative reviews, and by failing to abide by the fair comparison obligation in those proceedings, the USDOC also violated Article 2.4 of the AD Agreement with respect to its various administrative reviews identified in the EC's first written submission.

22. Likewise, Korea also submits that Article 2.4.2 applies to administrative reviews as well. Korea believes that the term "investigation phase" contained in Article 2.4.2 also incorporates periodic reviews envisioned in Article 9.3.

23. More properly understood, the term "investigation" connotes "activities" of an investigating authority as opposed to contents or scope of its inquiry in the course of carrying out such activities. The ordinary meaning of the word "investigation" indicates a systematic examination or inquiry, or a

[10] Tokyo Round Anti-dumping Code, Article 2.6.

careful study of or research into a particular subject.[11] This is hardly a rare or specialized meaning. Korea points out that the dictionary meaning should be a critical starting point for treaty interpretation.[12]

24. In the *Japanese Steel Sunset Review* case, the Appellate Body explained that reviews under Article 11 "envision a process combining *both* investigatory and adjudicatory aspects".[13] The Appellate Body therefore concluded that the prohibition of zeroing implicit in Article 2.4.2 also applied to dumping calculations in sunset reviews under Article 11.3.[14] The Appellate Body's decision in the *Japanese Steel Sunset Review* case suggests that the term "investigation phase" is properly understood in the context of Article 2.4.2 to mean the portion of the proceeding (original investigation or review) in which the authority "investigates" whether dumping has occurred.

25. Korea submits that the same logic employed in the *Japanese Steel Sunset Review* should be applied to a periodic review for duty assessment under Article 9.3. It is clear from the preceding observations that the obligations and methodologies that apply when a margin of dumping is investigated or relied upon are the same for the entire AD Agreement, including "administrative review" proceedings. The use of zeroing by the United States in the administrative reviews at issue here is thus inconsistent with the AD Agreement in both the calculation of a revised margin of dumping for cash deposit purposes and in the calculation of the amount of duty retrospectively assessed.

26. Therefore, in a periodic review, where the USDOC chooses to calculate a new dumping margin for the duty assessment and for the future cash deposit rate, the calculation of a new dumping margin must be done without using "zeroing", consistent with the requirements of Articles 2.4 and 2.4.2.

27. Also Article 11.2 of the AD Agreement imposes an obligation on the investigating authority to review the need to continue with a particular anti-dumping duty. As a result, to the extent that the investigating authority conducts its analysis under Article 11.2 based on margins of dumping produced as a result of zeroing, such analysis inevitably violates Article 11.2 because the amount of anti-dumping duty calculated with zeroing would exceed the margin of dumping properly established.

28. Accordingly Korea requests the Panel to find that the use of zeroing in the administrative reviews constitutes a direct violation of Articles 2.4, 2.4.2 9.3 and 11.2 of the AD Agreement.

D. UTILIZATION OF ZEROING IN SUNSET REVIEWS ALSO CONSTITUTES VIOLATION OF ARTICLES 2.4, 2.4.2, 11.1 AND 11.3 OF THE AD AGREEMENT

29. The same rule should also apply to the sunset reviews. In light of the above reasoning, to the extent the USDOC conducts sunset reviews based on margins of dumping calculated in previous proceedings using the zeroing methodology, it inevitably constitutes violations of Articles 2.4, 2.4.2, 11.1 and 11.3 of the AD Agreement.

30. The sunset reviews of the USDOC cannot be separated from previous anti-dumping proceedings. Rather, the sunset reviews are simply an extension of previous findings to the extent the

[11] *See The New Shorter Oxford English Dictionary,* Clarendon House (1993).

[12] *See European Communities – Customs Classifications of Frozen Boneless Chicken Cuts,* WT/DS269,286/AB/R, Report of the Appellate Body, adopted 12 September 2005, para. 238*; Canada – Measures Affecting Automotive Industry*, WT/DS139/R, Report of the Panel, adopted 11 February 2000, para. 10.12.

[13] *See Japanese Steel Sunset Review*, para. 111.

[14] *Id.*, para. 127.

USDOC relies on dumping margins calculated in a prior original investigation or an administrative review as the basis for the sunset review's likelihood determination. Therefore, Korea believes that the violation of these provisions is unavoidable.

III. CONCLUSION

31. Korea respectfully submits that in reaching its decision in this important dispute, the Panel should ensure that the provisions of Articles 2.4, 2.4.2, 9.3, 11.1, 11.2 and 11.3 of the AD Agreement are construed in their proper context. That will give effect to the ordinary meaning of those Articles consistently with the context, object and purpose of the AD Agreement as a whole, and will add clarity, consistency and fairness to the conduct of anti-dumping investigations and reviews by Members.

32. Korea appreciates the opportunity to participate in these proceedings, and to present its views to the Panel.

ANNEX B-3

THIRD PARTY WRITTEN SUBMISSION OF NORWAY

TABLE OF CONTENTS

Page

I. INTRODUCTION 31

II. THE ROLE OF PRECEDENT 31

III. THE FUNCTION OF THE ADOPTED LEGAL REPORTS IN INTERPRETING THE AGREEMENTS 33

IV. THE PRACTICE OF ZEROING IS CONTRARY TO ARTICLES 2.1 AND 2.4 OF THE AD AGREEMENT 33

4.1 INTRODUCTION 33

4.2 THE EXISTENCE AND AMOUNT OF DUMPING MUST BE DETERMINED FOR THE PRODUCT AS A WHOLE 34

4.3 ZEROING IS CONTRARY TO THE REQUIREMENT THAT THE MARGIN OF DUMPING MUST BE CALCULATED FOR "THE PRODUCT AS A WHOLE" 36

4.4 ZEROING IS CONTRARY TO THE REQUIREMENT OF "FAIR COMPARISON" IN ARTICLE 2.4 OF THE AD AGREEMENT 38

V. ARTICLE 2.4.2 OF THE AD AGREEMENT APPLIES ALSO TO REVIEW PROCEEDINGS 39

5.1 INTRODUCTION 39

5.2 ADMINISTRATIVE REVIEWS MUST COMPLY WITH THE REQUIREMENTS OF ARTICLE 2.4.2 OF THE AD AGREEMENT 39

VI. SUNSET REVIEWS 40

VII. CONCLUSION 41

TABLE OF CASES CITED IN THIS SUBMISSION

Short Title	Full Case Title and Citation
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, adopted 1 November 1996
United States – OCTG Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Corrosion Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Steel Flat Products From Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Shrimp (Article 21.5 – Malaysia	Appellate Body Report, *United States – import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/R, adopted 21 November 2001
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
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US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, /DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this dispute brought by the European Communities ("EC") regarding whether the continued existence and application of zeroing methodologies by the United States in anti-dumping proceedings is consistent with various provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement"* or the "AD Agreement"), Article VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.

2. Norway will not discuss the concrete cases to which the EC refers in this case. Norway understands that the facts surrounding these cases are not in dispute between the EC and the United States, and that the dispute is limited to questions of legal interpretation of the various WTO instruments referred to by the EC.

3. Norway will not in this third party submission address all the legal issues raised by the EC and responded to by the United States. Rather, Norway addresses the following general issues discussed in the First Written Submissions of the EC and the United States:

- whether a Panel may depart from the legal interpretations of the Appellate Body as set out in adopted Appellate Body Reports (Section II);
- the relationship between the obligations of Article XVI:4 of the WTO Agreement and the obligation to comply with adopted reports (Section III);
- whether the practice of zeroing in all forms and in all proceedings under the *AD Agreement* is consistent with Articles 2.1 and 2.4 of that agreement (Section II);
- whether Article 2.4.2 of the *AD Agreement* applies to review proceedings in addition to original investigations (Section III); and
- whether the continuation of anti-dumping measures in a sunset review is inconsistent with the *Anti-Dumping Agreement* in cases where the practice of zeroing has been used either in the original investigation or in a assessment review (Section IV).

II. THE ROLE OF PRECEDENT

4. The Appellate Body has ruled on almost all the issues raised in this case already, and set out the correct legal interpretation to be given to the contested provisions in respect of zeroing. The United States has not advanced any new legal arguments, and all the legal arguments presented by the United States in its First Written Submission have been rejected by the Appellate Body in previous cases.

5. The United States asks the Panel to disregard the legal interpretations of the Appellate Body, claiming that the reasoning of the previous Appellate Body reports is not "persuasive". Norway will address some of these arguments as they relate to specific provisions of the Agreements later in this submission. In this Section, Norway will present certain arguments relating to the precedential value of adopted Appellate Body Reports.

6. 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. There is no disagreement that the legal doctrine of *stare decisis* is not mandated by WTO law. While the Appellate Body is, thus, not formally bound to follow previous rulings, it is in the interests of legal certainty, foreseeability and equality before the law that the Appellate Body or a Panel should not depart, without good reason, from precedents laid down in previous cases. In this respect, the Appellate Body's practice is entirely in line with the practice of other international tribunals.

7. The question before this Panel is both a legal question, and a practical question. Firstly, whether – and under what conditions – a Panel can depart from the legal interpretation expressed by the Appellate Body and endorsed by the Members of the WTO through the adoption of the report(s). Secondly, whether the facts of this case makes it appropriate for the Panel to exercise its competence (if any) to make such a departure.

8. Addressing the first of these issues, the Panel must bear in mind, as also underscored by the Appellate Body, that adopted reports create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.[1] The Appellate Body has even 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".[2] Norway would add that following previous reports also ensures fewer disputes ("the issue is settled") and preserves both the system and the systemic function of the Appellate Body.

9. Additionally, the Panel should remember that the reports in question have all been adopted by the whole Membership through their decisions in the Dispute Settlement Body. This adoption is not just a formality, but makes the rulings and recommendations into binding international obligations. Norway also recalls the central importance given to the security and predictability of the system, as set out in Article 3.2 of the *Dispute Settlement Understanding* (the "DSU").

10. The United States argues that a Panel should free itself from the legal interpretations set out in Appellate Body reports, and only take such legal interpretations into account "to the extent that the reasoning is *persuasive*".[3]

11. Norway disagrees with the standard proposed by the United States, which may be considered lax and confusing. Norway does not argue that it is never possible for a Panel to advance a legal interpretation different from that set out in adopted Appellate Body reports. It is, however, clear from the central function of the reports in the dispute settlement system as well as in the clarifications of the provisions of the covered agreements, that Panels may only do so in extreme cases. More concretely, they may only do so where following the legal interpretation of the challenged provision by the Appellate Body would lead to a manifestly absurd result in a particular case, and where the facts of that case are entirely different from those already addressed in previous reports.

12. Such is not the case here. There is nothing new for the Panel to consider, the factual basis is the same, the methodologies are the same and the contested provisions are the same.

13. Norway further considers that if it were permissible to depart from previous legal interpretations in adopted Appellate Body reports, one enters into an unchartered territory. It also exposes the whole Membership to uncertainty, and is itself creating a precedent 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.

[1] Appellate Body Report, *Japan – Alcoholic Beverages II*, paras. 107-108 (with regard to adopted panel reports) and Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)* (with regard to Appellate Body reports).

[2] Appellate Body Report, *United States – OCTG Sunset Reviews*, para. 188.

[3] United States' First Written Submission para. 33.

III. THE FUNCTION OF THE ADOPTED LEGAL REPORTS IN INTERPRETING THE AGREEMENTS

14. Where laws, regulations or administrative procedures have been found to be inconsistent with the obligations of any of the WTO agreements, this entails a breach of Article XVI:4 of the WTO Agreement, which reads:

> "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

15. The obligations incumbent upon the respondent, having been found to be in non-compliance, does not seem to be in dispute between the parties to this dispute. Where a law, regulation or administrative procedure of a particular Member has been found to be inconsistent with a WTO agreement, that Member has an obligation to remedy that situation.

16. The legal issue before this Panel is whether Article XVI:4 of the WTO-Agreement implies an obligation on the respondent that is different or additional to the obligation to comply with the adopted reports. Norway believes the issue here is not whether adopted reports are binding upon Members not party to the dispute. Clearly the rulings and recommendations are addressed only to the parties to the dispute.

17. In respect of this issue, Norway submits that adopted Appellate Body reports influences the obligations of *all* Members under Article XVI:4 of the WTO – not just the obligations of the parties to the dispute subject to the Appellate Body reports.

18. This is because, in adopting or maintaining domestic laws and regulations in areas covered by the WTO agreements, Members will have to take into account the legal interpretation of the WTO provisions in adopted panel and Appellate Body reports. This obligation is a continuous obligation upon all Members. The obligation does not set in from the adoption of a particular report, contrary to what the EC seems to argue[4], but is there since the entry into force of the WTO Agreement. Being a continuous obligation, Members are required to review their laws, regulations and administrative procedures, when appropriate, to ensure that they are continuously in conformity with their WTO obligations.

19. As such, the obligation in Article XVI:4 is different from the obligation to comply with a particular adopted panel or Appellate Body report. Article XVI:4, therefore, entails obligations that go beyond the individual dispute. A Panel, however, can only address the claims in that particular dispute and between the parties to that particular dispute.

IV. THE PRACTICE OF ZEROING IS CONTRARY TO ARTICLES 2.1 AND 2.4 OF THE AD AGREEMENT

4.1 INTRODUCTION

20. Panels and the Appellate Body has repeatedly found that the use of zeroing when applying a "weighted average-to-weighted average" comparison methodology to calculate the dumping margin in original investigations (so-called model zeroing) is contrary to Article 2.4.2 of the *AD Agreement*.[5]

[4] EC's First Written Submission, para 131.

[5] See e.g. Appellate Body Report, *EC – Bed Linen*, para. 66 and Appellate Body Report, *US – Lumber V*, para. 117.

The United States acknowledges this, but contests any claims of WTO inconsistency as to Articles 2.1 and 2.4 of the *AD Agreement*.[6]

21. Norway considers that the prohibition of zeroing is not limited to cases of model zeroing under the weighted average-to-weighted average methodology in Article 2.4.2 of the AD Agreement. In line with the Appellate Body's ruling in previous cases, Norway finds that the prohibition of all forms of zeroing in all forms of proceedings under the *AD Agreement* is based on two important considerations: first, that dumping shall be established for the "product as a whole" – which is not the case where zeroing is employed. And second, that zeroing is contrary to the "fair comparison" requirement of Article 2.4 of the *AD Agreement*.

4.2 THE EXISTENCE AND AMOUNT OF DUMPING MUST BE DETERMINED FOR THE PRODUCT AS A WHOLE

22. There is a consistent line of reasoning by the Appellate Body regarding the requirement that the existence and amount of dumping must be determined for the product as whole. However, as the existence of such a requirement is something that is disputed between the Parties, Norway finds it pertinent to repeat the legal reasoning behind it.

23. The point of departure for Norway is that there is but one definition of "dumping" in the Anti-dumping Agreement, and that this definition is applicable to all proceedings under the *AD Agreement*.[7]

24. 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)

25. A number of provisions of the *AD Agreement* make reference to "a product"[8], "the product"[9] or "any product"[10], 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 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. [...]"[11]

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[6] United States' First Written Submission paras. 155-156.

[7] There are five such instances where the authorities calculate dumping margins, those being (i) original proceedings, (ii) "assessment reviews" (ADA Article 9.3), (iii) "new shipper reviews" (ADA Article 9.5), (iv) "changed circumstances reviews" (ADA Article 11.2), and (v) "sunset reviews" (ADA Article 11.3).

[8] E.g. Article 2.6.

[9] E.g. Article 2.2.

[10] E.g. Article 9.2.

[11] Appellate Body Report, *EC – Bed Linen*, para. 53.

26. The Appellate Body in *US – Softwood Lumber V*, restated this, where it held that "dumping is defined in relation to a product".[12] 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. [...]"[13] (emphasis added)

27. In *US – Zeroing (EC)* the Appellate Body, recalling its earlier rulings, stated that:

> "...the text of Article 2.1 of the Anti-Dumping Agreement, as well as the text of Article VI:1 of the GATT 1994 … indicate clearly that "dumping is defined in relation to a product as a whole"".[14]

28. The Appellate Body in *US – Softwood Lumber (Article 21.5 – Canada)* reiterated this, and analysed the context provided by Articles 5.8, 6.10 and 9.3 ADA. 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.[15] Also in *US – Zeroing (Japan)*, the Appellate Body based its reasoning on the concept of "product as a whole".[16]

29. Furthermore, it is evident from the provision of Article 6.10 ADA, 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".[17] Norway adds that Article 6.10 applies to original investigations and to reviews pursuant to Article 11 by virtue of Article 11.4.

30. 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 ADA "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".[18]

31. For "new shipper reviews" Article 9.5 equally foresees individual margins of dumping for each exporter for "the product".

32. Norway also refers to the provisions of GATT Article VI, which is the basis for the Anti-Dumping Agreement, and which is still the basis for permitting the imposition of anti-dumping duties – which barring this provision would have been contrary to the MFN provision of GATT Article I and the prohibition on levying of duties in excess of the scheduled bound duty under GATT Article II. The provision of GATT Article VI:2 states that:

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[12] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[13] Appellate Body Report, *US – Softwood Lumber V*, para. 99.
[14] Appellate Body Report, *US – Zeroing (EC)*, para. 126, quoting Appellate Body Report, *US – Softwood Lumber V* paras. 92-93. See also Appellate Body Report *US – Zeroing (EC)*, paras. 125, 127-129 and 132.
[15] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 105.
[16] Appellate Body Report, *US – Zeroing (Japan)*, para. 129.
[17] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 107.
[18] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 108.

> "In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1." (emphasis added)

33. 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 Article VI (Paragraph 1 of GATT Article VI is similar to Article 2.1 ADA in respect of the calculation of the dumping margin). Nothing in GATT 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.

34. 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*.

4.3 ZEROING IS CONTRARY TO THE REQUIREMENT THAT THE MARGIN OF DUMPING MUST BE CALCULATED FOR "THE PRODUCT AS A WHOLE"

35. 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. The United States acknowledges this as regards the use of zeroing in original investigations where comparisons are made using the weighted average-to-weighted average methodology.[19] The United States does not however acknowledges this for any other type of proceeding or comparison methodology, and Norway sees therefore the need to reiterate the legal arguments made by the Appellate Body in this respect.

36. 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."[20] (emphasis added)

37. 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:

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[19] See EC's First Written Submission para. 145, with references to relevant decisions in footnote 107. See also United States' First Written Submission para. 155.

[20] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para 135.

> "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."[21]

38. 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 recent rulings.

39. First of all, in regard to zeroing procedures in periodic reviews, the Appellate Body stated in *US – Zeroing (EC)*:

> "We note that Article 9.3 refers to Article 2. It follows that, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established "for the product as a whole".[22]

40. The Appellate Body then went on to say that:

> "… if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value."[23]

41. The requirement in Article 2.1 *AD Agreement* to aggregate multiple comparison results to produce a margin of dumping for the product as a whole applies equally when an authority conducts: weighted average-to-weighed average comparisons, weighted average-to-transaction comparisons and transaction-to-transaction comparisons.

42. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body concluded that the definition of "dumping" and "margin of dumping" in Article 2.1 (and Articles VI:1 and VI:2 of GATT 1994) applies to zeroing procedures using transaction-to-transaction comparison in an original investigation. The Appellate Body underlined that in relation to Article 2.4.2 ADA, the weighted average-to-weighted average and transaction-to-transaction comparisons provide "alternative means for establishing "margins of dumping" and that they "fulfil the same function" with no "hierarchy between them". In light of this, the Appellate Body stated:

> "… the term "margin of dumping" has the same meaning regardless of which of the two methodologies in the first sentence of Article 2.4.2 is used to establish them. In other words, it is a unitary concept and the two methodologies provided in the first sentence of Article 2.4.2 are alternative means to capture it."[24]

43. Based on these premises, the Appellate Body held that:

> "…it would be illogical to interpret the ["T to T"] comparison methodology in a manner that would lead to results that are systematically different from those obtained under the ["W to W"] methodology."[25]

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[21] Appellate Body Report, *US – Softwood Lumber V*, para. 98 (emphasis in the original).
[22] Appellate Body Report, *US – Zeroing (EC)*, para. 127.
[23] Appellate Body Report, *US – Zeroing (EC)*, para. 127.
[24] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 89.
[25] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para 93.

44. In *US – Zeroing (Japan)*, the Appellate Body reiterates this line of reasoning, and thus carrying out a consistent interpretation of the various provisions involved.[26]

45. Regarding sunset reviews, Norway holds that it would not be logically consistent to interpret the *AD Agreement* in a manner that will allow the investigating authorities to apply a duty where the requirements of the AD Agreement would have made it illegal to impose the duty in the first place.

46. 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.

4.4 ZEROING IS CONTRARY TO THE REQUIREMENT OF "FAIR COMPARISON" IN ARTICLE 2.4 OF THE AD AGREEMENT

47. The EC contends in its First Written Submission that the requirement of "fair comparison" in Article 2.4 of the *AD Agreement* is an independent and overarching obligation, which in addition to applying to original investigations, also is applicable to proceedings governed by Article 9.3. The EC further argues that the zeroing methodologies used by the United States both in original investigations and in later reviews are inconsistent with the "fair comparison" requirement.[27] The United States, on the other hand, submits that zeroing is not contrary to the "fair comparison" requirement.

48. The Appellate Body has in several cases found that zeroing is contrary to a "fair comparison" between the export value and normal value.[28] It has been found that "the use of zeroing (…) artificially inflates the magnitude of dumping resulting in higher margins of dumping and making a positive determination of dumping more likely", and further that "this way of calculating cannot be described as impartial, even-handed, or unbiased".[29]

49. In the latest case – *US – Zeroing (Japan)* – the Appellate Body referred to its earlier rulings in its interpretation of Article 2.4[30], and expressed the following when addressing the application of the requirement of "fair comparison" to assessment reviews:

> If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a "fair comparison" within the meaning of the first sentence of Article 2.4. This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2, as we have explained previously.[31]

50. The Appellate has had the opportunity to consider the "fairness" of the practice of zeroing with regard to all three comparison methodologies, and with regard to both original investigations and assessment reviews. The message from the Appellate Body in these cases has been clear: there is an inherent bias in zeroing methodology and zeroing is not a "fair comparison". Zeroing thus implies a

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[26] Appellate Body Report, *US – Zeroing (Japan)*, paras. 119-129.
[27] EC's First Written Submission para. 159, 176 and paras. 198-199.
[28] Appellate Body Report, *EC – Bed Linen*, para. 55, Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135, Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 42 and Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[29] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 142.
[30] Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[31] Appellate Body Report, *US – Zeroing (Japan)*, para. 168.

breach of Article 2.4 of the *AD Agreement.* Nothing in this case gives any cause to disturb the consistent Appellate Body findings in this respect.

51. In light of the clear case law referred to above, Norway does not see any need to go any further into the details of the interpretation of Article 2.4 of the *AD Agreement*.

V. ARTICLE 2.4.2 OF THE AD AGREEMENT APPLIES ALSO TO REVIEW PROCEEDINGS

5.1 INTRODUCTION

52. The EC submits that Article 2.4.2 of the *AD Agreement* applies not only in the context of original investigations, but also in the context of review proceedings, including administrative reviews.[32] The United States argues otherwise, contending that the express terms of Article 2.4.2 limit the application to original investigations.[33]

53. Norway is of the firm view that the methodologies provided for in Article 2.4.2 are the only permissible methodologies also for assessment reviews. Article 9.3.1 does not prescribe or permit a method for margin calculation different from those set out in Article 2.4.2 of the *AD Agreement*.

5.2 ADMINISTRATIVE REVIEWS MUST COMPLY WITH THE REQUIREMENTS OF ARTICLE 2.4.2 OF THE AD AGREEMENT

54. Article 9.3.1 does not speak to the question of the method for margin calculation in assessment reviews. The provision is silent in this regard, and thus cannot be said to imply a permission or a prohibition of any specific methodology.

55. Article 9.3 (the "chapeau") does, however, provide that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The reference to Article 2 must be read as a reference to the whole of that Article, without exceptions. On this basis, Norway submits that the establishment of a margin of dumping in the context of Article 9.3 must adhere to the disciplines of Article 2, including Article 2.4.2.

56. As mentioned above, the United States understands Article 2.4.2 to be limited to original investigations. It is argued that the term "the existence of margins of dumping during the investigation phase..." implies that the provision is not applicable to assessment reviews according to Article 9.3.1.[34]

57. Norway believes that a proper interpretation of the terms of Article 2.4.2, read in context and in light of the object and purpose of the treaty, leads to a different result. First of all the ordinary meaning of the word "investigation" comprises more than just the type of examination that takes place in an original investigation (…). The EC refers in its First Written Submission to how the word is defined in The New Shorter Oxford English Dictionary: "the action or process of investigating; a systematic inquiry; a careful study of a particular subject".[35] Norway submits that there are different kinds of examinations that are undertaken during the proceedings in accordance with the AD Agreement that fits this definition, including the assessment into the amount of anti-dumping duty addressed in Article 9.3.1.

[32] EC's First Written Submission paras. 212 and 223.
[33] United States' First Written Submission para. 99.
[34] United States' First Written Submission para. 99.
[35] EC's First Written Submission para. 213 and footnote 152.

58. Norway contends that also the context and the object and purpose of the treaty indicate that Article 2.4.2 is not limited to original investigations. Article 2 is the sole provision in the Agreement dealing with the "determination of dumping", and Article 2.4.2 is the sole provision in the Agreement dealing with how to calculate dumping margins.[36] If one were to interpret Article 2.4.2 in such a way as to limit its application to original investigations, one would implicitly say that there are no specifics as to the methodologies to be applied in determining dumping margins in reviews and thus no "security or predictability" in the system. This would effectively abolish also the "due process rights" for the exporter. Such a result would – in Norway's view - be manifestly absurd and contrary to the object and purpose of the treaty. One cannot come to the conclusion that it is for each and every Member to chose how to calculate dumping margins. This could lead to 151 different methodologies with 151 different results.

59. It is a general tenet of public international law that where a treaty may give rise to two different interpretations, the one enabling the treaty to have appropriate effects should be adopted. In the words of the International Law Commission:

> "When a treaty is open to two interpretations, on of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[37]

60. In Norway's view this requires us to adopt an interpretation of "investigation phase" in Article 2.4.2 that ensures that there are agreed methodologies applicable also to reviews, and not an interpretation that permits "a free for all" making the choice of methodology into a "black hole". Norway again refers to the object and purpose of the WTO Agreement, which *inter alia* is to establish a rules-based multilateral trading system ensuring security and predictability for Members in their trading relations.[38] Without such an interpretation, margins calculated based on the same sales may change wildly from Member to Member, leaving no security and predictability for the exporters.

61. While not entering into a detailed critique of all the interpretative arguments put forward by the United States, Norway believes that the above principle of "effectiveness" and the object and purpose of the *WTO Agreement*, the *GATT 1994* and the *AD Agreement all* imply that Article 2.4.2 must be interpreted to apply to all investigations – including those carried out for purposes of establishing dumping margins in reviews.

VI. SUNSET REVIEWS

62. The Appellate Body has previously held that all dumping margins in sunset reviews conducted in accordance with Article 11.3, must conform to the disciplines of Article 2.4. If the margins are calculated using a methodology that is inconsistent with Article 2.4, then this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3.[39] "In such circumstances, "the likelihood[of dumping] determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3"."[40]

63. Norway notes that the Appellate Body has confirmed that this also applies where the investigating authority relies on margins calculated (with the use of zeroing) during periodic reviews: In *US – Zeroing (Japan)* the Appellate Body ruled that since it was found that zeroing was

[36] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 127.
[37] YBILC 1966-II, page 219.
[38] See DSU Article 3.2, first sentence.
[39] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 127 and 130.
[40] Appellate Body Report, *US – Zeroing (Japan)*, para. 183, referring to Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 130.

inconsistent, as such, with Article 2.4 and Article 9.3, and the likelihood-of-dumping determinations in the sunset reviews at issue in the case relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they were inconsistent with Article 11.3 of that Agreement.

64. A margin calculated with zeroing can, therefore, never be the foundation for an authority's determination regarding the likelihood of continuation or recurrence of dumping.

65. The United States argues that the Panel should reject the claim by the EC because the EC has not demonstrated that a calculation without zeroing would result in zero or *de minimis* margins.[41]

66. This is an incorrect understanding of the obligation incumbent upon the investigating authority by virtue of Article 11.3 of the *Anti-Dumping Agreement.* Article 11.3 requires of the investigating authority that it makes a reasoned determination. As the Appellate Body has set out, a determination of the likelihood of continuation or recurrence of dumping based on a finding of dumping, where the dumping margin has been calculated employing zeroing, cannot be considered a reasoned determination. It is sufficient to constitute a breach of Article 11.3 for the EC to present a prima facie case that the determination is flawed. It is not necessary for the EC, nor for this Panel, to make the correct determination for the United States. The Panel's role is to review the determinations actually made by the United States. A panel's role is not to redo the investigation and make its own determinations.

VII. CONCLUSION

67. Norway respectfully requests the Panel to examine carefully the facts presented by the parties to this case in light of our arguments, in order to ensure a proper and consistent interpretation of the *AD Agreement*.

[41] United States, First Written Submission para. 154.

ANNEX B-4

THIRD PARTY WRITTEN SUBMISSION OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

TABLE OF CONTENTS

Page

INTRODUCTION **43**

ARGUMENTS **43**

The definition of "dumping" contained in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* applies throughout the *Agreement.* **43**

The existence of dumping and margins of dumping must be determined with respect to the product as a whole **44**

The term "investigation" in Article 2.4.2 of the *Anti-Dumping Agreement* does not refer exclusively to "original investigations". **44**

Article 2.4 imposes a general obligation requiring Members to ensure a "fair comparison". **45**

The assessment of anti-dumping duties shall be based on the margin of dumping established in accordance with Article 2 of the *Agreement.* **45**

The application of the zeroing methodology is WTO-inconsistent in all anti-dumping proceedings. **46**

CONCLUSION **46**

INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter referred to as "TPKM"), as a third party in this proceeding, thanks the Panel for this opportunity to present its views on the issue of zeroing.

2. The question before the Panel in this dispute is whether the application of zeroing in the 52 anti-dumping proceedings with respect to the 18 specific products cited by the European Communities is inconsistent with Articles 2.1, 2.4, 2.4.2, 9.3, 11.1, 11.2 and 11.3 of the *Anti-Dumping Agreement,* and Articles VI:1, VI:2 and XVI:4 of the GATT 1944.

3. In its first written submission, the European Communities has clearly described how the United States incorporates the zeroing methodology into its determinations in original investigations, administrative reviews and sunset reviews. The fundamental issue in these proceedings with respect to all of these determinations, therefore, is whether the use of the zeroing methodology impermissibly distorts the calculation of the dumping margin upon which the existence of dumping is determined and the subsequent duty assessments are based.

4. TPKM will focus its submission on why the zeroing methodology as applied in anti-dumping proceedings is inconsistent with the *Anti-Dumping Agreement* and relevant WTO provisions. This submission will address the following:

(1) The definition of "dumping" in Article VI:1 of the GATT 1994 and Article 2.1 applies throughout the *Anti-Dumping Agreement*.
(2) Pursuant to Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, dumping and margins of dumping must be defined with respect to the product under investigation as a whole.
(3) The term "investigation" in Article 2.4.2 of the *Anti-Dumping Agreement* does not refer exclusively to "original investigations" conducted under Article 5 of the *Anti-Dumping Agreement*.
(4) Article 2.4 of the *Anti-Dumping Agreement* requires Members to ensure a "fair comparison" when making a determination of dumping in any anti-dumping proceeding.
(5) The assessment of dumping duties shall not exceed the margin of dumping established in accordance with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement.*
(6) The use of the zeroing methodology distorts the margins of dumping and renders *any* determination of dumping based on that methodology inconsistent with WTO rules.

ARGUMENTS

The definition of "dumping" contained in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* applies throughout the *Agreement.*

5. Article 2.1 of the *Anti-Dumping Agreement* reiterates the definition of "dumping" provided in Article VI:1 of GATT 1994 and specifies that this definition applies "for the purpose of this Agreement". TPKM is of the view, therefore, that in any determination of "dumping", in any anti-dumping proceeding, it is not permissible to establish a margin of dumping without reference to the various requirements of Article 2.

6. For example, the Appellate Body has stated in *US – Zeroing (EC)* and *US – Zeroing (Japan)* that "the margin of dumping established for an exporter or foreign producer operates as a ceiling for

the total amount of anti-dumping duties".[1] This means that the requirements of Article 2 must be respected in establishing the margin of dumping in an assessment review. TPKM notes that Article 9.3 provides expressly that the amount of duties shall not exceed a margin of dumping established in accordance with the rules of Article 2.

The existence of dumping and margins of dumping must be determined with respect to the product as a whole.

7. Both Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* define dumping by reference to "a product". Article 2.1 specifies that the determination of dumping is based on a comparison of "the export price of the product" and "the comparable price ... for the like product". Thus, these texts expressly require that the existence of dumping and margins of dumping be determined for the product as a whole.

8. The Appellate Body has found that "Dumping, within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product".[2] The Appellate Body has consistently found that the use of zeroing in a manner that does not fully take into account the actual prices of all export transactions is inconsistent with the *Anti-Dumping Agreement*.[3]

The term "investigation" in Article 2.4.2 of the *Anti-Dumping Agreement* does not refer exclusively to "original investigations".

9. Contrary to the United States' interpretation, TPKM's view, as expressed in its third party submission in *US – Zeroing (EC)* WT/DS294, is that the term "investigation" as used in Article 2.4.2 of the *Anti-Dumping Agreement* does not refer exclusively to "original investigations" conducted in accordance with Article 5 of the *Anti-Dumping Agreement*.

10. It should be noted that the *Anti-Dumping Agreement* does not contain any definition of the term "investigation", although the term "investigation" is used in many different provisions of the *Agreement*. However, the term does not have the same meaning in all the instances in which it appears in the *Agreement*. While in certain provisions it must be interpreted narrowly, referring only to "original investigations", in other instances the term has a broader meaning, covering original investigations as well as assessment and review proceedings.

11. For example, Article 6.8, which relates to the use of facts available, refers to the term "investigation". However, it is accepted that the use of facts available is not limited to "original investigations". Indeed, as far as Article 6 is concerned, Article 11.4 of the *Agreement* expressly provides that the provisions of Article 6 regarding evidence and procedure shall apply to any "review" carried out under this Article, i.e. under Article 11. The existence of this cross-reference supports the view that the term "investigation" is capable of referring to proceedings additional to "original investigations". Any interpretation to the contrary would lead to the absurd result, for example, that Article 6.8 would not be applicable to duty assessment proceedings under Article 9.

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[1] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, para. 130, WT/DS294/AB/R*;* Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, para. 155, WT/DS322/AB/R.

[2] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, para. 93, WT/DS264/AB/R.

[3] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, para. 55, WT/DS141/AB/R. See also, Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R; Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R*;* Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R.

12. TPKM believes that the word "investigation" must be interpreted in light of its specific context. Even if they have different purposes, all types of anti-dumping proceedings involve the same kind of investigation of prices and costs in order to determine and measure dumping. In this respect, the purpose of Article 2 would be frustrated if, together with Articles 2.4 and 2.4.2, it were not generally applicable to assessment and sunset reviews. Therefore, TPKM considers the provisions of Article 2 are applicable not only to original investigations but also to duty assessment and other reviews.

Article 2.4 imposes a general obligation requiring Members to ensure a "fair comparison".

13. Article 2.4 of the *Anti-Dumping Agreement* establishes the fundamental obligation that "A fair comparison shall be made between the export price and the normal value".[4] This fair comparison is the only permissible means of determining or measuring the existence of dumping under the *Anti-Dumping Agreement*.

14. Furthermore, the fair comparison requirement in Article 2.4 does not only apply to certain types of intermediate comparisons used to determine margins of dumping; instead, it applies whenever dumping margins are calculated, no matter how the comparisons are made. As the Appellate Body stated in *US – Corrosion- Resistant Steel*, "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins".[5]

15. To comply with the obligation to make a "fair comparison" between export prices and normal value, the investigating authority must take fully into account the prices of all relevant export transactions. A "fair comparison" under Article 2.4 of *Anti-Dumping Agreement* requires that the comparison be conducted in an objectively "fair" manner, in the sense of being equitable and balanced. The comparison cannot prejudge the outcome and cannot contain a tendency to produce one outcome rather than another. For this reason, Article 2.4 entails an independent obligation to determine the relevant dumping margin by a fair method of comparison that takes fully into account the entirety of the actual prices of all sales of the products under investigation. The investigating authority cannot simply disregard or adjust the prices of some transactions in its calculation of the overall margin of dumping.

The assessment of anti-dumping duties shall be based on the margin of dumping established in accordance with Article 2 of the *Agreement.*

16. Article 9.3 of the *Anti-Dumping Agreement*, which determines the applicable rules for duty assessment proceedings, stipulates "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The Appellate Body has reiterated this stipulation by stating "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties".[6] This creates an unambiguous link between the dumping duty imposed, reassessed or collected and the disciplines in Article 2 governing the calculation of dumping margins. Article 9.3 thus expressly refers to Article 2 and requires the application of Article 2 to duty assessment proceedings. It follows that when calculating dumping margins in these proceedings, investigating authorities must do so in accordance with the rules of

[4] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, para. 59, WT/DS141/AB/R.

[5] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion- Resistant Carbon Steel Flat Products from Japan*, para.127, WT/DS244/AB/R.

[6] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, para.130, WT/DS294/AB/R; Appellate Body Report, *United States – Measures Relating and Sunset Reviews*, para.155, WT/DS322/AB/R.

Article 2, including, naturally, Article 2.4 and Article 2.4.2.[7] In other words, any determination of margins of dumping in a duty assessment review must fully comply with the requirements of Articles 2.4 and 2.4.2.

The application of the zeroing methodology is WTO-inconsistent in all anti-dumping proceedings.

17. Under the zeroing methodology, the prices of certain export transactions are not fully taken into account in determining the overall margin of dumping for the product as a whole. In these circumstances, the margin ceases to accurately reflect the margin of dumping as a whole and, instead, is improperly based on the prices of a particular part or category of that product. The result is the systematic inflation of the dumping margins. Such a comparison does not provide a "fair" basis for determining the existence of dumping or measuring dumping margins for the product as a whole as required by Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1944.

18. In the United States' practice at dispute, the USDOC determined the existence of dumping in the original investigations using the zeroing methodology (so-called "model" zeroing). In subsequent administrative reviews, the margin of dumping was also determined by the use of zeroing in aggregating the results of transaction-to-average comparisons. In sunset review proceedings, the USDOC relied on either the dumping margins calculated in the original investigation or a subsequent assessment review, both of which used zeroing, to determine whether the dumping was likely to continue or recur. The potential consequences of this approach include the improper finding of the very existence of dumping, as well as the excessive imposition and collection of anti-dumping duties, and the improper continuation of anti-dumping measures in sunset reviews.

19. The Appellate Body in *US – Corrosion Steel* noted 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".[8] The Appellate Body also stated that there is an "inherent bias in a zeroing methodology". Such bias "could, in some instances, turn a negative margin into a positive margin of dumping" and may "distort not only the magnitude of a dumping margin, but also result in a finding of the very existence of dumping".[9] Thus, it is clear that the use of the zeroing methodology is inconsistent with the requirements of Article 2.4 and Article 2.4.2, not only in original investigations but also in other proceedings such as administrative reviews and sunset reviews.

20. Accordingly, any determination in an original investigation, assessment review, or sunset review that relies on dumping margins that incorporate the zeroing methodology may be contrary not only to Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1944, but also Articles 2.1, 9.3, 11.1, 11.2 and 11.3 of the *Anti-Dumping Agreement*.

CONCLUSION

21. For the reasons discussed above, TPKM considers that, in line with the findings of previous Panels and the Appellate Body in similar cases that have found the zeroing methodology "as such"

[7] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion- Resistant Carbon Steel Flat Products from Japan*, para.135, WT/DS244/AB/R.

[8] As noted and confirmed by the Appellate Body, "the opening phrase of Article 2.1—"[f]or the purpose of this Agreement"—indicates that the definition of "dumping" as contained in Article 2.1 applies to the entire Agreement, which includes, of course, Article 2.4.2." Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, para.93, WT/DS264/AB/R.

[9] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion- Resistant Carbon Steel Flat Products from Japan*, para.135, WT/DS244/AB/R.

and "as applied" inconsistent with the *Anti-dumping Agreement*, the United States' application of the zeroing methodology in all phases of its investigations and reviews of anti-dumping measures, including the determinations cited by the European Communities, are inconsistent with the *Anti-Dumping Agreement* in light of Articles 2.1, 2.4 and 2.4.2, and 9.3, 11.1, 11.2 and 11.3, as well as Articles VI:1 and VI:2 of the GATT 1944.

22. In the interests of ensuring security and predictability in the multilateral trading system, TPKM encourages the Panel to find that, consistent with the previous findings of the Appellate Body, the use of zeroing, whether in investigations or reviews, and regardless of the type of comparison employed, is inconsistent with the *Anti-Dumping Agreement* and WTO provisions, and should be eliminated once and for all from all types of anti-dumping proceedings.

ANNEX B-5

THIRD PARTY WRITTEN SUBMISSION OF THAILAND

1. Thailand appreciates the opportunity to participate in this proceeding and to present its views to the Panel in this written submission.

2. Thailand reserved its right to participate as a third party in this proceeding under Article 10.2 of the *Dispute Settlement Understanding* due to its concern about the continued use of "zeroing" by the United States in the types of assessment and sunset review proceedings at issue before this Panel. In Thailand's view, the use of zeroing in *any* circumstance is inconsistent with both the spirit and the substance of Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*. In effect, the use of zeroing either artificially creates margins of dumping where none would otherwise have been found or, at a minimum, artificially inflates margins of dumping in both original anti-dumping investigations and periodic reviews of dumping margins.

3. Thailand generally supports the arguments made by the European Communities in its first written submission in this dispute regarding the inconsistency of the use of zeroing in the challenged measures with the *Anti-Dumping Agreement*. Thailand will not repeat those arguments. Instead, Thailand would simply remind the Panel that the Appellate Body's rulings to date on the issue of zeroing have coherently and consistently addressed the numerous different arguments put before it in each dispute, ranging from *EC – Bed Linen* to the latest *US – Zeroing (Japan)*. To summarize, the Appellate Body has held that whenever an investigating authority uses intermediate comparisons between subgroups of export prices and normal values – whether on a model-by-model, transaction-by-transaction or any other basis – as a step to arrive at the overall dumping margin for that product, the investigating authority may not, in aggregating those intermediate comparisons, "zero" the results of some of those comparisons.

4. Thailand considers this principle to have been fully and correctly reasoned by the Appellate Body and to apply equally and fully to the issues that are before the Panel in this case. Thailand notes that the dispute settlement system is intended to provide security and predictability to the multilateral trading system. Any departure by the Panel from the principles enunciated by the Appellate Body in its previous reports runs the risk of undermining the security and predictability of the multilateral trading system and, specifically, the dispute settlement system.[1]

5. In its first written submission, the United States has failed to provide any convincing legal ground for the Panel to depart from the reasoning of the Appellate Body in its previous decisions on the issue of zeroing. Thailand will address briefly some of the points made by the United States.

A. TRANSACTION-SPECIFIC DUMPING

6. First, the United States is incorrect to suggest that dumping – within the meaning of the GATT 1994 or the *Anti-Dumping Agreement* "may occur in a single transaction".[2] The United States

[1] See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188 ("following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same").

[2] See First Written Submission of the United States of America, 12 September 2007, para. 84 *et seq.* ("US Submission").

relies on the 1960 Report of the Group of Experts to support this proposition. However, the United States fails to note that the Group of Experts emphasised that a determination of *both dumping and injury* should be made for each importation.[3] In that circumstance, there would be symmetry between the universe of goods with respect to which the determination of dumping and injury would be made and, therefore, the determinations could also be said to be made with respect to the same "product". However, the Group of Experts noted that this was "clearly impracticable, particularly as regards to injury, and instead envisaged that these determinations would be made on the broader basis of a "pre-selected" product. Accordingly, the United States' reliance on the Group of Experts' Report as supporting the use of zeroing is misplaced.

7. In addition, anti-dumping measures may be imposed only against dumped goods that are found to cause or to threaten to cause injury to the domestic industry. Measures cannot be imposed, therefore, unless there is symmetry between the universe of goods found to be dumped and the universe of goods found to be causing injury. The United States' interpretation would permit dumping to be addressed on a transaction-specific basis, without requiring the injury determination to be determined on the same basis. Even at the stage of review proceedings, this would undermine the basic principle of Article VI of the GATT 1994 that dumping is to be condemned only if it causes or threatens to cause material injury.

B. PROSPECTIVE NORMAL VALUE SYSTEMS

8. Thailand also disagrees with the United States' argument that the European Communities' interpretation of Article 9.3 as requiring a determination of margins for the product as a whole is inconsistent with the existence of prospective normal value systems of assessment. Thailand sees no difference between prospective normal value (PNV) and retrospective systems of assessment that has any bearing on the question of whether zeroing is consistent with the *Anti-Dumping Agreement*.

9. Under a PNV system of assessment, following an investigation, in which the use of zeroing is not permitted, the authority uses the margin of dumping established in the investigation to set up a PNV. Importers must pay a duty equal to the difference between the export price and the PNV on all subsequent transactions priced below the PNV. Importers need not pay anything on imports priced above the PNV. Under this system, the amount, if any, paid at the time of entry is based on the authority's margin determination in the original investigation, and does not reflect an actual margin of dumping on a particular transaction. The United States (and in the panel in *US – Zeroing (Japan)*, which it quotes) is incorrect to say that in a PNV system, liability is final at the time of importation.[4] In fact, in a PNV system, the amount of the liability may not be final until the conclusion of any refund review conducted in accordance with Article 9.3.2 of the *Anti-Dumping Agreement*.[5]

10. Under a retrospective system, such as the United States', the investigating authority uses the margin of dumping established in the investigation, again in which zeroing is not permitted, to establish an *ad valorem* rate that will be applied to all imports to collect estimated duties at the time of

[3] See US Submission, para. 86, citing *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, 27 May 1960, L/1141, BISD 9S/194, para. 7 ("Group of Experts").

[4] US Submission, para. 140.

[5] The availability of a review under Article 9.3.2 to determine whether a refund is due with respect to imports already made means that, contrary to the United States' views, PNC systems already include a "retrospective" component. In practice, reviews occur less frequently in PNV systems than in retrospective systems, because (i) importers are less likely to request reviews in PNV systems where there was already a cap on their liability at the time of entry and, perhaps more importantly, (ii) at least under the US retrospective system, the domestic industry may also request reviews in the hope that the importer's liability may be increased. These various features of the two systems, however, have no direct bearing on whether zeroing may be used in determining margins of dumping in any proceeding subject to the disciplines of Article 2 of the *Anti-Dumping Agreement*.

entry. As with PNV systems, the amount paid at the time of entry is based on the authority's margin determination in the original investigation, and does not reflect an actual margin of dumping on a particular transaction. Also similar to PNV systems, the amount of the final liability may not be determined until the completion of a review, in this case conducted in accordance with Article 9.3.1 of the *Anti-Dumping Agreement*.

11. The only substantive difference between PNV and retrospective systems, therefore, is that under PNV systems, the liability for anti-dumping duties at the time of entry is limited to the amount by which the price falls below the target PNV and that the final liability is capped at that amount. Under the retrospective system, the importer must pay estimated duties at the time of import even for sales for which the export price might exceed the normal value and, moreover, the importer's liability is not capped at that amount but might later be increased in a review under Article 9.3.1.

12. There are two fundamental problems with the United States' arguments based on PNV systems to support its position that zeroing is permissible in reviews under its retrospective system. First, the United States incorrectly compares what happens *in its reviews* under Article 9.3.1 with what happens *at the time of entry* in PNV systems. The appropriate comparison, however, would be between reviews conducted under Article 9.3.1 in retrospective systems with reviews conducted under Article 9.3.2 in PNV systems. Both kinds of reviews must be conducted in accordance with Article 2 and must, therefore, determine a margin of dumping for the "product" rather than individual transactions and must be based on a fair comparison within the meaning of Article 2.4. In other words, the use of zeroing is not permitted in either kind of review.

13. Second, Thailand fails to understand how, as a matter either of textual interpretation or logic, the existence of a cap on the amount that an importer must pay at the time of entry in PNV systems supports the United States' position that it is allowed to use zeroing – which increases the liability for duties – in reviews conducted in a retrospective system, in which there is no cap on the potential liability for duties.

14. For these reasons, Thailand urges this Panel to follow the reasoning and findings of the Appellate Body, and rule that as submitted by the European Communities, the use of zeroing by the United States in original investigations and periodic reviews - regardless of the comparison methodology used - is inconsistent with its obligations under Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*.

15. Thailand looks forward to providing some additional views to the Panel during the course of the Panel's meeting with the parties and third parties.

ANNEX C

SECOND WRITTEN SUBMISSIONS BY THE PARTIES

Contents		Page
Annex C-1	Second Written Submission of the European Communities	C-2
Annex C-2	Second Written Submission of the United States	C-58

ANNEX C-1

SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

TABLE OF CONTENTS

I. INTRODUCTION 7

II. PRELIMINARY LEGAL ISSUES – REBUTTAL ARGUMENT 7

A. APPLICABLE STANDARD OF REVIEW 7

B. OBJECTIVE ASSESSMENT OF THE MATTER AND ROLE OF PRECEDENT 9

III. SUBSTANTIVE LEGAL ISSUES – REBUTTAL ARGUMENT 14

A. APPLICATION OR CONTINUED APPLICATION IN 18 ANTI-DUMPING MEASURES OF ANTI–DUMPING DUTIES AT A LEVEL WHICH EXCEEDS THE DUMPING MARGIN WHICH WOULD RESULT FROM THE CORRECT APPLICATION OF THE ANTI-DUMPING AGREEMENT 14

1. The Measures at issue 14

2. Violation of Article XVI:4 of the Agreement Establishing the WTO 16

B. THE ZEROING METHODOLOGY AS APPLIED IN 52 ANTI-DUMPING PROCEEDINGS, INCLUDING ORIGINAL INVESTIGATIONS, ADMINISTRATIVE REVIEW AND SUNSET REVIEW PROCEEDINGS 18

1. Original Investigations 18

2. Administrative Reviews 18

(a) Articles 2.1 and 9.3 of the Anti-Dumping Agreement and Article VI of the GATT: the duty must not exceed the margin of dumping as determined with respect to the product as a whole 18

(b) The duty must not exceed the dumping margin established in accordance with the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement 22

(i) Content of the "fair comparison" requirement in Article 2.4 22

(ii) "Inherently biased" 23

(iii) Unjustified imbalance 25

(iv) Internal Inconsistency 25

(v) Unjustified discrimination 27

(vi) Case-law confirming United States' simple zeroing unfair 28

(vii) Article 2.4.2 second sentence 28

(c) Violation of Article 2.4.2 of the Anti-Dumping Agreement 28

(i) Method for comparing normal value and export price: asymmetrical method 29

(ii) The word "investigation" in Article 2.4.2 of the Anti-Dumping Agreement 29

(iii) *Applicable rules of Treaty interpretation* *29*
(iv) *Ordinary meaning of the Phrase* *31*
♦ Investigation 31
♦ Existence 33
♦ "during… phase" 33
♦ The Phrase as a whole – Grammatical meaning 34
(v) *Context of the Phrase* *36*
♦ Article VI:2 of the GATT 37
♦ Article 2 38
♦ Article 9.3 39
♦ Article 5 40
♦ Article 6 41
♦ Article 18 42
♦ Different types of anti-dumping proceeding and the word "phase" 43
(vi) *Object and Purpose* *43*
(vii) *No proof that Member intended special meaning (Article 31(4) of the Vienna Convention)* *44*
(viii) *Preparatory Work* *45*
(ix) *Panel and Appellate Body Reports referred to by the United States* *49*
(x) *Article 2.4.2 second sentence* *51*
(d) Article 9.3 52
3. Sunset Reviews 57
IV. CONCLUSIONS 57

TABLE OF CASES

Short Title	Full Case Title and Citation
Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, and Corr.1 adopted 27 October 1999
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R/, adopted 5 April 2001
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EC – Chicken Cuts (Brazil)	Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil*, WT/DS269/R, adopted 25 September 2005, as modified by the Appellate Body Report, WT/DS269/AB/R and WT/DS286/AB/R
EC – Chicken Cuts (Thailand)	Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Thailand*, WT/DS286/R, adopted 25 September 2005, as modified by the Appellate Body Report, WT/DS269/AB/R and WT/DS286/AB/R
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R and WT/DS286/AB/R, adopted 25 September 2005
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
EC – Hormones (United States)	Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States*, WT/DS26/R/USA, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R/, WT/DS48/AB/R

Short Title	Full Case Title and Citation
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, adopted 1 November 1996
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999
Korea – Procurement	Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
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US – DRAMs	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW
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Short Title	Full Case Title and Citation
US – OCTG Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
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US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004
US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, 13 April 2004
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, 31 August 2004
US – Softwood Lumber V (Article 21.5)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Stainless Steel	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001
US – Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr. 1, adopted 23 May 1997
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I. INTRODUCTION

1. The European Communities has never seen a WTO Member in such an isolated and entrenched position as the United States in this dispute. All third parties in this case which have made either written submissions[1] and/or oral statements[2] during the first substantive meeting of the Panel have expressly supported the position of the European Communities, underlying the absurdity of the position of the United States in view of the obvious interpretation of the rules and the clear case-law of the Appellate Body.

2. What is striking in the First Written Submission of the United States is the absence of reference to the Vienna Convention on the Law of Treaties while Article 3.2 of the DSU clearly imposes the Vienna Convention as the central interpretative tool of WTO rules.

3. In fact, the US line of arguments is result-oriented. It starts with the result it intends to achieve, namely justifying the zeroing method as being WTO-consistent and tries to find arguments supporting it, which are however not in accordance with the principles of treaty interpretation.

4. The correct interpretation of the relevant provisions of the *Anti-Dumping Agreement* and of the *GATT 1994* has been clarified by the Appellate Body which concluded, in a clear and consistent case-law, that the US zeroing methodology in original and in review investigations which is used in the various measures challenged in this dispute is inconsistent with WTO rules.

5. Regarding more specifically Article 2.4.2 of the *Anti-Dumping Agreement*, the United States focuses its defence on the meaning of the phrase "the existence of margins of dumping during the investigation phase" (the "Phrase"), arguing that this Phrase in Article 2.4.2 of the *Anti-Dumping Agreement* has a limited meaning, i.e. that of the investigation to determine the existence, degree and effect of any alleged dumping. This interpretation is, however, not a permissible interpretation, that is one "which is found to be appropriate after application of the pertinent rules of the Vienna Convention". Indeed, as the European Communities will explain in detail below, pursuant to a systematic application of the interpretative rules in the Vienna Convention, it is not permissible to interpret the Phrase in the manner advocated by the United States.

6. The European Communities offers the Panel an interpretation that not only respects all the principles of treaty interpretation but also makes economic and legal sense of all the relevant treaty terms and respects the overall design and architecture of the provisions concerned and of the *Anti-Dumping Agreement* as a whole.

7. In this Second Written Submission, the European Communities would (again) like to examine in the light of the agreed rules of interpretation of the Vienna Convention the various provisions concerned, notably Article XVI:4 of the WTO Agreement; Article 2.1 of the *Anti-Dumping Agreemen*t and Article VI:1 and VI:2 of the *GATT 1994*; Article 2.4 of the *Anti-Dumping Agreement*; Article 2.4.2 of the *Anti-Dumping Agreement* and Article 9.3 of the *Anti-Dumping Agreement*.

II. PRELIMINARY LEGAL ISSUES – REBUTTAL ARGUMENT

A. APPLICABLE STANDARD OF REVIEW

8. It is not disputed that the standard of review which is applicable to this Panel is to be found in Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the

[1] Japan; Korea; Norway and Thailand.

[2] Brazil; India; Japan; Korea; Mexico; Norway and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

"DSU") as complemented by Article 17.6 of the *Anti-Dumping Agreement*, in particular Article 17.6(ii) which concerns the Panel's legal interpretation of the *Anti-Dumping Agreement*.

9. Article 17.6(ii) provides that:

> 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.

10. The Appellate Body clarified in *US – Hot Rolled Steel* that:

> [T]he second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be '*permissible* interpretations'. In that event, a measure is deemed to be in conformity with the Anti-Dumping Agreement 'if it rests upon one of those permissible interpretations'.[3]

11. It follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*. In other words, "a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*".[4]

12. The Appellate Body thus clarified that Article 17.6(ii) of the *Anti-Dumping Agreement* does not call for "deference" to any "possible" interpretation. It is only if, after applying the interpretative rules of the Vienna Convention, two competing interpretations are found to be of equal merit, that the possibility of concluding that both are "permissible" arises.

13. In this case, the United States submits that there may be "multiple permissible interpretations of particular provisions of the AD Agreement".[5] According to the United States, "negotiators" would have left a number of issues unresolved and the application of rules of interpretation would therefore lead to more than one permissible interpretation with respect to a given provision.[6]

14. However, as the European Communities explained in its First Written Submission and will explain in further detail in the present submission, the interpretation of the relevant provisions of the *GATT 1994* and the *Anti-Dumping Agreement* put forward by the United States is not a "permissible interpretation" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement* given that it is precluded by the correct application of the rules of the Vienna Convention.

15. Deciding whether an interpretation constitutes a "permissible" interpretation is the essence of the role of panels, and particularly the Appellate Body, when applying Article 3.2 of the DSU in order

[3] Appellate Body Report, *US – Hot Rolled Steel*, para. 59.

[4] Appellate Body Report, *US – Hot Rolled Steel*, paras. 59 - 60. Appellate Body Report, *US – Softwood Lumber V*, paras. 113 - 116; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 118; Appellate Body Report, *Thailand – H-Beams*, paras. 121 - 128; Appellate Body Report, *EC – Bed Linen*, paras. 63 - 65.

[5] US First Written Submission, para. 27.

[6] US First Written Submission, para. 26.

to clarify the meaning of the covered agreements, and particularly when dealing with appeals concerning questions of legal interpretation, pursuant to Article 17.6 of the DSU. The Appellate Body has made clear in various disputes that there is only one permissible interpretation of the relevant provisions of the *GATT 1994* and the *Anti-Dumping Agreement*, following which maintaining zeroing procedures in administrative reviews and sunset reviews is not permitted.

16. Indeed, in *US – Zeroing (Japan)*, the Appellate Body clarified that:

> In our analysis, we have been mindful of the standard of review provided in Article 17.6(ii). However, we consider that there is no room for recourse to the second sentence of Article 17.6(ii) in this appeal. This is because, in our view, Articles 2.4, 2.4.2, 9.3, 9.5 and 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the *GATT 1994*, when interpreted in accordance with customary rules of public international law, as required by the first sentence of Article 17.6(ii), do not admit of another interpretation of these provisions as far as the issue of zeroing before us is concerned.[7]

17. Similarly, in *US – Zeroing (EC)*, the Appellate Body concluded that:

> In our analysis of whether the zeroing methodology, as applied by United States in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*, we have been mindful of the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*. Article 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the *GATT 1994*, when interpreted in accordance with customary rules of interpretation of public international law, as required by Article 17.6(ii), do not, in our view, allow the use of the methodology applied by the United States in the administrative reviews at issue. This is so because, as explained above, the methodology applied by the USDOC in the administrative reviews at issue results in amounts of assessed anti-dumping duties that exceed the foreign producers' or exporters' margins of dumping. Yet, Article 9.3 clearly stipulates that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Similarly, Article VI:2 of the *GATT 1994* provides that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."[8]

18. In these prior cases, the Appellate Body has clearly rejected the interpretations put forward by the United States of Article VI:1 and VI:2 of the *GATT 1994* and Articles 2.1, 2.4, 2.4.2 and 9.3 and 11.3 of the *Anti-Dumping Agreement* as being "permissible" interpretations within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement*.

B. OBJECTIVE ASSESSMENT OF THE MATTER AND ROLE OF PRECEDENT

19. In its First Written Submission, the European Communities submitted that (i) there is a substantial and consistent case-law of the Appellate Body which has concluded that zeroing in weighted average-to-weighted average and transaction-to-transaction comparisons in original investigations, in weighted average-to-transaction comparisons in administrative review and sunset review investigations is inconsistent with the *Anti-Dumping Agreement* and the *GATT 1994* and that (ii) this Panel should follow this existing and consistent case-law, taking into account in particular the "security and predictability" which the dispute settlement system must provide to the multilateral

[7] Appellate Body Report, *US – Zeroing (Japan)*, para. 189.
[8] Appellate Body Report, *US – Zeroing (EC)*, para. 134.

trading system. It is what would be expected from this Panel in particular given that this case-law emanates from the Appellate Body, has been repeated in several cases consistently and has already addressed the arguments which are raised by the United States in this case.[9]

20. Disagreeing with the findings of the Appellate Body in these prior cases, the United States urges this Panel to disregard these findings. More precisely, the United States urges this Panel to disregard the findings of the Appellate Body in prior cases when they are contradictory to its position but relies on other findings of the Appellate Body in those same cases where they allegedly support its position.[10] Apparently, the findings made in prior cases would only be legally relevant where they allegedly support the US position and would become legally irrelevant where they oppose the US position. This would depend, according to the United States, on whether these findings are "persuasive".[11] This is clearly a legally erroneous presentation of the question of the relevance of past DSB reports of the Dispute Settlement Body (the "DSB") to present disputes. Either findings in prior cases are legally relevant or they are not – and this cannot depend on the unilateral will of one of the Members.

21. The European Communities considers that the reports of panels (as eventually modified by the Appellate Body) and the Appellate Body in prior cases, which will be adopted by the DSB absent consensus opposing adoption, are legally relevant to subsequent panels.

22. In this case, the United States not only requests the Panel to disregard the findings of the Appellate Body which were adopted by the DSB but to follow instead the panel findings in those same cases that were never adopted by the DSB since they have been reversed by the Appellate Body.

23. Indeed, the panels' reports referred to by the United States[12] which have concluded that certain forms of zeroing were consistent with the GATT and the *Anti-Dumping Agreement* have <u>all</u> been reversed on appeal by the Appellate Body which has considered the panels' legal interpretation in those cases as being inconsistent with the provisions of the relevant Agreements. In all those disputes, the reports that have been adopted by the DSB include the Appellate Body report and the Panel report <u>as modified by the Appellate Body report</u>.

24. As noted by the Appellate Body, it is the "adopted panel reports […] [that] create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute".[13] In other words, such findings – which will have been adopted by the DSB absent consensus opposing adoption – are legally relevant. If the Appellate Body did not rule out, in *Japan – Alcoholic Beverages II*, that reasoning contained in an unadopted GATT panel report can nevertheless provide useful guidance to a subsequent panel, the Appellate Body thereby certainly did not mean WTO panel findings which it has itself reversed. Consequently, the findings of the panels invoked by the United States in various points of its First Written Submission are not legally relevant to the extent that they have been reversed by the Appellate Body and have not been adopted by the DSB.

25. In its First Written Submission, the United States argues that by requesting this Panel not to deviate from prior Appellate Body reports addressing the issue of zeroing, "the EC is urging the

[9] EC First Written Submission, paras. 62 – 110.

[10] e.g. US First Written Submission, para. 133 footnote 152 (the US agrees with the findings of the AB in *US – Zeroing (Japan)*) and para. 143 (the US disputes the findings of the AB in *US – Zeroing (Japan)*).

[11] US First Written Submission, para.33; US Closing Statement at the First Substantive Meeting of the Panel, para. 3.

[12] The United States refers frequently to the reports of the panels in *US – Zeroing (Japan)*, *US – Zeroing (EC)* and *US – Softwood Lumber Dumping (Article 21.5)*.

[13] Appellate Body Report, *Japan – Alcoholic Taxes on Beverages II*, p. 14.

Panel […] to ignore the Panel's obligation under Article 11 of the DSU to conduct an objective assessment of the matter before it".[14]

26. The European Communities strongly disagrees with this. On the contrary, ignoring the findings of the Appellate Body in previous disputes would be inconsistent with the Panel's obligation under Article 11 of the DSU. Indeed, if interpreted properly, this provision implies that panels should follow the findings of the Appellate Body in earlier disputes relating to precisely the same matter.

27. Article 11 of the DSU provides that:

> [t]he function of panels is to assist the DSB in discharging its responsibilities under this understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. (emphasis added)

28. In accordance with the rules of treaty interpretation in the Vienna Convention, this provision, which includes two sentences, must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[15]

29. The first sentence of Article 11 of the DSU clarifies that the function of panels is to assist the DSB in discharging its responsibilities. To the extent that the same issues have been examined by a panel and/or the Appellate Body in earlier disputes whose reports have been adopted by the DSB, it is to be expected that a panel in a subsequent case follows the findings of the panel/Appellate Body laid down in the reports as adopted by the DSB.

30. As noted above, the reports of panels which concluded that zeroing was consistent with the covered Agreements have all been reversed on appeal and in those cases the DSB adopted the findings of the Appellate Body. To the extent that they have been adopted by the DSB, these reports create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to a subsequent dispute.[16]

31. The second sentence of Article 11 of the DSU requests panels to make an objective assessment of the matter before it. The matter covers both factual and legal issues.

32. Article 3.2 of the DSU provides strong contextual support for the interpretation of Article 11 of the DSU. Article 3.2 of the DSU provides that:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

[14] US First Written Submission, para. 29.
[15] Article 31 of the Vienna Convention on the Law of Treaties.
[16] Appellate Body Report, *Japan – Alcoholic Taxes on Beverages II*, p. 14 and Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 107.

33. In its First Written Submission, the European Communities highlighted the importance for this Panel not depart from the previous rulings of the Appellate Body, *inter alia*, in view of the purpose of the dispute settlement system in Article 3.2 to "provide security and predictability to the multilateral trading system".[17]

34. The United States argues that "read in its context in Article 3.2, the reference to security and predictability in Article 3.2 supports the opposite conclusion [that this Panel should not follow the reasoning set forth in any Appellate Body report]". The United States further states that "[a] result which adds to or diminishes the rights or obligations of Members provided in the covered agreements is prohibited by the third sentence of Article 3.2 and is therefore the antithesis of the "security and predictability" referred to in the first sentence of Article 3.2. This conclusion does not change because the result in question had previously been reached by the AB".[18]

35. What the United States is thus actually saying is that the findings reached by the Appellate Body in the previous disputes which have found zeroing to be inconsistent with the WTO Agreements, add to or diminish the rights or obligations of WTO Members and therefore that this Panel should not follow them as this would not ensure security and predictability to the system.

36. This statement of the United States is highly worrying. It means that the United States not only disputes the fact that the Appellate Body correctly interpreted WTO law in those cases, but also that it is conducting its proceedings in accordance with the provisions of the DSU and more specifically that its findings are consistent with Article 3.2 of the DSU.

37. The Appellate Body is a standing body which has been established by the DSB. Hierarchically superior to panels, the Appellate Body's function is to "hear appeals from panel cases"[19], the "appeal [being] limited to issues of law covered in the panel report and legal interpretations developed by the panel".[20] In discharging its function, the Appellate Body, just as panels must do, must apply the requirements set forth in Article 3.2. Thus, as a matter of principle, the Appellate Body's findings comply with the requirements laid down in Article 3.2 of the DSU. Accordingly, the findings of the Appellate Body should be followed by a panel in subsequent cases, in particular when the issues which are examined are the same. It cannot be argued, as the United States does, that, as a matter of principle, the findings of the Appellate Body should not be followed on the grounds that they add to or diminish the rights and obligations of WTO Members and are therefore inconsistent with Article 3.2 of the DSU.

38. The Appellate Body has expressly noted that:

> It was appropriate for the Panel, in determining whether the SPB is a measure, to rely on the Appellate Body's conclusion in that case. Indeed, <u>following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels</u>, <u>especially where the issues are the same</u>.[21] (emphasis added)

39. The European Communities is not arguing that the DSU contains an express rule providing that panels are legally bound by the findings of the Appellate Body in prior cases, but following these findings is what would be expected from panels. Panels should not depart, without good reasons, from the findings laid down in previous cases. These principles are of particular relevance in this case

[17] EC First Written Submission, para. 87.
[18] US First Written Submission, para. 32.
[19] DSU, Article 17.1.
[20] DSU, Article 17.6.
[21] Appellate Body Report, *US – OCTG Sunset Reviews*, para. 188.

where the issues raised before this Panel are identical to the issues examined by the Appellate Body in *US – Zeroing (Japan)*, *US – Zeroing (EC)* and *US – Softwood Lumber (21.5)*.

40. In other words, a proper interpretation of the standard of review of panels under Article 11 of the DSU implies that a panel, when assessing the applicability and the consistency of a measure with covered agreements, should follow the findings of the Appellate Body in prior cases. Indeed, it follows from Article 3.2 of the DSU that these findings are deemed to be consistent with the customary rules of interpretation of public international law and that following these findings will enhance the security and predictability of the dispute settlement system.

41. The United States is actually refusing to acknowledge that its arguments regarding zeroing have been fully considered by the Appellate Body and have in fact been rejected.

42. Finally, the European Communities would like to address a number of *false and incorrect assertions* of the United States in its First Written Submission.

43. First, the United States contends that that "the EC, in relying so extensively on examples from outside the WTO dispute settlement context, highlights the fact that there is no support for its approach in the DSU".[22] This is incorrect. As was explained above, there is strong support for the position that panels should follow the findings of panels and the Appellate Body in previous disputes, in particular Articles 11 and 3.2 of the DSU. Furthermore, it is norm that in other dispute settlement systems, including those referenced by the European Communities, there is no express rule of "vertical precedent" in the legislation; and yet this does not preclude the application of such a rule by the dispute settlement system itself. There is thus a very substantial analogy in this respect between those other dispute settlement systems and the DSU; and it is the European Communities submission that that parallelism must of necessity extend to the question of the relationship between hierarchically superior courts and hierarchically inferior judicial instances – that is, between panel's and the Appellate Body.

44. Second, the United States submits that "the EC *erroneously* argues that 'the WTO inconsistency of … [zeroing] has already been established in previous disputes".[23] This statement is incorrect as is demonstrated by the consistent case-law of the Appellate Body concluding that zeroing is inconsistent with the *Anti-Dumping Agreement*.

45. Third, the United States, in the absence of valid counter-arguments, is trying to create confusion about the arguments submitted by the European Communities by saying that "the EC citations do not permit the Panel to simply adopt those findings here without an objective assessment of the facts at issue".[24] The European Communities has never argued that this Panel should not make an objective assessment of the facts. Rather, in reviewing the facts of this case, and in making its objective assessment, this Panel should conclude that the facts in this case are for all material purposes identical to the facts assessed in the previous disputes in which the Appellate Body concluded that zeroing was inconsistent with the *Anti-Dumping Agreement* and the GATT.

46. Fourth, in several paragraphs of its Written Submission, the United States argues that the Panel is not bound to apply the reasoning and findings of the Appellate Body. However, the European Communities disagrees with the view expressed by the United States according to which "Appellate Body reports should be taken into account only to the extent that the reasoning is persuasive" and that "the reasoning in such reports may be taken into account".[25] As explained above,

[22] US First Written Submission, para. 29.
[23] US First Written Submission, para. 30.
[24] US First Written Submission, para. 30.
[25] US First Written Submission, para. 33.

the findings of the Appellate Body are either legally relevant for the purpose of subsequent panels or they are not. According to the European Communities, findings are legally relevant when they are included in reports that have been adopted by the DSB.

47. In conclusion, a proper interpretation of the standard of review of panels requires a panel, when making an objective assessment of the matter before it, to follow the findings of previously adopted reports, in particular when the issues are the same. In other words, panels are not simply entitled to follow these findings but should, as a matter of principle, do so. This conclusion is even stronger in this case since (i) the findings in previously adopted reports are the findings of the Appellate Body which is hierarchically superior and only deals with issues of law; (ii) these findings have been repeated in several cases so that there is now a consistent line of interpretation and (iii) the Appellate Body examined the same issues as those raised in this case and has expressly rejected the arguments and the interpretation put forward by the United States.

III. SUBSTANTIVE LEGAL ISSUES – REBUTTAL ARGUMENT

A. APPLICATION OR CONTINUED APPLICATION IN 18 ANTI-DUMPING MEASURES OF ANTI–DUMPING DUTIES AT A LEVEL WHICH EXCEEDS THE DUMPING MARGIN WHICH WOULD RESULT FROM THE CORRECT APPLICATION OF THE ANTI-DUMPING AGREEMENT

1. The Measures at issue

48. The first set of measures which the European Communities challenges in this dispute is the application or continued application in the 18 anti-dumping cases listed in the Annex to the Panel Request of anti-dumping duties which were calculated or maintained in place pursuant to the most recent administrative review, or as the case may be, original proceeding or changed circumstances or sunset review proceedings at a level which exceeds the anti-dumping duty which would result from the correct application of the *Anti-Dumping Agreement*, i.e. without zeroing.

49. In its First Written Submission, the United States submits that the claim concerning the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex "refers to an indeterminate number of alleged measures in connection with the 18 cases", "to the extent that the EC's request does not refer to the most recent identified measure".[26] The United States further submits that this claim "would challenge the calculation of anti-dumping duties in an indeterminate number of current and/or future reviews that Commerce allegedly is concluding or will conclude at some point in the future".[27]

50. By arguing that the claim of the European Communities "refers to an indeterminate number of alleged measures", the United States is actually disputing the characterisation of the continued application or application of an anti-dumping duty as a measure. In other words, the United States is trying to create confusion between the two sets of measures identified by the European Communities in the Panel Request: on the one hand, the continued application or application of an anti-dumping duty in the 18 cases identified by product and country of origin concerned, which has been calculated or maintained in place at a level exceeding the anti-dumping margin which would result from the correct application of the *Anti-Dumping Agreement*; and on the other hand, the 52 anti-dumping proceedings.

51. Similarly, during the substantive meeting with the Panel, the United States spent much time in trying to discuss the scope of this dispute and the measures being challenged by the European Communities in this case.

[26] US First Written Submission, para. 51.
[27] US First Written Submission, para. 51.

52. In particular, with respect to the "application or continued application" of anti-dumping duties, the United States disputed the description of the first set of measures in the Panel Request as being "specific" in accordance with Article 6.2 of the DSU.[28]

53. However, the European Communities has clearly identified the precise content of the first set of measures being challenged: that being a duty rate based on the use of the zeroing methodology which is being applied against imports of a specific product from a specific country. In other words, the duties being currently applied in the 18 anti-dumping cases listed in the Annex to the Panel Request are all duties which have been calculated and/or maintained pursuant to the zeroing methodology. In *US – Zeroing (EC)*[29] and *US – Zeroing (Japan)*[30], the Appellate Body has accepted that both the European Communities and Japan have described the "precise content" in the context of the methodology itself. It necessarily follows that what the European Communities has described in each of the 18 measures also meets the "precise content" requirement.

54. As noted by the Appellate Body in *US – Corrosion Steel*, in principle any act or omission attributable to a WTO Member can be a "measure" of that Member for purposes of WTO dispute settlement proceedings.[31] In *Guatemala – Cement I*, the Appellate Body also noted that "in the practice established under the GATT 1947, a "measure" may be any act of a Member, whether or not legally binding and it can include even non-binding administrative guidance by a government. A measure can also be an omission or a failure to act on the part of a Member".[32] Moreover, in *EC – Computer Equipment*, the Appellate Body observed that a "duty" can be a "measure" subject to dispute settlement proceedings.[33]

55. There is thus no requirement as to the form of a "measure". The United States is therefore wrong in saying that measures which can be challenged cover either a framework law or original investigations, administrative review or sunset reviews.[34] The European Communities has in the Panel Request precisely identified the content of the measure being challenged. That is sufficient. It is not necessary that the measure takes the form either of an original proceeding or an administrative review proceeding or a sunset review proceeding.

56. Furthermore, the European Communities submits that there can reasonably be no dispute as to the existence of the 18 measures in the Panel Request. The Annex to the Panel Request precisely identifies the 18 anti-dumping measures, by product and country concerned, mentioning the relevant places where the measures were published in the United States and the duty rates imposed.

57. The reference to the duty as a measure is clear throughout Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*. Thus, the title of Article VI of the *GATT 1994* refers to "Anti-dumping … Duties"; and Article VI:2 of the *GATT 1994* refers to "an anti-dumping duty". The title of the *Anti-Dumping Agreement* states that it implements Article VI of the *GATT 1994*; and Article 1 of the *Anti-Dumping Agreement*, which is titled "principles", refers to "[a]n anti-dumping measure", confirming that the duty is conceived of as a measure. Article 7.2 of the *Anti-Dumping Agreement* expressly confirms that "[p]rovisional measures may take the form of a provisional duty…". The final sentence of Article 8.6 of the *Anti-Dumping Agreement* similarly confirms the conceptual identity of "measures" and "duties". Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* repeatedly refer to the duty. Article 11.1 of the *Anti-Dumping Agreement* states that "[a]n anti-

[28] US Opening Statement at the First Panel Meeting, paras. 19 – 22.
[29] Appellate Body Report, *US – Zeroing (EC)*, paras. 185 – 205.
[30] Appellate Body Report, *US – Zeroing (Japan)*, para. 96.
[31] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Steel*, para. 81.
[32] Appellate Body Report, *Guatemala – Cement I*, footnote 47.
[33] Appellate Body Report, *EC – Computer Equipment*, para. 65.
[34] US Opening Statement at the First Panel Meeting, para. 22.

dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury". The term "in force" is significant, since that concept generally refers to a legal instrument, that is, a measure, which is here equated with the "duty". Article 11.2 refers repeatedly to the "duty", and to the "termination" of the "duty" – again confirming the nature of the duty as a measure. Article 11.3 of the *Anti-Dumping Agreement* is drafted in the same terms. Article 12.2.2 of the *Anti-Dumping Agreement* refers again to the imposition of the "duty". The first sentence of Article 15 of the *Anti-Dumping Agreement* refers to "anti-dumping measures", which is equated with the reference in the second sentence to "anti-dumping duties". Article 18.3.2 of the *Anti-Dumping Agreement* similarly refers to "anti-dumping measures", that is, duties, being "imposed".

58. For all of these reasons the European Communities respectfully requests the Panel to conclude that the measures at issue duly before the Panel include the 18 cases referred to by the European Communities; and respectfully requests the Panel to make the findings in relation to these 18 measures that the European Communities considers are its right under the *Anti-Dumping Agreement* and the DSU.

2. Violation of Article XVI:4 of the Agreement Establishing the WTO

59. In its First Written Submission, the European Communities submitted that the United States violates Article XVI:4 of the WTO Agreement, not only as a consequential claim (*i.e.*, when a violation of other provisions of the *Anti-Dumping Agreement* has been found), but also as an independent claim of having laws, regulations or administrative procedures not in conformity with the covered agreements, as declared by adopted DSB reports.[35] Indeed, the reports of the panels and the Appellate Body adopted by the DSB in prior disputes and finding the same zeroing methodologies challenged in the present proceeding inconsistent with the covered agreements create an independent obligation for the United States.

60. Once the interpretation of the relevant rules was made and the violation was found and adopted by the DSB, it becomes evident that any attempt by the United States to keep the zeroing methodology in anti-dumping proceedings would run against its obligation to ensure the conformity of its existing laws, regulations, and administrative procedures with the *Anti-Dumping Agreement* and the *GATT 1994*. Such obligation can be invoked by any WTO Member, regardless of whether a Member was a Party to the dispute where the adopted DSB report found the violation. Indeed, the European Communities notes that the DBS reports are adopted by the whole WTO Membership. Thus, since the interpretation of the rules and the DSB reports are adopted by all Members, any Member can invoke Article XVI:4 of the WTO Agreement.

61. The United States contests the idea of an "independent international obligation" arising from adopted DSB reports. The United States submits that it cannot be reconciled with the fact that the Appellate Body and panel reports are not binding, except with respect to resolving the particular dispute between the Parties to that dispute. It further submits that it cannot be reconciled with the text of the DSU, in particular Articles 3.2 and 19.2 of the DSU. In other words, according to the United States, there can be no obligation arising from adopted reports given that panels and the Appellate Body cannot add to or diminish the rights and obligations of WTO Members.[36]

62. The European Communities disagrees with the observations made by the United States on this point. In the view of the European Communities, the issue is not whether adopted DSB reports add to or diminish the rights and obligations of Members. Indeed, the adopted DSB reports clarify the interpretation of the relevant provisions of the covered agreements with respect to a particular law, regulation or practice on which the Parties to that particular dispute did not agree. It cannot be argued

[35] EC's First Written Submission, paras 122 - 132.
[36] US Opening Statement at the First Panel Meeting, para. 12.

that, because an interpretation is negative for a Member, such interpretation of the rules "adds to or diminishes rights and obligations of Members". In other words, the obligation of the panels and the Appellate Body not to add to or diminish the rights and obligations of the Members relates to the content of their findings. In that respect, the panels and the Appellate Body are not entitled to make findings that would add to or diminish the rights and obligations of the WTO Members as laid down in the various WTO Agreements. The issue here is different. It relates to the consequences for the losing Member arising from those adopted DSB reports.

63. Whether adopted DSB reports create an independent international obligation which may be invoked by any WTO Member needs to be answered on the basis of the texts of the WTO Agreement and of the DSU in accordance with the relevant principles of treaty interpretation. In particular, the fact that adopted DSB reports create an independent obligation for the losing party which can be invoked by any WTO Member is supported by various provisions of the DSU, in particular Articles 3.2, 3.4, 3.8 and 17.14 of the DSU.

64. Article 3.2 of the DSU states that a central element of the WTO is "providing security and predictability to the multilateral trading system". The dispute settlement system is thus supposed to "clarify" the various rules of the covered agreements. This objective obviously supports the notion of the desirability of developing a jurisprudence that not only would accord in particular some predictability and reliability, but also would be available to all government members of the WTO. Further, Article 3.4 of the DSU provides that "recommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter", which means a settlement which is consistent with all obligations under the covered agreements. Moreover, as Article 3.8 of the DSU states, if an infringement of the obligations assumed under a covered agreement has been found by an adopted DSB report, it is presumed that the measure concerned causes nullification or impairment for "other Members parties to the covered agreements". Thus, any WTO Member can invoke nullification or impairment when an infringement has been found and adopted by the DSB. Last but not least, Article 17.14 of the DSU provides for the obligation on the Parties to the dispute to *unconditionally* accept the reports adopted by the DSB. The losing Member cannot argue that it has unconditionally accepted the DSB reports if, in a new dispute concerning the same matter, it denies that the same measures violated the covered agreements. Since the adoption of those reports take place by negative consensus, this implies that all WTO Members adopt the interpretation of the relevant provisions of the covered agreements with respect to a particular law, regulation or practice contained in the adopted report. Again, this independent obligation for the United States arising from the adopted DSB reports can be invoked by any WTO Member, as a violation of Article XVI:4 of the WTO Agreement.

65. The principles included in those provisions would be frustrated if it was not acknowledged that an independent obligation exists under Article XVI:4 of the WTO Agreement for Members to ensure conformity of their laws, regulations and administrative procedures with the covered agreements, once it has been clarified by adopted DSB reports that existing laws, regulations or administrative procedures are inconsistent with the Members' WTO obligations.

66. Moreover, it should be noted that the fact that Article XVI:4 of the WTO Agreement creates an independent obligation is supported by the important treaty interpretation principle according to which the interpretation of clauses or paragraphs of a treaty cannot lead to redundancy or *inutility*".[37] Indeed, Article XVI:4 of the WTO Agreement must be given a meaning by itself. As the Appellate Body mentioned in *US – Gasoline*, an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[38] Treating this provision

[37] Appellate Body Report, *Japan – Alcoholic Beverages*, paras. 12 - 13.
[38] Appellate Body Report, *US – Gasoline*, p. 23, footnote 45.

as a purely consequential claim when a violation of another provision has been found would render this provision inutile.

67. Finally, the European Communities clarifies that it is not asking this Panel to rule on whether the United States has complied or failed to comply with DSB recommendations and rulings in past disputes. Rather, the European Communities is asking this Panel to take into account the fact that the United States, by its own admission, bases its entire defence on its refusal to unconditionally accept the Appellate Body Reports in DS294 and DS322.

68. In light of the foregoing, the European Communities requests this Panel to make a specific finding that the United States, by applying and continuing to apply zeroing in original investigations, administrative review and sunset review proceedings, has violated Article XVI:4 of the WTO Agreement. The European Communities also requests the Panel to examine the argument based on Article XVI:4 of the WTO Agreement first, as an independent claim, and to refrain from exercising judicial economy on this point.

B. THE ZEROING METHODOLOGY AS APPLIED IN 52 ANTI-DUMPING PROCEEDINGS, INCLUDING ORIGINAL INVESTIGATIONS, ADMINISTRATIVE REVIEW AND SUNSET REVIEW PROCEEDINGS

1. Original Investigations

69. The European Communities challenges four original investigations contained in the Annex to the request for establishment of the Panel (Cases XV to XVIII) as being inconsistent with *the Anti-Dumping Agreement* and the *GATT 1994*.[39]

70. The United States does not dispute these claims, thereby acknowledging their inconsistency with the *GATT 1994* and the *Anti-Dumping Agreement*.[40]

2. Administrative Reviews

(a) Articles 2.1 and 9.3 of the Anti-Dumping Agreement and Article VI of the GATT: the duty must not exceed the margin of dumping as determined with respect to the product as a whole

71. The European Communities claims that, in the relevant measures at issue, the United States did not correctly establish the anti-dumping duty amount or the margin of dumping, consistent with the obligations set out in Articles 9.3 and 2 of the *Anti-Dumping Agreement* and Article VI of the *GATT 1994*. This is so because the simple zeroing used by USDOC in the measures at issue did not allow for the calculation of the margin of dumping for the *product as a whole*.

72. In its First Written Submission, the United States contests this. In essence, the disagreement between the parties flows from their respective interpretations of the terms "dumping" and "margins of dumping" in the *Anti-Dumping Agreement* and whether these terms apply at the level of the product as whole or at the level of a comparison between a weighted average normal value and an individual export transaction.

73. The United States contends that the terms of "dumping" and "margins of dumping" are not defined in the GATT and in the *Anti-Dumping Agreement* so as to require that export transactions be examined at an aggregate level.[41] According to the United States, the definition of "dumping" as included in Article 2.1 of the *Anti-Dumping Agreement* "describes the real-world commercial conduct

[39] EC First Written Submission, paras 135 – 179.
[40] US First Written Submission, para. 155.
[41] US First Written Submission, paras 82 – 98.

by which a product is imported into a country, i.e. transaction by transaction".[42] The United States further submits that "there is nothing in the *GATT 1994* or the Anti-Dumping Agreement that suggests that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at non-dumped price".[43]

74. The interpretation put forward by the United States is not permissible as it is directly contradicted not only by the ordinary meaning of the text of Articles 2 and 9.3 of the *Anti-Dumping Agreement* and Article VI of the *GATT 1994*, but also by their context and the well-established and consistent findings of the Appellate Body in previous disputes according to which the terms "dumping" and "margins of dumping" as defined in Article 2.1 of the *Anti-Dumping Agreement* and in Article VI:1 of the *GATT 1994* apply to the *product under investigation as a whole.*[44]

75. The European Communities first examines Article VI:1 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement* which defines "dumping". Article VI:1 defines "dumping" as occurring where "products of one country are introduced into the commerce of another country at less than the normal value of the products". This definition is reiterated in Article 2.1 of the *Anti-Dumping Agreement* as follows: "For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if […]". It is clear from the texts of these provisions that dumping is defined in relation to a product as a whole as defined by the investigating authority.

76. This is further clear from the context of the Agreement. Indeed, the purpose of Article VI of the *GATT 1994* and of the *Anti-Dumping Agreement* is to determine the conditions for the application of anti-dumping measures. Article 1 of the *Anti-Dumping Agreement* states that "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the *GATT 1994* and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement" (emphasis added). For the purpose of the investigation, the investigating authority must identify the "product under consideration"[45] which will have to be used consistently throughout the investigation for various purposes including the determination of the volume of dumped imports, the injury determination, the causal link, etc. Article VI:2 of the *GATT 1994* clarifies that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater than the margin of dumping in respect of such product". Article 6.10 clarifies that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". It is thus clear that "dumping", within the meaning of Article VI:1 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement*, can be found only for the product under investigation as a whole, and cannot be found to exist only for a type, model or category of that product, including a "category" of one or more relatively low priced export transactions.

77. Other provisions of the *Anti-Dumping Agreement* confirm this view. For example, Article 9.2 stipulates that an anti-dumping duty is to be imposed in respect of the product under investigation. In addition, Article 6.10 provides that the "investigating authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation".

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[42] US First Written Submission, para. 82.

[43] US First Written Submission, para. 85.

[44] Appellate Body Report, *EC – Bed Linen*, para 53; Appellate Body Report, *US – Hot-Rolled Steel*, para 118; Appellate Body Report, *US – Softwood Lumber V*, paras 91 to 103; Appellate Body Report, *US – Zeroing (EC)*, paras 123 to 135; Appellate Body Report, *US – Zeroing (Japan)*, paras 108 to 116.

[45] This flows from Article 2.6 of the *Anti-Dumping Agreement* which defines the "term 'like product' as a product which is identical, i.e. alike in all respects to the product under consideration".

78. The United States is therefore clearly wrong when stating that "there is nothing in the *GATT 1994* or the AD Agreement that suggests that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price".[46]

79. Second, the European Communities examines the terms "margin of dumping". While "dumping" refers to the introduction of a product into the commerce of another country at less than its normal value, the term "margin of dumping" refers to the magnitude of dumping. Indeed, as noted in Article VI:2 of the *GATT 1994* "[…] the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1 [of Article VI of the *GATT 1994*]". As with dumping, margins of dumping can be found only for the product under investigation as a whole. As noted by the Appellate Body in *US – Hot Rolled Steel* "'margins' means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product. This margin reflects a comparison that is based upon examination of all of the relevant home market and export market transactions".[47]

80. It is clear that an investigating authority may undertake multiple intermediate comparisons between a weighted average normal value and individual export transactions. However, the results of any such multiple comparisons are not "margins of dumping". Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating all these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole.

81. The European Community fails to see how margins of dumping can properly be established for the product as a whole without aggregating all of the "results" of the multiple comparisons. Aside from the exception provided for by the targeted dumping provisions, there is no textual basis in the *Anti-Dumping Agreement* that would justify taking into account the "results" of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other "results".

82. In its First Written Submission, the United States does not explain how, in the light of the rules of treaty interpretation embodied in the Vienna Convention on the Law of Treaties, the terms "dumping" and "margins of dumping" could be interpreted as referring to the product at individual transaction level.

83. The United States largely relies on the findings of the panels in *US – Zeroing (Japan)* and in *US – Softwood Lumber (Article 21.5)*. However, these findings have been reversed by the Appellate Body which has concluded and explained why "dumping" and "margins of dumping" can only be established for the product under investigation as a whole. In *US – Zeroing (Japan)*, the Appellate Body stated that:

> A product under investigation may be defined by an investigating authority. But "dumping" and "margins of dumping" can be found to exist only in relation to that product as defined by that authority. They cannot be found to exist for only a type, model or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the level of an individual transaction. Thus, when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather, they are merely inputs that are to be aggregated in order to establish the margin of

[46] US First Written Submission, para.85.
[47] Appellate Body Report, *US – Hot Rolled Steel*, para. 118.

> dumping of the product under investigations for each exporter or producer.[48] (emphasis added)

84. In fact, there is a continuous and consistent line of findings of the Appellate Body in *EC – Bed Linen*, *US – Softwood Lumber*, *US – Zeroing (EC)* and *US – Zeroing (Japan)* according to which ""dumping" and "margins of dumping can only be established for the product under investigation as a whole".

85. The United States errs in arguing that "in *US – Softwood Lumber* V, the Appellate Body reasoned that zeroing was not permitted in the context of "multiple averaging", on the basis of the phrase "all comparable export transactions" but did not explain how zeroing could be prohibited in the context of "multiple comparisons" generally.[49] On the contrary, as the Appellate Body made clear in *US – Softwood Lumber V*, these principles are based most fundamentally on Articles VI:1 and VI:2 of the *GATT 1994* and on Article 2.1 of the *Anti-Dumping Agreement*[50] and are confirmed by Articles 9.2 and 6.10 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the *GATT 1994*.[51] The Appellate Body explicitly rejected the notion that these principles apply only in original proceedings. Referring to Article VI:1 of the *GATT 1994* and Article 2.1 if the *Anti-Dumping Agreement*, the Appellate Body concluded: "it is clear from the texts of these provisions that dumping is defined in relation to a product as a whole as defined by the investigating authority. Moreover, we note that the opening phrase of Article 2.1 "for the purposes of this Agreement" indicates that the definition of "dumping" as contained in Article 2.1 applies to the entire agreement…".[52] In *US – Softwood Lumber V*, the Appellate Body referred generally to the use of zeroing in relation to the use of "multiple comparisons" when it stated that, "[i]f an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole".[53]

86. The United States submits that the examination of the term "product" as used throughout the *Anti-Dumping Agreement* and the *GATT 1994* demonstrates that the term "product" in these provisions does not exclusively refer to "product as a whole" and that it can have either a collective meaning or an individual meaning.[54] However, the unique example that the United States gives where the word "product" would be used in the individual sense of the object of a particular transaction is Article VII:3 of the *GATT 1994*. However, Article VII:3 of the *GATT 1994* is a provision concerning customs valuation issues. It has thus nothing to do with anti-dumping. As explained above, the term "dumping" as defined in Article 2.1 of the *Anti-Dumping Agreement* must be interpreted in the specific context of the determination of the framework in which anti-dumping measures can be applied, i.e. pursuant to an investigation which focuses on a specific "product under investigation" as defined by the investigating authorities. Therefore, we do not consider this example to be relevant.

87. In any case, as the Appellate Body correctly noted in *US – Softwood Lumber (Article 21.5)*, "the Appellate Body referred to Article VI:1 and 2 of the *GATT 1994*, together with Article 2.1 of the *Anti-Dumping Agreement*, to interpret the term "margins of dumping" in Article 2.4.2. The Appellate Body did not address the meaning of "product" in the other paragraphs of Article VI or in other provisions of the *GATT 1994*".[55]

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[48] Appellate Body Report, *US – Zeroing (Japan)*, para. 115.
[49] US First Written Submission, para.91.
[50] Appellate Body Report, *US – Softwood Lumber V*, paras. 91 - 93.
[51] Appellate Body Report, *US – Softwood Lumber V*, para. 94.
[52] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[53] Appellate Body Report, *US – Softwood Lumber V*, para. 98 quoted by the Appellate Body in Appellate Body Report, *US – Softwood Lumber V (Article 21.5)*, para. 114.
[54] US First Written Submission, para. 92.
[55] Appellate Body Report, *US – Softwood Lumber V (Article 21.5)*, para. 113.

88. Indeed, even though it could be demonstrated that the word "product" may have various meanings across the GATT and the *Anti-Dumping Agreement*, it is clear from both the text and context that in the framework of Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the *GATT 1994* the word product refers to "product under investigation" and thus the product as a whole.

89. The view that "dumping" and "margins of dumping" can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping proceeding. Thus, 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. Moreover, according to Article VI:2 of the *GATT 1994* and Article 9.2 of the *Anti-Dumping Agreement*, an antidumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole, and export transactions in the so-called "non-dumped" sub-groups (that is, those sub-groups in which the weighted average normal value is less than the weighted average export price) are not excluded. The European Communities sees no basis, under the *Anti-Dumping Agreement*, for treating the very same sub-group transactions as "non-dumped" for one purpose and "dumped" for other purposes.[56]

90. The obligations and methodologies that apply when a margin of dumping is investigated or relied upon are the same for the entire *Anti-Dumping Agreement*, including administrative review investigations. The use of zeroing by the United Sates is thus equally inconsistent in both the calculation of a revised margin of dumping for cash deposit purposes and in the calculation of the amount of duty retrospectively assessed. The US calculation of a revised margin for cash deposit purposes is identical in all relevant respects to the margin calculation performed in the original proceeding. There is no basis on which it is possible to argue that zeroing, which is prohibited in original proceedings, becomes somehow permissible in the same calculation in an administrative review.

(b) The duty must not exceed the dumping margin established in accordance with the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement

91. As a preliminary remark, the European Communities notes that it appears undisputed by the United States that the fair comparison requirement in Article 2.4 also applies to proceedings governed by Article 9.3 of the *Anti-Dumping Agreement*. The Parties, however, disagree as to the content of this obligation and as to whether, as a result, the simple zeroing method used by the United States in the relevant measures at issue results in the calculation of a dumping margin which violates Article 2.4 of the *Anti-Dumping Agreement*.

(i) Content of the "fair comparison" requirement in Article 2.4

92. Referring to the quotation which the European Communities makes in its First Written Submission of the Appellate Body's findings in *US – Zeroing (Japan)*, the United States submits that "the rationale followed by the Appellate Body [in that case] was based on the *results* of the comparison methodology in relation to the previously interpreted 'margin of dumping' rather than on any inherently unfair aspect of the comparison methodology itself" and therefore that "the EC claim of unfairness depends not on the text of Article 2.4 but on whether it is permissible to interpret the term 'margin of dumping' as used in Article 9.3 as applying to transactions".[57] This is an incorrect description of the European Communities' claim which, on the contrary, and as explained further

[56] Appellate Body Report, *US – Softwood Lumber V*, para. 99.
[57] US First Written Submission, para. 143.

below, is based on an inherent analysis of the fair comparison requirement which demonstrates the inherently unfair nature of the simple zeroing method used by the United States in its administrative reviews.

93. The first argument presented by the United States to support the view that there is no inconsistency with Article 2.4 is that if "it is permissible to understand the term 'margin of dumping' as used in Article 9.3 as applying to an individual transaction, then the challenged assessment will not exceed the margin of dumping" and there will therefore be no basis for a finding of inconsistency with Article 2.4.[58] It implies that, according to the United States, whether the use of simple zeroing in the context of administrative reviews is consistent with the fair comparison requirement in Article 2.4 or not depends on whether Article 9.3 would authorize the use of zeroing. According to the United States, since it is permissible to interpret "margin of dumping" as used in Article 9.3 as applying to an individual transaction, there is no obligation to aggregate transactions in calculating margins of dumping in an assessment proceeding, and there can be no obligation to "offset" the antidumping duty liability for a transaction to reflect the extent to which other transactions were not dumped. As a result, there is no basis for inconsistency with Article 2.4.[59] The United States does not offer any explanation as to why the simple zeroing method would be consistent with Article 2.4 apart from saying that if such method is authorized by Article 9.3, there is no inconsistency with Article 2.4.

94. The United States' approach is incorrect as it conflicts with the independent and general nature of the fairness requirement in Article 2.4 of the *Anti-Dumping Agreement*. Since the fairness requirement of Article 2.4 is an independent and general obligation, it cannot be reduced to whether the simple zeroing method applied by the United States is permitted or not under the other provisions of the *Anti-Dumping Agreement*.

(ii) "Inherently biased"

95. In its First Written Submission, the European Communities noted that the term "fair" is generally understood to connote impartiality, even-handedness or lack of bias.[60] The simple zeroing used in administrative reviews is inherently biased because when an exporter makes some sales above normal value and some below normal value, the use of zeroing will inevitably result in a margin higher than would otherwise be calculated. This increase in the margin is not attributable to any change in the pricing behaviour of the exporter but is the result of the United States' choice to apply a calculation methodology which has the effect of ignoring the negative intermediate comparison results.[61]

96. The United States disputes the European Communities' claim that zeroing in administrative reviews is inconsistent with Article 2.4 since it is inherently biased. According to the United States, there is "nothing in the text of the Agreement to support its contention that a methodology can be designated as "fair" or "unfair" within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down".[62]

[58] US First Written Submission, para. 144.
[59] US First Written Submission, para. 144.
[60] EC First Written Submission, para. 167. According to the dictionary, fair means "just, unbiased, equitable, impartial, legitimate, in accordance with the rules of standards" and "offering an equal chance of success" (Shorter Oxford English Dictionary; 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol.1, p.915), quoted by the Appellate Body in *US – Lumber V (Article 21.5)*, para. 138.
[61] EC First Written Submission, para. 200.
[62] US First Written Submission, para.146.

97. In this regard, the European Communities notes that the *Anti-Dumping Agreement* does not contain a definition of the concept of "fairness". However, various panels and the Appellate Body have analysed the "fair" nature of both dumping and injury determinations. Any methodology or approach taken by investigating authorities in the framework of either dumping determinations or injury determinations and which makes it more likely to find either dumping (or higher dumping margins) or injury, is not "fair". As a result, a methodological choice such as the simple zeroing method in administrative reviews which systematically and inevitably result in a higher dumping where there is no change in pricing behaviour is inherently biased and therefore unfair within the meaning of Article 2.4 of the *Anti-Dumping Agreement*.

98. Furthermore, the Appellate Body in *US – Hot Rolled Steel* examined the "objective examination" requirement in Article 3.1 of the *Anti-Dumping Agreement* and underlined that "the word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness. In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party or group of interested parties, in the investigation".[63]

99. Applying this test in *EC – Bed Linen (Article 21.5)*, the Appellate Body found that:

> The approach taken by the European Communities in determining the volume of dumped imports was not based on an "objective examination". The examination was not "objective" because its result is predetermined by the methodology itself. Under the approach used by the European Communities, whenever the investigating authorities decide to *limit* the examination to some, but not all, producers—as they are entitled to do under Article 6.10—*all* imports from *all non*-examined producers will *necessarily always be included* in the volume of dumped imports under Article 3, as long as any of the producers examined individually were found to be dumping. This is so because Article 9.4 permits the imposition of the "all others" duty rate on imports from *non*-examined producers, *regardless* of which alternative in the second sentence of Article 6.10 is applied. In other words, under the European Communities' approach, imports attributable to *non*-examined producers are simply *presumed*, in all circumstances, to be *dumped*, for purposes of Article 3, solely because they are subject to the imposition of anti-dumping duties under Article 9.4. This approach makes it "more likely [that the investigating authorities] will determine that the domestic industry is injured", and, therefore, it cannot be "objective". Moreover, such an approach tends to favour methodologies where *small numbers* of producers are examined individually. This is because the *smaller* the number of individually-examined producers, the *larger* the amount of imports attributable to *non*-examined producers, and, therefore, the larger the amount of imports *presumed* to be *dumped*. Given that the *Anti-Dumping Agreement* generally requires examination of *all* producers, and only exceptionally permits examination of only *some* of them, it seems to us that the interpretation proposed by the European Communities cannot have been intended by the drafters of the Agreement.[64] (emphasis added)

100. Similarly, the European Communities argues that the simple zeroing method used by the United States in its administrative reviews is to be regarded as "unfair" since the use of zeroing makes it more likely that the investigating authorities find dumping or higher margins of dumping and cannot

[63] Appellate Body Report, *US – Hot Rolled Steel*, para. 193.
[64] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 132.

therefore be regarded as being "fair" within the meaning of Article 2.4 of the *Anti-Dumping Agreement*.

(iii) Unjustified imbalance

101. The obligation imposed by Article 2.4 to conduct a fair comparison precludes the simple zeroing method used by the United States in the measures at issue. Given the ordinary meaning of the word "fair"[65], the obligation to make a fair or equivalent comparison must necessarily involve a fairly balanced comparison, being one that, subject to the targeted dumping exception, takes equivalent account of all the data relating to normal value and export price, in calculating a "margin of dumping" for each exporter. The United States in fact used a simple zeroing method without any justification, and for that reason acted in a manner inconsistent with its obligation to make a fair comparison, pursuant to Article 2.4.

102. The Panel and Appellate Body reached a similar conclusion in *US Hot – Rolled Steel*, regarding the "arm's length" and "aberrationally high" price tests for determining whether or nor domestic sales are made in the ordinary course of trade. The panel observed that the mere fact that a domestic sale is at a relatively low price does not necessarily mean that it can no longer be considered to have been made in the ordinary course of trade. Similarly, in the present case, the mere fact that an export sale is at a relatively high price does not mean that it ceases, for that reason alone, to be comparable. The panel further observed that the United States' methodology excluded lower priced domestic sales, skewing the normal value upward, thereby inflating the margin of dumping. Similarly, in the present case, the United States' methodology partially excludes higher priced export sales, skewing the export price downward, thereby inflating the margin of dumping. The Appellate Body agreed with the panel that the United States was systematically exercising discretion in a manner that was not even-handed and that was unfair, automatically resulting in the distortion and inflation of the margin of dumping, to the disadvantage of exporters.[66]

(iv) Internal Inconsistency

103. Just as an anti-dumping proceeding concerns "a product" (the subject product), so it also concerns a margin of dumping based on a comparison of sales made during the investigation period (whatever type of anti-dumping proceeding is being conducted). Just as the *Anti-Dumping Agreement* contains no express rule governing the definition of the "subject product", so it contains no express rule governing the definition of the investigation period. The investigation period might be a shorter period or a longer period (such as a year), provided that it is a sustained period, in relation to which market fluctuations or other vagaries do not distort a proper evaluation.[67] Just like product characteristics, time is typically a parameter by reference to which markets – that is, categories of goods or services with a certain competitive relationship or degree of comparability - are defined. Just as the United States defined the "subject product", so the United States defined the investigation period in the measure at issue. Just as the European Communities does not take issue, in this case, with the definition of the subject product, so the European Communities does not take issue, in this case, with the definition of the investigation period. Just as in the case of model zeroing, having defined the investigation period, the United States was obliged to ensure that the margin of dumping

[65] A comparison that is "just, unbiased, equitable, impartial", "offering an equal chance of success", conducted "honestly, impartially" and "evenly, on a level" (*The New Shorter Oxford English Dictionary*).

[66] Panel Report, *US – Hot-Rolled Steel*, paras 7.110 to 7.112; Appellate Body Report, *US – Hot-Rolled Steel*, paras 144, 145, 148, 154 and 158.

[67] Appellate Body Report, *EC – Tube or Pipe Fittings*, para 80.

for that period was fairly calculated in conformity with Article 2.4. The United States had become bound by its own logic.[68]

104. The United States having fixed the investigation period, it had effectively decided that, in principle, and due account being taken of all necessary adjustments, any transaction during the investigation period, at whatever time it was made, was potentially comparable with any other transaction during the investigation period, at whatever time *it* was made. In short, the reasoning of the Appellate Body in the *EC – Bed Linen* and *US – Softwood Lumber V* cases in relation to model zeroing also applies whenever an investigating authority decides to fix the parameters of its investigation, whether in relation to subject product, region, time or any other parameter. The investigating authority thereby becomes bound by its own logic, and must complete its analysis on the basis of the same logic.[69]

105. The European Communities finds contextual support for the preceding analysis in Article 2.4.2, which refers to certain other parameters of the determination, including "time periods". This indicates that, having fixed the temporal parameters of its investigation, the United States had become bound by its own logic, unless the exceptional targeted dumping situation described in the second sentence of Article 2.4.2 was present (which it was not). The same is true in respect of any other parameters of the investigation fixed by the investigating authority, notably the purchasers and regions concerned, these also being matters referred to in the second sentence of Article 2.4.2. The simple zeroing method used by the United States is offensive to any one of these parameters, because it is performed at the most disaggregated level, that is, at the level of individual transactions. In other words, instead of treating all the relevant export transactions as a whole, the United States methodology is based on treating each export transaction individually in the same manner as model zeroing is based on treating each model separately.

106. Further contextual support may be found in other provisions of the *Anti-Dumping Agreement* which indicate that temporal considerations are relevant to the calculation of a margin of dumping. For example, below cost domestic sales may only be disregarded if they are made within an extended period of time. That period should normally be one year (the typical length of an investigation) but in no case less than six months. Cost allocations must be adjusted appropriately for non-recurring items of cost which benefit future production (so that such cost items are not entirely allocated to the investigation period, inflating the normal value, thus artificially generating a finding of "dumping"). Exporters must be allowed at least 60 days to have adjusted prices to reflect sustained movements in exchange rates. In the ordinary course of trade costs and prices typically vary in the very short term, even if in the medium term things average out. Dumping only occurs when a situation in which export prices are below normal value becomes the norm. Similar contextual support may be found in the *Anti-Dumping Agreement* in relation to both purchasers and regions.

107. The European Communities does not enter into a discussion of the several mooted economic rationales for the anti-dumping rules, much discussed in the literature and well known. The fact remains, however – and this much is uncontroversial – that they are all economic. Articles VI:1 and VI:2 of the *GATT 1994* repeatedly use words such as "commerce", "trade", "price", "sale", "cost" and "profit". In this respect, it is highly significant that Ad Article VI, paragraph 1, second sub-paragraph and Article 2.7 of the *Anti-Dumping Agreement* disapply certain rules with respect to Members in which there is no market *economy*. The preamble to the *GATT 1994* refers to "trade and economic endeavour", "expanding the production and exchange of goods" and "international commerce". Similarly, the preamble to the WTO Agreement refers to "trade and economic

[68] Appellate Body Report, *EC – Bed Linen*, paras 57, 58, 60 and 62; Appellate Body Report, *US – Softwood Lumber V*, paras 93 and 99.

[69] Panel Report, *US – Stainless Steel*, paras 6.121 to 6.123.

endeavour" and "expanding the production of and trade in goods" and "international trade relations" and the objective "to develop an integrated, more viable and durable multilateral trading system".

108. The application of the discipline of economics requires a minimum of consistency. Investigating authorities cannot, from one day to the next, and in a random or capricious manner, or even within the same proceeding, chop and change the basic legal economic concepts used in the *Anti-Dumping Agreement* – such as, for example, the concept of sales not "in the ordinary course of trade" or the concept of what is an "exporter or producer" or related company, and so on. On certain matters, Members may have a certain latitude in deciding what rule they will apply. But once they have made their choice, they must apply the rule in an even-handed way.

109. Thus, it is not by chance that the *Anti-Dumping Agreement* uses the words "market" or "competition" or "compete" 28 times[70], these being the indispensable and basic building blocks of consistent economic analysis. It is particularly significant that Article 2.2 refers repeatedly to a "market of the exporting country". And it is not by chance that the basic parameters by which markets are defined: product (or physical characteristics)[71], geography[72] and time[73] play a central role in the *Anti-Dumping Agreement*. Nor is it chance that these are also the basic parameters essentially referred to in the second sentence of Article 2.4.2. Finally, it must come as no surprise that part of the reasoning of the Appellate Body in the model zeroing cases is essentially about consistency with respect to one of these parameters: product definition. The Appellate Body has recently confirmed that a market is "a place with a demand for a commodity or service … a geographical area of demand for commodities or services … the area of economic activity in which buyers and sellers come together and the *forces of supply and demand affect prices*".[74]

110. Viewed in this light, it is impossible to measure international price discrimination in two different markets (the domestic market and the export market), if the fundamental methodology for defining and measuring price in each of the markets is different. Absent good reason (targeted dumping – that is, distinct markets), such an approach is actually *incapable* of measuring alleged international price discrimination. And in this sense it is unfair, because it is internally inconsistent. As Jacob Viner observed:

> … sufficient justification is to be found in the usage of the most authoritative writers and in the considerations of economy and precision of terminology for confining the term dumping to *price-discrimination between national markets*. This definition, I venture to assert, will meet all reasonable requirements
>
> … The one essential characteristic of dumping, I contend, is price-discrimination between purchasers in different national markets.[75]

(v) Unjustified discrimination

111. Article 9.2 of the *Anti-Dumping Agreement* obliges WTO Members to collect any anti-dumping duty on a non-discriminatory basis on imports of such products from all sources found to be

[70] *Anti-Dumping Agreement*, Articles 2.2 (thrice), 2.2.1, 2.2.2(i), 2.2.2(ii), 2.2.2(iii), 2.4.1, 3.1, 3.3 (twice), 3.4, 3.5, 3.7(i), 3.7(ii) (twice), 4.1(ii) (seven times), 4.2, 4.3, 5.2(iii), 5.2(iv), footnote 2.

[71] See particularly Article 2.6 of the *Anti-Dumping Agreement*.

[72] See particularly Article 4 of the *Anti-Dumping Agreement*.

[73] See the repeated references to the investigation "period" in the *Anti-Dumping Agreement*.

[74] Appellate Body Report, *US – Upland Cotton*, para 404.

[75] Jacob Viner, *Dumping, A Problem in International Trade*, First Edition 1923, Reprinted 1991, Chapter I, *The Definition of Dumping*, pages 3 and 4 (original italics, footnote omitted).

dumped and causing injury. The United States' zeroing method results in imposition and collection on the basis of unfair and unjustified discrimination.

112. Indeed, in relation to the same period, some firms may be assessed and have to pay anti-dumping duties at the rate resulting from the original proceeding and the methodology used therein (model zeroing). Other firms, exporting the same product from the same country during the same period, may be assessed at a revised rate, in "administrative review" proceedings, calculated on the basis of a different methodology (simple zeroing).

113. Similarly, some firms may be subject to a measure imposed on the basis of model zeroing in the original proceeding; whilst other firms subject, for example, to a new shipper proceeding may be subject to a measure imposed on the basis of simple zeroing. In such a case, it would appear that, in the logic of the United States, a firm could be penalised simply for having begun exports to the United States after the end of the original period of investigation.

(vi) Case-law confirming United States' simple zeroing unfair

114. The above-mentioned conclusions are confirmed by the findings of the Appellate Body in several cases, as indicated in the First Written Submission of the European Communities.[76]

(vii) Article 2.4.2 second sentence

115. The United States defends itself by submitting that "an interpretation of Article 2.4 that gives rise to a general prohibition of zeroing renders the second sentence of Article 2.4.2 'inutile'".[77] However, the issue which this Panel needs to examine is not whether there is a "general prohibition of zeroing" but whether the simple zeroing method applied by the United States in the administrative review proceedings concerned is consistent or not with the fair comparison requirement in Article 2.4.

116. Furthermore, the United States incorrectly assumes that what an investigating authority must necessarily do in a targeted dumping analysis is the same as the simple zeroing method discussed in this case. But this is not so. Article 2.4.2 second sentence does not specify in every detail how an investigating authority might conduct its targeted dumping analysis. For example, an investigating authority faced with a pattern of export transactions at different prices into two different regions might simply make a margin of dumping calculation for the region in which targeted dumping is occurring. In such a case, the investigating authority will simply have re-set the parameters of its investigation, consistent with the targeted dumping provisions.

(c) Violation of Article 2.4.2 of the Anti-Dumping Agreement

117. The European Communities' claim with respect to Article 2.4.2 is double. First, the European Communities claims that by using the asymmetrical method of comparison of the second sentence of Article 2.4.2, the United States violates Article 2.4.2. Second, the European Communities also claims that by using simple zeroing in the measures at issue, which involves a downward adjustment of the relatively high export prices, and the making of the dumping calculation based only or preponderantly on the relatively low export transactions, the United States breaches Article 2.4.2.

118. The obligation under Article 2.4.2 to normally make price comparisons on a symmetrical basis is not coextensive with the obligation not to zero in aggregating the results of intermediate comparisons, although the different issues are related. The obligation not to zero primarily derives from the requirements in Article VI of the *GATT 1994* and in Articles 2.1 and 9.3 of the *Anti-*

[76] EC First Written Submission, paras. 171 - 175.
[77] US First Written Submission, para. 145.

Dumping Agreement that the dumping margin must be computed for the product as a whole without distortion in the aggregation of intermediate comparisons; and from the obligation in Article 2.4 of the *Anti-Dumping Agreement* to effect a fair comparison. All of these obligations apply to the determinations in the measures at issue by virtue of the rule in Article 9.3 that the amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2.

(i) Method for comparing normal value and export price: asymmetrical method

119. In its first written submission, the European Communities submitted that the United States violates Article 2.4.2 *inter alia* by using the asymmetrical method of comparison of the second sentence in Article 2.4.2.[78]

120. It appears to the European Communities that the US First Written Submission does not contain any assertions to the effect that the United States did not use the average-to-transaction method or that the conditions required by Article 2.4.2 were fulfilled or that the required explanation was provided. Therefore, the European Communities concludes that, apart from the alleged restricted meaning of the word "investigation" in Article 2.4.2, the United States does not contest the claims and arguments of the European Communities on that point.

(ii) The word "investigation" in Article 2.4.2 of the Anti-Dumping Agreement

121. In its First Written Submission, the United States repeatedly refers to what it asserts is the limited application of Article 2.4.2, based on the allegedly limiting meaning of the Phrase "the existence of margins of dumping during the investigation phase". That limited meaning, according to the United States, is an "original investigation" or an "investigation to determine the existence, degree and effect of any alleged dumping" under the terms of Article 5.1 of the *Anti-Dumping Agreement*. According to the United States, there is no prohibition against zeroing that would apply in the context of assessment proceedings since Article 2.4.2, by its very terms, is limited to the "investigation phase" considered by the United States to mean "original proceeding". The United States even goes so far as to assert that the text leaves no doubt that the Members did not intend to extend these obligations to any phase beyond the investigation phase" (emphasis added).[79]

122. It is incumbent on the United States to establish that the word "investigation" in Article 2.4.2 does have the limited or defined or special meaning that the United States asserts it to have. However, the United States merely repeats this assertion without explaining the reasons for such assertion.[80] In particular, it never refers to the Vienna Convention on the Law of Treaties (the "Vienna Convention") and to its rules.

(iii) Applicable rules of Treaty interpretation

123. Pursuant to Article 3.2 of the DSU, any legal analysis must be conducted in accordance with the customary rules of interpretation of public international law. Various panels and the Appellate Body have confirmed this requirement as allowing resort to be made to the Vienna Convention.

124. It is striking when reading the United States' First Written Submission that there is no reference at all to the Vienna Convention. Actually, in its First Written Submission, the United States submits that Article 2.4.2 would not be applicable to assessment proceedings since Article 2.4.2 limits

[78] EC First Written Submission, paras 209 - 226.
[79] US First Written Submission, para. 102.
[80] See for instance at para. 102 the statement that "the limited applicability of Article 2.4.2 could not be plainer".

its application to the "investigation phase" and that "to require the application of Article 2.4.2 to Article 9 assessment proceedings would read out the AD Agreement Article 2.4.2's express limitation to investigations". According to the United States, such a result would be inconsistent with the principle of effectiveness, under which all the terms of an agreement should be given a meaning.[81]

125. However, the systematic application of the Treaty interpretation rules as included in the Vienna Convention leads to the very clear conclusion that Article 2.4.2 applies to administrative review investigations covered by Article 9.3 and that the asymmetrical comparison method using zeroing applied by the United States in its administrative reviews is inconsistent with Article 2.4.2.

126. Article 31 of the Vienna Convention entitled "General rule of interpretation" provides that:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one of more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
>
> 3. There shall be taken into account, together with the context
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty of the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

127. Article 32 of the Vienna Convention entitled "Supplementary means of interpretation" further provides that:

> "Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable."

[81] US First Written Submission, para. 99.

128. In accordance with the above-mentioned rules, the European Communities will analyse below in details the relevant Phrase in the first sentence of Article 2.4.2 (i.e. "the existence of margins of dumping during the investigation phase"), including (i) the ordinary meaning of the Phrase (ii) the context of the Phrase and (iii) in the light of the object and purpose.

(iv) Ordinary meaning of the Phrase

- Investigation

129. The United States considers the word "investigation" in Article 2.4.2 first sentence as being determinative of the issue as to whether Article 2.4.2 applies only to original proceedings or also to other types of proceedings. However, the United States refrains from analyzing the ordinary meaning of that word. According to the United States, the term "investigation" as used in Article 2.4.2 has the same specific meaning as in Article 5, namely "an investigation to determine the existence, degree and effect of any alleged dumping".[82] The United States submits that "panels have consistently found that the references to "investigations" in Article 5 only refer to the original investigation and not to subsequent phases of an anti-dumping proceeding".[83] It is not disputed that "investigations" in Article 5 only refer to original investigations since these are "investigations to determine the existence, degree and effect of any alleged dumping". However, there is no such limitation to the word "investigation" in Article 2.4.2. Therefore, why would "investigations" in Article 2.4.2 equate to an "investigation to determine the existence, degree and effect of any alleged dumping" as this term is used in Article 5, while it is clear that this word does not have a particular meaning in all provisions of the Agreement?

130. In its First Written Submission, the European Communities highlights the fact that dictionary meanings strongly support the view that the ordinary meaning of the word "investigation" indicates a systematic examination or inquiry or careful study of or research into a particular subject.[84]

131. Indeed, the New Shorter Oxford English Dictionary gives the following meaning for the word "investigation": "the action or process of investigating; systematic examination; careful research … An instance of this; a systematic inquiry; a careful study of a particular subject". This is not a rare or specific meaning but a common and even universal meaning.

132. The United States does not dispute this definition but argues that "the Panel in *US – Zeroing (EC)* squarely rejected that the decisive element regarding the interpretation of the scope of Article 2.4.2 is the word "investigation" which has not been defined in the AD Agreement and which must therefore be interpreted strictly by reference to a dictionary definition".[85]

133. The European Communities does not argue that the dictionary meaning is the decisive criterion, but that it is a relevant element that must be included in the analysis.[86] In other words, in considering the ordinary meaning, it is appropriate to have regard to the meanings provided by dictionaries as a part of the analysis. In that respect, it is interesting to note that no dictionary indicates that the word "investigation" has the special meaning argued for by the United States.

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[82] US First Written Submission, para. 101.
[83] US First Written Submission, para. 101.
[84] EC First Written Submission, para. 213.
[85] US First Written Submission, para. 107.
[86] The Appellate Body has observed that dictionaries are a "useful starting point" for the analysis of "ordinary meaning" of a treaty term even if they are not necessarily dispositive. See Appellate Body Report, *EC – Chicken Cuts*, para.175. See also Appellate Body Report, *US – Softwood Lumber IV*, para. 59; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248; and Appellate Body Report, *US – Gambling*, para. 166.

134. Additional evidence supports the European Communities' interpretation of the word "investigation".

135. First, numerous panels and Appellate Body reports refer to "original investigations".[87] If, by definition, all investigations were "original", it would not be necessary to specify that the investigations are "original". It is thus clear that the term "original investigations" has been used to limit the meaning of the word investigations. In all these cases, the use of the word "original" is used as a shorthand way of referring to the words "to determine the existence, degree and effect of any alleged dumping" as referred to in Article 5.1.

136. Second, there are panel reports which have used the word "investigation" to describe "sunset review investigations". For instance, in *US – Countervailing Duties on certain EC Products*, the Panel stated: "We consider that in a sunset review investigation the importing Member is obliged…".[88]

137. Third, in *US – DRAMs*, the Panel expressly noted that:

> The DOC initiated the first annual review of DRAMs from Korea on 15 June 1994 and investigated whether the Korean companies made sales of DRAMs less than normal values, (i.e. dumped) during the period of review.[89]

138. Fourth, there are numerous examples in US practice in which the word "investigation" is used in the context of review investigations.

139. Referring to the web site of the United States International Trade Commission, the European Communities notes that that investigating authority clearly does believe itself to be involved in the conduct of "investigations" – giving that word its ordinary meaning – since it refers expressly and repeatedly, for example, to "changed circumstances review investigations" and "Five-Year Review (Sunset) Investigations".

140. In addition, the Rules of Practice and Procedure of the International Trade Commission[90] contain the following provision:

> Investigation to review outstanding determination
>
> (a) Request for review. Any person may file with the Commission a request for the institution of a review investigation under Section 751(b) of the Act. The person making the request shall also promptly serve copies on the request on the parties to the original investigation upon which the review is to be based. All request shall set forth a description of changed circumstances sufficient to warrant the institution of a review investigation by the Commission. (emphasis added)

141. A review under Section 751(b) of the Tariff Act is a changed circumstances review, as provided for in Article 11.2 of the *Anti-Dumping Agreement*.

142. As a matter of fact, this language is also to be found in specific determinations adopted by the ITC relating to individual cases – the European Communities does not wish to burden the Panel with these documents, but can provide examples on request.

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[87] For example, Appellate Body Report *US – OCTG Sunset Reviews* (54 instances).
[88] *US – Countervailing Duties on certain EC Products*, footnote 295 para.7.114.
[89] Panel Report, *US – DRAMs*, paras 2.3 – 2.4.
[90] 63 FR 30599.

143. Finally, it is also consistent with the way in which the *Anti-Dumping Agreement* has been implemented by the European Communities.[91]

144. In the light of the foregoing, and recalling that the burden of proof and persuasion that the word "investigation" has the special meaning advocated by the United Sates falls on or has been shifted to the United States, the correct conclusion is that the ordinary meaning of the word investigation in Article 2.4.2 is that advanced by the European Communities.

- Existence

145. The United States has previously sought to rely on the term "existence", arguing that this refers only to a question addressed during an original investigation, and that it appears only in Article 5.1 of the *Anti-Dumping Agreement*. The United States is mistaken. The term "existence" also appears in the title to Article 2 of the *Anti-Dumping Agreement* (in the French and Spanish language versions). Furthermore, also during an assessment proceeding an investigating authority is concerned not only with the amount but also with the existence of dumping: if the amount of dumping is found to be zero, then dumping does not exist. In this respect, and for these purposes, it is not possible to dissociate the concept of "dumping" and the concept of "margin of dumping", as the Appellate Body confirmed in *US – Zeroing (Japan)*. In other words, by definition, it is not possible to state whether or not an exporter is dumping without actually making a precise calculation in that respect of the supposed amount or margin of dumping.

146. Furthermore, in making such an argument, the United States actually confirms another point that the European Communities has consistently made: the grammatical structure of the Phrase compels the conclusion that the term "during … phase" refers to a distinct period of time in which dumping margins exist, that is, an investigation period; and not, as the United States would have it, the time period referred to in Article 5.10 of the *Anti-Dumping Agreement*. In other words, the grammatical structure of the Phrase precludes the US interpretation, and confirms that it is not permissible. The United States has consistently demonstrated itself unable or unwilling to be responsive to this point.

- "during… phase"

147. The *New Shorter Oxford English Dictionary* provides that the meanings of the term "during" include "through the duration of; in the course of; in the time of". It further provides that the meanings of the term "phase" include "a distinct period or stage in a process of change or development; any one aspect of a thing of varying aspects". The European Communities considers that the ordinary meaning of the term "during … phase" considered as a whole has a temporal aspect to it and coincides with a distinct period. The terms "during … phase" indicate a determinate temporal stage in the passage of time. However, nothing indicates that the "distinct period" referred to is the period of time in which the "margins of dumping" must be established, as the United States would have it, as opposed to the period of time in which the "margins of dumping" must have existed.

148. The United States is wrong to assume that the terms "during … period" and "during … phase" *cannot* be equated. In other words, there is no rule of interpretation of public international law that

[91] Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, *Official Journal of the European Communities*, L 56, 6.3.1996, p.1, as amended, Article 2.11 ("existence of margins of dumping during the investigation period") and 11.2, third sub-para, 11.3, third sub-para, 11.5, third sub-para, 11.9 and 11.10 (references to new shipper, changed circumstances, sunset, and refund **investigations**).

rigidly and *mechanistically*[92] precludes synonyms. The Appellate Body has held that the terms "contingent", "conditional", "tied to" and "tie" are synonymous in the context of Articles 3.1(a) and footnote 4 of the *SCM Agreement*.[93] Similarly, the Appellate Body has held that the terms "nature of competition" and "quality of competition" may be considered synonymous[94]; as may the terms "like" and "similar"[95]; and the terms "jural society", "state" and "organized political community".[96] The Appellate Body has also effectively agreed with the United States that the term "except" in Article 2.4 of the *Agreement on Textiles and Clothing* is synonymous with the terms "only", "provided that" and "unless".[97] Remarkably, the United States itself elsewhere considers that the terms "investigation" and "investigation to determine the existence, degree and effect of any alleged dumping" are also synonymous.[98] The conclusion that the meaning of the terms "during … period" and "during … phase" coincide is a far more reasonable and balanced conclusion, consistent with all other considerations of context and object and purpose; than the conclusion that all the Members intended the terms "investigation" and "investigation to determine the existence, degree and effect of any alleged dumping" to be synonymous.

149. Furthermore, the fact that the word "phase" is only used in Article 2.4.2, i.e. is unique, is not significant. Indeed, the Vienna Convention does not indicate that "uniqueness" in itself is a basic principle of treaty interpretation.[99]

150. In addition, the United States' interpretation implies that because of the word "phase" in Article 2.4.2, each of the five types of anti-dumping proceeding, that is, Article 5 (original), 9.5 (new shipper), 11.2 (changed circumstances), 11.3 (sunset) and 9.3 (assessment), are to be re-labelled "phases". Such a proposition flatly contradicts the text of the *Anti-Dumping Agreement* which refers to five types of anti-dumping "proceedings" and not "phases". Thus, the word "proceedings" is used, for example, in Article 5.9 to include original proceedings. Article 9.5 refers to "duty assessment … proceedings". Article 9.5 also refers to "review proceedings", meaning changed circumstances or sunset proceedings. Finally, footnote 20 refers to "judicial review proceedings". The *Anti-Dumping Agreement* therefore does not refer to five "phases", but rather five types of "proceeding".

- The Phrase as a whole – Grammatical meaning

151. It is now necessary to consider whether or not combining terms in the Phrase or considering the Phrase as a whole, changes the conclusion concerning the ordinary meaning(s).

152. First, the European Communities considers that the ordinary grammatical meaning of the Phrase as a whole is that the term "during the investigation phase" refers to the term "existence" and not to the term "established". Thus, the Phrase refers to a distinct period in which margins of dumping exist, i.e. an investigation period.

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[92] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 93 and 178; Appellate Body Report, *US – OCTG Sunset Reviews*, paras 208, 213 and 214.

[93] Appellate Body Report, *Canada – Autos*, para 107.

[94] Appellate Body Report, *Korea – Alcoholic Beverages*, paras 133 to 134.

[95] Appellate Body Report, *EC – Asbestos*, para 91.

[96] Appellate Body Report, *Canada – Dairy*, para 97 and footnote 73. See also Panel Report, *EC – Hormones (United States)*, para 8.60: "good veterinary practice" synonymous with "good animal husbandry practice" synonymous with "Good Practice in the Use of Veterinary Drugs".

[97] Appellate Body Report, *US – Wool Shirts and Blouses*, page 9, second para; and page 16, final para.

[98] US First Written Submission, paras 101 - 102.

[99] Panel Report, *EC – Chicken Cuts*, para. 7.172; Appellate Body Report, *EC – Chicken Cuts*, para. 218 (rejecting argument about the significance of the uniqueness of a treaty term).

153. The grammatical units of English are: word, phrase, clause and sentence. In English grammar, there are nine word classes: verb; noun; adjective; adverb; preposition; determiner; pronoun; conjunction; and interjection. There are five kinds of phrase: verb phrase; noun phrase; adjective phrase; adverb phrase and prepositional phrase. These are the elements of an English sentence or clause: subject; verb; object; complement; adverbial. The subject precedes the verb. The relevant clause contains one verb phrase, "shall … be established", in the passive: the verb "be" and the passive participle "established", it being understood that it is the investigating authority that will do the "establishing". The use of the modal auxiliary verb "shall" and the future tense of the verb "be" indicates a formal or binding rule, of prospective application.[100]

154. The word "during" is a preposition of time. The term "during the investigation phase" is a temporal modifier of the term "the existence of margins of dumping". The indivisible subject of the clause is the entire Phrase "the existence of margins of dumping during the investigation phase".

155. Thus, applying basic rules of English grammar, the term "during the investigation phase" cannot be construed as a modifier either of the object of the clause, which is, by implication, the investigating authorities; or of the verb phrase ("shall … be established"). It can only be construed as a temporal modifier of the term "the existence of margins of dumping"; and as an integral part of the subject of the clause. In this respect, the rules of English grammar are clear; and there is no basis for reaching any other conclusion. Any other conclusion would directly and manifestly contradict the basic rules of English grammar.

156. In order for the term "during the investigation phase" to modify the verb, the clause would have to be drafted differently, for example:

> "during the investigation phase, the existence of margins of dumping shall normally be established on the basis of …"; or
>
> "the existence of margins of dumping shall normally be established, during the investigation phase, on the basis of …"; or
>
> "the existence of margins of dumping shall, during the investigation phase, normally be established on the basis of …".

157. The Members had these and many other alternatives open to them – all of which they rejected, opting instead for the specific grammatical structure of the text as it now stands.

158. The word "normally" is an adverb that modifies the verb phrase "shall … be established". It shows that the Members were perfectly aware of the possibility of modifying the verb phrase with an adverbial; and that they chose to do that with the word "normally", but not with the term "during the investigation phase".

159. The same conclusion results from a consideration of the grammatical structure of the French and Spanish texts of the *Anti-Dumping Agreement*.[101]

160. This is confirmed by the preparatory work. In each of the New Zealand I, II and III texts the phrase "during the investigation phase" appears at the end of the first sentence, in such a way that it could refer to "when establishing" or to "the existence of dumping margins". In the final Dunkel Draft text the Members decided to eliminate this ambiguity, moving the phrase "during the

[100] *Oxford Guide to English Grammar, John Eastwood, Oxford University Press* (1994), pages 1, 2, 3, 4, 7, 96, 97, 130 and 135.

[101] Vienna Convention, Article 33(3).

investigation phase" to a new position in the grammatical structure of the first sentence, so that it unambiguously refers to "the existence of margins of dumping" and does not refer to "shall … be established". This change in the final Dunkel Draft text marks a significant difference. This *carefully negotiated* language, which reflects an equally carefully drawn balance of rights and obligations of Members, must be respected.[102] It is not now possible to reverse and eliminate the meaning achieved through negotiation, and counterbalanced by other concessions and to re-instate precisely the structure discarded by the Members during the negotiations.

161. Furthermore, the European Communities considers the term "existence of *margins* of dumping". The word "margin" in the term "margins of dumping", as opposed to the word "dumping" on its own, confirms that Article 2.4.2 is concerned with a precise numerical determination, by contrast, for example, with Article 11.3, which is concerned with a prospective determination of "dumping". Thus, the term "margin" does not refer to a "binary" yes or no answer to the hypothetical question: does *dumping* "exist". This confirms the position of the European Communities.

162. Finally, the European Communities considers the significance of reading the special term "margins of dumping" together with the general term "during … phase". Any interpretation of the general term "during … phase" must take into account the special meaning of the term "margins of dumping" which precedes it, the two terms being inseparable parts of the subject of the relevant clause. This further supports the view that the Phrase cannot be interpreted in the manner advocated by the United States.

163. Having carefully considered the ordinary meanings of the terms in the Phrase, the European Communities fails to see how combining these terms in itself leads to an ordinary meaning of the Phrase as a whole that supports the United States defence.

164. The above thus clearly demonstrates that the ordinary meaning of the word "investigation" as flowing not only from dictionaries but also by the practice of the United States and as supported by numerous references of panel and Appellate Body reports refers to the general notion of "systematic analysis" as advanced by the European Communities. The correct conclusion is that the word "investigation" in Article 2.4.2, and the Phrase as a whole, has the meaning advocated by the European Communities.

(v) Context of the Phrase

165. In accordance with the principles of treaty interpretation, the context is an important tool for the purposes of interpretation. Not all context carries equal weight. Some context may be more persuasive than other context. The weight to be given to a particular contextual argument must be considered on a case-by-case basis. The European Communities will consider first the immediate context, moving progressively to more remote context. Thus, the European Communities begins with provisions to which the Phrase expressly and directly refers; then the provisions of Article 2 of which the Phrase is a part; then other provisions of the *Anti-Dumping Agreement* that cross-refer the Phrase; then other specific provisions of the *Anti-Dumping Agreement* in the order in which they appear in the *Anti-Dumping Agreement*; finally contextual arguments derived from the *Anti-Dumping Agreement* as a whole.

[102] Appellate Body Report, *US – Wool Shirts and Blouses*, page 16, penultimate para; Appellate Body Report, *US – Underwear*, page 15.

- Article VI:2 of the GATT

166. The Phrase contains one direct link to other treaty terms: the term "margins of dumping" has a special defined meaning, as provided for in Article VI:2 of the *GATT 1994*.[103] There are only a handful of defined terms in Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*[104], and they have a significance that goes beyond a mere cross-reference.[105] Furthermore, the *Anti-Dumping Agreement* implements the *GATT 1994*[106]; and Article 2 of the *Anti-Dumping Agreement* implements the defined term "margin of dumping".

167. Article VI:1 of the *GATT 1994* defines the word "dumping"; whilst Article VI:2 of the *GATT 1994* defines the term "margin of dumping".[107] Thus, whenever the *Anti-Dumping Agreement* uses the word "dumping" (such as, for example, in Article 11.3), that word has the special meaning given to the defined term "dumping"; and whenever the *Anti-Dumping Agreement* uses the term "margin of dumping" (such as, for example, in Article 2.4.2) that phrase has the special meaning given to the defined term "margin of dumping". It results from the text of Article 2.1 of the *Anti-Dumping Agreement* ("a product is to be considered as being dumped …") that Article 2.1 implements the definition of "dumping". Similarly, it results from the text of Article 2.2 ("the margin of dumping shall be determined …") and the text of Article 2.4 ("margins of dumping") that Articles 2.1 to 2.4 also implement the definition of "margin of dumping". There are no other provisions of the *Anti-Dumping Agreement* that concern themselves with how to calculate a margin of dumping.

168. In these circumstances, the European Communities fails to see how the United States may be permitted to see the defined term "margin of dumping" in Article VI:2 of the *GATT 1994* in one way for one anti-dumping proceeding (all of the provisions of Article 2 in the case of an original proceeding), and in other ways for other anti-dumping proceedings (only some of the provisions of Article 2). That would mean that the defined term "margin of dumping" in Article VI:2 of the *GATT 1994* would have multiple meanings: one meaning for original proceedings; and different meanings for each of the other four types of anti-dumping proceeding. This would be fundamentally inconsistent with the basic concept of a definition. The purpose of defining a term is to give it one meaning; subsequently to refer to that meaning by referring to the defined term; and to achieve a particularly high degree of consistency. The *implementation* of a definition cannot result in its negation, and certainly not merely on the basis of an interpretation that is grammatically incorrect; ignores the ordinary meaning; relies on remote context; and relies on object and purpose arguments that lead to a result that is manifestly absurd or unreasonable.

169. There is no textual basis for such a proposition in Article VI of the *GATT 1994*. On the contrary, those provisions set out definitions of "dumping" and "margin of dumping" of general application in all anti-dumping proceedings. This is further confirmed by the reference in Article VI:2 of the *GATT 1994* to "levy", a term defined in the *Anti-Dumping Agreement* as referring to final assessment or collection of a duty, including those made under Article 9.[108] This further confirms that the concept of "margins of dumping" applies to all anti-dumping proceedings, whenever investigating authorities calculate or rely on margins of dumping; or levy an anti-dumping duty.

[103] Article VI:2 of the GATT 1994, second sentence: "For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1".

[104] Dumping, margin of dumping, injury, domestic industry, like product, interested parties, authorities, initiated, levy (Articles VI:1 and VI:2 of the GATT 1994; Articles 2.6, 4.1, 6.11 and footnotes 1, 3, 9 and 12 of the *ADA*).

[105] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para 126.

[106] The title of the *ADA* is: "Agreement on *Implementation* of Article VI of the General Agreement on Tariffs and Trade 1994".

[107] Appellate Body Report, *US – Softwood Lumber V*, paras 91 to 96.

[108] *ADA*, footnote 12: "As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax".

Since any interpretation of the general term "during … phase" must take into account the special meaning of the term "margins of dumping" which precedes it, the two terms being inseparable parts of the subject of the relevant clause, this further supports the view that the Phrase cannot be interpreted in the manner advocated by the US.

170. In conclusion, the use of the term "margins of dumping" in the Phrase, together with the defined term "margin of dumping" in Article VI:2 of the *GATT 1994*, as implemented in Article 2 of the *Anti-Dumping Agreement* and used in other provisions of the *Anti-Dumping Agreements*, supports the European Communities' claim; and must be given weight commensurate with the express and direct link between the Phrase and the definition.

- Article 2

171. The European Communities considers that the context of Article 2 supports its position.

172. The first sentence of Article 2.4.2 continues, after the Phrase, with the words "shall normally be established …". The use of the word "normally" suggests that these obligations and methodologies apply in most situations. That is at odds with the view expressed by the United States that the comparison rules only apply in one situation: an original proceeding; and do not apply to the investigation of or reliance on margins of dumping in any of the other four types of anti-dumping proceeding. That is, according to the United States, these obligations would only apply in 1 out of 5 types of proceeding. This ratio increases when it is taken into account that one original proceeding will typically spawn several other types of proceeding, particularly "administrative review" proceedings, so that the final ratio is likely to be 1 in 10 or more. This would make the rules in Article 2.4.2, first sentence, at best, the *exception* as opposed to the norm, and this is inconsistent with the use of the word "normally". In the structure of Article 2.4.2, the *exception* is contained in the second sentence. The European Communities therefore submits that the context of this part of the first sentence of Article 2.4.2 does not support the US defence.

173. Article 2.4.2 begins: "[s]ubject to the provisions governing fair comparison in paragraph 4". This includes the third to fifth sentences of Article 2.4. The fourth sentence of Article 2.4 contains a further reference to Article 2.3, which concerns constructed export price. There is nothing in these provisions to support the view that they apply only in one type of proceeding under the *Anti-Dumping Agreement*. On the contrary, the drafting of the provisions supports the view that they apply whenever an authority investigates or relies on a "margin of dumping". We conclude that the context of this part of the first sentence of Article 2.4.2 does not support the US defence. Precisely the same is true of the second sentence of Article 2.4.2; as well as the other provisions of Article 2.4; and the provisions of Article 2 as a whole, which implements the definitions of "dumping" and "margin of dumping" in Article VI of the *GATT 1994*. In particular, Article 2.2 contains rules according to which "the margin of dumping shall be determined" and refers eight times to the word "investigation". In relation to each of these specific provisions US municipal anti-dumping law implements the *Anti-Dumping Agreement* not just for original proceedings, but for all types of proceedings under the *Anti-Dumping Agreement* in which margins of dumping are investigated or relied on. The SAA expressly states that this is "required or appropriate". The United States admits that these obligations apply to all types of proceedings, and not just to original proceedings. Furthermore, the words "in the course of the investigation" in Article 2.2.1.1 and "during the investigation" in footnote 6 refer to the period of time in which the investigation is to be conducted; yet the United States admits that these obligations apply to all types of proceedings under the *Anti-Dumping Agreement*. Finally, the title of

Article 2, in the French and Spanish texts, demonstrates that the whole of Article 2 is concerned with the "existence" of dumping.[109]

174. In the light of the foregoing, the European Communities concludes that the context of Article 2 confirms the ordinary meaning of the word "investigation" in the Phrase as referring to all types of proceeding under the *Anti-Dumping Agreement* in which margins of dumping are investigated or relied on, and does not support the US defence.

- Article 9.3

175. The European Communities submits that its interpretation of Article 2.4.2 is further supported by Article 9.3 of the *Anti-Dumping Agreement*.

176. According to Article 9.3: "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The reference to "Article 2" must be taken to be a reference to the whole of Article 2. The cross-references in the *Anti-Dumping Agreement* make express provision when they refer only to certain paragraphs or sub-paragraphs of an article, particularly when the cross-reference is between different articles[110], or when they are restricted in some way[111], or when the provision to which reference is made is to be modified when applied in certain circumstances.[112] There is no such express provision in Article 9.3. Article 9.3 does not provide, for example, that the amount of the anti-dumping duty is not to exceed the margin of dumping as provided under Article 2, with the exception of Article 2.4.2; or as provided in Article 2, with the exception of the rules for comparing duly adjusted normal value and export price; or *mutatis mutandis*. This confirms that, in the context of Article 9.3, a "margin of dumping" is to be established by reference to the whole of Article 2, consistent with the use of the defined term "margin of dumping".[113]

177. If the cross-reference in Article 9.3 to Article 2 was intended to mean all of the provisions of Article 2, except Article 2.4.2, then the text of the *Anti-Dumping Agreement* would have said that, as in other instances. If this would mean *mutatis mutandis*, then the text of the *Anti-Dumping Agreement* would say that, as in other instances. The text of Article 2.4.2 does not contain such limitation. To get to that result, the following steps must be taken: break the grammatical structure of the Phrase; ignore the changes in the final Dunkel Draft; ignore the defined term "margin of dumping"; ignore the coinciding ordinary meaning of "during … period" and "during … phase"; transpose the Phrase into the second sentence of Article 2.4.2; deduce from the word "phase" that the *Anti-Dumping Agreement* refers to anti-dumping "phases" when it in fact refers to anti-dumping proceedings; read the 11 words "to determine the existence, degree and effect of any alleged dumping" into the Phrase;

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[109] "*Determination de l'existence d'un dumping"; "Determinacion de la existencia de dumping*"; Vienna Convention, Article 33(3): "The terms of the treaty are presumed to have the same meaning in each authentic text".

[110] For example: Article 11 (footnote 21) cross-refers to "paragraph 3 of Article 9"; Article 11 (footnote 22) cross-refers to "subparagraph 3.1 of Article 9"; Article 9.3.3 cross-refers to "paragraph 3 of Article 2"; Article 9.4 cross-refers to "paragraph 10 of Article 6", "paragraph 8 of Article 6" and "subparagraph 10.2 of Article 6"; Article 4.4 cross-refers to "paragraph 6 of Article 3"; Article 10.1 cross-refers to "paragraph 1 of Article 7" and "paragraph 1 of Article 9".

[111] For example: Article 11.4 cross-refers to "The provisions of Article 6 *regarding evidence and procedure* …"; Article 7.5 cross-refers to "*The relevant provisions of* Article 9 …".

[112] For example: Article 11.5 cross-refers to Article 8 "*mutatis mutandis*"; Article 12.3 cross-refers to Articles 11 and 10 "*mutatis mutandis*".

[113] Appellate Body Report, *US – Softwood Lumber V*, paras 93 ("… which includes, of course, Article 2.4.2. …") and 99 ("… Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*, an anti-dumping duty can be levied only on a dumped product. *For all these purposes*, the product under investigation is treated as a whole …").

conclude, *a contrario*, that the obligation does not apply outside an original proceeding; rely on an alleged object and purpose that is manifestly absurd or unreasonable; ignore the absence of any such intent on the part of the Members; and ignore the preparatory work.

- Article 5

178. The European Communities next considers Article 5 of the *Anti-Dumping Agreement*, this being the provision to which the United States first refers in its defence. According to the United States, Article 5 limits its application to "the investigation phase of an anti-dumping proceeding".[114] However, Article 5 does not refer to the "investigation phase". It refers to investigation to "determine the existence, degree and effect of any alleged dumping".

179. As underlined above, the European Communities agrees that the provisions of Article 5 are limited to original proceedings, precisely because of the limiting words "to determine the existence, degree and effect of any alleged dumping" that appear in Article 5.1, to which the other provisions of Article 5 refer.

180. The parties agree that Article 5.1 refers to "an investigation to determine the existence, degree and effect of any alleged dumping"; that through a series of cross-references the other provisions of Article 5 that refer to investigations equally refer to "an investigation to determine the existence, degree and effect of any alleged dumping"; that Article 5 does not contain a definition of the word "investigation" for the purposes of the *Anti-Dumping Agreement*; and that there are no cross-references between Articles 2 and 5.

181. Titles do not themselves generally contain or create rights or obligations. The title of Article 5 does not define its subject matter. The purpose of a title is to quickly convey to a reader the essential content of an article, part or annex. The *Anti-Dumping Agreement* and the *GATT 1994* contain several definitions, but no definition of the term "investigation". The Members were aware of definitions, discussing them at length during the preparatory work, and used them when they sought a particularly high degree of consistency. The Members chose, however, not to define the term "investigation" (or for that matter, the terms "proceeding" and "review"), and those choices must be respected. In these circumstances, it would be an error to interpret the *Anti-Dumping Agreement*, under the guise of context or otherwise, as if Article 5 contains a definition of "investigation", when manifestly it does not.

182. The European Communities does not agree that it is natural to read into Article 2.4.2 the 11 words "to determine the existence, degree and effect of any alleged dumping", an exercise that would significantly contribute to completely changing the ordinary meaning of the Phrase. Nor does it consider that it is natural to interpret Article 2 by reference to provisions that the reader has not yet even reached (Article 5), and absent any definition or cross-reference. Nor does it consider that it is natural to read the Phrase in a manner that is grammatically erroneous. Nor does it consider that it is natural to assume that all the Members intended such a result, given that they chose not to use the various simple means at their disposal to achieve it (different drafting, definitions, cross-references), and when the evidence overwhelmingly supports the view that the Members intended no such thing.

183. On the contrary, the European Communities considers that it is natural to read Article 2 as containing the consistent *methodologies* for determining "dumping" and "margins of dumping". The Phrase must be read in the only manner that is grammatically correct. Therefore, the term "during … phase" must be interpreted as synonymous with "during … period", given that the ordinary meanings coincide. Furthermore, given the repeated references to the investigation period in Article 2,

[114] US First Written Submission, para. 101.

especially taken together with the grammatical link, and given the inherent logic of and even necessity for such a rule, the Phrase must be read as referring to the investigation period. Finally, the European Communities considers that it is most natural to give the word "investigation" its ordinary meaning; and most natural to read the words "to determine the existence, degree and effect of any alleged dumping" in Article 5.1 not as redundant, but rather as delimiting the scope of the particular type of investigation with which Article 5 is concerned.

- Article 6

184. Consistent with the progressive analysis of the context, the European Communities turns to the next provision of the *Anti-Dumping Agreement*: Article 6. The European Communities argues that the application of the word "investigation" in Article 6 to changed circumstances and sunset proceedings is context supporting its claim.

185. Article 6 of the *Anti-Dumping Agreement* apply to "reviews" within the meaning of Article 11 of the Anti-Dumping Agreement because of the express cross-reference from Article 11.4 to Article 6. The European Communities notes that Article 11.4, cross-referring to the provisions of Article 6 regarding evidence and procedure, does not contain the words "*mutatis mutandis*", such as are used in Articles 11.5 and 12.3. Consequently, absent any further express cross-reference, the relevant provisions of Article 6 apply, without any modification, to changed circumstances and sunset proceedings. The European Communities notes that the relevant provisions of Article 6 refer repeatedly to an "investigation". Consequently, a plain reading of the text supports the view that an investigating authority engaged in the conduct of a changed circumstances or sunset proceeding is engaged in an "investigation" within the meaning of these provisions. The European Communities further notes that this is consistent with US municipal anti-dumping law, which refers expressly to "changed circumstances review investigations" and "sunset review investigations".[115] In conclusion, the meaning of the word "investigation" in these provisions is not limited to "an investigation to determine the existence, degree and effect of any alleged dumping". This supports the view of the European Communities that the meaning of the word "investigation" in the Phrase is also not limited to the type of investigation conducted in original proceedings.

186. The method by which it is confirmed that the relevant provisions of Article 6 apply to changed circumstances and sunset proceedings does not have any bearing on this analysis. To reason that "but for" the cross-reference in Article 11.4 the relevant provisions of Article 6 would be limited to investigations in *original* proceedings is to pre-judge the very question into which we are supposed to be enquiring, because such reasoning is based on the (erroneous) premise that the word "investigation" has the special meaning *original* investigation throughout the *Anti-Dumping Agreement*.

187. Furthermore, the European Communities notes that in a US administrative review the investigating authority makes two determinations: it not only establishes final liability for payment on a retrospective basis; but at the same time it reviews and changes (that is, varies) the "cash deposit rate", that is, the anti-dumping duty rate at which the measure will be prospectively applied until the next administrative review. The European Communities considers that this second determination varying the duty rate is *also* subject to the obligations set out in Article 11.2, which refers expressly to a proceeding in which the duty is "varied" in this way. This is confirmed by footnote 21, which states that the determination of final liability for payment *itself* is not a review, indicating that any variation of the duty is; and by footnote 22, which again confirms the distinction between final assessment proceedings and changed circumstances proceedings. The European Communities does not express a view on whether or not the United States is *required*, when conducting a final assessment proceeding, to also review the duty rate. The European Communities considers only that if an investigating

[115] See Section III.B.2(c)(iv)(a).

authority chooses to rely on or calculate a varied duty rate, it must do so in accordance with the provisions of Article 11.2. The European Communities sees no other provisions of the *Anti-Dumping Agreement* that deal directly with the variation of the duty rate.

188. Accordingly, the European Communities concludes that the provisions of Article 6 also apply, without modification, to the variation of the duty rate. It thus further concludes that the variation of the duty rate also involves an "investigation" within the meaning of Article 6. It notes that the calculation of an exporter's margin of dumping for the purposes of a variation of the rate of duty, and the calculation of an exporter's margin of dumping for the purpose of retrospective assessment of final liability for payment, are based on identical facts and investigative activity, and are in these respects inseparable. The European Communities does not see how the United States may be permitted to see these identical and inseparable facts and activities in one way for one purpose (there is an investigation for the purposes of varying the rate of duty) and in another way for another purpose (there is no investigation for the purposes of calculating final liability).

189. In conclusion, Article 6 of the *Anti-Dumping Agreement* supports the claims of the European Communities.

- Article 18

190. According to the United States, "Article 18.3 of the AD Agreement explicitly recognizes the difference between investigations, which may lead to the imposition of a measure, and "reviews" of existing measures".[116] Thus, the United States considers that the word "investigations" in Article 18.3 means original proceedings and that this indicates that the word "investigation" has that particular meaning throughout the *Anti-Dumping Agreement*, including in Article 2.4.2.

191. Article 18.3.1 indicates that where, as in the present case, the measures at issue are "refund procedures under paragraph 3 of Article 9" in which the authorities investigate "margins of dumping", then in the first refund procedure the investigating authorities are obliged to apply the same rules as were used in the original proceeding to determine "margins of dumping". Those rules are set out in Article 2, and include the comparison rules in Article 2.4.2. The European Communities concludes that Article 18.3.1 confirms its position in this case.

192. The European Communities does not believe that the word "investigations" in Article 18.3 is necessarily limited to the type of investigation conducted in original proceedings. Rather, the fact that Article 18.3 is "subject to" Article 18.3.1 suggests that "refunds" could be either "investigations" or "reviews". Given that Article 9.5 clearly indicates that duty assessments are *not* reviews[117], the only logical conclusion would be that "administrative review" proceedings do involve investigations, giving that word its ordinary meaning.

193. In any event, even if the word "investigations" in Article 18.3 did carry the special meaning argued for by the United States, it would still not be the case that Article 18.3 defines the word "investigation" for the purposes of the *Anti-Dumping Agreement*. The review of the use of the word "investigation" in the *Anti-Dumping Agreement* leads the European Communities to the conclusion that it does not have a particular special meaning throughout the *Anti-Dumping Agreement* (that is, investigations in original proceedings); but that in each case its meaning must be discerned through the application of customary rules of interpretation of public international law. However Article 18.3 would be interpreted, that conclusion remains the same. Such an interpretation would therefore have no implications for our interpretation of the Phrase. The European Communities concludes that such

[116] US First Written Submission, para. 105.

[117] "… Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member …".

context as is provided by Article 18.3 does not support the United States' defence, but rather confirms the position of the European Communities.

- Different types of anti-dumping proceeding and the word "phase"

194. The United States refers to the "distinctions between investigations and other segments of an anti-dumping proceeding" and later on in the same paragraph to the "purpose of an assessment proceeding".[118] This is incoherent. One the one hand, the United States submits that there would be within a given anti-dumping proceeding various segments or phases, the first of these phases being the "original investigation". On the other hand, the word "proceeding" would refer to each of these segments or phases. The United States' analysis collapses in a morass of confusion because the United States is unable to state to what it is referring: phase or proceeding.

195. As noted above, such a proposition contradicts the terms of the *Anti-Dumping Agreement* which refers to five types of anti-dumping proceedings, not "phases". For instance, in Article 5.9, the word "proceedings" is used to refer to original proceedings. Article 9.5 refers to "duty assessment … proceedings". Article 9.5 also refers to "review proceedings", meaning changed circumstance or sunset proceedings.

(vi) Object and Purpose

196. According to the United States, the fact that Article 2.4.2 would apply to original investigations only is consistent with the distinction between original proceedings and other types of proceedings and the fact that they serve different purposes[119] and have different functions. The United States further argues that "the limited application of Article 2.4.2 to the investigation phase is consistent with the divergent functions of investigations and other proceedings under the *Anti-Dumping Agreement*".[120]

197. However, that the disciplines in Article 2 apply whenever an authority investigates or relies on a "margin of dumping" does not have as result that there is no longer any meaningful distinction between different types of anti-dumping proceedings.

198. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body noted that "Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins. As observed earlier, we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins" (emphasis added).[121] The findings of the Appellate Body are clear and logical. If investigating authorities rely on dumping margins for the purposes of proceedings other than original proceedings, the calculation of these margins will have to comply with the disciplines of Article 2.4. If Article 2.4 and 2.4.2 were limited to "original investigations", that would open up in the *Anti-Dumping Agreement* a vast loophole on the fundamental issue of how to calculate a margin of dumping. It would also make the results of an original investigation worthless.[122]

[118] US First Written Submission, para. 108.
[119] US First Written Submission, para. 108.
[120] US First Written Submission, para. 110.
[121] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 187.
[122] EC First Written Submission, para. 221.

(vii) No proof that Member intended special meaning (Article 31(4) of the Vienna Convention)

199. According to Article 31(4) of the Vienna Convention, "a special meaning shall be given to a term if it is established that the parties so intended". This means the Members and *all* the Members. The burden of proof is on the Member seeking to establish the intent, in this case, the United States. The first place to look for evidence of the Members' intent is the text of the *Anti-Dumping Agreement* and the *GATT 1994*. In this respect, it is appropriate to bear in mind that if the Members intend to give a term a special meaning, there is a simple means of doing that: define it, or at least use a cross-reference. The *Anti-Dumping Agreement* and the *GATT 1994* contain several definitions and many cross-references, but no definition of the word "investigation", and no cross-reference between Articles 2 and 5.[123]

200. In our view, if the Members had "intended" the Phrase to have the result argued for by the United States, they would not have tried to "implement" the definition of "margin of dumping" by fragmenting that definition and introducing internal inconsistencies in the *Anti-Dumping Agreement* and the *GATT 1994*; they would not have confined the Phrase to the first sentence of Article 2.4.2; they would not have grammatically tied the words "during the investigation phase" to the word "existence" as opposed to the word "established" (in English, French and Spanish); they would not have changed the drafting in the final Dunkel Draft precisely in order to achieve this grammatical link; they would have expressly defined or cross-referenced or referred to "an investigation to determine the existence, degree and effect of any alleged dumping"; they would have made express provision for investigating authorities to disregard the relevant data, as they did in Articles 2.2.1, 2.7, 9.4 and Annex II, paras 5 to 7; they would not have inserted the cross-reference to all of Article 2 in Article 9.3; and they would not have used the word "investigation" in Articles 2, 6 and elsewhere in the *Anti-Dumping Agreement* to refer to different types of anti-dumping proceeding.

201. The Phrase uses the words "during … phase" rather than the words "during … period". However, the ordinary meaning of these two phrases coincides, both terms referring to: "a distinct period". Furthermore, there are other words that appear only once in the *Anti-Dumping Agreement* without that meaning, mechanistically, that those words have a special meaning.[124] And there is no general mechanistic rule against synonyms. Taking all of these matters fairly into consideration, and considering the range of options open to the Members, it is simply not possible to reasonably conclude that *all* the Members intended, merely by the use of the word "phase", placed in a grammatically irrelevant position, to render the disciplines of Article 2 on the calculation of the defined term "margin of dumping" worthless – and this for all practical purposes, that is, for all final payments, given that the results of the first refund procedure are applied from the date on which provisional duties are first imposed.

202. The United States did not adduce any evidence in support of the proposition that the Members intended the Phrase to have the special meaning argued for by the United States. Instead, the European Communities refers to several pieces of evidence.

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[123] Panel Report, *US – FSC (Article 21.5 - EC)*, para 8.93: "… it is not clear to us that the term has obtained a universally agreed upon special meaning. … no such definition or meaning has been included in the *SCM Agreement* as a common understanding among WTO Members. Therefore … we do not impose a single rigid definition or interpretation of the term …"; confirmed by Appellate Body Report, *US – FSC (Article 21.5 - EC)*, para 138 and footnote 115.

[124] For example "accelerated" in Article 9.5; "fragmented" in footnote 13; "zero" in Article 9.4; "offset" in Article 11.2. In the context of the present dispute, what matters is the ordinary meaning of the word "investigation". The ordinary meaning of the word phase is of much less significance – and in any event merely confirms the position of the European Communities.

203. First, the European Communities refers to the preparatory work, and provides an analysis of those documents.[125] If all the Members had intended to take a step as important as that argued for by the United States, one might expect to find some trace of that decision in those documents, which run to several hundred pages, and span seven years. However, these documents offer no support to the United States. On the contrary, they support the European Communities.

204. Second, the European Communities refers to and has previously adduced a complete copy of the notifications made by 105 WTO Members to the WTO of municipal laws implementing the *Anti-Dumping Agreement*, together with an analysis of those laws. None of these notifications indicate any Member that has taken the same line as the United States. It is not to be expected that the Members would intend one thing when concluding the *Anti-Dumping Agreement*, and systematically do something different on implementation. Whether or not the legislation pre-dates the *WTO Agreement* is irrelevant, if it has subsequently been notified as implementing the *Anti-Dumping Agreement*. The European Communities also cites this in support of its case as "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention.

205. In the light of the preceding matters, it is clear that the United States has not established that all the WTO Members intended to give the special meaning to the Phrase argued for by the United States.

(viii) Preparatory Work

206. A correct interpretation of the Phrase according to Article 31 of the Vienna Convention does not leave the meaning ambiguous or obscure and does not lead to a result which is manifestly absurd or unreasonable. It just means that the United States' defence fails. And this is *confirmed* by the preparatory work. However, the interpretation adopted by the United States *does* lead to a result that is manifestly absurd or unreasonable. That interpretation cannot therefore prevail without a proper analysis of the preparatory work. The relevant aspects of the preparatory work may be summarised as follows.

207. A review of the negotiating history up until the first draft of a revised agreement from the chair shows that many Members repeatedly raised the issues of definitions; of the need for a consistent, balanced and fair approach; of changes in international trade; and of asymmetry and zeroing.

208. At the meetings of the MTN Negotiating Group on 31 January-2 February and 19-20 February 1990 the Members generally presented and discussed the submissions made up until that moment; and the Chairman circulated a paper "which could provide a structured agenda for future work". Aside from the continuing pre-occupation with the need for balance and definition issues, the discussion on the price comparison issue is revealing:

> Some delegations said that it was fair to have the principles of symmetry of price calculation and symmetry of adjustment in normal value and in export price inscribed in Article 2.6. One delegation said that the practice of comparing the average of the normal value with export prices on a transaction-by-transaction basis was duly described and commented upon in Table 1 of MTN.GNG/NG8/W/64, as well as in MTN.GNG/NG8/W/51/Add.1, paragraphs 14-15. This was an obvious area of prejudice against exporters; the Code should be amended to require comparison to be made between the weighted average of the normal value and the weighted average of the export price.
>
> …

[125] See below Section III.B.2(c)(viii).

> One delegation considered that it would be too large a burden upon the investigating authority if it were to investigate possible factors leading to adjustments, without the mentioning of such factors by the exporters. It was normal that even small exporters at least drew attention to the factors that might lead to adjustment, and that they provide evidence, since they alone had it. It did not think that on the basis of Article 2.6 there was a symmetry problem; it required a comparison of prices at the same level of trade and adjustments for factors that affected price comparability. The main reason for the practice of averaging on a transaction-by-transaction basis was to prevent exporters from practising selective dumping. This phenomenon was of great concern and manifested itself by successive attacks of unfair trade practices on different parts of an importing market. Such a strategy should not leave the authorities concerned without the possibility to react. It added, concerning the table in MTN.GNG/NG8/W/64, that it was common to break down the periods in case of significant fluctuations; differences should not be calculated in an artificial manner which for given time periods did not exist. However, it believed current practices took care of this.
>
> One delegation said that the problem remained that the method used against selective dumping was applied to all, by way of which protectionist barriers were raised across the board.
>
> One delegation said that there was a real problem of selective dumping whether on a regional basis or along product-lines within a single "like product" category. However, it also understood the concerns of some other delegations. The Group should try to find solutions to accommodate the legitimate concerns of both sides.

209. In this discussion ones sees the juxtaposition between the two sides and critically, one sees the express statement that the reason for the practice of comparing a weighted-average normal value with export prices transaction-by-transaction was to combat targeted dumping. Finally, one sees the launching of the solution "to accommodate the legitimate concerns of both sides" – that being Article 2.4.2 of the *Anti-Dumping Agreement* as it stands today.

210. Duty assessment was also discussed (see page 26 of the note), but only with reference to the question of the "lesser duty rule". Once again, it is highly significant that at no time was there any indication or suggestion in the discussion of different treatment for original investigations and retrospective assessments on the fundamental question of how to calculate a margin of dumping.

211. Further meetings of the MTN Negotiating Group followed on 21-22 March 1990[126], with a submission from the European Communities[127], and on 1 May 1990[128], discussing a submission by the Nordic Countries[129], broadly speaking maintaining its established line on symmetry and zeroing. The notes of the 1 May 1990 and 1 June 1990[130] meetings of the MTN Negotiating Group recall that the negotiations were continuing under the chair of Mr. C. R. Carlisle, Deputy Director-General. Japan submitted a further communication[131] stating:

> (b) The Code should set out clear guidelines that ensure symmetrical comparison of "normal value" and "export price" at the same level of trade, and eliminate the possibility of asymmetrical comparison, in disregard of certain costs actually incurred, and thereby artificially creating "dumping" when none actually exist. The Code should also be clarified, as another aspect of "symmetrical comparison", to disallow the practice of calculating "normal value" on an average basis and then to compare it to "export price" on an individual basis.

[126] MTN.GNG/NG8/16.
[127] MTN.GNG/NG8/W/74.
[128] MTN.GNG/NG8/17.
[129] MTN.GNG/NG8/W/76, at page 3.
[130] MTN.GNG/NG8/18.
[131] MTN.GNG/NG8/W/81.

212. Thus, the conclusions about the negotiating process are as follows:

213. First, the negotiators were acutely aware of and sensitive to the issue of definitions. Every single one of the documents in the negotiating history, without exception, whether drafted by Members or by the secretariat, refers to and discusses several definitions. The documents repeatedly and at length discuss the merits of having definitions or not having definitions. There is never one voice raised against the basic assumptions that underlie these discussions. There is consensus: it really matters whether or not something is defined; and the fact that some terms are defined and others not must be given meaning.

214. Second, there was general consensus on the need for a consistent, balanced and fair application of anti-dumping measures.

215. Third, there was broad consensus on both sides of the debate that international markets and business had evolved, and that the *Anti-Dumping Agreement* should be up-dated accordingly.

216. Fourth, at no point in the debate was it ever suggested that there should be different treatment for original investigations and retrospective assessments on the fundamental question of how to calculate a margin of dumping. This is so notwithstanding the fact that assessment and refund issues were repeatedly discussed in detail and at length, with regard to the "duty as a cost" and "lesser duty" issues.

217. Fifth, there is a clear and strong indication of consensus that the interests of both parties in the asymmetry and zeroing debate could be accommodated in the targeted dumping provisions that eventually became the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*.

218. Sixth, there is an overwhelming indication of consensus that the presence of the word "investigation", used repeatedly in what was to become Article 2.2 of the *Anti-Dumping Agreement*, did not mean that those provisions were to be irrelevant when a margin of dumping was calculated in retrospective assessments.

219. Following the MTN Negotiations, successive drafts of what eventually became Article 2.4.2 of the *Anti-Dumping Agreement* are referred to as: Carlisle I[132], Carlisle II, New Zealand I, New Zealand II, New Zealand II Ramsauer and the Dunkel draft. All of these drafts reflect the basic "solution to accommodate the interests of both sides" that emerged from the MTN Negotiating Group, as outlined above: symmetry, with an exception in the case of targeted dumping.

220. In all of the drafts, the word "investigation" or the words "investigation period" were used several times in the draft provisions that were eventually incorporated into Article 2, and particularly Article 2.2, of the current *Anti-Dumping Agreement*. At no time was there any indication or suggestion that this meant that these provisions would only apply in an original investigation, as opposed to any circumstances in which a margin of dumping was to be re-calculated, including a retrospective assessment. The United States has fully implemented the provisions of Article 2.2 in its municipal anti-dumping law also for "reviews", considering this "required or appropriate". In these circumstances, the mere introduction of the word "investigation" into what eventually became Article 2.4.2, in the New Zealand I text, was not such as to indicate any exceptional or special or limited or defined meaning for that word, distinguishing it from the other provisions of what eventually became Article 2.2. And this situation was not altered by the use of the word "phase", given the ordinary meaning of that word.

[132] MTN.GNG/NG8/W/83/Add.5 and Corr.1.

221. The negotiating history does not record which Member or Members – if any – proposed the particular form of words "during the investigation phase" or why. It may or may not be that one or more persons acting for the *United States* (but not all the other Members of the WTO) *thought* that retrospective assessments had thereby been excluded. However, they were mistaken. They erred because they made the mistake of assuming that the word "investigation" – as it may or may not be commonly understood in United States municipal anti-dumping law – *always* means in WTO anti-dumping law, an *original* investigation. But that is not true. Because, unlike many other terms, the word "investigation" is not defined in the *Anti-Dumping Agreement*. And a brief perusal of the *Anti-Dumping Agreement* reveals that the word "investigation" cannot be construed as *always* meaning an investigation "to determine the existence, degree or effect of any alleged dumping" – that is, an original investigation. They also made the mistake, apparently, of forgetting about the rules of interpretation of customary international law, as set out in the Vienna Convention, expressly incorporated into the *Anti-Dumping Agreement*, according to which terms must be given their ordinary meaning (referring to a dictionary where appropriate), having regard to context, object and purpose. If they had paused for thought for a moment – for *legal* thought as opposed to *wishful thinking* – they would have instantly recognised the errors in their thinking.

222. At the same time, *all the other Members* of the WTO, not knowing which Member or Members (if any) were at the origin of the relevant Phrase, and not being privy to the points of view now expressed by the United States before this Panel, would not have had any particular reason to associate the Phrase with the municipal anti-dumping law of the United States – nor draw inspiration from that law for the purposes of interpreting the revised text. In any event, not having the power of mind reading, they would have had no reason whatsoever, based on proper legal considerations of correct interpretation, to view the insertion of the words "investigation" (already littered about in the draft of Article 2.2) or "phase" as having the consequences argued for by the United States – namely the complete negation of all the concerns about asymmetry and zeroing consistently expressed throughout the MTN negotiations. There would be complete negation, because the results of the first retrospective assessment displace entirely the results of the original investigation. That would not be a balanced solution. Nor would it be a solution that "accommodates the legitimate interests of both sides".

223. And the final proof of that is that when the United States negotiators brought the text home, they were obliged, in the SAA, unilaterally, and in an attempt at *ex post* rationalisation of the negotiations, to insert the words they no doubt so dearly wished were in Article 2.4.2 – words that they had neglected or chosen not to place fairly and squarely on the table during the negotiations: "(not reviews)".

224. Making the reasonable assumption that the Members negotiated in full cognizance of the customary rules of interpretation of public international law, including Articles 31 and 32 of the Vienna Convention, it may reasonably be assumed that they negotiated in good faith, just as they agreed that the terms of the *Anti-Dumping Agreement* were to be interpreted in good faith.[133] In such negotiations, one would neither expect nor accept that what is clearly given, after lengthy debate, with one hand (agreement not to use asymmetry, absent targeted dumping), would be *entirely* taken away with the other, on the basis of an obscure, unarticulated, unilateral and erroneous "interpretation" of the relevant provisions. In these circumstances, insofar as the United States claims paternity of the Phrase, it cannot be allowed to rely on its own failure either to have the Phrase drafted so as to convey the meaning now argued for by the United States, or its failure to explain the supposed object and purpose of the Phrase to its negotiating partners, as an excuse for unilaterally ignoring other clear obligations clearly entered into. That would be inconsistent with basic requirements of legal security and legal stability in international relations, which also inform subsequent negotiations. Members are

[133] Panel Report, *Korea – Procurement*, para 7.100: "Parties have an obligation to negotiate in good faith just as they must implement the treaty in good faith". See also, Vienna Convention, Article 48.

not entitled to any reservation other than to the extent clearly provided for in the *Anti-Dumping Agreement*.[134]

(ix) Panel and Appellate Body Reports referred to by the United States

225. In support of its assertion that Article 2.4.2 is limited to original proceedings, the United States refers to various panel and Appellate Body reports.

226. The United States refers to the findings of the Panel in *US – Zeroing (EC)* which have been overruled by the Appellate Body and are therefore not legally relevant.

227. The United States also refers to the Appellate Body Report in *Brazil – Desiccated Coconut*. According to the United States, "Article 18.3 of the AD Agreement explicitly recognises the difference between investigations, which may lead to the imposition of a measure, and "reviews" of existing measures. In *Brazil – Desiccated Coconut (AB)*, the Appellate Body analysing an identical distinction in Article 32.3 of the SCM Agreement, noted that the imposition of "definitive" duties ends the investigative phase".[135]

228. However, the United States does not provide any quotation. Footnote 116 in the US First Written Submission refers to "p. 9" of the Appellate Body Report in that case which appears to mean "page 9". However, page 9 contains no statement by the Appellate Body, but merely summarises arguments of the parties.

229. *First*, the Appellate Body has never stated in that case that "the imposition of "definitive" duties ends the investigative phase" as alleged by the United States. In particular, the Appellate Body makes no reference to an investigation "phase". In that respect, the European Communities would like to draw the Panel's attention to the weakness of references such as these which are even not quotations and the non-transparent manner in which they are presented to the Panel by the United States. *Second*, in that dispute, the Appellate Body was not concerned with considering the meaning of the word "investigation" in general terms, but about the transitional provisions of the *SCM Agreement* and its relationship with *GATT 1994*. The European Communities therefore disagrees with the United States' assertion that the Appellate Body was in that case, "analysing [the] … distinction in Article 32.3" of the *SCM Agreement* between investigations and reviews. This is simply not an accurate description of that case. In that case, the Appellate Body had to determine whether *GATT 1994* Article VI and the *SCM Agreement* apply to a countervailing duty imposed pursuant to an investigation initiated by Brazil pursuant to an application for an investigation filed prior to the entry into force of the WTO Agreement for Brazil. In this context, the Appellate Body considered Article 32.3 of the *SCM Agreement* as a clear statement that for countervailing duty investigations or reviews the dividing line between the application of the GATT 1947 system of agreements and the WTO Agreement is to be determined by the date on which the application was made for the countervailing duty investigation or reviews.[136]

230. The United States refers to the Appellate Body findings in *US - OCTG Sunset Reviews.*[137] This case does not, however, support the United States in the present dispute. Indeed, in that case, the Appellate Body dealt with an entirely different issue, i.e. the application of rules on cumulation in sunset reviews. The European Communities agrees that Article 3.3 of the *Anti-Dumping Agreement* is limited to original proceedings, given the cross-reference to Articles 5.8 and 5.1 which are expressly limited by their own terms to original proceedings. That has no bearing on the meaning of the word

[134] Article XVI.5 of the WTO Agreement.
[135] US First Written Submission, para. 105.
[136] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.
[137] US First Written Submission, para. 106.

"investigation" in Article 2.4.2 of the *Anti-Dumping Agreement*. In fact, that case supports the European Communities' position to the extent that the Appellate Body notes that when the rationale for a certain provision applies to different types of anti-dumping proceedings, it would be anomalous to read the *Anti-Dumping Agreement* as limiting such provisions to original proceedings.[138]

231. The United States' reference to the Panel's findings in *US – DRAMs* is inappropriate.[139] The full quotation reads:

> In this regard, we note that Korea has not argued before us that an Article 9.3 duty assessment procedure should be included within the notion of "investigation" for the purpose of Article 5.8. In the context of Article 5 of the AD Agreement, it is clear to us that the term "investigation" means the investigative phase leading up to the final determination of the investigating authority.

232. In the first place the European Communities takes note that the United States does not quote the full text of footnote 519, nor even the full text of the second sentence of that footnote. Rather, it chooses to omit the important opening words "In the context of Article 5 of the AD Agreement …". This probably reflects an awareness on the part of the United States that the meaning of the word "investigation" in Article 2.4.2 is an entirely different legal matter from the meaning of that word in various provisions of Article 5 of the *Anti-Dumping Agreement*. Furthermore, the existence of those opening words also indicates that an important and significant degree of care was being exercised by the drafter of the panel report in *US – DRAMs*. The drafter took care to limit the observation to the context of Article 5 – saying nothing about Article 2.4.2 – and with good reason. As repeated several times already, it is not disputed that Article 5 of the *Anti-Dumping Agreement* only deals with original proceedings. Actually, this statement of the Panel would support the European Communities' case in that it implies that there may be investigative phases other than the one leading up to the final determination of the investigating authority in the context of Article 5.

233. The United States also refers[140] to para. 7.70 of the Panel Report in *US – Corrosion-Resistant Steel Sunset Reviews* which states:

> [T]he text of paragraph 8 of Article 5 refers expressly to the termination of an investigation in the event of *de minimis* dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews.

234. The European Communities agrees that the outcome in that panel on this point is correct. Article 5.8 of the *Anti-Dumping Agreement* refers expressly to "[a]n application under paragraph 1 …" and paragraph 1 of Article 5 refers expressly to "an investigation to determine the existence, degree and effect of any alleged dumping" – that is, to an original investigation. That said, the European Communities would point out that in that case the panel was enquiring into whether or not certain obligations contained in Article 5 apply only to original investigation, or also in other types of investigation or proceeding. The panel was not enquiring into the meaning of the word "investigation" in Article 2.4.2 of the *Anti-Dumping Agreement*, which is an entirely different legal matter. There was no argument and no findings in that case on the meaning of the word "investigation" in Article 2.4.2 of the *Anti-Dumping Agreement*. In these circumstances, the case provides no support for the position of the United States in these proceedings.

[138] Appellate Body Report, *US – OCTG Sunset Reviews*, para. 297.
[139] US First Written Submission, para. 106.
[140] United States first written submission, para 101.

(x) Article 2.4.2 second sentence

235. The United States submits that the prohibition of zeroing in duty assessment proceedings would be inconsistent with Article 2.4.2 which provides for an alternative "targeted dumping" methodology that may be utilized in certain circumstances. According to the United States, the implication of a general prohibition of zeroing is that the targeted dumping clause would be reduced to inutility since the targeted dumping methodology mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons.[141]

236. As a preliminary matter, the European Communities would like to recall that the United States does not argue that the use of zeroing in its administrative review proceedings is justified by the fact that they address targeted dumping within the meaning of Article 2.4.2 second sentence. In other words, the United States is not defending itself by submitting that its investigating authorities have found a pattern of export prices which differ significantly among different purchasers, regions or time periods, and that an explanation has provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

237. Actually, this third method can only be used by investigating authorities in exceptional circumstances. According to the wording, the circumstances justifying the use of that exceptional method is where the investigating authorities find a "pattern" of "export prices" which "differ significantly among purchasers, regions or time periods". This provision thus focuses on the existence of a "pattern" which affects "export prices". The second condition to use this methodology is that these differences cannot appropriately be addressed by one of the two symmetrical comparison methods. These conditions are not fulfilled with respect to the measures at issue – which the United States does not dispute.

238. Since the United States does not submit that the second sentence of Article 2.4.2 is applicable to the administrative review proceedings, the European Communities considers that the issue of whether zeroing is or not permitted under the asymmetrical comparison method contained in that provision is not an issue here.

239. In any event, the European Communities would like to respond to the arguments submitted by the United States as follows.

240. First, the United States refers to a "general prohibition of zeroing". However, recourse to targeted dumping is an exceptional remedy under the Anti-Dumping agreement and is of no relevance as regards the fairness of otherwise of zeroing in other situations.

241. In *US – Softwood Lumber (21.5)*, the Appellate Body expressly noted that "the methodology in the second sentence of Article 2.4.2 is an exception. […] Being an exception, the comparison in the second sentence of Article 2.4.2 alone cannot determine the interpretation of the two methodologies provided in the first sentence, that is, transaction-to-transaction and weighted average-to-weighted average".[142]

242. Second, in any case, there appears to be a number of ways of responding to targeted dumping that do not involve zeroing, such as restricting the universe of export transactions to those in the pattern in which case there would be no mathematical equivalence.

[141] US First Written Submission, para. 112.
[142] Appellate Body Report, *US – Lumber (Article 21.5)*, para. 97.

243. In *US – Lumber (21.5)*, the Appellate Body expressed this by saying that:

> the United States' "mathematical equivalence" argument assumes that zeroing is prohibited under the methodology set out in the second sentence of Article 2.4.2. The permissibility of zeroing under the weighted average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is not before us in this appeal, nor have we examined it in previous cases. We also note that there is considerable uncertainty regarding how precisely the third methodology should be applied.[143]

244. Third, the United States' mathematical equivalence argument is simply legally erroneous. As underlined by the Appellate Body, "[o]ne part of a provision setting forth a methodology is not rendered inutile simply because, in a specific set of circumstances, its application would produce results that are equivalent to those obtained from the application of a comparison set out in another part of that provision".[144]

245. The United States further submits that "if the Appellate Body is correct that dumping may only be determined for the product as a whole, there is no textual basis for inferring that the targeted dumping comparison methodology is an exception to that provision".[145]

246. The methodology described in Article 2.4.2 second sentence applies in very specific circumstances. It permits a comparison between a weighted average normal value and the export transactions that fall within the pattern. Excluding the export transactions outside the pattern would not be inconsistent with the basic rule that the dumping margin must be calculated for the product as a whole because the targeted dumping provisions are an exception to the normal rule which permits an authority to unmask targeted dumping that would otherwise be hidden.

247. All of this reasoning was effectively confirmed by the Appellate Body in *US – Zeroing (EC)*, and with even greater force in *US – Zeroing (Japan)*.

(d) Article 9.3

248. In its First Written Submission, the European Communities has indicated that the provision in Article 9.3 according to which "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2" clearly means that Article 2.4.2 applies in administrative reviews as well. The United States spends much time in its First Written Submission in trying to argue why Article 2.4.2 would not be applicable to administrative reviews, on the basis of Article 9.3. More specifically, the United States submits that Article 2.4.2 is not applicable to assessment proceedings because the general reference to Article 2 in Article 9.3 necessarily would include any limitations found in the text of Article 2 and that since Article 2.4.2 would be limited by its own terms to original investigations, such limitation would be included in the reference to Article 2 in Article 9.3.[146]

249. For the reasons already set out in this submission, this argumentation has no merit. The US method is inconsistent with Article VI of the *GATT 1994* and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*. Although these issues have largely been dealt with above, for the convenience of the Panel, in this section the European Communities groups together and re-visits various issues related to the interpretation of Article 9.3, and Article 9 more generally.

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[143] Appellate Body Report, *US – Lumber (Article 21.5*), para. 98.
[144] Appellate Body Report, *US – Lumber (Article 21.5)*, para. 99.
[145] US First Written Submission, para. 116.
[146] US First Written Submission, para. 120.

250. In the first place, the interpretation put forward by the United States is directly contradicted by the text itself which indeed refers to Article 2. The cross-references in the *Anti-Dumping Agreement* make express provision when they refer only to certain paragraphs or sub-paragraphs of an article, particularly when the cross-reference is between different articles[147], or when they are restricted in some way[148], or when the provision to which reference is made is to be modified when applied in certain circumstances.[149] There is no such express provision in Article 9.3. Article 9.3 does not provide, for example, that the amount of the anti-dumping duty is not to exceed the margin of dumping as provided under Article 2, with the exception of Article 2.4.2; or as provided in Article 2, with the exception of the rules for comparing duly adjusted normal value and export price; or *mutatis mutandis*. This confirms that, in the context of Article 9.3, a "margin of dumping" is to be established by reference to the whole of Article 2, consistent with the use of the defined term "margin of dumping".[150]

251. The United States tries to find support for its position in the Panel's Report *Argentina – Poultry* according to which "Article 9.3 does not refer to the margin of dumping established "under Article 2.4.2", but to the margin established "under Article 2". In our view, this simply means that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2".[151] This statement simply confirms that the duty applied cannot exceed the dumping margin as established in accordance with Article 2, including all its provisions. What the panel is saying is that the reference to Article 2 in Article 9.3 includes the entire Article 2, including Article 2.1, 2.4 and 2.4.2.

252. In addition, it is important to recall the context of these findings of the panel. In that dispute, Argentina had imposed a variable duty which was based on the difference between the invoiced f.o.b. price and a "minimum export price" calculated for each exporter found to have dumped. Therefore, depending on the amount of the invoiced f.o.b. price for a given import transaction, this difference (and the resultant duty) could sometimes exceed the dumping margin "calculated for the relevant exporter during the investigation". Brazil claimed that this was inconsistent with Article 9.3 and Article 2.4.2, particularly because of the reference in Article 2.4.2 to the words "during the investigation phase". Brazil claimed that the variable anti-dumping duties at issue are inconsistent with Article 9.3 because they are collected by reference to a margin of dumping established at the time of collection and that duties cannot exceed the margin of dumping established during the investigation. The panel correctly concluded that the variable duties at issue are not inconsistent with Article 9.3 simply because they are collected by reference to a margin of dumping established at the time of collection. The panel expressly noted that Brazil had not argued that the anti-dumping duties actually collected by the authorities exceeded the margin of dumping prevailing at the time of duty collection.[152]

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[147] For example: Article 11 (footnote 21) cross-refers to "paragraph 3 of Article 9"; Article 11 (footnote 22) cross-refers to "subparagraph 3.1 of Article 9"; Article 9.3.3 cross-refers to "paragraph 3 of Article 2"; Article 9.4 cross-refers to "paragraph 10 of Article 6", "paragraph 8 of Article 6" and "subparagraph 10.2 of Article 6"; Article 4.4 cross-refers to "paragraph 6 of Article 3"; Article 10.1 cross-refers to "paragraph 1 of Article 7" and "paragraph 1 of Article 9".

[148] For example: Article 11.4 cross-refers to "The provisions of Article 6 *regarding evidence and procedure* …"; Article 7.5 cross-refers to "*The relevant provisions of* Article 9 …".

[149] For example: Article 11.5 cross-refers to Article 8 "*mutatis mutandis*"; Article 12.3 cross-refers to Articles 11 and 10 "*mutatis mutandis*".

[150] Appellate Body Report, *US – Softwood Lumber V*, paras 93 ("… which includes, of course, Article 2.4.2. …") and 99 ("… Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*, an anti-dumping duty can be levied only on a dumped product. *For all these purposes*, the product under investigation is treated as a whole …").

[151] US First Written Submission, para. 121.

[152] Panel Report, *Argentina – Poultry*, para. 7.364.

253. The United States further submits that the European Communities' position that investigating authorities cannot make asymmetrical comparisons in assessment proceedings is contradicted by the fact that Article 9 provides for comparisons between weighted average normal values and individual export transactions, in particular in Article 9.4(ii).[153]

254. Article 9.4(ii) relates to sampling and has thus no relevance to the present dispute, in which sampling is not an issue.

255. Even if Article 9.4(ii) of the *Anti-Dumping Agreement* is taken as a confirmation that Members may apply a system of so-called "variable duties", by which a duty may be imposed if and to the extent by which the price of an export transaction is below a *prospective* normal value, the essential fact remains that the provision refers to a *prospective* normal value. Thus, the provision does not mean, and cannot be taken to mean, that in a *final* assessment of anti-dumping duties, based on *actual* (contemporaneous) exporter-specific margins of dumping, the basic disciplines governing the calculation of a margin of dumping, contained in Article VI of the *GATT 1994* and Article 2 of the *ADA*, no longer apply. The collection of anti-dumping duties on the basis of *prospective* normal values is only an intermediate stage of collection, since it is subject to final assessment under Article 9.3.1 and "a prompt refund, upon request" under Article 9.3.2. Members must ensure that the obligations in Article 9.3 are complied with, particularly whenever the "amount of the anti-dumping duty is assessed on a prospective basis"; and there is nothing in Article 9.4 that releases authorities from the obligations in Article 9.3, including Articles 9.3.1 and 9.3.2. In short, the possibility for Members to use a variable duty system such as that referred to in Article 9.4(ii), based on a *prospective* normal value, offers no support for the position of the United States.

256. The United States then argues that "the calculation of transaction-specific anti-dumping duties in assessment reviews has been found consistent with the ADA"[154] and refers again to the panel's report in *Argentina – Poultry* in that respect.

257. However, in *Argentina – Poultry*, the panel has never stated that the calculation of transaction-specific anti-dumping duties in assessment reviews was consistent with the *Anti-Dumping Agreement*. In that case, the question arose as to whether the fact that anti-dumping duties are collected by reference to a margin of dumping established at the time of collection was consistent with the *Anti-Dumping Agreement*. The Panel concluded that the imposition of variable duties were consistent with the *Anti-Dumping Agreement*, referring *inter alia* to Article 9.4(ii) of the *Anti-Dumping Agreement* which, according to the panel, "is describing the use of variable anti-dumping duties, which are calculated by comparing actual (i.e. at the time of collection) export price with a prospective normal value".[155] However, the Panel clearly clarifies that "a properly designed variable duty system would include a refund mechanism consistent with Article 9.3.2".[156] In addition, the Panel expressly noted that it does not examine whether the anti-dumping duties actually collected by the Argentinean authorities exceeded the margin of dumping (prevailing at the time of duty collection) since Brazil had not made this claim before the panel.[157] The panel has thus admitted that one issue is whether the fact that variable anti-dumping duties may be collected, i.e. on a transaction-basis level and another issue is whether such anti-dumping duties do not exceed the relevant dumping margin.

258. The United States further submits that "the obligation set forth in Article 9.3 to assess no more in anti-dumping duties than the margin of dumping, is similarly applicable at the level of

[153] US First Written Submission, para. 124.
[154] US First Written Submission, para. 126.
[155] Panel Report, *Argentina – Poultry*, para. 7.359.
[156] Panel Report, *Argentina – Poultry*, para. 7.362.
[157] Panel Report, *Argentina – Poultry*, para. 7.364.

individual transactions".[158] The United States quotes various findings of panels in *US – Zeroing (EC)* and *US – Zeroing (Japan)* to support its contention that in duty assessment proceedings, the term "margin of dumping" can be interpreted as applying on a transaction-specific basis.[159]

259. However, this is contradicted by the text and context of the *Anti-Dumping Agreement*. Article 6.10 of the *Anti-Dumping Agreement* provides relevant context for the interpretation of the term "margin of dumping". It provides that "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned for the product under investigation". Therefore, under Article 6.10, margins of dumping for a product must be established for exporters or foreign producers. The text of Article 6.10 does not limit the application of this rule to original investigations and is thus relevant to duty assessment proceedings governed by Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*. As noted by the Appellate Body in *US – Zeroing (EC)*:

> We note that in *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body confirmed that the term "margin of dumping" in the *Anti-Dumping Agreement* in general refers to the margins of dumping for exporters or foreign producers.[230] The Appellate Body made that observation in relation to the interpretation of the term "margin of dumping" in Article 5.8 of the *Anti-Dumping Agreement*. The Appellate Body also referred to a previous report, *US – Hot-Rolled Steel*, where the Appellate Body indicated, in the context of Article 2.4.2 of the *Anti-Dumping Agreement*, that the term "margin of dumping" "means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product". In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated, in the context of sunset reviews under Article 11.3 of the *Anti-Dumping Agreement*, that, "should investigating authorities choose to rely upon dumping margins in making their ... determination, the calculation of these margins must conform to the disciplines of Article 2.4."[232] The Appellate Body noted that there are "no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins". The Appellate Body made it clear in *US – Hot-Rolled Steel*, in the context of Article 2.4.2, that the term "margin of dumping" refers to margins of dumping for exporters and foreign producers. Therefore, the Appellate Body's findings in *US – Corrosion-Resistant Steel Sunset Review* imply that the margins of dumping that might be established in a sunset review under Article 11.3 are margins of dumping for exporters or foreign producers. Establishing margins of dumping for exporters or foreign producers is consistent with the notion of dumping, which relates to the foreign producer's or exporter's pricing behaviour. Indeed, it is the exporter, not the importer, that engages in practices that result in situations of dumping. For all of these reasons, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*, margins of dumping are established for foreign producers or exporters.[160]

260. By stating that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2", Article 9.3 sets a requirement regarding the amount of the assessed anti-dumping duties.[161] However, it does not prescribe any specific methodology according to which the duties should be assessed. In particular, it is not suggested that final anti-dumping duty cannot be assessed on a transaction- or importer-specific basis. However, in any case, the anti-dumping duty

[158] US First Written Submission, para. 127.
[159] US First Written Submission, paras. 129 – 132.
[160] Appellate Body Report, *US – Zeroing (EC)*, para. 129.
[161] Appellate Body Report, *US – Zeroing (EC)*, para. 130.

cannot exceed the dumping margin as established in accordance with Article 2. As explained by the Appellate Body in *US – Zeroing (Japan)*:

> Under any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter. To the extent that duties are paid by an importer, it is open to that importer to claim a refund if such a ceiling is exceeded. Similarly, under its retrospective system of duty collection, the United States is free to assess duty liability on a transaction-specific basis, but the total amount of anti-dumping duties that are levied must not exceed the exporters' or foreign producers' margins of dumping.[162]

261. The United States further argues that an exporter-based approach to Article 9.3 of the *Anti-Dumping Agreement* is unreasonable because importers for which the amount of dumping is greatest will have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports. This argument is based on one very obvious flaw: exporters can dump (i.e. discriminate between normal value and export price); importers cannot. Therefore, only exporters can have margins of dumping. If an exporter has a dumping margin of zero, it may be that this margin is composed of the aggregation of transactions with two importers with the first importer having a dumping amount of 5 and the second of -5. In this situation, no duty can be collected from the first importer because the exporter has not dumped.

262. The United States further refers to Article 9.4(ii) to support its contention that in a prospective system, the amount of liability for payment of anti-dumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. According to the United States, if in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of anti-dumping duties, without regard to whether or not prices of other export transactions exceed normal value, there is no reason why liability for payment of anti-dumping duties may not be similarly assessed on the basis of export price less than normal value in the retrospective systems.[163]

263. This argument is not convincing. As a matter of principle, under any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter. To the extent that duties are paid by an importer, it is open to that importer to claim a refund if such a ceiling is exceeded. The collection of anti-dumping duties on the basis of *prospective* normal values is only an intermediate stage of collection, since it is subject to final assessment and "a prompt refund, upon request" under Article 9.3.2 of the *Anti-Dumping Agreement.* Similarly, under its retrospective system of duty collection, the United States is free to assess duty liability on a transaction-specific basis, but the total amount of anti-dumping duties that are levied must not exceed the exporters' or foreign producers' margins of dumping.[164]

264. Finally, the United States asserts that the provisions of Article 2.4.2 apply when determining the existence of margins of dumping during the investigation phase and do not apply to Article 9.3 proceedings.[165] In other words, the United States considers itself bound by the methodologies contained in Article 2.4.2 of the *Anti-Dumping Agreement* when calculating the original duty rates (and establishing cash deposits accordingly) but, when calculating the duties to be collected in assessment proceedings pursuant to Article 9.3, it can use any method. Again, the

[162] Appellate Body Report, *US – Zeroing (Japan)*, para. 162.
[163] US First Written Submission, par. 139.
[164] Appellate Body Report, *US – Zeroing (Japan)*, para. 162.
[165] Addendum: US Answers to the EC's Questions, para. 16.

European Communities notes that the interpretation suggested by United States is flatly inconsistent with all elements of the agreed rules of interpretation in the Vienna Convention. The relevant provisions of the *Anti-Dumping Agreement* cannot be interpreted so as to leave investigating authorities entirely free to decide the amount of duties to be collected.

3. Sunset Reviews

265. In its First Written Submission, the sole defence of the United States with respect to the claims of the European Communities concerning sunset reviews is that "the EC has not demonstrated that a calculation done in accordance with the EC's approach would result in zero or *de minimis* dumping margins in the cited cases, leading to a revocation of the order".[166]

266. The European Communities submits that to the extent that it has demonstrated that the measures concerned were WTO inconsistent, it is entitled to a finding in that respect and a recommendation that the United States brings its measures into conformity with it. The argument put forward by the United States that it is incumbent on the European Communities to demonstrate that the sunset reviews at issue would have resulted in a different outcome in case dumping margins would have been calculated without zeroing is therefore irrelevant. It is sufficient to demonstrate that the United States used a method which systematically and inevitably makes it more likely to find dumping (or higher margins of dumping).

267. With respect to the sunset reviews contained in the Annex to the request for establishment of the Panel, the European Communities submitted that the United States failed to comply with its obligations under the *Anti-Dumping Agreement* and the *GATT 1994* by relying on dumping margins calculated in prior investigation proceedings using zeroing and that in so doing, the United States violated Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement*.

IV. CONCLUSIONS

268. In conclusion, the European Communities would respectfully re-iterate its request that the Panel make the findings and recommendations requested in its first written submission.

[166] US First Written Submission, para. 154.

ANNEX C-2

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

TABLE OF CONTENTS

Page

I. INTRODUCTION 61

II. THE PANEL SHOULD GRANT THE US REQUEST FOR PRELIMINARY RULINGS 62

A. THE EC'S PANEL REQUEST CONTAINED MEASURES THAT WERE NOT IDENTIFIED IN ITS REQUEST FOR CONSULTATIONS 62

B. THE EC'S "18 MEASURES" FAIL FOR A LACK OF SPECIFICITY 65

C. THE EC'S REQUEST INCLUDED MEASURES WHICH WERE NOT FINAL AT THE TIME OF ESTABLISHMENT 67

III. THE PANEL SHOULD REJECT THE EC'S ARGUMENTS CONCERNING THE METHODOLOGIES IN ASSESSMENT PROCEEDINGS 69

A. US ASSESSMENT REVIEWS ARE DISTINCTIVELY DIFFERENT FROM INVESTIGATIONS 69

B. THE EC FAILED TO ESTABLISH THAT ARTICLE 2.4.2 APPLIES OUTSIDE OF AN INVESTIGATION 71

C. ARTICLE 9.3.1 DOES NOT REQUIRE AN "EXPORTER-ORIENTED" ANALYSIS 74

D. THE EC'S CHALLENGE WITH RESPECT TO AN ASYMMETRICAL METHOD OF COMPARISON WITHOUT JUSTIFICATION IS NOT APPARENT FROM THE EC'S PANEL REQUEST AND FIRST WRITTEN SUBMISSION 77

E. BECAUSE THE CHALLENGED MEASURES ARE BASED ON A PERMISSIBLE INTERPRETATION, THE PANEL SHOULD FIND THEM TO BE IN CONFORMITY WITH THE AD AGREEMENT 77

IV. THE EC HAS DISTORTED THE NEGOTIATING HISTORY OF THE AD AGREEMENT 77

V. CONCLUSION 84

TABLE OF REPORTS

Short Form	Full Citation
Argentina – Footwear Safeguard (Panel)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R
Argentina – Poultry (Panel)	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
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EC – Audiocassettes	GATT Panel Report, *EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, circulated 28 April 1995 (unadopted)
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EC – Cotton Yarn	GATT Panel Report, *EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, adopted 30 October 1995
Guatemala – Cement I (AB)	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998
Mexico – HFCS	Panel Report, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000
Mexico – Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
US – Carbon Steel (Panel)	Panel Report, *United States – Carbon Steel*, WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by the Appellate Body Report, WT/DS213/AB/R and Corr.1
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Certain EC Products (AB)	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001
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Short Form	Full Citation
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US – Zeroing (EC) (Panel)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
US – Zeroing (Japan) (Panel)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R
US – Zeroing (Mexico) (Panel)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, circulated to WTO Members 20 December 2007 (on appeal)

I. INTRODUCTION

1. In this dispute, the European Communities ("EC") has asked this Panel to read an obligation into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), notwithstanding the lack of any textual basis for the obligation that the EC proposes. The EC also would like the Panel to consider as binding Appellate Body reports finding "zeroing" in certain contexts inconsistent with the covered agreements, despite the absence of *stare decisis* in the WTO dispute settlement system. The EC goes so far as to argue that Article XVI:4 of the *Agreement Establishing the World Trade Organization* ("WTO Agreement") imposes on the United States some sort of continuing international obligation to eliminate "zeroing".

2. At the same time that the EC uses terms like "good faith" it presents the Panel with a wildly inaccurate version of the negotiating history of the AD Agreement, as discussed more fully below. In particular, not only did the EC never agree to any of the Uruguay Round proposals that would have limited or eliminated zeroing, the EC was one of the participants in the negotiations that had defended the use of zeroing under the similar language in the Tokyo Round Code and continued to use it after the WTO came into force. Indeed, the EC defended the use of zeroing under the WTO in the *Bed Linen* dispute. The United States is unsure which prospect it finds more disturbing, that the EC has knowingly presented this incorrect negotiating history, or that it did not bother to check the actual negotiating history before making its representations to the Panel. Far from a "unilateral" interpretation of the AD Agreement[1], the interpretation that the EC disparages is one that the EC itself held and advocated.

3. The United States has asked that this Panel remain faithful to its obligation under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), which calls on each panel to make its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. Moreover, the United States has emphasized that under Articles 3.2 and 19.2 of the DSU the Panel cannot add to or diminish the rights and obligations provided for in the covered agreements. Acceptance of the EC's interpretation of the AD Agreement, the GATT 1994, and the WTO Agreement would improperly add to the obligations of the United States under the covered agreements. Such a result would undermine the very security and predictability of the multilateral trading regime that the WTO dispute settlement system is designed to preserve.

4. The United States is confident that the Panel will conduct an objective assessment of the matter before it, and find that there is no general obligation to provide offsets for non-dumped transactions in assessment reviews. We believe that the Panel should find persuasive the reasoning of panels in four other disputes – *US – Zeroing (EC), US – Softwood Lumber Dumping (Article 21.5), US – Zeroing (Japan)* and *US – Zeroing (Mexico)* – which all conducted an objective assessment as required by Article 11 and found that "zeroing" was not inconsistent with the covered agreements outside the context of weighted average-to-weighted average comparisons in investigations.

5. In this rebuttal, the United States first responds to the EC's arguments against the US request for preliminary rulings. As the United States shows, the EC has added 14 measures to its panel request that were not identified in its consultations request. Under Articles 4 and 6 of the DSU, these measures cannot fall within the Panel's terms of reference. The EC's attempted reliance on prior Appellate Body reports cannot support its position that it was entitled to add 14 new measures to its panel request.

[1] EC Opening Statement at the First Substantive Meeting with the Parties, para. 14 ("EC First Opening Statement").

6. The United States also addresses the EC's attempt to include 18 measures, identified as the application or continued application of antidumping duties in 18 cases listed in the Annex to its panel request. These alleged measures were the subject of considerable debate at the first meeting with the Panel. As the United States explains, the EC failed to specifically identify these 18 "measures" as required by Article 6.2 of the DSU. The EC is trying to reach indefinite subsequent proceedings that were not identified in its panel request and that were not in existence at the time of that request. It now would like the Panel to treat any duties in the 18 cases as some type of free-standing measure, divorced from the underlying determinations. Such an approach is inconsistent with the requirement to identify the specific measures at issue.

7. The United States also objects to the EC's challenge to four preliminary measures. Under Article 17.4 of the AD Agreement, only those measures where "final action has been taken by the administering authorities" may be referred to a panel. The EC claims that the Panel should allow these preliminary measures, even though it has not demonstrated that the exception under Article 17.4 applies here. In fact, the EC asks the Panel to take into account so-called "specific circumstances" of this case that are not contained in the AD Agreement or anywhere else in the covered agreements.

8. The United States also addresses several arguments that the EC made in its first written submission, at the first substantive meeting with the parties, and in its answers to the Panel's questions concerning methodologies in assessment proceedings. At the meeting with the Panel, the EC seemed almost singularly focused on its flawed argument that Article 2.4.2 of the AD Agreement applies outside the context of investigations. In this submission, the United States demonstrates that, based on the application of customary rules of treaty interpretation, the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 is inextricably and uniquely linked to Article 5 investigations to determine the "existence, degree and effect" of dumping. The United States further rebuts the EC's assertion that Article 9.3.1 of the Antidumping Agreement requires an exporter-oriented analysis, and shows that the undesirable outcome of such a requirement would be to reward importers involved in the transactions priced furthest below normal value. Lastly, the United States demonstrates that it is not at all clear that the EC made a claim against the alleged use of the "third methodology" in Article 2.4.2 in assessment reviews.

II. THE PANEL SHOULD GRANT THE US REQUEST FOR PRELIMINARY RULINGS

A. THE EC'S PANEL REQUEST CONTAINED MEASURES THAT WERE NOT IDENTIFIED IN ITS REQUEST FOR CONSULTATIONS

9. The United States objects to the EC's addition of measures in its panel request that were not contained in its request for consultations. As the United States explained in its first written submission and at the first meeting with the Panel, a measure cannot fall within a panel's terms of reference unless it was first identified in the request for consultations.[2] Under Article 7.1 of the DSU, a panel's terms of reference are based on the complaining party's request for the establishment of a panel. In turn, Article 6.2 of the DSU provides that a panel request must "identify *the specific measures at issue*" in a dispute.[3] Under DSU Article 4.7, however, a Member may only request the establishment of a panel with regard to a measure upon which the consultations process has run its course. Finally, Article 4.4 of the DSU requires that the request for consultations state the reasons for the request, "including identification of *the measures at issue*".[4] There is thus a clear progression

[2] US First Written Submission, paras. 47-65; US Opening Statement at the First Substantive Meeting with the Parties, paras. 13-18. ("US First Opening Statement").

[3] Emphasis added.

[4] Emphasis added.

from consultations request to panel request, and measures not identified in the consultations request, but later identified in the panel request, cannot properly form part of the panel's terms of reference.[5]

10. The EC would have this Panel apply legal standards that are not found in the DSU. The EC asserts that there is no need for measures in the panel request to be identified in the request for consultations, as long as they "involve essentially the same matter" or "relate to the same matter" as those identified in the request for consultations.[6] Moreover, provided the additional measures have a "direct relationship" with the measures in the request for consultations, the EC claims that they are properly before the Panel.[7] The EC's interpretation disregards the text of Articles 4 and 6 of the DSU – a panel's terms of reference cannot include measures that were not the subject of a request for consultations – and should be rejected.

11. Here, the EC added 14 new proceedings, as well as an imprecise reference to the application and continued application of antidumping duties in 18 cases, to its panel request.[8] These measures were not identified anywhere in its consultations request, and pursuant to Articles 4 and 6 of the DSU, they are not within this Panel's terms of reference. This finding is supported by the Appellate Body in *US – Certain EC Products*, which agreed that the scope of measures subject to establishment of a panel is defined by the consultations request, and that new, legally distinct measures may not be added in the panel request.[9]

12. The EC erroneously relies on the Appellate Body report in *Brazil – Aircraft*, which is distinguishable from the matter before this Panel.[10] In that case, the Appellate Body considered whether certain regulatory instruments relating to the Brazilian regional aircraft export subsidies program PROEX were properly before the panel.[11] Canada had included new regulatory measures under PROEX in its panel request, but not in its request for consultations. The Appellate Body found that the new regulations "did not change the essence" of the export subsidies that were at issue in the dispute and included in the request for consultations, and that they therefore were properly before the panel.[12]

13. The critical question here is whether the measures added to the panel request are in essence the same measures as those identified in the consultations request. In *Brazil – Aircraft*, the new regulatory instruments were simply periodic re-enactments of the identical measures that were specified in a consultations request as part of Canada's challenge to payments under those measures. In this dispute, however, the EC identified in its consultations request separate antidumping measures that are legally distinct under US law, and added new and legally distinct antidumping measures to its panel request. The four new administrative review determinations and 10 new sunset review

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[5] The AD Agreement imposes parallel requirements in Articles 17.3-17.5. US First Written Submission, paras. 56-58.

[6] EC Response to the US. Request for Preliminary Rulings, paras. 17, 21, 22, 24, 29 ("EC Response"). The EC fails to understand what "matter" means for purposes of dispute settlement. The Appellate Body has stated that the "matter" consists of two elements: "the specific *measures* at issue and the *legal basis for the complaint* (or the *claims*)". *Guatemala – Cement I (AB)*, para. 72. The EC, however, describes the "matter" for purposes of its legal standard as "the application of zeroing methodologies when calculating the dumping margins in the specific anti-dumping proceedings with respect to a particular product originating from one specific country". EC Response, para. 17. This is not the "matter". The EC's definition does not encompass the specific measures, nor does it encompass the legal basis for the complaint. In short, the EC would also like the Panel to apply a standard that relies on an erroneous view of what the "matter" is.

[7] EC Response, paras. 25, 29.

[8] US First Written Submission, paras. 49-50, provides a specific list of the new "measures".

[9] *US – Certain EC Products (AB)*, paras. 70, 82.

[10] EC Response, paras. 18-19.

[11] *Brazil – Aircraft (AB)*, paras. 127-29.

[12] *Brazil – Aircraft (AB)*, para. 132.

determinations, even if they involve the same subject merchandise as the measures listed in the consultations request, resulted from completely different proceedings than those identified in the consultations request. They each involve different time frames, and different calculations using different information and data. The results from one administrative review do not apply to entries of subject merchandise for any other administrative review. Moreover, a sunset review results in a determination about whether an antidumping order should be revoked going forward, and does not affect the results of an administrative review, which is conducted independently of a sunset review. The EC's reference to the "continued application, or application" of antidumping duties in 18 cases also appeared for the first time in its panel request, and is legally distinct from the separate challenge to the "zeroing methodology" as applied in separate antidumping proceedings that was identified in the consultations request. None of the new "measures" can be considered a mere "re-enactment" of identical measures identified in the consultation request, as in *Brazil – Aircraft*.

14. The EC also invokes the Appellate Body report in *Mexico – Rice* as supporting its view that there is "no need for identity between the specific measures that were the subject of the request for consultations and those subject of the Panel request provided that they involve essentially the same matter".[13] In *Mexico – Rice*, however, the question was whether provisions of the covered agreements that the United States added to its claims against Mexico in its panel request were within the panel's terms of reference.[14] Here, the EC has not added to the *legal basis* for its complaint; rather, it added to the *measures* at issue that were identified in its consultations request.

15. The EC relies on the panel report in *Chile – Price Band System* to support its assertion that "the inclusion of new measures which amount to an extension or a modification of measures previously mentioned in the request for consultations do not affect the consistency of the panel request with the consultations carried out between the parties".[15] In *Chile – Price Band System*, Chile promulgated a regulation which extended the period of application of a definitive safeguard measure. The extension was not identified in the consultations request. The panel, examining the text of the Agreement on Safeguards, considered that the extension was not a distinct measure, and instead a mere continuation in time of the definitive safeguard measure that was identified in the consultations request. The panel concluded that the extended safeguard measure fell within the panel's terms of reference.[16]

16. The EC's reliance on the panel report in *Chile – Price Band System* is misplaced. The EC's challenge does not pertain to a safeguard measure whose "duration" has been extended. The EC explicitly listed determinations from original investigations, administrative reviews, and sunset reviews in its consultations request. Its focus was on the determinations in the individual proceedings in which the alleged "zeroing methodology" was applied. The EC then tried to expand the number of proceedings by adding 10 new sunset review determinations, as well as four new administrative review determinations, to its panel request. Each of these measures is separate and legally distinct, and not a mere "extension" or "modification" of another identified antidumping determination.

17. The EC has relied on semantics ("essentially the same matter", "direct relationship") and has asked the Panel to consider Appellate Body and panel reports that do not support its position in this dispute. Nothing the EC does, however, can avoid the logical outcome of a proper analysis under Articles 4 and 6 of the DSU: the specific proceedings identified in the EC's panel request for the first time – 14 new antidumping determinations and the application or continued application of duties in 18 cases – cannot properly fall within the panel's terms of reference.

[13] EC Response, paras. 20-21.
[14] *Mexico – Rice (AB)*, para. 133.
[15] EC Response, para. 23.
[16] *Chile – Price Band Systems (Panel)*, paras. 7.110-7.120.

B. THE EC'S "18 MEASURES" FAIL FOR A LACK OF SPECIFICITY

18. Under Article 6.2, a panel request must identify the "*specific measures* at issue" in the dispute[17], and a panel's terms of reference under Article 7.1 are limited to those specific measures. The EC in its panel request identified as "measures" the "continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding". The United States objects to the EC's failure to specifically identify these "18 measures" as required by Article 6.2 of the DSU.[18] As the United States explained at the first meeting with the Panel, these "measures" have been the source of considerable confusion[19]; armed with further attempted clarifications from the EC, we would like to explain why these measures do not meet the specificity requirement and why they are not within this Panel's terms of reference.

19. In its October 5 Response to the US Request for Preliminary Rulings, the EC admitted the broad, indeterminate nature of the 18 measures when it noted that its panel request pertained to all "subsequent measures" adopted by the United States with respect to the 18 measures, and to "any subsequent modification of the measures (*i.e.*, the duty levels)".[20] In its response to the Panel's questions, the EC also asserted that the term "continued application" reaches "subsequent proceedings".[21]

20. Under the DSU, such "subsequent measures", "subsequent proceedings", and "subsequent modifications" cannot be subject to dispute settlement – among other things, they were not in existence at the time of the Panel's establishment.[22] Each determination that sets a margin of dumping for a defined period of time is distinct and separate, and under Article 6.2 of the DSU, the EC must identify each such measure in its panel request.[23] The EC is improperly trying to include the application or continued application of duties resulting from determinations that have not yet been made – the EC even admits that these "measures" have "a life stretching an indeterminate time into the future".[24] As we stated at the first meeting with the Panel, the United States is unable to determine when these determinations were or will be made, what calculations they did or will include, what duty rates they have established or will establish, and what individual companies they did or will cover.[25]

21. The EC invokes several Appellate Body and panel reports to support its argument that "subsequent measures" are properly before the Panel.[26] In these disputes, a law of general application, or framework law, was identified in a panel request, and the subsequent implementing regulations

[17] Emphasis added.

[18] US First Written Submission, paras. 66-71; US First Opening Statement, paras. 19-22; US Closing Statement at the First Substantive Meeting with the Parties ("US First Closing Statement"), paras. 7-15.

[19] US First Closing Statement, paras. 7-15. The Panel itself has asked for clarification about the description of the "18 measures" that the EC identified in its panel request. *See* Panel Question 1. The EC, despite all indications to the contrary, still considers the 18 measures "simpler to understand and conceptualise". EC Answer to Panel Question 2, para. 13.

[20] EC Response, paras. 47-48.

[21] EC Answer to Panel Question 1(b), para. 10. The EC claims that variation in the phrasing "application or continued application" throughout its first written submission "is for ease of reference", but that it "has no incidence on the legal assessment to be conducted by the Panel". However, that very phrasing, and any variations thereto, is related to the way in which the EC described the 18 measures, and is directly relevant to how the Panel analyzes the specificity of those alleged measures.

[22] US First Closing Statement, para. 9.

[23] US First Written Submission, para. 67.

[24] EC Answer to Panel Question 3, para. 20.

[25] US First Opening Statement, para. 21.

[26] EC Response, paras. 37, 43-47.

issued after the panel request were considered to fall within the panel's terms of reference. For example, in *Japan – Film*, the United States discussed various measures for the first time in its written submission. Japan objected on the grounds that these measures were not identified in the United States' panel request and that the United States had therefore failed to meet the specificity requirement of Article 6.2 of the DSU. The panel found that subsequent measures promulgated under a framework law that was identified in the panel request fell within its terms of reference. It considered these measures "subsidiary" or "so closely related" to the law of general application specifically identified that the responding party could reasonably be found to have received adequate notice of the scope of the claims.[27]

22. Unlike *Japan – Film* and the other reports, this dispute does not involve subsequent regulations issued under a law of general application. The EC instead is asking this panel to consider any and all subsequent antidumping measures related to 18 specified cases. Such subsequent measures, however, are not "subsidiary" or "so closely related" to all of the antidumping proceedings that were identified in the panel request. The application or continued application of antidumping duties results from distinct legal proceedings leading to a final determination. Each proceeding, whether an original investigation, administrative review, or sunset review, involves different time periods, different entries of merchandise, and different information and data. The EC's challenge to application or continued application of duties related to all subsequent and previously unidentified proceedings is not the equivalent of a challenge to regulations promulgated under the general authority of a framework law after a panel request has been made.

23. The EC also seems to indicate, as it did at the hearing, that the 18 measures cover the application or continued application of the "zeroing" methodology in 18 cases. The EC tells the Panel that the word "continued" in the description of the 18 measures "reflects the fact that the US continues to use the zeroing methodology throughout the various proceedings in the 18 anti-dumping cases".[28] Moreover, the EC claims that "[t]he 18 measures are instances of the application of the zeroing methodology".[29] To the extent the EC is saying that it is challenging the application or continued application of zeroing in 18 cases (a description not found anywhere in its panel request), that "measure" lacks specificity. The EC cannot make a generalized reference to the application of zeroing in 18 broadly-defined cases without indicating the exact determinations where "zeroing" was applied.

24. In response to the Panel's questions, the EC has put further spin on its description of the 18 measures. It now speaks of the concept of "duty as measure".[30] To the EC, the 18 measures contain a methodology that is "like a computer virus replicating itself"[31] and "have a life which stretches, at least potentially, further into the future than the 52 measures".[32] Moreover, the EC incorrectly analogizes the duties to "a subsidy programme under the *SCM Agreement*"[33], without even explaining the exact nature of the analogy.

25. The EC's analysis of the 18 measures, when defined in this way, does not assist its position. It is entirely circular for the EC to suggest that it has described measures with specificity because it asserts that "duties" are "measures". In the first place, to repeat the terms of the Antidumping Agreement (as the EC does in paragraphs 2 through 3 of its answers) tells the Panel nothing about specifically what measures the EC is challenging *in this dispute*. Moreover, the EC ignores the fact

[27] *Japan – Film (Panel)*, paras. 10.8-10.14.
[28] EC Answer to Panel Question 1(b), para. 10.
[29] EC Answer to Panel Question 3, para. 20.
[30] EC Answer to Panel Question 1(a), para. 7.
[31] EC Answer to Panel Question 1(a), para. 4.
[32] EC Answer to Panel Question 2, para. 17; *see also* EC Answer to Panel Question 2, para. 13; EC Answer to Panel Question 3, para. 20; EC Answer to Panel Question 5(b), para. 28.
[33] EC Answer to Panel Question 1(a), para. 5; EC Answer to Panel Question 3, para. 20.

that, for any given importation, the antidumping duty assessed depends on a particular underlying administrative determination, whether that be an original investigation, assessment review, new shipper review, or changed circumstances review, while the continuation of that duty depends on an underlying sunset review.[34] The EC must identify the specific determination leading to the particular application or continued application of an antidumping duty, and cannot merely refer to "duty" in a general and detached way.

26. The EC's description also appears to demonstrate what the EC asserted at the first meeting with the Panel – that the 18 measures are some sort of "as applied/as such" measures.[35] By considering a duty to be the equivalent of a subsidy program, the EC seems to think that it can challenge "as such" a duty resulting from the application of "zeroing". It is difficult to understand how the EC could be making an "as such" claim when it has defined the measure as "the *application* or the continued *application*" of antidumping duties. Moreover, the EC has explicitly stated that it decided not to make an "as such" claim in this dispute.[36] The United States still is unsure whether the EC is trying make "as such" claims.

27. Apparently then, the EC is not seeking to challenge particular measures, but rather to have the Panel make a general, overall pronouncement with respect to the future and "zeroing" without regard to whether such a pronouncement would apply to real measures that were in existence at the time of the consultations request or even at the time of the Panel's findings.[37] The EC cannot ignore the specificity requirement of Article 6.2 of the DSU and define "measures" in such a way so as to reach indeterminate future antidumping determinations.[38] The Panel should reject the EC's attempt to expand the scope of this proceeding beyond what is permissible under the DSU.

28. The EC also claims that the Panel request adequately informs the United States of the challenged measures.[39] According to the EC, "the United States has failed to show that the Panel request is so flawed that the defending party's rights of defence are prejudiced . . .".[40] The implication of this argument is that even with a failure to identify the specific measures at issue, those measures can be considered by the Panel, as long as the responding party is not prejudiced. (Apparently the EC is not concerned with the rights of Members whose decision as to whether to participate as a third party is based on which measures are specifically identified in the EC's panel request.) This prejudice requirement, however, is not found in Article 6.2 of the DSU, or anywhere else in the covered agreements. The requirements of the DSU are clear: the complaining party must specifically identify the measures at issue, or those measure cannot properly fall within a panel's terms of reference.

C. THE EC'S REQUEST INCLUDED MEASURES WHICH WERE NOT FINAL AT THE TIME OF ESTABLISHMENT

29. The United States has asked the Panel to exclude from consideration four measures which were not final at the time of the EC's request for panel establishment.[41] Under Article 17.4 of the AD Agreement, only those measures where "final action has been taken by the administering authorities"

[34] AD Agreement, Articles 1, 5, 7, 9, 11.

[35] US First Closing Statement, paras. 12-13.

[36] EC First Written Submission, para. 2, 115.

[37] EC Answer to Panel Question 4(b), paras. 25-26; EC First Written Submission, paras. 127-28.

[38] As the EC acknowledges, "findings concerning the 18 measures will have a broader impact than those concerning the 52 measures". EC Answer to Panel Question 1(a), para. 8.

[39] EC Response, paras. 40-42.

[40] EC Response, para. 42.

[41] US First Written Submission, paras. 72-74; US First Opening Statement, paras. 23-24.

may be referred to a panel.[42] As the United States explained in the first written submission, the EC added three on-going sunset reviews, and one on-going administrative review to its request for establishment. Therefore, under Article 17.4 of the AD Agreement, the four preliminary measures in the EC's panel request cannot properly form part of the Panel's terms of reference.

30. In rebutting the United States, and in responding to the Panel's questions, the EC has complicated an issue which is not very complicated at all. The EC first claims that its challenge to the application or continued application of antidumping duties in 18 cases includes "subsequent measures, including preliminary determinations setting out the duty levels (wrongly calculated by applying zeroing) and insofar as those duties are still in place"[43], and that therefore the preliminary measures are properly before the Panel. Aside from the fundamental problem with the EC's attempt to include "subsequent measures" in its panel request[44], the United States fails to see how preliminary measures in existence at the time of panel request are "subsequent measures". Moreover, neither on-going administrative reviews, nor on-going sunset reviews, can be the basis for the "application or continued application" of antidumping duties, as the EC seems to think. A preliminary determination in an administrative review does not affect the cash deposit rate or the assessment rate – those rates are set in the final determination, and until then, the rates in effect from the prior administrative review remain in effect. In addition, a sunset review can only result in the continuation of an order beyond the five-year sunset period once a final determination has been made by both the US Department of Commerce and the US International Trade Commission. Most importantly, the EC's argument ignores the plain text of Article 17.4. The investigating authority must take final action by the time of the panel request, which has not happened here; otherwise, the antidumping measure cannot fall within the panel's terms of reference.[45]

31. The EC attempts to confuse the Panel by citing to the panel report in *Mexico – HFCS* and asserting that other panels have allowed claims against preliminary measures.[46] *Mexico – HFCS* involved a claim that Mexico had applied a provisional measure for longer than six months, and thereby violated Article 7.4 of the AD Agreement. Mexico argued that because the United States failed to identify the provisional measure in its panel request, the claim concerning that measure fell outside the panel's terms of reference. The United States, however, had identified the definitive antidumping duty in its panel request, and argued that it was asserting a violation of Article 7 not with reference to the provisional measure as a "measure" in the dispute, but rather as one of its legal claims related to the final antidumping measure. The panel concluded that the claim was related to the definitive antidumping duty identified in the panel request and therefore fell within the scope of the proceeding.[47]

32. Unlike the United States in *Mexico – HFCS*, the EC has not even challenged a final determination in any of the four proceedings, so there is no question as to whether the preliminary determination is somehow related to the final measure. There is no textual basis under which the EC can bring these claims, when it can wait until the issuance of final results and challenge those as

[42] Under Article 17.4, a provisional measure may only be challenged when it "has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7". The EC has not demonstrated the applicability of this exception.

[43] EC Response, para. 50; EC Response to Panel Question 6, para. 29.

[44] *See* Part II.B, *supra*.

[45] The EC also challenges 52 determinations, among which are four preliminary determinations. The EC's alleged defence neglects to address the fact that the EC is making separate claims as to these preliminary determinations. It now appears that the EC is abandoning its claims with respect to the four preliminary measures insofar as they are part of its claims against zeroing as applied in 52 antidumping proceedings.

[46] EC Response, para. 53.

[47] *Mexico – HFCS (Panel)*, paras. 7.44-7.55.

inconsistent with the AD Agreement. The plain text of Article 17.4 is clear: the EC's specific claims against preliminary measures are outside this Panel's terms of reference.

33. The Panel asked the EC whether the exception to the finality requirement under Article 17.4 of the AD Agreement was applicable in this dispute as to the four preliminary measures identified by the EC.[48] The EC's response is anything but clear, and does violence to the text of Article 17.4. The EC first seems to be saying that the conditions "are in any event met in this case", but then contradicts itself in the very next sentence by claiming that "the EC is however not challenging provisional measures in the sense of Article 17.4".[49] It is difficult to see how the exception could be applicable, if the exception requires that the measures be provisional within the meaning of Article 17.4. Moreover, the EC does not demonstrate that it is making a claim under Article 7.1 of the AD Agreement, as required by the terms of Article 17.4.

34. The EC also asks the Panel "to take into account the specific circumstances of this case".[50] To the EC, these include the "fact that the EC is complaining about what is essentially a mathematical formula that is essentially identical" wherever it is used; the alleged response of the United States to Appellate Body reports on "zeroing" in wholly unrelated disputes; and the nonsensical reasoning that Article 17.1 refers to Article 7.1 and Article 7.5 refers to Article 9 of the AD Agreement, the "provision that the US has already been found to have infringed".[51] The EC asserts that these "specific circumstances" have a "significant impact" on the EC, and that it is "within the Panel's discretion" to exercise jurisdiction.[52]

35. These EC essentially would like the Panel to act as a court of equity. However, this Panel is bound by the terms of the DSU and the covered agreements, which do not accord it the authority to assume jurisdiction over a matter which otherwise would not be within the Panel's terms of reference. It is improper to take into account "specific circumstances" that are nowhere to be found in the text of Article 17.4. Most egregiously, the EC is asking the Panel to consider the alleged US response to prior Appellate Body reports on "zeroing", which is another manifestation of the EC's attempt to improperly bring into this dispute for what allegedly has happened in separate, distinct disputes. The EC, however, cannot escape the fact that it is challenging preliminary measures, and that under Article 17.4, such measures are not within the Panel's terms of reference.

III. THE PANEL SHOULD REJECT THE EC'S ARGUMENTS CONCERNING THE METHODOLOGIES IN ASSESSMENT PROCEEDINGS

A. US ASSESSMENT REVIEWS ARE DISTINCTIVELY DIFFERENT FROM INVESTIGATIONS

36. The EC's proposed approach in this dispute fails to appreciate what is happening in investigations and assessment reviews. The United States would like briefly to discuss for the Panel how investigations and administrative reviews operate under US law.

37. In the investigation phase, US law provides that the US Department of Commerce ("Commerce") will normally use the average-to-average method for comparing transactions during the period of investigation. US law also authorizes the use of transaction-to-transaction comparisons

[48] Panel Question 6.
[49] EC Answer to Panel Question 6, para. 29.
[50] EC Answer to Panel Question 6, para. 30.
[51] EC Answer to Panel Question 6, para. 30.
[52] EC Answer to Panel Question 6, para. 30. The EC attempts to create confusion by using the "significant impact" language of the exception under Article 17.4. However, as demonstrated above, the EC is not even challenging a provisional measure under Article 7.1 of the AD Agreement, so the exception is not applicable in the first instance.

and, provided that there is a pattern of prices that differs significantly by region or time period, among other things, the average-to-transaction method.

38. In the second phase of a US antidumping proceeding – the "assessment phase"– Commerce's focus is on the retrospective calculation and assessment of antidumping duties on individual customs entries covered by an antidumping order. While an antidumping investigation typically covers a broad range of exporters, foreign producers, and US importers, antidumping duties are paid by US importers, who become liable when they enter goods into the United States. Thus, the US retrospective assessment system seeks to calculate the duty based on specific entries by importers during the period covered by the review.

39. In the US system[53], while an antidumping duty liability attaches at the time of entry, duties are not actually assessed at that time. Instead, the United States collects a security in the form of a cash deposit at the time of entry. Once a year (during the anniversary month of the orders) interested parties may request a "periodic review" to determine the final amount of duties owed on each entry made during the previous year.[54] Antidumping duties are calculated on a transaction-specific basis, and are paid by the importer of the transaction. If the final antidumping duty liability exceeds the amount of the cash deposit, the importer must pay the difference. If the final antidumping duty liability is less than the cash deposit, the difference is refunded. If no periodic review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties. To simplify the collection of duties calculated on a transaction-specific basis, the absolute amount of duties calculated for the transactions of each importer are summed up and divided by the total entered value of that importer's transactions, including those for which no duties were calculated. US customs authorities then apply that rate to the entered value of the imports to collect the correct total amount of duties owed. A similar calculation is performed for each exporter to derive a new estimated antidumping duty deposit rate.

40. The US retrospective duty assessment system is more complex to operate, and requires a larger expenditure of administrative resources and personnel. However, it allows US authorities to closely calibrate the imposition of antidumping duties to the actual levels of dumping during the period covered by a periodic review. In addition, it encourages exporters and importers to adjust prices on their own – either through the exporter reducing prices in their home market to bring down the "normal value", the importer and exporter agreeing to a higher "export price", or in the case of a related importer, if the importer raises its US sales price – in order to eliminate dumping margins and avoid paying antidumping duties. Thus, in the United States the level of antidumping duties actually collected from importers typically declines sharply during the period covered by an order.[55] This means that prices in the marketplace can adjust without the actual collection of duties.

41. In contrast, while a prospective assessment system is more predictable (because the duty does not change)[56], it is also more punitive and inflexible because an importer generally is subject to the original *ad valorem* rate or reference price found in an original investigation or sunset review for the next five-year period, regardless of price fluctuations or changing competitive conditions in the market. While refunds are theoretically available under Article 9 in such systems , antidumping

[53] *See US – Zeroing (Mexico)*, paras. 7.98-7.100.

[54] The period of time covered by U.S. assessment proceedings is normally twelve months. However, in the case of the first assessment proceeding following the investigation, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures during the investigation.

[55] On average, margins in the US system decline by approximately 75-80 per cent. This, of course, varies by case, and there are exceptions, such as where the respondents do not cooperate and margins must be calculated on the basis of the facts available.

[56] The main advantage of the prospective assessment system is that an importer knows its maximum antidumping liability in advance – for better or worse.

authorities often tend to strongly "discourage" requests for a refund, and most sophisticated importers are well aware of the "risks" of seeking one (or simply discover that no refund procedure exists under the antidumping law, e.g. India). A prospective *ad valorem* system also typically results in the collection of much higher amounts of duties from a revenue standpoint, since the antidumping duty effectively serves as an additional tariff for the five-year period, as opposed to being adjusted annually as in the United States.

B. THE EC FAILED TO ESTABLISH THAT ARTICLE 2.4.2 APPLIES OUTSIDE OF AN INVESTIGATION

42. The EC focused much attention at the first meeting with the Panel on its arguments concerning its allegedly proper reading of Article 2.4.2 of the AD Agreement. It is the EC's position that any time a Member makes "a systematic examination or inquiry" as to dumping, that Member is conducting an investigation subject to the disciplines of Article 2.4.2.[57] The United States has fully demonstrated in its first written submission and response to the Panel's questions[58], that Article 2.4.2 does not apply to each and every segment of an antidumping proceeding that happens to involve a systematic examination or inquiry.

43. A critical examination of each of the words in the phrase "the existence of margins of dumping during the investigation phase", independent of one another, support the US position. Additionally, when the phrase is considered in its entirety, it is clear that the obligations in Article 2.4.2 do not extend beyond an investigation within the meaning of Article 5.

44. An Article 5 investigation is a *sui generis* proceeding that resolves the threshold question of "the existence, degree, and effect" of dumping. An analysis of the relationship between Article 2.4.2 and an Article 5 investigation begins with the text of Article 1, which provides as follows:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to *investigations initiated*[1] and conducted in accordance with the provisions of this Agreement ... .
>
> [1] The term "*initiated*" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.[59]

45. The text of Article 1, when read with its footnote, provides that "investigations initiated and conducted in accordance with the provisions of this Agreement" are investigations initiated pursuant to Article 5. Article 5 defines the nature of the investigation for which it provides:

> [A]n investigation to determine the *existence*, degree and effect of any alleged dumping shall be initiated. . . .[60]

46. Thus, Article 1 defines the "initiation" of the investigation phase that leads to an antidumping measure as "the procedural action by which a Member formally commences an investigation as provided in Article 5". Article 5.1, in turn, provides that investigations are initiated upon a written application, or pursuant to other specified conditions, to determine the "existence, degree and effect" of alleged dumping. Consequently, there is no ambiguity as to the nature of the "investigations initiated and conducted" pursuant to Article 1. There is only one type of investigation provided for in Article 5, and footnote 1 to Article 1 explicitly refers to "an investigation as provided in Article 5", thus, Article 1 can only be referring to Article 5 investigations.

[57] EC First Written Submission, paras. 213-216; EC Answer to Panel Question 9, paras. 54-65.

[58] *See* US First Written Submission, para. 107-110, *see also* US Answer to Panel Question 9, paras. 18-19 (discussing, among other things, the meaning of the word "phase").

[59] AD Agreement, Article 1 (emphasis added).

[60] AD Agreement, Article 5.1 (emphasis added).

47. Additionally, the term "existence" must be considered as it is a necessary part of an Article 5 investigation which may lead to applying an antidumping measure consistent with Article 1. "Existence" is used in connection with the term dumping in only one other place in the AD Agreement besides Article 5.1: Article 2.4.2. Article 2.4.2 provides for the manner in which the "existence" of dumping margins is to be established, "[T]he *existence* of margins of dumping during the investigation phase shall normally be established on the basis of a comparison . . . ".[61] The ordinary meaning of the word "existence" according to *The New Shorter Oxford English Dictionary* is "the fact or state of existing; actual possession of being; a mode or kind of existing; dealing with the existence of a mathematical or philosophical entity". The word "existence" before the phrase "of margins of dumping" indicates that Members are to determine the "existence of [the] mathematical or philosophical entity" referred to as "margins of dumping".

48. The drafters' intent to limit Article 2.4.2 exclusively to Article 5 investigations is further demonstrated by the use of the *definite* article "the" before the term "investigation phase", rather than the indefinite article "an". According to *The New Shorter Oxford English Dictionary*, the ordinary meaning of the article "the" is "designating one or more persons or things already mentioned or known, particularized by context, or circumstances, inherently unique, familiar or otherwise sufficiently identified". If, as the EC contends, the term "investigation" in the context of Article 2.4.2 may be interpreted in generic terms, rather than as a term of art referring to the Article 5 phase, the drafters would have used the *indefinite* article "an".

49. The EC has argued that ordinary rules of grammar compel its reading of "during the investigation phase" as any investigation (in the sense of an inquiry) undertaken by the investigating authority. For the reasons given above, the United States disagrees. In this regard, it is notable that the Appellate Body itself has used the phrase "the investigation phase" in order to describe how obligations in Article 11 of the SCM Agreement (the parallel provision to Article 5 of the AD Agreement)[62] are limited to original investigations and do not apply to any reviews. In particular, in the dispute *United States – Carbon Steel*, in rejecting a claim by the EC that the *de minimis* standard in Article 11.9 applied also to sunset reviews pursuant to Article 21.3, the Appellate Body noted:

> Although the terms of Article 11.9 are detailed as regards the obligations imposed on authorities thereunder, none of the words in Article 11.9 suggests that the *de minimis* standard that it contains is applicable beyond *the investigation phase* of a countervailing duty proceeding.[63]

Indeed, before the panel in that dispute, the EC *itself* used the phrase "the investigation phase" to mean the initial investigation and not any reviews.[64] The EC was not acting contrary to the ordinary rules of grammar but rather used the phrase according to its ordinary, and grammatical, sense.

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[61] Emphasis added.

[62] Article 11 of the SCM Agreement is entitled "Initiation and Subsequent Investigation". Article 5 of the AD Agreement is entitled "Initiation and Subsequent Investigation".

[63] *US – Carbon Steel (AB)*, para. 68 (italics added; footnote omitted); *see id.*, para. 68 n. 58 ("We do not subscribe to the view, expressed by Japan, that the use of the word "cases" (rather than the word "investigation") in the second sentence of Article 11.9 means that the application of the *de minimis* standard set forth in that provision must be applied in *all* phases of countervailing duty proceedings - not only in investigations. The use of the word "cases" does not alter the fact that the terms of Article 11.9 apply the *de minimis* standard only to *the investigation phase*.") (italics added); *id.*, para. 89 ("For these reasons, we consider that the non-application of an express *de minimis* standard at the review stage, and limiting the application of such a standard to *the investigation phase* alone, does not lead to irrational or absurd results.") (italics added).

[64] *US – Carbon Steel (Panel)*, para. 5.97 (reproducing EC oral statement at the first panel meeting: "The US also draws (at para. 67) the wrong conclusions from the distinction between *the investigation phase* and the review phase of a CVD proceeding.") (italics added; underlining in original).

50. The limited application of Article 2.4.2 to the investigation phase is further consistent with the divergent functions of investigations and other proceedings under the AD Agreement. The Appellate Body has already recognized that investigations and other proceedings under the AD Agreement serve different purposes and have different functions, and therefore are subject to different obligations under the Agreement.[65] Contrary to the EC's contention, the AD Agreement does not require Members to examine whether margins of dumping "exist" in the assessment phase. Article 9 assessment proceedings are not concerned with the existential question of whether injurious dumping "exists" above a *de minimis* level such that the imposition of antidumping measures is warranted. That inquiry would have already been resolved in the affirmative in the investigation phase. Instead, Article 9, by its terms, focuses on the amount of duty to be assessed on particular entries, an exercise that is separate and apart from the calculation of an overall dumping margin during the threshold investigation phase of an antidumping proceeding.

51. Even the EC recognizes that "different types of proceedings have different purposes and are not all subject to all the provisions of the *Anti-Dumping Agreement*".[66] Thus, as the panel in *US – Zeroing (EC)* found, the qualitative differences between Article 5 and Article 9.3 make reasonable an interpretation that different methodologies could be applied to address the different purposes of the separate and distinct proceedings.[67]

52. Among the various alternative definitions that the EC posits for the meaning of "during the investigation phase" in Article 2.4.2, it claims that the phrase may be read as synonymous with the term "period of investigation".[68] However, this suggested interpretation denies meaning to the drafters' decision to utilize the unique "investigation phase" terminology in Article 2.4.2. As the panel in *Argentina – Poultry* found: "Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping 'during the investigation phase'".[69] Numerous provisions in the AD Agreement refer to a "period of investigation",[70] and the drafters' use of the different term "the investigation phase" was deliberate and must be given separate meaning.

53. Furthermore, the EC's argument that duties calculated in assessment proceedings are subject to Article 2.4.2 because "margin of dumping" has only one meaning, is premised on the incorrect presumption that margins of dumping must be calculated for the product as a whole in all contexts, and that transaction-specific margins are not permitted.[71] No confusion or inconsistency is present if, as the AD Agreement provides, transaction-specific margins are permitted. In Article 9 assessment proceedings, because it is the importers that will incur liability for duties, it is appropriate to determine liability on an importer- and transaction-specific basis. Additionally, the general reference to Article 2 in Article 9.3 necessarily includes any limitations found in the text of Article 2. Article 2.4.2 by its own terms is limited explicitly to the investigation phase, whereas Article 9 contains certain procedural obligations applicable in assessment reviews[72], but does not prescribe methodologies for assessment proceedings such as those established in Article 2.4.2 for the

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[65] *US – Corrosion-Resistant Steel AD Sunset Review (AB)*, para. 87.

[66] EC First Written Submission, para. 223.

[67] *US – Zeroing (EC) (Panel)*, paras. 7.113-7.223 (considering and rejecting arguments the EC raises here in connection with the term "investigation phase"). The Appellate Body "[did] not express [] any view" on the Panel's analysis of Article 2.4.2. *US – Zeroing (EC) (AB)*, paras. 160-164.

[68] EC Answer to Panel Question 9, para. 53.

[69] *Argentina – Poultry (Panel)*, para. 7.357.

[70] *See, e.g.*, AD Agreement, Articles 2.2.1, 2.2.1.1, 2.2.1.1 n.6, 2.4.1.

[71] EC Answer to Panel Question 9, para. 58.

[72] *Argentina – Poultry*, para. 7.355 ("The primary focus of Article 9.3, read together with sub-paragraphs 1-3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected").

investigation phase. Thus, there is no basis in Article 9 for ignoring the explicit language in Article 2.4.2, limiting its reach to investigations.

54. The Appellate Body in *EC – Bed Linen* found that there is no connection between Article 9.3 and Article 2.4.2, and that the "requirements of Article 9 do not have a bearing on Article 2.4.2, because the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties".[73] As the panel in *Argentina – Poultry* concluded, if "the drafters of the *AD Agreement* had intended to refer exclusively to Article 2.4.2 in the context of Article 9.3, the latter provision would have stated that 'the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.4.2'".[74]

55. Finally, the EC's arguments related to the negotiated placement of various terms within the phrase "the existence of margins of dumping during the investigation phase shall normally be established" are based on mere speculation.[75] The negotiating history does not define "investigation phase" and does not comment on the reason for moving the text. Further, as the Panel observed in *US – Zeroing (EC) (Panel)*, moving the text could have been a compromise to limit ability to impose an order, but to maintain the ability to extend an order once in place.[76]

C. ARTICLE 9.3.1 DOES NOT REQUIRE AN "EXPORTER-ORIENTED" ANALYSIS

56. The EC's assertions that an exporter-oriented approach to Article 9.3.1 assessment proceedings is appropriate because "exporters can dump [and] . . . importers cannot"[77] is unsupported by the plain text of the AD Agreement because it ignores that it is *importers* who participate in export transactions and are ultimately liable for the antidumping duties. By its terms, the function of an Article 9.3.1 assessment proceeding is to determine "the final liability for payment of anti-dumping duties". This function is fundamentally different from that of Article 2.4.2, which sets forth the comparison methodologies to be used to establish the "existence of margins of dumping during the investigation phase".

57. Although, as stated by the Appellate Body in *US – Zeroing (Japan)*, dumping involves differential pricing behaviour of exporters or producers between its export market and its normal value[78], in the real world dumping occurs at the level of an importer's individual transactions. It is the importer who negotiates the "export price" when purchasing a product from a foreign producer or exporter, or, in a related-party transaction, when selling to an unrelated purchaser in the United States. Thus, while the foreign producer may control the "normal value" by virtue of its sales prices in its home market, it is the importer who actually helps determine whether a product is "dumped" in the United States by agreeing on an "export" price and thus becoming liable for any resulting antidumping duties. Moreover, under both prospective and retrospective assessment systems, the remedy for dumping in Article VI:2 of GATT 1994, *i.e.*, antidumping duties, is applied at the level of individual customs entries and paid by importers who thereby incur liability for the additional duties.

58. The US retrospective assessment system is designed to ensure that an individual importer's liability reflects the actual level of dumping associated with its transactions. Put another way, an importer should not pay duties because another importer has bought dumped goods, or escape liability because another importer has bought non-dumped goods. In addition, one of the underlying goals of the US retrospective assessment system is not to collect large amounts of antidumping duties from importers, but to encourage exporters and importers to adjust prices on their own to bring them in line

[73] *EC – Bed Linen (Article 21.5) (AB)*, paras. 123-124 (emphasis in original).
[74] *Argentina – Poultry (Panel)*, para. 7.358 (emphasis added).
[75] EC Answer to Panel Question 9, para. 57.
[76] *US – Zeroing (EC) (Panel)*, paras. 7.212, 7.219.
[77] EC Answer to Panel Question 8, para. 45.
[78] *US – Zeroing (Japan) (AB)*, para. 156.

with fair market value. Thus, upon issuance of a US order, sophisticated exporters and importers typically will work together to adjust either the home market price or US export price to eliminate the dumping margins and avoid future liability for antidumping duties. Thus, the US system encourages importers to raise resale prices (or exporters to reduce prices in their home market) to cover the amount of the antidumping duty liability, thereby eliminating injurious dumping. This achieves the goals of the US antidumping law (and GATT Article VI) of preventing injurious dumping, while avoiding subjecting importers to additional duties.

59. If under *US – Zeroing (EC) (AB)* and *US – Zeroing (Japan) (AB)*, the amount of one importer's antidumping margin must be aggregated with other importers to account for the amount by which some other transaction involving an entirely different importer was sold at above normal value, and *vice versa*, then an importer could be subjected to liability for dumped imports made by another importer over whom he or she has no control. This also means the importer who is engaged in dumped transactions would receive a windfall, because he or she may escape antidumping duties, or have his or her liability sharply reduced through the actions of another importer who behaved responsibly by eliminating its dumping margin.

60. No panel that has considered this issue has agreed that it is reasonable for one importer's liability to be reduced because another importer paid a "less dumped" price.[79] The panel in *US – Zeroing (Japan)* observed that mandating an exporter-oriented approach in Article 9.3 assessment reviews, where assessment liability is determined based on the product as a whole, would mean WTO Members with retrospective assessment systems "may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value".[80] The panel in *US – Zeroing (Mexico)* agreed that such "competitive disincentive to engage in fair trade could not have been intended by the drafters of the Antidumping Agreement and should not be accepted . . . as consistent with a correct interpretation of Article 9.3'".[81]

61. Furthermore, an exporter-oriented approach, where assessment liability is determined for the product as a whole, makes no sense in the context of a prospective normal value duty assessment system, because the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. Under Article 9.4(ii), in a prospective normal value system[82], the importer's liability for payment of antidumping duties must be determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value.[83] As a result, an importer who imports a product, the export price of which is equal to or higher than the prospective normal value, cannot be subjected to liability for payments of antidumping duties. If other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers.[84]

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[79] US First Written Submission, paras. 133-136, *quoting US – Zeroing (Japan)(Panel)*, para. 7.199 and *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.54-5.57; *see also US – Zeroing (Mexico)*, para. 7.146.

[80] *US – Zeroing (Japan) (Panel)*, para. 7.199.

[81] *US – Zeroing (Mexic)*, para. 7.146, quoting Oral Statement of the United States at the Second Meeting, para. 18.

[82] *US – Zeroing (Japan) (Panel)*, para. 7.201.

[83] *US – Zeroing (Japan) (Panel)*, para. 7.201; *See also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53.

[84] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.54-5.57.

62. It would be manifestly absurd to interpret Article 9 as requiring offsets between importers in a retrospective assessment system while capping the importer's liability based on individual transactions in a prospective system.[85] As the panel in *US – Zeroing (Japan)* concluded, "the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transaction below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value".[86] If in a prospective normal value system individual export transactions at prices less than normal value can lead to liability for antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, the clear implication is that liability for payment of antidumping duties can be similarly assessed on the basis of individual export prices for less than normal value in the retrospective system applied by the United States.

63. The EC's exporter-oriented approach suggests that investigating authorities must assess antidumping duties based on the aggregated pricing behaviour of exporters, without regard to the actual margin of dumping associated with the particular import transaction.[87] This approach turns Article 9.3 on its head as it divorces the amount of antidumping duty assessed with respect to an import from the dumping margin associated with that import transaction, and is inconsistent with the importer- and import-specific character of the obligation to pay an anti-dumping duty.[88] Nothing in the text or context of Article 9.3.1 supports such a result. This argument reflects the EC's effort to force the requirements of Article 2.4.2 with respect to the *existence* of margins of dumping during the investigation phase, into Article 9.3, with its focus on *duty liability*. However, as we fully set forth above, and in our first written submission and answers to the Panel's questions[89], the provisions of Article 2.4.2 are irrelevant to Article 9.3.1 assessment proceedings.

64. Furthermore, the EC's proposed "solution"[90] only serves to demonstrate the absurdity of its argument. The EC suggests that even though some importers import subject merchandise at less than normal value, the importing Member should only be permitted to assess a partial amount of the duties owed on those transactions. The panel in *US – Zeroing (Japan)*, correctly observed that the "[i]mplication of such an interpretation is that a Member . . . may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value".[91] Such a result would be inconsistent with the notion that injurious dumping is to be condemned and may be remedied under the Antidumping Agreement.

65. Finally, the EC's contention that importer-specific dumping duties are unnecessary because the targeted dumping provision is available when low-price exporter transactions are attributable to only one importer[92] does not resolve the mathematical equivalency problem discussed in our first written submission and in our answer to the Panel Question 10. Nor, has the EC, in its answers to Question 10, provided a viable solution to the fact that the targeted dumping provision is rendered *inutile* by its suggested interpretation. On the contrary, despite its asserted concern with the customary rules of treaty interpretation, the EC states that the fact that the mathematical equivalence

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[85] *US – Zeroing (Mexico)*, para. 7.133.

[86] *US – Zeroing (Japan) (Panel)*, para. 7.205; *see also US – Zeroing (EC) (Panel)*, para. 7.206.

[87] EC Answer to Panel Question 8, para. 45 ("only an exporter can have a dumping margin").

[88] *US – Zeroing (Japan)(Panel)*, para. 7.199.

[89] US First Written Submission, paras. 99-111; 119-28; US Answer to Panel Question 119(c) & (d), paras. 31-34.

[90] EC Answer to Panel Question 8, para 49.

[91] *US – Zeroing (Japan) (Panel)*, para. 7.199

[92] EC Answer to Panel Question 8, para. 48.

caused by a general prohibition on zeroing in all contexts renders an entire provision in the Agreement redundant, "doesn't matter".[93]

D. THE EC'S CHALLENGE WITH RESPECT TO AN ASYMMETRICAL METHOD OF COMPARISON WITHOUT JUSTIFICATION IS NOT APPARENT FROM THE EC'S PANEL REQUEST AND FIRST WRITTEN SUBMISSION

66. The United States disagrees that the EC made "very clear" that it intended to make a separate claim that the "use of the third methodology in periodic reviews" violates Article 2.4.2 of the Antidumping Agreement.[94] The EC's citations to its panel request in support of its assertion that it made such a claim are, at best, veiled references. Moreover, the EC provided no discussion in support of this claim in its first written submission. Given that the EC's panel request was unclear, and that it did not attempt to make a *prima facie* case in its first written submission, it is hardly meaningful that the United States did not respond more fully in its first written submission to such an alleged claim by the EC.

E. BECAUSE THE CHALLENGED MEASURES ARE BASED ON A PERMISSIBLE INTERPRETATION, THE PANEL SHOULD FIND THEM TO BE IN CONFORMITY WITH THE AD AGREEMENT

67. With respect to the EC's substantive arguments, the Panel should reject the EC's request that this Panel create an obligation to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same assessment proceeding exceed normal value, notwithstanding the absence of any textual basis for such an obligation. For the reasons set forth in the US first written submission, the United States respectfully requests the Panel to refrain from reading into the AD Agreement and Article VI of the GATT 1994 an obligation that is not reflected in the text. Furthermore, for the reasons discussed above, interpreting "the existence of margins of dumping during the investigation phase" under Article 2.4.2 as referring to an investigation under Article 5 is a permissible interpretation because it follows from the application of the customary rules of interpretation of public international law to the text of the AD Agreement. Therefore, the United States requests that this Panel remain faithful to the standard of review under Article 17.6(ii) of the AD Agreement by finding that the US actions in the assessment proceedings at issue rest upon a permissible interpretation of the AD Agreement under the customary rules of interpretation of public international law.

IV. THE EC HAS DISTORTED THE NEGOTIATING HISTORY OF THE AD AGREEMENT

68. The EC stated at the first meeting with the Panel that "*all* of the interpretive elements in the Vienna Convention support the position of the EC".[95] Among these elements is the recourse to negotiating history. The EC, however, relies on an inaccurate and revisionist version of that history to support its argument that "zeroing" is prohibited in all contexts. The United States would like to set the record straight and discuss the proper version of the negotiating history of the AD Agreement.

69. Zeroing is not a new subject for the GATT/WTO system. It was discussed extensively during the Uruguay Round. It was also the subject of two major disputes under the Tokyo Round Antidumping Code. On July 8, 1991, Japan initiated a dispute settlement proceeding challenging an EC antidumping decision in *EC – Audiocassettes*.[96] A short time later, in November 1991, Brazil requested consultations regarding an EC antidumping decision in *EC – Cotton Yarn*.[97] Both cases

[93] EC Answer to Panel Question 10, para. 66.
[94] EC Answer to Panel Question 11(b), para. 73.
[95] EC First Opening Statement, para. 22.
[96] *EC – Audiocassettes*, para. 360.
[97] *EC – Cotton Yarn*, para. 502.

challenged numerous aspects of the EC's antidumping methodology, including zeroing. Both Japan's and Brazil's zeroing claims turned on a now familiar argument that zeroing violated the "fair comparison" requirement of Article 2.6 of the Tokyo Round Antidumping Code, the predecessor to Article 2.4 of the AD Agreement. In both cases, the panels rejected Japan's and Brazil's claims. The panels found no basis in Article 2.6 of the Tokyo Round Antidumping Code to support an expansive reading of "fair comparison". As a result, they concluded that the EC's zeroing practices were not a violation of the Code. As the *EC – Cotton Yarn* panel stated:

> In the view of the Panel the argument of Brazil was that the requirement to make due allowance for differences affecting price comparability had to be interpreted in light of the object and purpose of Article 2.6, which was to effect a fair comparison. However Brazil had not made any independent arguments designed to establish that apart from the requirements of the first sentence, and the allowances required by the second sentence of Article 2.6, there was a further requirement that any comparison of normal value and export price must be "fair". The Panel was of the view that although the object and purpose of Article 2.6 is to effect a fair comparison, the wording of Article 2.6 "[i]n order to effect a fair comparison" made clear that if the requirements of that Article were to be met, any comparison thus undertaken was deemed to be "fair".

70. In this regard, Brazil noted at the outset that it "was not arguing against zeroing per se".[98] Instead, Brazil conceded that "zeroing" is normally permissible, but argued that in an environment of high inflation like Brazil the EC's zeroing methodology had an especially prejudicial effect on the calculation of dumping margins.[99]

71. The Panel, however, rejected Brazil's expansive reading of "fair comparison". Instead, it read "fair comparison" narrowly as relating strictly to allowances and adjustments:

> The Panel noted that the first sentence of Article 2.6 concerned the actual comparison of prices at the same level of trade and in respect of sales made as nearly as possible the same time. The Panel considered that the second sentence of Article 2.6 concerned allowances to be made for the relevant differences in the factors that affected price determination in the respective markets sufficient to ensure the required comparability of prices. The Panel took the view that the second sentence of Article 2.6 required that allowances necessary to eliminate price comparability be made prior to the actual comparison of the prices, in order to eliminate the differences which could affect the subsequent comparison. The Panel considered that "zeroing" did not arise at the points at which the actual determination of the relevant prices was undertaken pursuant to the second sentence of Article 2.6. In the Panel's view, "zeroing" was undertaken subsequently to the making of allowances necessary to ensure price comparability in accordance with the obligation contained in the second sentence of Article 2.6. It related to the subsequent stage of comparison of prices; a stage which was not governed by the second sentence of Article 2.6. Therefore, the Panel dismissed Brazil's argument that the EC had failed to make due allowances for the effects of its so-called "zeroing" methodology.[100]

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[98] *EC – Cotton Yarn*, para. 486.

[99] The Panel noted: "Brazil argued that even if so-called "zeroing" could be defended in most circumstances, it could not be defended in cases where due to high inflation very high fluctuations in positive and negative dumping margins occurred". *EC – Cotton Yarn*, para. 498.

[100] *EC – Cotton Yarn*, para. 500.

72. In other words, the *EC – Cotton Yarn* panel did not agree with Brazil's contention that the term "fair comparison" in Article 2.6 of Tokyo Round Antidumping Code[101] incorporates a broad prohibition zeroing. Instead, the panel interpreted "fair comparison" as referring only to the use of adjustments or allowances for purposes of facilitating price comparability.

73. In sum, these panel decisions provide important context on the meaning of the term "fair comparison" in the Tokyo Round Code. In these disputes, Tokyo Round Antidumping Code panels did not interpret identical language in the Code as a prohibition on zeroing or a requirement to average negative antidumping margins. Both panels rejected Japan's and Brazil's attempts to give this term the expansive meanings sought by the EC in this case. It is also noteworthy that Brazil was prepared to admit at the outset that zeroing is permissible in "most" cases, and thus did not challenge zeroing *per se*. In short, a prohibition on zeroing, if it exists, must have come into being in the Uruguay Round, since it did not exist in the Tokyo Round Antidumping Code. This would have required a textual change, but where is that change? As we now show, the Uruguay Round did not result in any new "common understanding" on a broad-based zeroing prohibition. Instead, the key textual provisions that have been cited by the Appellate Body in its previous findings remained virtually unchanged from GATT 1947 Article VI, the Kennedy Round Antidumping Code, and the Tokyo Round Antidumping Code, including such phrases as "product", "products", "margin of dumping", and "fair comparison".

74. During the Uruguay Round negotiations, Japan, Norway, Hong Kong, and Singapore repeatedly sought to add a ban on "zeroing" to the draft AD Agreement text. They argued vehemently that zeroing is inherently unfair; provided lengthy negotiating proposals discussing the treatment of "negative dumping" and "non-dumped sales" under GATT Article VI and the Tokyo Round Antidumping Code; and submitted detailed textual proposals to ban zeroing or require consideration of non-dumped sales. Their proposals, however, were strongly opposed at that time by the EC, the United States, and Canada, and were not incorporated into the final AD Agreement. As a result, as we now show, careful analysis of the negotiating history pursuant to Article 32 of the Vienna Convention demonstrates conclusively that the AD Agreement does not incorporate a broad ban on zeroing or a requirement to aggregate individual transactions under Article 9.3.

75. In September 1987, Japan submitted an initial proposal to the Uruguay Round Negotiating Group on MTN Agreements and Arrangements ("MTN Negotiating Group"), which had jurisdiction over the Tokyo Round Antidumping Code. The Japanese proposal called attention to the need to build a "common understanding" to address the role of "non-dumped" sales in calculating the "export price", as follows:

> Although the Code states that, in order to effect a fair comparison between export price and domestic price, two prices are to be compared at the same level of trade and due allowance be made for the differences in conditions of sale, it is still susceptible of authority's subjective discretion. To clarify elements to be counted for adjustment in order to assure the same level of trade and to enumerate the content of the differences in conditions of sale would help the authorities to assure a fair comparison.
>
> Certain Signatories use the weighted average of prices in all transactions in calculating the "normal value" whereas they use the weighted average of dumped prices exclusively in calculating the "export price". There is a need, therefore, to

[101] This provision was incorporated in Article 2.4 of the AD Agreement, which deals with adjustments.

> build a common understanding on the calculation of dumping margin in order to eliminate such an arbitrary calculation.[102]

76. The Japanese submission is noteworthy because it underscores that at that time Japan fully recognized that: (1) there was no "common understanding" on zeroing and (2) the Tokyo Round language on "fair comparison" did not incorporate a "common understanding" to prohibit "zeroing" or to require the inclusion of "non-dumped sales" in the export price.

77. Japan submitted a second "zeroing" proposal to the Uruguay Round Negotiating Group on MTN Agreements and Arrangements in June 1988:

> **In cases where sales prices vary among many transactions, certain signatories, using the weighted-average of domestic sales price as the normal value with which each export price is compared, calculate the average dumping margin in such a way** that the sum of the dumping margins of transactions the export prices of which are lower than normal value is divided by total amount of export prices. In this method, however, negative dumping margins, i.e., the amount by which export price exceeds normal value, are ignored.
>
> Consequently, dumping margins occur in cases where export prices vary over time … or where export prices vary due to different routes of sale …, even if the average level of export prices is equal to that of domestic sales prices.[103]

Accordingly, the second Japanese proposal explicitly referenced the role of "negative dumping margins".

78. In July 1989, Hong Kong submitted a competing proposal to address "zeroing" in what was then Article 2.6 of the "Carlisle draft"[104] (and would later become Article 2.4 of the AD Agreement) as follows:[105]

> Negative dumping margin (Article 2.6)
>
> 14. In calculating the overall dumping margin of the producer under investigation, certain investigating authorities compare the normal value (calculated on a weighted average basis) with the export price on a transaction by transaction basis. For transactions where normal value is higher than the export price (i.e. dumping occurs), the dumping margin by which the normal value exceeds the export price of each transaction in value terms will be added up. The grand total will then be expressed as a percentage of the total value of the transactions under investigation. This will then represent the overall dumping margin in percentage terms. For transactions where normal value is lower than the export price (i.e. no dumping occurs) the "negative" dumping margin by which the normal value falls below the export price in value terms will be treated as zero instead of being added to the other transactions to offset the dumping margin. As a result, it would be technically easy to find dumping with an inflated overall dumping margin in percentage terms.

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[102] ***Communication From Japan,*** **MTN.GNG/NG8/W/11, at item II.1(4) (Sept. 28, 1987) (emphasis added).**

[103] ***Communication From Japan,*** **MTN.GNG/NG8/W/30, at item I.4(3) (June 20, 1988) (emphasis added).**

[104] Referring to the then Deputy Director General of the GATT, Charles Carlisle.

[105] MTN.GNG/NG8/W/51/Add.1, p. 3 (22 Dec. 1989) (emphasis added).

79. In a separate communication entitled "Principles and Purposes of Anti-Dumping Provisions", Hong Kong discussed the imposition of duties on an individual transaction basis:

> The second way in which anti-dumping duties are imposed on goods which are not dumped, arises out of the tendency to apply an anti-dumping duty as though it were an import levy on all imports from a named country because certain suppliers from that country have been found to have dumped at some time in the past. This ignores the fact that under Article VI, an anti-dumping duty is a levy on dumped imports of products, not on all such products from a named source which may be been found to be dumping such products in the past. *By a strict interpretation, it would appear that only an entry-by-entry system is fully consistent with Article VI; and any variations to such a system to address administrative difficulties must be carefully assessed as to whether this basic requirement of Article VI is still met.*[106]

80. Similar concerns about "negative dumping" were expressed by Singapore in a paper regarding "Proposed Elements for a Framework for Negotiations, Principles and Objectives for Antidumping Rules".[107] Singapore argued that: "In calculating dumping margins, "negative"" dumping should be taken into account i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value".

81. On November 15, 1989, the GATT Secretariat summarized the status of discussions in the Negotiating Group as follows:[108]

> 13. Use of weighted averages in the comparison of export price and normal value
>
> 29. The following were among comments made:
>
> - the problem arose from practices where the normal value, established on a weighted-average basis, was compared to the export price on a transaction-by-transaction basis. Thereby, dumping might be found merely because a company's export price varied in the same way as its own domestic price. Even when domestic profit margin was the same as in the export market, any variations in the export price would, due to the disregard of negative dumping margins, cause dumping to be found, or a dumping margin to be increased;
>
> - if negative margins were included in the calculation, one would not deal with instances in which dumping was targeted to a particular portion of a product line or to a particular region; sales at fair value in one region or in one portion of a product line did not offset injury caused in the other;
>
> - given the definition of like products in Article 2:2, it was difficult to see the relevance of the product line argument. Injury to producers in certain areas presupposed market segmentation which was dealt with in Article 4:1(ii);

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[106] MTN.GNG/NG8/W/46, p.8 (underlining in original; italics added). This communication represents the view not just of one participant in the MTN Agreements negotiations, but the statement by a skilled and sophisticated WTO Member. This Member's view that ideally the imposition of dumping should apply at an individual importer level based on individual entries suggests that the findings in *US – Zeroing (EC) (AB)* and *US – Zeroing (Japan) (AB)* that the calculation of a dumping margin must be done on the basis of the "product as a whole" are misplaced.

[107] MTN.GNG/NG8/W/55, p.7 (13 Oct. 1989).

[108] *Meeting of 16-18 October 1989 of the Negotiating Group on MTN Arrangements*, MTN.GNG/NG8/13, at para. 29 (Nov. 15, 1989) (emphasis added).

> - the issue at stake was masked, selective dumping, the effects of which could be considerable;
>
> - an important question was whether non-dumped imports should also have to be included in the examination of injury.

82. In short, there was no consensus. The Secretariat's report underscores the lack of agreement within the Negotiating Group on modifying Article 2.6 to prohibit "zeroing". While some participants, *e.g.* Japan, Hong Kong, Singapore, and the Nordics strongly supported such a proposal, others were concerned that it would facilitate "selective dumping" into specific markets or for specific product lines.

83. When the negotiations shifted to the drafting of a proposed text, the Nordic Countries submitted proposed amendments to the Code as follows:[109]

> Due allowances and fair comparison
>
> Amend present Article 2.6 (i.e. new Article 2.7) to read as follows and add a footnote: In order to effect a fair comparison between the normal value, as determined in accordance with paragraphs 4 and 5 above and the export price, both prices shall be calculated in a uniform and consistent manner*
>
> . . .
>
> (Footnote) * A uniform and consistent manner of calculation implies that when normal value is determined, e.g. by calculating the weighted or arithmetical averages, the export price shall also be determined by similar weighted or arithmetical average calculations. . .

Nothing even vaguely resembling the Nordic footnote appears in the final text of the AD Agreement.

84. An alternative proposal to revise Article 2.6 of the Tokyo Round Antidumping Code was offered by Singapore, as follows:

> E. Determination of normal value and comparison between normal value and export price
>
> (a) [T]here should be no asymmetrical adjustment. Comparisons between the export price and the normal value should be conducted on a fair and symmetrical basis in determining the dumping margin.
>
> (b) Normal value should reflect the normal costs in the country of origin or exportation, plus profits which are commercially acceptable.
>
> (c) If Normal Value is to be constructed, the investigating authorities should reflect as closely as possible the real conditions in the country of export. In particular, they should reflect the actual production costs and the commercially accepted profit margin in that exporting country. Cost allocation rules should follow the generally-accepted accounting practices in the country of export. Furthermore, the cost-of-production provisions should recognize the need to amortize "start-up" costs and extraordinary costs, such as R&D development costs.

[109] MTN.GNG/NG8/W/76 (11 April 1990) (underlining in original).

> (d) In calculating dumping margins, "negative" dumping should be taken into account i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value. . . .

Again, none of the language in Singapore's proposed text appears in the final Uruguay Round AD Agreement.

85. Finally, in December 1989, Hong Kong submitted a textual proposal to address "negative dumping". Like Japan's and Singapore's, the Hong Kong proposal was framed as a revision to Article 2.6 of the Tokyo Round Antidumping Code, which became Article 2.4 of the AD Agreement, as follows:

> In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provision of Article VI:1(b) of the General Agreement, the prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. The investigating authorities shall give due allowance [shall be made] in each case [on the merits] for the differences in conditions and terms of sale, for the differences in taxation, and for [the] all other differences affecting price comparability in order to put normal value and the export price on a comparable basis and effect a fair comparison. In the cases referred to in paragraph 5 of Article 2 allowance for costs, including duties and taxes, incurred between importation and sale, and for profits accruing, should also be made. Normal value and export price shall be established on a weighted average basis of all sales on the relevant markets for purposes of determining the dumping margin.
>
> (Explanatory note – To ensure that comparison between the normal value and export price be made on an equal basis. Please refer to paragraphs 15 and 15 of paper W/51/Add.1.)
>
> *Underlined text is new language proposed by Hong Kong. Bracketed language reflects deletions from Article 2.6 of the Tokyo Round Antidumping Code.*

Accordingly, like Japan and Singapore, Hong Kong did not view the existing Tokyo Round Antidumping Code provisions regarding "fair comparison" or "margin of dumping" as incorporating a ban on zeroing, but instead sought to introduce new obligations to the text through the addition of new language. Again, Hong Kong's language did not appear in the final AD Agreement text.

86. In sum, the negotiating history of the Uruguay Round shows that the negotiators were well aware of zeroing. Japan and Brazil had already initiated GATT disputes challenging the EC's zeroing practices under the Tokyo Round Antidumping Code. Japan, Singapore, Hong Kong, and the Nordic Countries had submitted negotiating proposals to prohibit zeroing, and Japan, Singapore, and the Nordic Countries had submitted textual language to implement such a ban. The negotiators from Japan, Singapore, Hong Kong, Brazil, and the Nordic Countries were some of the most skilled and sophisticated in the GATT. Given past practice, they were also well aware that they needed to secure major changes in the existing language of GATT 1947 Article VI and the Tokyo Round Antidumping Code in order to achieve their objective of banning zeroing. It was no secret that there was no "common understanding" under GATT 1947 Article VI and the Tokyo Round Antidumping Code of such terms as "fair comparison", "margin of dumping", "product", or "products". As a result, they sought to introduce new obligations to the WTO Agreement through the addition of new textual provisions to mandate A-to-T comparisons and require averaging in all contexts. Unfortunately, none of the language cited above appeared in the final WTO AD Agreement. Instead, the key terms of the

WTO text (apart from the "all comparable export transactions" provision which is limited to A-to-A comparisons in investigations and is not at issue here) were virtually identical to GATT 1947 Article VI and the Tokyo Round Antidumping Code. Accordingly, an analysis of the "preparatory work of the treaty and the circumstances of its conclusion" for purposes of Article 32 of the Vienna Convention shows beyond doubt that there was no common understanding in the Uruguay Round to bar zeroing.

87. While the panel reports in *EC – Cassettes* and *EC – Cotton Yarn* were issued after the conclusion of the Uruguay Round, Japan, Brazil, Singapore, Hong Kong, and the Nordics were well aware that the EC was contesting Japan and Brazil's claims that the Tokyo Round Code prohibited zeroing, because they, like other Members of the Antidumping Code Committee, participated in discussions of the consultation request and the decisions to establish Antidumping Code Panels. In other words, it would have been foolish for Japan, Brazil, Singapore, Hong Kong, and the Nordics to count on some "hidden meaning" in the text being carried over to the WTO AD Agreement from the same terms in its GATT 1947/Tokyo Round predecessors, when they knew the meaning of these terms was cloudy and in dispute. To the extent that they made a bet that they would succeed in inserting a zeroing prohibition into the existing "fair comparison" language of the Tokyo Round Code through the dispute settlement process, the panel reports in *EC – Audiocassettes* and *EC – Cotton Yarn* indicate that this was a wager that they lost. Indeed, the *EC – Cotton Yarn* panel report, upon its adoption by the Antidumping Committee, represented an important interpretation of the Tokyo Round Antidumping Code under the dispute settlement procedures in effect at that time. This phrase, as discussed above, did not change in any material way when it was carried over to the WTO AD Agreement.

88. In short, the lack of any explicit textual reference in the Uruguay Round AD Agreement to prohibiting zeroing, or any meaningful elaboration on the longstanding GATT 1947 and Tokyo Round Antidumping Code terms relating to the "margin of dumping", "fair comparison", "product", or "products", speaks for itself. No common understanding was reached on zeroing in the Uruguay Round. No consensus could be reached because despite extensive efforts by Japan, Hong Kong, Singapore, and the Nordic Countries, their proposals were firmly opposed by the EC, the United States and Canada[110], who had long used zeroing in their antidumping programs under GATT Article VI and the Tokyo Round Code, and continued to use zeroing after the WTO entered into force (and in the case of the EC and Canada continue to use zeroing today, despite their protestations otherwise). Any effort by the EC to read a "zeroing" prohibition into the WTO AD Agreement, therefore, flies in the face of reality.

V. CONCLUSION

89. For the reasons set forth above, along with those set forth in the United States' first written submission, oral statements at the first substantive meeting with the Panel, and responses to the Panel's questions, the United States requests that the Panel reject the EC's claims.

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[110] *See e.g.*, "Meetings of 31 January - 2 February and 19-20 February 1990, MTN/GNG/NG8/15, p. 19 (15 March 1990) (discussing problem of targeted dumping); Meeting of 23 July 1990 MTN/GNG/NG8/19, p. 5 (US delegation expresses concern regarding "the use of average export values"); Meeting of 16-18 October 1989, pp. 13-14, MTN/GNG/NG8/13 (Nov. 15, 1989) (noting that negative comments included "if negative margins were included in the calculation, one could not deal with instances in which dumping was targeted to a particular portion of a product line or to a particular region" and another delegation commented that "the issue at stake was masked, selective dumping").

ANNEX D

ORAL STATEMENTS OF THE PARTIES AND THIRD PARTIES AT THE FIRST AND SECOND MEETINGS OF THE PANEL

Contents		Page
Annex D-1	Opening Statement of the United States at the First Meeting of the Panel	D-2
Annex D-2	Opening Statement of the European Communities at the First Meeting of the Panel	D-10
Annex D-3	Closing Statement of the United States at the First Meeting of the Panel	D-15
Annex D-4	Closing Statement of the European Communities at the First Meeting of the Panel	D-18
Annex D-5	Third Party Oral Statement of Brazil at the First Meeting of the Panel	D-20
Annex D-6	Third Party Oral Statement of India at the First Meeting of the Panel	D-25
Annex D-7	Third Party Oral Statement of Japan at the First Meeting of the Panel	D-26
Annex D-8	Third Party Oral Statement of Korea at the First Meeting of the Panel	D-28
Annex D-9	Third Party Oral Statement of Mexico at the First Meeting of the Panel	D-30
Annex D-10	Third Party Oral Statement of Norway at the First Meeting of the Panel	D-34
Annex D-11	Third Party Oral Statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu at the First Meeting of the Panel	D-37
Annex D-12	Opening Statement of the European Communities at the Second Meeting of the Panel	D-39
Annex D-13	Opening Statement of the United States at the Second Meeting of the Panel	D-40
Annex D-14	Closing Statement of the European Communities at the Second Meeting of the Panel	D-49
Annex D-15	Closing Statement of the United States at the Second Meeting of the Panel	D-50

ANNEX D-1

OPENING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, Members of the Panel:

1. On behalf of the United States delegation, I would like to thank you for agreeing to serve on the Panel. We do not intend to offer a lengthy statement, as our first written submission responds thoroughly to the substantive arguments that the European Communities ("EC") raised in its first written submission.

2. As an initial matter, the United States would like to thank the Panel for agreeing to open the Panel's meetings to the public, including opening the third party session for those third parties willing to make their statements public. The Panel properly recognized that under the Dispute Settlement Understanding ("DSU") it has the authority to modify the working procedures and to organize open sessions. Opening this meeting to the public will have a positive impact on the perception of the WTO dispute settlement system, particularly with respect to transparency. This dispute has a substantial public interest. Permitting the public to observe proceedings and be able to see first-hand the professional, impartial, and objective manner in which they are conducted can only further enhance the credibility of the WTO.

3. Today in our statement we would like to focus on a few points concerning the EC's argument. First, we will offer some comments on the applicable standard of review and the EC's argument concerning Article XVI:4 of the WTO Agreement. Second, we will briefly discuss the proper scope of this dispute and the US requests for preliminary rulings. Third, we will refute the EC's claim that the text of the Antidumping Agreement establishes an obligation to provide an offset for non-dumped transactions in assessment proceedings.

Standard of Review

4. Article 11 of the DSU generally defines a panel's task in reviewing the consistency with the covered agreements of measures taken by a Member. In a dispute involving the Antidumping Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) with respect to various permissible interpretations of a provision of the Antidumping Agreement.

5. The question under Article 17.6(ii) is whether an investigating authority's action rests upon a permissible interpretation of the Antidumping Agreement. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation". Where that is the case, and where the investigating authority's action rests upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.[1]

6. Under DSU Article 11, this Panel is charged with making an objective assessment of the matter before it, including an objective assessment of the facts and the conformity of the challenged measures with the relevant covered agreements. However, the EC and certain third parties would like this Panel to neglect its express obligation under Article 11 of the DSU to conduct an objective assessment.

[1] *See Argentina – Poultry*, para. 7.341 and n. 223.

7. Instead, those Members urge the Panel to follow prior Appellate Body findings in order to ensure the "security and predictability" referred to in Article 3.2 of the DSU. However, Article 3.2 does not impose on panels an obligation to create security and predictability. Rather, Article 3.2 explains that the dispute settlement system is a central element in providing security and predictability to the multilateral trading system. That only occurs, however, when panels and the Appellate Body comply with the provisions of Articles 3.2 and 19.2 of the DSU – that is, when they do not create rights and obligations to which the Members did not agree.

8. The EC's approach would result in undermining the very security and predictability to which the EC pays lip service. For the EC, it would be enough for a panel to rely uncritically upon a prior Appellate Body report. The EC, in essence, would like this Panel to rubber-stamp those reports favourable to its position. Fortunately for the dispute settlement system, panels and the Appellate Body have refused to embrace the approach urged by the EC.

9. Two panels have expressly rejected allegations that they were bound by Appellate Body conclusions, most recently in *US – Zeroing (Mexico)*. That panel, like the *US – Zeroing (Japan)* panel, was not convinced. According to the *US – Zeroing (Mexico)* panel, in light of its "obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB", the panel "felt compelled to depart from the Appellate Body's previous approach" to claims against so-called "zeroing" in administrative reviews.[2] Similarly, the panel in the dispute *United States – Anti-dumping Measure on Shrimp from Ecuador* re-affirmed the need for a panel to take seriously its obligations under DSU Article 11 to conduct an objective assessment and to hold a complaining party to its burden of proof even where the responding party did not contest the complaining party's claims. And it is ironic that while the EC urges the Panel to treat past Appellate Body reports as being definitive interpretations of the covered agreements, the EC ignores the very findings of the Appellate Body on the issue of the effect to be given to prior Appellate Body reports. In *Japan – Taxes on Alcoholic Beverages*, the Appellate Body explained:

> We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. . . . Article IX:2 of the *WTO Agreement* provides: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Article IX:2 provides further that such decisions "shall be taken by a three-fourths majority of the Members". The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.[3]

10. This Panel likewise is charged with undertaking an objective assessment of the matter before it, applying the proper customary rules of interpretation, and cannot make findings or recommendations that add to or diminish the rights and obligations in the covered agreements.

Article XVI:4 of the WTO Agreement

11. Turning to Article XVI:4 of the WTO Agreement, the EC's interpretation of that provision, if adopted, would improperly add to or diminish the rights and obligations of Members. The EC argues that "the findings of the Appellate Body as adopted by the DSB in specific disputes create an independent international obligation for the losing party in that dispute to comply".[4] Because the

[2] *US – Zeroing (Mexico)*, para. 7.106.
[3] *Japan – Alcoholic Beverages (AB)*, p. 13.
[4] EC First Written Submission, para. 128.

DSB has adopted Appellate Body reports holding zeroing inconsistent with provisions of the covered agreements, the EC asserts that the United States is under a continuing obligation to comply, has not yet done so, and has therefore acted inconsistently with Article XVI:4.

12. The EC's expansive interpretation of Article XVI:4 should be rejected. The idea of a continuing "independent international obligation" arising from adopted reports cannot be reconciled with the text of the DSU, nor with the fact that Appellate Body and panel reports are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, no report can create any "obligation" independent of the covered agreements – Articles 3.2 and 19.2 of the DSU are explicit on this fact, and the EC approach is directly contrary to the very text to which the EC has agreed. In light of Articles 3.2 and 19.2 of the DSU – which prohibit panels and the Appellate Body from adding to the obligations of Members – and the specific provisions of the DSU on compliance, including Article 21.5, the EC's proposed interpretation of the text of Article XVI:4 is entirely inconsistent with the covered agreements and the rules of treaty interpretation as reflected in the Vienna Convention.

Scope of this Dispute

(a) The EC Requested Establishment of the Panel on Measures not Included in its Request for Consultations

13. The United States has asked the Panel to make preliminary rulings as well on the EC's attempt to expand improperly the scope of this proceeding. Today we will briefly discuss our three preliminary objections and respond to a few points that the EC raised in its submission of October 5.

14. The United States first requests a preliminary ruling that the measures appearing in the EC's panel request, but not in its request for consultations, are outside of the Panel's terms of reference. More specifically, the EC's panel request added 10 sunset reviews and 4 administrative reviews to the 38 specific measures originally listed in its request for consultations. The EC also added a new request concerning the "continued application of, or the application of, the specific antidumping duties" resulting from the antidumping orders in 18 cases, as calculated or maintained in place pursuant to the most recent administrative review, original proceeding, or changed circumstances or sunset review proceeding.

15. Under DSU Article 7.1, a panel's terms of reference are determined by the complaining party's request for the establishment of a panel. In turn, DSU Article 6.2 provides that a panel request must "identify *the specific measures at issue*" in a dispute. Under DSU Article 4.7, however, a Member may not request the establishment of a panel with regard to any measure, but only with respect to a measure that was subject to consultations. Finally, DSU Article 4.4 requires that the request for consultations state the reasons for the request, "including identification of *the measures at issue* and an indication of the legal basis for the complaint". As the United States explained in its first written submission, the Antidumping Agreement contains parallel requirements in Articles 17.3-17.5.

16. The covered agreements thus establish a clear progression from the measures contained in the consultations request to the measures identified in the panel request, upon which a panel's terms of reference are based. As the Appellate Body explained in *Brazil – Aircraft*, "Articles 4 and 6 of the DSU . . . set forth a process by which the complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[5] Under the relevant provisions in the DSU and Antidumping Agreement just discussed, a panel's terms of reference cannot include measures which were outside the request for consultations.

[5] *Brazil – Aircraft (AB)*, para. 131.

17. The EC's panel request contained measures that are not found in its request for consultations. None of the new measures can properly fall within this Panel's terms of reference. Moreover, permitting the EC's panel request with respect to these measures would have a detrimental effect on the WTO dispute settlement system. If a party could simply add new measures after consultations, the very purpose of consultations, and their practical utility, would be severely undermined. The parties would never have had the opportunity through consultations to resolve their differences, contradicting the very notion of "prompt settlement" of disputes under Article 3.3 of the DSU. Such an outcome would also detract from the goal in DSU Article 4.1 "to strengthen and improve the effectiveness of the consultation procedures employed by Members".

18. Responding to the United States' preliminary objections, the EC has created various legal standards in an effort to convince the Panel to accept the new measures contained in its panel request. However, it is irrelevant whether the new measures have a "direct relationship" with the measures in the consultations request.[6] Nor has the Appellate Body articulated a test that new measures involving "essentially the same matter" may be included in the panel's terms of reference when they were not included in the consultation request.[7] Instead, this Panel should be guided by the DSU – a panel's terms of reference cannot include measures that were not the subject of a request for consultations. And, in *US – Certain EC Products*, the Appellate Body agreed that the scope of measures subject to referral to the DSB is delineated by the consultations request, and, absent a request for consultations, a new, legally distinct measure may not be placed before a panel in the request for establishment.[8]

(b) The EC Failed to Meet the Specificity Requirement of DSU Article 6.2

19. The United States also asks that the Panel find that the EC's reference in its panel request to the continued application, or application of antidumping duties in 18 enumerated cases does not meet the specificity requirement of DSU Article 6.2. The EC affirmed the open-ended, indeterminate nature of these alleged measures when it stated in its October 5 response that the EC's panel request pertained to all "subsequent measures" adopted by the United States with respect to the 18 measures included in its panel request.[9] In effect, the EC is asking this Panel to take jurisdiction over determinations that the United States has not yet made.

20. Under DSU Article 6.2, a panel request must "identify the *specific measures* at issue" in the dispute. The specificity requirement is important for two reasons.[10] First, it ensures the clarity of the panel's terms of reference, which, pursuant to DSU Article 7, are typically determined by the panel request. Second, it informs the responding party and other Members of the nature of the complainant's case (i.e., the "measures" challenged and the WTO provisions invoked by the complaining party). For other Members, this could often mean the difference between deciding to participate as a third party or not.

21. The EC's imprecise reference to "most recent" measures, and its admitted inclusion of "subsequent measures", related to 18 separate orders, is anything but specific. Each determination that sets the margin of dumping for a defined period of time (for example, the period of an administrative review) is distinct and separate, and under DSU Article 6.2, the EC must identify specifically each measure in its panel request. Instead, the EC is impermissibly attempting to include determinations beyond those explicitly listed in its panel request. Because of the EC's lack of specificity, the United States is unable to determine when these determinations were or will be made, what calculations they did or will include, what duty rates they have established or will establish, and what individual companies they did or will cover.

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[6] EC Response to Request for Preliminary Rulings, para. 25.
[7] EC Response to Request for Preliminary Ruling, para. 24.
[8] *US – Certain EC Products (AB)*, para. 82.
[9] EC Response to Request for Preliminary Rulings, para. 47.
[10] *Japan – Film (Panel)*, para. 10.9.

22. The EC cites various Appellate Body and panel reports in an effort to convince the Panel that the "subsequent measures" are somehow identified "precisely" in its request for establishment. However, the reports cited by the EC are inapposite. They involve disputes, such as *EC – Bananas III* and *Japan – Film*, where a law of general application was identified in a panel request, and subsequent implementing regulations were considered to fall within a panel's terms of reference. Here, the EC is not challenging a framework law and subsequent implementing regulations. Each original investigation, administrative review, and sunset review results in a distinct final determination which constitutes an action taken by the United States. In other words, a measure which must be identified precisely in the panel request.

(c) The EC's Request Included Measures That were not Final at the Time of its Panel Request

23. Additionally, the United States asks that the Panel exclude from its consideration four "measures" in the EC panel request because they are preliminary determinations. Under Antidumping Agreement Article 17.4, a matter may only be referred to a panel if "final action has been taken by the administrating authority". The EC, however, identifies three on-going sunset reviews, and one on-going administrative review in its request for establishment of a panel. In these four proceedings, the United States has not taken "final action", and therefore, under the Antidumping Agreement, these proceedings have not yet resulted in any measure that can form part of this Panel's terms of reference.

24. The EC asserts that the on-going proceedings are part of their catch-all reference to "subsequent measures" related to the 18 antidumping duty orders and that they therefore are properly included in the Panel's terms of reference. Aside from the flaws related to the EC's "subsequent measure" argument, the EC neglects altogether the plain language of Article 17.4 that governs here. The four on-going proceedings cannot properly be before this Panel**,** and terming them "subsequent measures" does not change this fact.

The Alleged Obligation to Provide Offsets

25. We now turn to the EC's argument that the Antidumping Agreement contains an obligation to provide offsets for instances of non-dumping in the context of certain identified assessment proceedings. The key here is that the text of the Antidumping Agreement does not impose on Members an obligation to provide an offset for non-dumped transactions in assessment proceedings. The starting point must be the text of the Agreement. It is fundamental that in interpreting a treaty, a panel must not impute into that treaty words and obligations that are not contained in the text. In this dispute, the EC asks this Panel to read an obligation into the Antidumping Agreement. In particular, the EC seeks to impose an obligation to reduce antidumping duties to account for instances of non-dumping in assessment proceedings. The EC does so despite the absence of a textual basis for such an obligation and despite the presence of a permissible interpretation of the Antidumping Agreement that does not require such offsets.

26. In fact, 4 panels addressing this exact issue have consistently found that there is no textual basis supporting an obligation to provide offsets outside the context of average-to-average comparisons in investigations.[11] There is a significant reason for this consistency. The only textual basis that panels have identified for an obligation to provide offsets has been the "all comparable export transactions" language in the text of Article 2.4.2 of the Antidumping Agreement, which relates specifically to average-to-average comparisons in investigations, and is not applicable to any other kind of comparison in any other context.[12]

[11] *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.65, 5.66, 5.77; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284; *US – Zeroing (Mexico)*, paras. 7.118, 7.119, 7.143.

[12] *US – Softwood Lumber Dumping (AB)*, paras. 86-90, 104-05.

27. In urging this Panel to find that the Antidumping Agreement prohibits zeroing in the context of assessment proceedings, the EC cannot rely on text, because no such text exists. Instead, the EC seems to rely most heavily on the Appellate Body's report in *US – Zeroing (Japan)*. We respectfully disagree with the reasoning used by the Appellate Body regarding the WTO-inconsistency of what it referred to as "simple zeroing" in periodic reviews. Every panel that has examined the issue has concluded that zeroing is not prohibited by the Antidumping Agreement in such circumstances.

28. The EC argues that margins of dumping calculated in assessment proceedings must relate to the "product as a whole", and cannot be calculated for individual transactions. The term "product as a whole" is not found anywhere in the Antidumping Agreement, nor does it have a defined meaning; moreover, "product as a whole" is not found anywhere in the Appellate Body report in *US – Zeroing (Japan)*.

29. In attempting to find a basis for its legal theory, the EC refers to the definition of dumping contained in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994. Nothing in either provision supports the argument that a margin of dumping must be calculated for the "product as a whole". Instead, these provisions talk about dumping in terms of a product being introduced into the commerce of another country – an action that occurs through *individual transaction*s. Nowhere does GATT Article VI or Article 2.1 of the Antidumping Agreement refer to the total of all transactions relating to that product over a period of time, let alone explain what would be the applicable period of time.

30. The EC's argument is that injurious dumping that occurs with respect to one transaction is mitigated by another transaction made at a non-dumped price. However, nothing in the Agreement supports that view, nor does commercial reality. To the extent that some transactions introduce merchandise into the market of an importing country at a price above normal value, this is to the benefit of the seller, and does not relieve the domestic industry of the injury caused by other transactions made at less than normal value.

31. Our written submission more fully sets forth the textual and contextual bases, and other evidence that the concepts of dumping and margins of dumping, as defined in the Antidumping Agreement and the GATT 1994, are applicable to individual transactions. It explains that the terms "dumping" and "margins of dumping", as used in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994, do not support the existence of an obligation to provide offsets for instances of non-dumping in assessment proceedings.

32. The EC's arguments concerning Article 9.3 fail for much the same reason. The EC contends that the term "margin of dumping" relates exclusively to the "product as a whole", considered on an exporter-wide basis. Article 9.3 requires that the amount of antidumping duty assessed shall not exceed the margin of dumping. However, the obligation in Article 9.3 may be applied at the level of individual transactions. This understanding of the term "margin of dumping" is particularly appropriate in the context of antidumping duty assessments, where duties are assessed on individual customs entries resulting from individual transactions for which importers are liable for payment. Panels in prior disputes have agreed that there is no reason why a product that is introduced into the commerce of another country cannot refer to a particular export sale.[13]

33. Prior panels have also noted that an obligation to weigh one transaction against another cannot be reconciled with Article 9.4, which recognizes the existence of prospective normal value systems of assessment. Under such systems, liability is determined on the basis of an individual transaction. One import transaction has no effect on the amount of antidumping duty due as a result of other distinct transactions. Reading Article 9.3 as requiring one transaction to offset another would

[13] *US – Zeroing (Japan) (Panel)*, para.7.201; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.53-5.57; *US – Zeroing (EC) (Panel)*, para. 7.204.

require Members that use prospective normal value systems to conduct refund reviews even where every import was properly assessed duties based on a correct comparison of its export price to the appropriate normal value. This would lead to an absurd result: prospective normal value systems would then be indistinguishable from retrospective assessment systems. The United States has been unable to identify a single prospective normal value system that provides for such reviews.

34. It is also important to consider that, if the EC's reading of "margin of dumping" is accepted as the sole permissible interpretation of Article 9.3, the remedy provided under the Antidumping Agreement and the GATT 1994 may be prevented from fully addressing injurious dumping. If authorities have to take into account the export prices paid by all importers importing from the same exporter, the importers with the highest margins would pay less than the true margin of dumping because of the other importers importing at non-dumped prices. Such an approach would favor importers who participate in dumping over other importers (and domestic competitors) that compete fairly.

35. The panel in *US – Zeroing (Mexico)* recognized this dilemma, finding that this "kind of competitive disincentive to engage in fair trade could not have been intended by the drafters", and should not be accepted as consistent with Article 9.3.[14] The fact that some imports are made at non-dumped prices does not change the fact that the domestic industry suffers from dumped imports, and the injury suffered is not mitigated by non-dumped prices. Thus, requiring authorities to use non-dumped imports as an offset to dumped imports precludes the objective of antidumping duties – which is to redress the injurious effects of dumping.

36. Furthermore, adopting the EC's reasoning would cause implications for Article 2.4.2. Any finding that Articles 2.1 and 2.4.2 of the Antidumping Agreement and GATT Article VI contain a general prohibition of zeroing, would render the second sentence of Article 2.4.2, the targeted dumping provision, *inutile*. This is because the targeted dumping methodology provided for in Article 2.4.2 mathematically must yield the same result as the average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. In fact, the EC, a Member that uses the average-to-transaction comparison, addressed this matter before its own tribunal. There, the EC argued that a prohibition of zeroing cannot apply equally to both comparison methodologies because it would lead to the same mathematical result, rendering the average-to-transaction methodology redundant.[15] This fact cannot be ignored or diminished by assuming that the targeted dumping provision permits an authority to ignore any obligation in the Antidumping Agreement other than the obligation to use one of the two symmetrical comparison methods. The panel in *US – Zeroing (Mexico)* agreed that this is a significant concern and one that the Appellate Body in *US – Zeroing (Japan)* had not properly addressed.

37. The EC also contends that zeroing is inconsistent with the "fair comparison" requirement of Article 2.4. However, the EC does not argue that any of the transaction-specific comparisons made by the United States failed to reflect a "fair comparison". Instead, the EC contends that the aggregate amount of antidumping duties assessed exceeded the margin of dumping for the product as a whole. The relevant text of Article 2.4, however, provides only that a "fair comparison shall be made between the export price and the normal value". The text of Article 2.4 does not address whether any particular assessment of antidumping duties exceeds the margin of dumping. This is because the text of Article 2.4 does not address whether "dumping" and "margins of dumping" are concepts that apply to individual transactions. Nor does the text address, for purposes of assessing antidumping duty liability, whether a margin of dumping may be specific to each importer that is liable for payment of

[14] *US – Zeroing (Mexico)*, para. 7.146, quoting Oral Statement of the United States at the Second Meeting, para. 18.

[15] US First Written Submission, para. 117, citing Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006, para. 94 (Exhibit US-3).

the antidumping duties. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is "fair" or "unfair".

38. Consequently, resolution of the EC's claim depends not on the text of Article 2.4, but on whether it is permissible to interpret the term "margin of dumping" as used in Article 9.3 as applying to individual transactions. Therefore, if the Panel finds, as the prior panels have found, that it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction, the challenged assessments will not exceed the margin of dumping and there will be no basis for a finding of inconsistency with Article 2.4.

39. The EC, in arguing for a blanket prohibition of zeroing, also relies on an erroneous interpretation of the term "investigation" in Article 2.4.2. It seeks to deny meaning to the phrase "during the investigation phase" by recasting Article 9 assessment proceedings and Article 11 reviews as "investigations". In the EC's view, any proceeding which involves questionnaires, verification, and the possibility of a hearing constitutes an investigation subject to Article 2.4.2.

40. The Antidumping Agreement contains clear distinctions between investigations under Article 5 to determine the existence, degree and effect of dumping and other phases of an antidumping proceeding, such as assessment reviews and sunset reviews. The basic interpretive problem with the EC's analysis is that it reduces language in the Antidumping Agreement to redundancy. Article 2.4.2 provides for the application of certain methodologies to determine the existence of margins of dumping "during the investigation phase". The inclusion of the phrase "during the investigation phase" in Article 2.4.2 was intended to have a limiting effect. Indeed, labeling every dumping calculation exercise to be an investigation would render the phrase "during the investigation phase" without meaning.

41. In summary, the United States respectfully disagrees with the Appellate Body's reasoning that the Antidumping Agreement includes a general prohibition of zeroing, and rejects the EC's assertion that the United States has some type of general obligation under international law to eliminate "zeroing". Instead, the United States agrees with the reasoning of antidumping experts on recent panels, finding that outside the context of average-to-average comparisons in investigations, the Antidumping Agreement does not impose an obligation to provide offsets for non-dumping. At a minimum, we urge this Panel to find that a permissible interpretation of the Antidumping Agreement contains no obligation to provide for an offset to dumping in assessment proceedings.

42. Mr. Chairman, Members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.

ANNEX D-2

OPENING STATEMENT OF THE EUROPEAN COMMUNITIES AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, distinguished Members of the Panel:

1. Thank you for agreeing to serve on this Panel.

2. So here we all are again. Another zeroing case – to be precise 18 further zeroing cases and some 52 further instances of the application of zeroing by the US. No doubt this is not the first time that you may have had occasion to consider the zeroing issue. Certainly it is not the first time that the EC and the US have exchanged arguments on this point – I may say exhaustive – sometimes even exhausting – arguments. So much so that some people have said that there is a certain amount of zeroing fatigue at the WTO – I certainly have the impression that the third party statements are getting shorter – although the real world impact on EC exporters remains as severe as it ever was.

3. But there is one thing about this zeroing hearing that is new. It is *public* – something very much welcomed by the EC – and something that, in a profound sense, goes to the very heart of this case. One could put the question in these terms: who owns the ADA? Who is to tell us what it means? Is its meaning a *private* matter to be settled behind closed doors, according to the will of a few? Or does its meaning rather result from a systematic and objective application – by judges – of the agreed rules of interpretation of *public* international law – that is, the Vienna Convention? To recall, the Vienna Convention refers to: good faith, ordinary meaning, context, object and purpose and (as a supplementary means of interpretation) the preparatory work.

4. Mr. Chairman, I am not sure I have ever seen a WTO Member in such an isolated and entrenched position as that of the US in this case. Leaving aside for a moment the views of those who say this is just belligerent posturing by the US driven by protectionist sentiment, let us ask ourselves the question: what is it that really divides the two sides? After-all, we cannot hope to resolve the dispute if we do not make a supreme effort, with an open mind, to get to the root of this apparent mutual incomprehension.

5. In that spirit, after carefully re-reading many times the US FWS I was finally struck by what is *not* in it: namely any reference to the Vienna Convention. I was further struck by the impression that the US position appears to reflect a strongly held belief that a prohibition on zeroing in assessment proceedings was never "intended" by the US, because of the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 of the ADA. Consequently, in this opening statement, and in a genuine effort to resolve the matter, the EC would (again) like to try and bridge that gap, by bringing the agreed rules of interpretation in the Vienna convention to bear on the phrase in question.

6. Mr. Chairman, as an advocate, I am doomed to advocate. But the story that I would now like to tell you has – I believe – the very great merit of being true – so much so that I think you would be hard pressed to find anyone on either side of the debate who – after cool-headed reflection – would seriously question it.

7. We begin with the observation that the term "zeroing" – which does not appear in the ADA, may be considered something of a misnomer, because it describes only part of the problem: that is, the downward adjustment of the relatively high export transactions; or, in other words, the setting to zero of the negative amounts. The *heart* of the matter, however, is the **selection** of the relatively low

priced export transactions *per se*, as a sub-category, as the only or preponderant basis for the dumping margin calculation. This has nothing to do with "offsets" or "credits".

8. This is not a new problem. It is discussed at length in Jacob Viner's 1923 Memorandum,[1] and was specifically addressed in the Uruguay Round negotiations, during which the Members were fully informed of the issue and knew exactly what they were talking about.[2] After more than 3 years of public negotiations, the problem was nicely summarised by the WTO secretariat:[3] it was generally considered that the practice of comparing a weighted average normal value with individual export transactions was obviously *unfair* to exporters – particularly from *developing* countries – and required amendment of the Tokyo Round AD Code; the US explained that such a method was necessary to reveal *targeted dumping* – that is, successive attacks on different parts of an importing market; the consensus was that the Membership should try to find a solution to accommodate the legitimate concerns of both sides. That *compromise* was the text of Article 2.4.2 of the ADA, as it stands today.

9. Looking at the overall design and architecture of Article 2.4.2, and reading its provisions intelligently, in the light of the underlying *economic* realities that the legal rules are intended to address and respond to – that is, the *real world*, it is clear that *there are only three sub-categories of clustered low priced export transactions that it is permissible to respond to*: those clustered by purchaser, region or time.[4] The Panel will note that these categories broadly correspond to typical market definition parameters: they make *economic* sense.

10. Thus, it is not *permissible*, and it is not *fair*, to pick up low priced export transactions clustered by model. The US has acknowledged as much. This is clear from the term "all" in the first sentence of Article 2.4.2, and the definition of dumping in Article 2.1 of the ADA and Article VI:1 of the GATT 1994 in terms of the product; ***read together with the absence in the targeted dumping provisions of any reference to a sub-category by model***. Thus, the relevant provisions, and particularly the normal rule and the exception, are read *harmoniously*, so as to give meaning – both *legal* and *economic* – to all the treaty terms.

11. In exactly the same way, it is not possible to pick up low priced export transactions *per se* as a sub-category. ***There is no reference to any such sub-category in the provisions on targeted dumping***. To accept such a proposition would be to render the targeted dumping provisions useless; and to negate the compromise, negotiated and agreed by all the WTO Members (in return for other concessions), to which I have just referred. The proof of this is that for some 13 years the US has simply ignored the targeted dumping requirements, content to continue doing exactly what it was doing before, based on its own unilateral interpretation of Article 2.4.2. The further proof of this is that, by its own assertion, the US sought the insertion of the phrase "the existence of margins of dumping during the investigation phase" precisely with the intention of *side-stepping* the compromise and the obligations that I have just outlined. This is an important point – so I hope you will permit me to repeat it. The entire US position is premised on the implied admission that the overall design and architecture of Article 2.4.2 is to be interpreted in the manner advocated by the EC.

12. We turn, therefore, to the phrase "the existence of margins of dumping during the investigation phase", added – *behind closed doors* – after some three and a half years of public

[1] Jacob Viner, *Memorandum on Dumping*, written for the World Economic Conference of the League of Nations, 1926, Reprinted 1966, discussing dumping in terms of international price discrimination between different markets, and distinguishing between systematic or permanent dumping and sporadic, abnormal or temporary dumping (for example, at paragraphs 2, 5, 6, 9, 11, 12 and 13).

[2] The US agrees (US FWS, paragraph 89). The US is correct that Article VI of the GATT did not change, but ignores the fact that Article 2.4.2 of the ADA was introduced in the Uruguay Round.

[3] MTN.GNG/NG8/15, page 13.

[4] ADA, Article 18.1: "No specific action against dumping … can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement".

negotiations. According to the US, this means that the obligations in Article 2.4.2 do not apply to the re-calculation of dumping margins in assessment proceedings. Rather, the US is to be completely free to choose the methodology to be used for calculating a contemporaneous dumping margin and finally collecting duties. Since the results of the first retrospective assessment proceeding are applied with effect from the date on which duties were first imposed, this would negate *entirely* the compromise enshrined in Article 2.4.2.

13. In the EC's view, assuming Members negotiate in full knowledge of the Vienna Convention, it may reasonably be assumed that they negotiate in good faith, just as they agree that the terms of the ADA are to be interpreted in good faith. In such negotiations, the EC would neither expect nor accept that what is clearly given, after lengthy debate, with one hand (that is, agreement not to use asymmetry absent targeted dumping) would be surreptitiously entirely taken away with the other hand. The US position reflects what might be termed the "last minute" "spanner in the works" theory of international negotiation – a tactic that, in the view of the EC, is hardly suited to a multilateral organisation with 151 Members, including many *developing* countries.

14. However, assuming for the sake of argument, that such negotiation tactics are permissible, ***the EC would like to draw the Panel's very close attention to what a Member forfeits when it adopts such an approach***. First, most obviously, the Member chooses to leave no trace of its intended unilateral interpretation in the *preparatory work*. Second, and in similar vein, the Member chooses not to offer any explanation to its negotiating partners – many of whom are *developing* countries – as to what the *object and purpose* of such a provision might be. This is particularly problematic when the subsequent unilateral interpretation flies in the face of the overall design and architecture of the ADA. Especially when there is no object and purpose capable of explaining why, on the basis of identical data, the mere act of collection should inflate the dumping margin many times over – a proposition that is "manifestly absurd or unreasonable" within the meaning of the Vienna Convention – both in legal terms and in *economic* terms. Third, and in similar vein, the Member chooses to forego any attempt to reconcile conflicting *context* with its intended unilateral interpretation. The Panel will thus note that of the various elements of the interpretive rule in the Vienna Convention, *by the US' own choice*, there is only one that stands between the US and failure: the supposed *ordinary meaning* of the phrase.

15. We believe we have amply demonstrated that the ordinary meaning of the phrase is not that advocated by the US.

16. We believe that, for the US, the term "investigation" was key in its intended unilateral interpretation. In fact, we have an express admission of this in the US Statement of Administrative Action (SAA), which accompanied the adoption of the US Uruguay Round Agreements Act, and which contains the words ("not reviews").[5] Obviously, the drafter of the SAA well appreciated that these words are not contained in Article 2.4.2 of the ADA, and do not result from a proper interpretation of that provision, which is precisely why they were inserted in the SAA ***in an attempt at ex post rationalisation*** – an attempt doomed to fail, as subsequent WTO litigation has demonstrated.

17. The ordinary meaning of the term "investigation" is simply a systematic examination or careful study of a particular subject.[6] When the US asserts that Article 2.4.2 refers to "an investigation to determine the existence, degree and effect of any alleged dumping", within the meaning of Article 5.1 of the ADA, it is the US – not the EC – that is asking the panel to read words

[5] United States Statement of Administrative Action accompanying the adoption of the Uruguay Round Agreements Act (URAA), and providing authoritative guidance for its interpretation (Appellate Body Report, *US - OCTG from Argentina*, paragraph 207). The SAA also confirms that: "the reluctance to use an average-to-average methodology has been based on a concern that such methodology could conceal "targeted dumping"".

[6] This view is supported by the dictionary meanings set out in *The Shorter Oxford English Dictionary, fifth edition (2002).*

into the text of Article 2.4.2 that are not there, and in a manner that is squarely disrespectful of the existing text. Under the ADA there are five types of proceeding (original, newcomer, changed circumstances, sunset and assessment), each of which involves an investigation into something. This is exactly how the term is used in US municipal law.[7] It is also exactly how it has generally been understood in the WTO.[8]

18. Thus, in these proceedings, the US is arguing for the term "investigation" to have a limited[9] or *special meaning*. Under the terms of the Vienna Convention, that is only possible if the US establishes that *all* the *Members* of the WTO so intended.[10] And that is where the US stumbles, precisely because, in pursuing its "last minute" theory of negotiation, the US itself chose to forego any attempt to get its intended special meaning agreed by the other WTO Members – who have since confirmed that they intended no such thing.[11]

19. Although the cause is lost, the US struggles on. It turns first to the term "existence" as somehow unique to original investigations – but this term simply relates to any dumping margin calculation.[12] Next, the US turns to the term "during … phase" – but this simply indicates "a distinct period" in the passage of time[13] – as the EC submits, an investigation period – and the US is simply wrong to assert that there is only one type of "proceeding" with five phases, when there are in fact five types of proceeding, each of which may involve an investigation into something.

20. The discussion could stop here. But there are a *multitude* of other interpretative points against the US. First, the grammatical structure of the phrase, in which the term "during … phase" is grammatically linked to a period of time in which margins exist (an investigation period) as opposed to one in which they are established (as the US would have it). This both confirms the EC interpretation and *precludes* the US interpretation. Second, the defined term "margin of dumping" has the same meaning throughout the ADA, and must inform the meaning of the phrase – there being no support in the text for the view that the definition should change at the moment of final collection. Third, the overall design and architecture of Article 2.4.2, as outlined above. It is particularly

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[7] The US Rules of Practice and Procedure of the International Trade Commission effective 6 July 1998 (63 FR 30599) contain the following provision:

> Investigation to review outstanding determination
>
> (a) Request for review. Any person may file with the Commission a request for the institution of a review investigation under Section 751(b) of the Act. The person making the request shall also promptly serve copies on the request on the parties to the original proceeding upon which the review is to be based. All request shall set forth a description of changed circumstances sufficient to warrant the institution of a review investigation by the Commission.

A review under Section 751(b) of the Tariff Act is a changed circumstances review, as provided for in Article 11.2 of the *ADA*.

The US International Trade Commission systematically refers to "Changed Circumstances Investigations" and to "Five-Year Review (Sunset) Investigations".

[8] *World Trade Organization, A Handbook on Anti-Dumping Investigations, Judith Czako, Johann Human and Jorge Miranda, Cambridge University Press, 2003*, page 93, with respect to retrospective assessment proceedings: "The margin would be recalculated by means of an **investigation** much like the original investigation, addressing normal value, export price, and comparing the two, using the data for the POR. This **investigation** could take up to 12 months". (emphasis added).

[9] US FWS, paragraphs 99 and 101.

[10] Vienna Convention, Article 31(4): "A special meaning shall be given to a term if it is established that the parties so intended".

[11] A review of all notifications by WTO Members of their anti-dumping laws implementing the ADA reveals that none has adopted the US interpretation. Furthermore, when questioned on this issue, other WTO Members have confirmed that they did not intend Article 2.4.2 to have the meaning advocated by the US (Appellate Body Report, *US – Zeroing*, paragraph 22).

[12] See particularly the title to Article 2 in the French language version of the ADA.

[13] This view is supported by the dictionary meanings set out in *The Shorter Oxford English Dictionary, fifth edition (2002).* It was advanced by the US itself in DS294.

significant in this respect that the EC position reads the normal rule referring to the *investigation period* in counterpoint to the exceptional rule permitting a response to *time* based targeted dumping. Thus, once again, the EC advances a *harmonious* reading of all the treaty terms, that makes legal and *economic* sense of all of them. Fourth, the numerous references in Article 2 to "investigations", which are considered, even in US municipal law, to refer to all types of investigations, including assessment proceedings. Fifth, the rule in Article 9.3 that the amount assessed cannot exceed the dumping margin – with an express cross-reference to *all* of Article 2. Sixth, the absence of any object and purpose argument capable of supporting the US position. Seventh, the preparatory work, as outlined above … And the list goes on.

21. Finally, the US turns to some other general arguments, equally without merit. First, the so-called "mathematical equivalence" argument,[14] which is obviously vitiated by a simple intellectual error: something can perfectly well be fair as a response to targeted dumping, but unfair absent targeted dumping. Second, the argument derived from Article 9(4)(ii) and the so-called "variable duty" or prospective normal value.[15] This provision concerns sampling, and insofar as it implies the possibility that one of the measures that could be imposed pursuant to Article 9.2 ADA could be a variable duty, it equally implies that any such duty is ultimately subject to final assessment or refund under Article 9.3, with dumping margins re-calculated in accordance with all of the provisions of Article 2. This is completely logical. It plugs the gap that would otherwise arise in the *refund* system under Article 9.3.2, in which final liability cannot, by definition, increase. The only option for Members operating such systems who are fearful of targeted dumping is a variable duty, with refund in the event that the feared targeted dumping does not materialise. The proposition that Article 9(4)(ii) in any way contradicts any of the interpretative points that we have already outlined is thus without merit. Third, the proposition that because, in the US, assessment proceedings are importer driven, this should change the analysis.[16] This practical assertion is without merit. The ADA responds to international price discrimination by *exporters*; and it is a matter of *elementary accounting* to calculate final liabilities for importers, whilst respecting the ceiling fixed by the amount of dumping practiced by an exporter.

22. Mr. Chairman, distinguished Members of the Panel, if *all* of the interpretative elements in the Vienna Convention support the position of the EC, and disprove the position of the US, the US interpretation cannot be said to be "permissible" within the meaning of Article 17.6 of the ADA.

23. Some people say that zeroing poses a "constitutional" challenge for the WTO. Certainly, these Panel proceedings place you at the centre of a lively debate. The EC is confident, however, that ultimately the still quiet voice of legal reason will prevail. What determines the matter is the systematic application of the agreed rules of interpretation of public international law in the Vienna Convention. Not *ex post* expressions of personal will. Human nature being what it is, it is not always easy for people to acknowledge their own error. Your task under Article 11 DSU to reach an objective and independent assessment is, however, clear – and however difficult it may prove to be – the EC is confident you will rise to the challenge.

Thank you for your attention.

[14] US FWS, paragraphs 112 to 118 and 145.
[15] US FWS, paragraph 93, 111 and 125.
[16] US FWS, paragraphs 129 and following.

ANNEX D-3

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, Members of the Panel:

1. On behalf of the United States' delegation, I would once again like to thank you and the members of the Secretariat for your work on this dispute. We appreciated the opportunity to provide you with preliminary thoughts on your questions and look forward to providing you with additional comments in our written responses and our second submission.

2. The United States would like to thank the Panel again for opening this hearing to the public. We note that three third parties took the opportunity to make public statements. WTO Members and the public have had an opportunity to see the Panel's professionalism and impartiality, which can only strengthen the credibility of the WTO dispute settlement system.

3. The issue of the role of Appellate Body reports in WTO dispute settlement has been raised several times over the last two days. To be clear, the United States is not asking the Panel blindly to follow the four panel reports that have not found a general prohibition on zeroing in the Antidumping Agreement, nor have we asked you to ignore Appellate Body reports finding zeroing to be WTO-inconsistent in certain circumstances. What we have asked you to do, and are confident you will do, is to fulfil your function to make an objective assessment of the matter before you and not to add to or diminish the rights and obligations of Members. As part of that, we have asked you to consider whether previous panel reports on this issue are persuasive; we believe they are. We have also asked you to consider whether previous Appellate Body reports on this issue are persuasive; we have explained they are not. The Panel will have to make its own consideration and decision on the relevance of these reports as previous panels confronted with claims against so-called zeroing have done.

4. The United States would like to address one set of the alleged measures that the EC has asked the Panel to consider, and that was the basis for considerable discussion at yesterday's panel meeting – the so-called "application or continued application" of specific antidumping duties in 18 cases as identified in the EC's panel request. The EC's attempt to clarify that set of supposed "measures" has caused even further confusion; the United States would like to shed light on how it believes the Panel should approach the question of whether such "measures" exist and, to the extent they do, whether they fall within the Panel's terms of reference.

5. As we discussed yesterday, the EC's panel request dropped the reference to the so-called "zeroing" methodology that was contained in its consultation request, but added the alleged "measure" of "the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders" in 18 cases listed in its Annex. Moreover, the EC listed the 38 investigation and administrative review final determinations from its consultations request plus an additional 14 administrative reviews and sunset reviews.

6. By virtue of DSU Articles 4 and 6, the additional "measures" contained in the EC's panel request are not properly before the Panel. Under those provisions, a Member must first request consultations on a measure before requesting a panel. It cannot identify the measure for the first time in its panel request. Significantly, in this dispute, the EC's panel request did not "narrow" its consultations request as the EC suggested to us yesterday. Instead, it broadened its panel request inconsistent with the DSU.

7. The "application or continued application" of antidumping duties has been the subject of considerable confusion for the United States. Under Article 6.2 of the DSU, the EC was obligated to identify the specific measures at issue, and the Panel's terms of reference under Article 7.1 of the DSU are limited to those specific measures. Therefore, the only specific measures identified by the EC's panel request must be those applications of duties actually contained in the EC's consultation request. As an initial matter, the EC's request appears to ask the Panel to decide whether it is the "continued application" or the "application" that is at issue. The EC as the complaining party is the one that must decide this in identifying the "measures" that it is challenging.

8. Furthermore, the application or continued application of duties resulting from 18 separate orders maintained in place or calculated pursuant to the "most recent" measure refers to the "most recent" determination identified in the Annex to the panel request for each of the 18 orders and otherwise properly before the Panel. In other words, the "application" of the duties under the 18 orders would be at least 18 different measures, although in referring to the various administrative and sunset reviews and original investigations the EC appears to refer to a large multiple of 18. The "continuing application" is unclear – to the extent that the EC intends to refer to unspecified determinations or the application of duties under an order after the date of the panel request, then the EC panel request fails to conform to Article 6.2 of the DSU. The panel request cannot identify "specific" measures if they are not specified or if they do not exist at the time of identification.

9. Perhaps in recognition of the failings of its panel request, the EC has again tried to rewrite these measures. In its Response to the US Request for Preliminary Rulings, the EC noted that the "most recent" determination also included "any subsequent measure".[1] Under the DSU, "any subsequent measure" could not be a measure subject to dispute settlement if it did not exist as of the time of the Panel's establishment.

10. The reference in the EC's request to unspecified "most recent" proceedings would also appear to reach unspecified past antidumping determinations. To illustrate, with respect to *Ball Bearings from Germany*, which is case III in the EC's Annex to its panel request, the EC identified a number of administrative reviews and a number of particular companies. However, there is also at least one other rate currently in effect – known as the all others rate. It is unclear whether the EC's reference to the "application or continued application" of antidumping duties would include that rate. This is relevant for the US defence and for the Panel's analysis because it would raise distinct legal and factual issues related to this rate that have not otherwise been discussed. At a minimum, the Panel should be aware that the all others rate currently in effect in this case, among others, is the result of the original investigation determination. In this specific case, that determination was made in 1989. There are clearly certain additional legal issues that must be considered if the EC is asserting that the obligations in the Antidumping Agreement apply to dumping margins calculated more than five years before the Agreement's conclusion. Similar or additional issues might arise with respect to the other cases identified by the EC depending on the full breadth of what the EC means by the phrase "application or continued application".

11. Unfortunately, the problems with the EC's approach do not end here. Yesterday, the EC seemed to be saying that the "application and continued application" of antidumping duties resulting from 18 orders was intended to encompass the application of zeroing in the 18 cases listed in the Annex. The EC also claimed that the "application and continued application" was possibly part of some sort of combined "as applied/as such" measure – what Japan recognized this morning to be "a new kind of measure".[2]

[1] EC Response to Request for Preliminary Rulings, para. 47.
[2] Japan Oral Statement, para. 3.

12. The EC's attempted redefinition of this alleged measure cannot be reconciled with its panel request. That document refers to "the continued application of, or the application of the specific anti-dumping duties" in 18 cases. The United States fails to see how that phrase could be interpreted to refer to the application or continued application of "zeroing". This description also lacks specificity. The EC would like to assert now that it included a generalized reference to the application of "zeroing" in 18 broadly-defined cases without identifying the exact determination where it was actually applied, indeed explicitly trying to sweep in determinations that the United States has not even made.

13. The United States asks the Panel to ponder how such a purported measure could in any way be part of an "as such" claim, when it refers to the "application" of something. The EC has stated explicitly that it "has decided not to ask this Panel to rule again on the inconsistency of the United States' zeroing methodology in original investigations and in review investigations 'as such.'"[3] It is unclear whether the EC has again changed its mind.

14. It would appear that what the EC really would like is to have this Panel impose some sort of continuing obligation on the United States to eliminate "zeroing" based on non-binding Appellate Body reports in disputes other than the current dispute. As the United States explained, an obligation to provide offsets in administrative reviews is found nowhere in the covered agreements, and the EC cannot play games with the identification of measures in an effort to accomplish what the WTO agreements have not established.

15. This Panel should reject the "application or continued application" set of measures as outside its terms of reference. The supposed measures were not identified in the consultations request and the EC's request also fails for lack of specificity.

16. Mr. Chairman, members of the Panel, we appreciate this opportunity to present these closing comments and look forward to continuing to work with you on these issues.

[3] EC First Written Submission, para. 2.

ANNEX D-4

CLOSING STATEMENT OF THE EUROPEAN COMMUNITIES AT THE FIRST MEETING OF THE PANEL

1. Mr. Chairman, distinguished Members of the Panel:

2. In this closing statement the EC would briefly like to recall some of the things that have been discussed at this hearing – some of them quite remarkable.

3. In general terms, we have heard the US assert that you do not need to consider the economic aspects of the real world that the legal rules in the ADA were designed to regulate. Nor do you need to consider the overall internal economic logic and consistency of the ADA, and particularly the overall design and architecture of Article 2.4.2. In the words of the US, the ADA is a "flying pig". We disagree. We offer the Panel an interpretation that not only fully respects – indeed we believe is dictated by – the legal rules of interpretation (good faith, ordinary meaning, context, object and purpose and the preparatory work), but which also makes economic sense of all the relevant treaty terms, and respects the overall design and architecture of the provisions in question and the ADA as a whole.

4. We have also heard the US assert that the essential disciplines of the ADA are voluntary when it comes to investigating and re-calculating dumping margins in assessment proceedings – both the substantive disciplines of Article 2 and the procedural disciplines of Article 6. We have further heard the US assert that it is not bound by any methodology at all – but free to do as it wishes when comparing normal value and export price in assessment proceedings – as well as newcomer proceedings. Again, we disagree. The ADA imposes mandatory obligations. The WTO is a single undertaking, and Members are not permitted to enter reservations to any of the obligations established in the covered agreements.

5. We have further heard the US confirm that the only real defence it offers to the EC claims is the meaning of the phrase "the existence of margins of dumping during the investigation phase" – the US does not otherwise seriously question the meaning of the overall design and architecture of Article 2.4.2. And yet, in the same breath, and in an extraordinary U turn, we have heard the US admit that the ordinary meaning of the term "investigation" is not synonymous with the term "an investigation to determine the existence, degree and effect of any alleged dumping". We have also explained why the term "during … phase" does not assist the US. The US has agreed that this term has a temporal connotation, and therefore refers to a "distinct period" – in other words the US has agreed that the terms "during … phase" and "during … period" are, in this context, synonymous. The observation that the term "during … phase" refers to a distinct period of time does not advance in any way the US claim that the term refers to the 18 month period in Article 5.10. On the contrary, the ordinary meaning of the grammatical structure of the phrase compels the conclusion that it refers to a period of time in which margins exist, that is, a data period – an original investigation or review investigation period; and precludes the proposition that it refers to a period of time in which margins are "established" as the US would have it. There is no rule of interpretation of public international law that supports the view that a term should be given a special meaning just because it is "unique" – there are many unique terms in the ADA and their meaning is to be determined by applying the agreed rules of interpretation in the Vienna Convention. Nor is there any rule of interpretation that precludes synonyms – the AB has said this many times, and there are many such synonyms in the ADA. In the EC reading, the normal rule (investigation period) complements the exception (time based targeted dumping), and thus fits with the overall design and architecture of Article 2.4.2 and the ADA as a whole.

6. Mr. Chairman, whatever the intent of the US might or might not have been, is irrelevant. Under the terms of the Vienna Convention, for the US to establish the special meaning it argues for, the US would have to demonstrate that all the Members intended such special meaning – which is manifestly not the case. The US made a mistake. We are sorry about that. But the consequences are for the US to bear, not the rest of the WTO Membership. If the US had taken the trouble to discuss its intentions with the other WTO Members, many things might have been different. The US cannot rely on its own failings in order to unilaterally acquire additional rights under the WTO.

7. Some might say that the US has already achieved everything it desired – on the basis of its unilateral interpretation the US has for some 13 years collected hundreds of millions of dollars in excess anti-dumping duties – not to mention the far greater economic harm that such measures will have caused in terms of lost trade and development, particularly for developing countries. 13 years is a long time – long enough even for a new round of WTO negotiations. Not one cent of this money has ever been repaid and there is no prospect that the US will ever agree to repayment, or remedy the other harm it has inflicted on its fellow Members. All the WTO Members now agree: enough is enough. It is time for the US to stop.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF BRAZIL AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, Distinguished Members of the Panel:

1. Brazil welcomes this opportunity to present its views on some of the issues in this dispute. Brazil is part of the overwhelming majority of the Membership that has been year after year standing for the condemnation of the so-called "zeroing" methodology.

The reiterated condemnation of "zeroing"

2. Almost a decade has passed since "zeroing" was first condemned in *EC – Bed Linen*. From 2000, the year of the first condemnation, to now, 2008, such a methodology was challenged at least seven other times, and "zeroing" *as applied* and *as such* was found to be inconsistent with the Antidumping Agreement. The list of cases is long: *US – Hot Rolled Steel*; *US – Corrosion-Resistant Steel Sunset Review*; *US – Softwood Lumber V; US – OCTG Sunset Review*; *US – Zeroing (EC)*; *US – Antidumping Measure on Shrimp from Ecuador*, and most recently, *US – Zeroing (Japan)*.

3. You may have noticed that in those seven disputes – not to mention the on-going cases – the complained party has been always the same. The number of cases brought against the United States on this issue tells us that, unfortunately and despite the successive rulings against it, the United States continues to resort to the "zeroing" methodology.

4. The language of those rulings is crystal clear, reaffirming the illegality of "zeroing" in all types of investigation. Considering the US reiterated use of "zeroing", one can only conclude that what the United States intends to do is to prolong the life of "zeroing", keeping it in place, until the Membership challenges all the possible forms, use and application of zeroing in all kinds of comparison (W-W, T-T, W-T), in all types of investigation (original, periodic and sunset reviews).

5. The consequences of such a tactic have been disastrous. Deliberately misrepresenting the Agreement on Antidumping, as well as ignoring the findings and conclusions of panels' and Appellate Body's reports, the United States has in practice refused to eliminate the "zeroing" methodology in its investigations, in breach of its WTO obligations.

6. In every new dispute on the issue – and they have been numerous – as listed before, the United States tries to reargue its previous cases, attempting to defend what is undefendable and what has been condemned many times. This dispute is no different.

7. Most of the arguments the United States put forward in the present case were tested before and rejected by panels and the Appellate Body. The United States seems to refuse to recognize this fact.

8. In the following sections I will explain why Brazil considers this panel should not concede the US arguments and why it should reiterate the illegality of the zeroing methodology.

The United States continued refusal to abide by the Agreement on Antidumping and the DSB determinations

9. In a vain attempt to support its particular view of the AD Agreement, the United States rehashes in the present dispute a "pot-pourri" of its best arguments in almost ten years of WTO litigation on "zeroing". It resorts to objections of different nature, from burden of proof to procedural and substantive issues. While Brazil will focus its statement on some of the substantive objections raised by the United States, this approach should not be seen as endorsing the remainder of the US claims.

10. It is undisputed between the parties that zeroing is not permitted under certain circumstances. Even the United States recognizes it.[1] Nonetheless, the central argument of the US defence is that the obligations of Articles 2.1 and 2.4 of the Agreement on Antidumping refer solely to original investigations. According to the United States, for having purposes different from the ones of the original investigation, the periodic and sunset reviews would not be subject to those obligations.[2]

11. For this reason, it seems to be the US argument that the definitions of "product", "margins of dumping" and the obligation of "fair comparison", as provided for in Article 2, would not apply to periodic and sunset reviews.

12. Then, it would follow; the Department of Commerce would be entitled to resort to the "zeroing" methodology in all circumstances other than the original investigation. Brazil strongly disagrees with the United States. This line of argumentation is flawed and should not be accepted by the Panel in the present dispute. In Brazil's opinion, the standards set forth by Article 2, namely, "product", "margins of dumping" and "fair comparison", are at the core of any investigation, be it original, periodic or sunset reviews. This is the very spirit of the Antidumping Agreement, expressly reflected under Article 18.3: "the provisions of this agreement shall apply to investigations and reviews".

13. Let me comment on each of them, beginning with "product". When it comes to the existence of dumping, the Agreement establishes a direct relationship between "dumping and product", rather than "dumping and transaction", as alleged by the United States.[3] Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 clearly set out that "for the purpose of this Agreement, a *product* is considered as being dumped […] if the export price of the *product* […] is less than the comparable price for the like *product* when destined for consumption in the exporting country".

14. One would note *first* that there is no single reference to transaction. Additionally, dumping is characterized in relation to the *product as a whole*. Second, a such definition is applicable to the entire Agreement. This interpretation was confirmed by the Appellate Body in *EC – Bed Linen*, *US – Corrosion-Resistant Steel Sunset Review*; *US – Softwood Lumber V*, *US – Zeroing (EC)*, and, most recently, in *US – Zeroing (Japan)*.

15. Let us take now the second standard, "margin of dumping". Similarly to the concept of dumping, margins of dumping are also defined in relation to the product, rather than transaction. Article VI:2 of the GATT 1994 leaves no doubt about this. The Appellate Body itself failed 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*

[1] See United States First Written Submission, paras. 77 and 155.
[2] See United States First Written Submission, para. 108.
[3] See United States First Written Submission, para. 85.

product types".[4] It also affirmed that "the amount of the assessed antidumping duties shall not exceed the margin of dumping as established for the product as a *whole*".[5]

16. As we can see by these decisions and statements, the concept of "margin of dumping" not only encompasses the notion of *product as whole*, but also operates as a *ceiling* to the duties to be imposed.

17. It should be clear for the United States, by now, that the concepts of dumping, margins of dumping and product (considered as a whole) are intertwined. If not, let me recall the Appellate Body's view on this: "it is evident from the design and architecture of the Antidumping Agreement that: (a) the concepts of 'dumping' and 'margins of dumping' pertain to a 'product' […] and (b) 'dumping' and 'dumping margins' must be determined in respect of each known exporter or foreign producer examined. These concepts are interlinked. They do not vary with the methodologies followed for a determination made under the various provisions of the Antidumping Agreement".[6]

18. Now I turn to the third standard, the obligation of "fair comparison" also provided for in Article 2. This is an overarching principle that applies throughout the Agreement, as established by Articles 2.4, 9.3, 18.3 and interpreted by the Appellate Body in *EC – Bed Linen* and subsequently reiterated in *US – Zeroing (EC)*. The Appellate Body explained that 'fair comparison' "is a general obligation that [...] informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'".[7] It also affirmed that "the 'fair comparison' language in the first sentence of Article 2.4 creates an independent obligation, and, secondly, that the scope of this obligation is not exhausted by the general subject matter expressly addressed by paragraph 4 (that is to say, the price comparability)".[8]

19. In zeroing some transactions, the US Department of Commerce is not taking account of the product as a whole; neither is it respecting the ceiling established by the margins of dumping because zeroing results in artificial, higher margins of dumping and makes a positive determination of dumping more likely.[9] It is clear, then, that – by resorting to the zeroing methodology – an investigating authority cannot conduct an unbiased and fair determination of dumping, as required by Article 17.6 (i).

The US arguments

20. Let us address *first* the argument concerning the alleged authorization to apply zeroing in investigations related to targeted dumping. The United States tries to convince this panel that the second sentence in Article 2.4.2 would allow for the application of "zeroing" methodology. It resorts to that second sentence in order to legitimate its zeroing practice in the "average-to-transaction" method in periodic reviews. This cannot be accepted.

21. Neither the second sentence of Article 2.4.2 nor the AD Agreement as a whole endorses "zeroing". We all know that (i) "zeroing" conflicts with the architecture and design of the AD Agreement; (ii) the second sentence of Article 2.4.2 foresees an *exceptional circumstance*. It does not constitute an *exception to the principles* governing the AD Agreement and (iii) a corollary of the precedent, since it is not an exception to the fundamental principles of the Agreement, the

[4] See Appellate Body Report in *US – Softwood Lumber V*, para. 98.
[5] See Appellate Body Report in *US – Zeroing (EC)*, para. 127.
[6] See Appellate Body Report in *US – Zeroing (Japan)*, para. 114.
[7] See Appellate Body Report in *EC – Bed Linen*, para.59.
[8] See Appellate Body Report in *US – Zeroing (EC)*, para.146.
[9] See Appellate Body Report in *US – Softwood Lumber V (Art.21.5 – Canada)*, para.142.

situation described in the second sentence of Article 2.4.2 is still subject to the tenets set out by the AD Agreement.[10]

22. *Second*, the United States also claims that dumping may occur in a single transaction.[11] This does not hold true. While conceding that the investigating authority has discretion to define the product under investigation, the Appellate Body laid down that "dumping" and "margins of dumping" can be found to exist only in relation to a product. They cannot be found to exist at the level of a type, model, or category of a product under consideration; nor can they be found to exist at the level of an individual transaction.[12]

23. *Third*, the United States argues that – because they have different purposes – the three types of investigation (original, assessment and sunset) are not subject to the same obligations under the AD Agreement. In Brazil's opinion, such an argument is misleading because it changes the focus of the analysis from the existence and amount of dumping to *purposes*.

24. Let us assume that those three investigations have indeed different objectives; namely, i) to establish whether a remedy against dumping should be provided; ii) to precise the amount of that remedy[13] and, finally, iii) to determine the likely continuation or recurrence of dumping.[14]

25. All of us know that, in order to meet any of those three objectives, the investigating authority has necessarily to assess the existence and/or the margins of dumping. This assessment cannot be made without applying the concepts of "product", "margins of dumping" and "fair comparison", as defined by the Agreement and the Appellate Body. In applying those standards, one can reasonably conclude that what really matters in those investigations – whether original, periodic or sunset – is *how* the margin of dumping is calculated, irrespective of the objective of the investigation. Therefore, no matter the purpose, the three types of investigation are all about "product", "margin of dumping" and "fair comparison".

26. *Four*, turning now to the United States suggestion that original investigation and assessment reviews would also be *independent* proceedings.[15] Brazil strongly disagrees with this creative, but totally illogical suggestion. Independence of proceedings is not at stake. This is about the use of zeroing as a methodology for dumping calculation. Even if we concede that those investigations may be independent, one cannot allege independence of proceedings to refuse to apply the principles and guidelines set out in Articles 2.1 and 2.4, namely, again, the concepts of "product", "margins of dumping" and "fair comparison". Zeroing itself is inconsistent with the Antidumping Agreement, no matter the proceeding it is applied to[16].

27. Moreover, investigations may be independent, but they are not dissociated from each other. This is so because the flawed margins or the mere existence of dumping found in any phase – by means of applying zeroing – will irreparably taint the subsequent investigation, to the extent that the subsequent investigation relies on a legally flawed existence or margin of dumping.

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[10] See Appellate Body Report in *US – Softwood Lumber V* (Art. 21.5 – Canada), para.97. See also notes 7 and 8.

[11] See United States First Written Submission, para. 85.

[12] See Appellate Body Report in *US – Zeroing (Japan)*, paras.115 and 151.

[13] See United States First Written Submission, para. 108.

[14] See United States First Written Submission, para. 153.

[15] See United States First Written Submission, para. 71.

[16] See Appellate Body Reports in *US – Corrosion- Resistant Steel Sunset Review*, para.127; and *US – Zeroing (Japan)*, paras.183-185.

Mr. Chair,

28. All those arguments put forward by the United States in this case were already tested in previous opportunities. The numerous quotations made by the EC and third parties to the Appellate Body and panels' reports show us a consistent pattern: the failure of the United States to convince the dispute settlement mechanism that zeroing can meet the standards of Article 2: "product", "margin of dumping" and "fair comparison", and of the Antidumping Agreement as a whole.

29. The US tries to dismiss the EC's arguments regarding the Appellate Body's conclusions on the grounds that they are not "persuasive".[17] Given the United States record on non-compliance with multilateral rulings, especially when it comes to "zeroing", one can only conclude that arguments may *never* be persuasive enough for the United States, notwithstanding the consistent condemnations of the practice by the WTO dispute settlement mechanism. The continued existence and application of zeroing by the United States, regardless of what the Antidumping Agreement, the panels' and the Appellate Body reports had to say about it during the course of almost ten years of litigation, seems to suggest that the United States will continue to disregard DSB rulings. It also indicates that the United States will persist on implementing them in a very specific and limited way, as it did in the "Hot Rolled Steel" and "Shrimp" cases brought by Japan and Ecuador, respectively.

30. Persuasiveness, however, is not the issue. This is about abiding by the successive rulings of the DSB on the illegality of zeroing and eliminating once and for all this biased and non-compliant practice.

31. In its crusade to safeguard the use of the US DoC antidumping practices, the United States resorts to negotiating history, to the Tokyo Round Antidumping Code and to the work of the experts in the GATT 1947. After repeated rulings on the illegality of zeroing, unearthing the past seems at this point an argument of last resort, completely unpersuasive, where all others have failed. The Appellate Body confirmed that they are of limited relevance and provide no additional guidance on the issue.[18] Nonetheless, while the United States may interpret that zeroing was permitted at that time, the reality today under the Antidumping Agreement and the Appellate Body's decisions leaves no margin for accepting zeroing. The zeroing methodology is the embodiment of one of the capital sins in the multilateral trading system: protectionism.

Mr. Chair, Distinguished Members of the panel,

32. Brazil is confident that your conclusions will add to the list of successive condemnations of zeroing in all types of investigation, regardless of the methodology employed, be it prospective or retrospective. For the sake of multilateralism and compliance, we genuinely hope that, in the light of another condemnation, the United States this time will abide by your decisions, whether or not it is persuaded by your arguments.

Thank you very much.

[17] See United States First Written Submission, paras. 98 and 115.
[18] See Appellate Body Report in *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 121.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF INDIA AT THE FIRST MEETING OF THE PANEL

Mr. Chairman and Distinguished Members of the Panel:

1. India thanks you for having provided us an opportunity to present our views as a third party in this dispute.

2. The issue of zeroing is of extreme systemic importance to the multilateral trading system. It is regrettable that the United States continues to apply the "zeroing" methodology for determining anti-dumping margins despite the clear conclusion reached in several reports of Panels and the Appellate Body that use of this zeroing methodology is inconsistent with Articles 2.4.2, 9.3, 11.2 and 11.3 of the Anti-Dumping Agreement.

3. Mr. Chairman, India notes that, on 26 December 2006, the United States announced that it had partly implemented the DSB rulings and recommendations in DS294 *United States – Laws, Regulations and Methodology for calculating dumping Margins (US – zeroing (EC))* by changing its methodology of model zeroing, so as to abandon the use of zeroing. However, several measures imposed by US have not been corrected, and remain tainted by the use of zeroing. In this respect, we would specifically draw attention to the Appellate Body report in *United States – Measures related to zeroing and Sunset reviews – Japan* (DS322). At the DSB meeting of 20 February 2007, the US confirmed its intention to implement the recommendations and rulings of the DSB in the Dispute and stated that it would require a reasonable period of time to do so as per Article 21.3 of DSU. Sufficient time has elapsed since then and India notes that, except abolishing zeroing regarding Weighted average -to-Weighted average comparisons in the original investigations, the US continues to practice zeroing in other comparison methodologies via transaction to transaction (T-to-T) and weighted average to transaction (W-to-T) in the original investigations as such. Further, the US continues to practice zeroing in every comparison methodology at the stage of administrative reviews as such, and sunset reviews as such and is yet to take steps to amend its laws and administrative practices in the matter.

4. Mr. Chairman, it is therefore important that this Panel reiterates and reinforces the conclusion that practice of Zeroing as stated above is "as such" inconsistent with the obligations under GATT, 1994, Anti-Dumping Agreement and the Agreement for Establishing the WTO as held by the Appellate Body. Any other conclusion would result in continuance by the United States of the zeroing practice, which not only inflates dumping margins, but also detracts from the obligation to undertake an objective examination of the impact of dumped imports and finally ascribes dumping even in cases where no dumping may exist.

5. Mr. Chairman, we are convinced that the US will eventually be forced to realize the futility of pursuing the use of "zeroing". However, we remain deeply concerned at the impact of their prolonged use of this methodology on the credibility and predictability of the multilateral dispute settlement system. In view of the settled jurisprudence by the Appellate Body, we believe that the panel will reiterate that practice of "zeroing" by any WTO Member in every comparison methodology during the original investigation, periodic or administrative reviews and sunset reviews is inconsistent with Members' WTO obligations under the Anti-Dumping Agreement.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF JAPAN AT THE FIRST MEETING OF THE PANEL

Introduction

1. Mr. Chairman and Members of the Panel, we are pleased to appear before you today to present the views of Japan as a third party in this dispute. Today, Japan would like to briefly address two issues before the Panel: (1) measures at issue; and (2) role of the precedent.

Measures at Issue

2. There are two sets of measures which the European Communities ("EC") challenges in the present dispute. First one is "the application or continued application of specific anti-dumping duties resulting from the 18 anti-dumping orders in the Annex to the Panel request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding".[1] Second one is "the application of zeroing (*i.e.*, either using the model or simple zeroing technique) as applied in 52 anti-dumping proceedings, including original proceedings, administrative review proceedings and sunset review proceedings listed in the Annex to the Panel request".[2]

3. The first measure above-mentioned is a new kind of measure we have seen in a series of zeroing cases in WTO Dispute Settlement System. However, Japan considers this is admissible as a measure at issue based on the following reasons.

4. Japan considers that the first measure is specific enough so as to suffice the specificity required by Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"). The anti-dumping orders on which the duties are based are identified in the Annex to the Panel request. The applied duties are calculated or maintained by using zeroing practice. It is a well known custom that the zeroing practice is continued to be done in the subsequent administrative reviews, or, as the case may be, original proceeding or changed circumstances or sunset review proceeding. Therefore, "the application or continued application of specific anti-dumping duties resulting from the 18 anti-dumping orders" can be seen as a measure at issue.

5. With respect to the periodic reviews which were found to be inconsistent with AD Agreement and the GATT 1994, in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) (DS294)* and *United States – Measures relating to Zeroing and Sunset Reviews (DS322)*, the United States argues that the results were superseded by subsequent reviews in each case, and that, therefore, no further action is necessary for the United States to bring these challenged measures into compliance with the recommendations and rulings of the Dispute Settlement Body ("DSB").[3] Japan finds this logic hard to be understood. This logic undermines the results of the WTO dispute settlement system.

6. EC's theory in this case is one of the reasonable approaches to block such kind of argument which deteriorates the effectiveness of the WTO dispute settlement system.

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[1] EC First Submission, para. 34.
[2] *Id.* para. 35.
[3] WT/DS322/22/Add.2.

Role of the precedent

7. Japan agrees with the EC's argument that "[r]eliance on previous case-law actually flows from the necessity to ensure in any legal system security, consistency and predictability"[4] and that, thus, "even where previous decisions are not binding *per se*, reliance on previous case-law is necessary to ensure consistency of such case-law, in particular where case-law comes from higher courts or tribunals".[5]

8. In *US – Zeroing (Japan)*, the Appellate Body, after deliberating thoroughly, manifested that zeroing procedures are prohibited in any anti-dumping proceedings regardless of methodology of calculation of dumping margin. Japan requests the Panel would respect the above-mentioned Appellate Body decision and maintain a consistent line of findings on the legal issues of zeroing. The followings are the grounds of Japan's argument.

9. As the EC argues, (i) findings of the Appellate Body is hierarchically superior and only dealing with issues of law, (ii) findings have been repeated in several cases so that there is now a consistent line of interpretation[6].

10. Article 3.2 of the DSU sets forth the purpose of the dispute settlement system of the WTO. This Article provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system" (underline added.) A consistent application of the WTO Agreement to the Members shall be secured within the dispute settlement system. In other words, if the situation that the legal findings adopted by decision of the DSB varies on a case by case basis with regard to the same legal issues, it would lead to unfair or unequal treatment among Members, which would undermine "security and predictability" of the WTO dispute settlement system. If unfair or unequal treatment of Members persists, the dispute settlement system can not maintain its consistency and it must lose its credibility.

11. On the other hand, Japan also recognizes that the panel does not have to rely on the precedent in exceptional circumstances. Nevertheless, we can find no exceptional circumstances in this dispute at all. It appears that the United States has merely reopened the argument by showing that the Appellate Body's decisions concerning zeroing are not persuasive. Under current circumstances, Japan requests the panel to do an "objective assessment of the matter" relying on the precedents. In this sense, Japan understands the decision by the panel in *Mexico – Stainless*, dated 20 December 2007 is deviated from the above-mentioned standards.

12. Accordingly, Japan strongly requests that the Panel in this dispute respects the above-mentioned Appellate Body decision and maintain a consistent line of findings in the dispute settlement system.

13. Japan would like to thank the Panel for this opportunity to raise these issues. We would welcome any questions.

[4] EC First Written Submission, para. 68.
[5] *Id*.
[6] EC First Written Submission (20 August, 2007), para.106.

ANNEX D-8

THIRD PARTY ORAL STATEMENT OF KOREA AT THE FIRST MEETING OF THE PANEL

Mr. Chairman and Members of the Panel:

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party in this important dispute. Through this statement, Korea provides an overview of the key issues included in Korea's third party submission dated 19 September 2007.

A. AS THE APPELLATE BODY HAS CONSISTENTLY FOUND, "ZEROING" MUST BE PROHIBITED IN *ALL* ANTI-DUMPING PROCEEDINGS INCLUDING ORIGINAL INVESTIGATIONS, ADMINISTRATIVE REVIEWS, AND SUNSET REVIEWS

2. First of all, Korea notes that in *US – Zeroing (Japan)*, the most recent Appellate Body decision relating to zeroing, the Appellate Body unequivocally held that zeroing in *all* respects violates relevant provisions of the Anti-dumping Agreement ("AD Agreement").[1] Korea requests the Panel to conform to this unambiguous and clear precedent directly on point and reiterate in this dispute that the USDOC's "zeroing" must be prohibited in *all* anti-dumping proceedings.

3. Korea submits that a panel's deference to the Appellate Body jurisprudence is critical and essential to maintain the integrity of the WTO dispute settlement procedure. Disregarding clear precedents of the Appellate Body, in the absence of particular reasons distinguishing the case at hand, would erode the cherished trust of Members in the dispute settlement system and undermine the stability of the international trading regime. We also note that even the United States keep referring to prior panel and Appellate Body precedents to make its own arguments. We find it puzzling how the United States would justify its position that each panel is encouraged to depart from the prior precedents while it itself devotes significant portion of its own submission to cite these precedents. Korea calls upon the Panel to discharge its obligation under Article 11 of the DSU by applying relevant precedents reasonably.

B. "ZEROING" AS USED IN ORIGINAL INVESTIGATIONS, VIOLATES ARTICLES 2.4 AND 2.4.2 OF THE AD AGREEMENT

4. There is an ample body of precedents, where panels and the Appellate Body found that the zeroing practice used in an average-to-average comparison in an original investigation violates Articles 2.4 and 2.4.2 of the AD Agreement. Korea also understands that even the United States does not contest this issue any more. In Korea's view, therefore, the Panel could easily render its determination on this issue in the present dispute.

C. THE PERIODIC REVIEW UNDER ARTICLE 9.3 IS ALSO GOVERNED BY THE PRINCIPLES OF ARTICLES 2.4 AND 2.4.2 AND THUS ZEROING IN THE PERIODIC REVIEWS VIOLATES ARTICLES 2.4, 2.4.2 AND 9.3

5. The basic requirement provided for in Articles 2.4 and 2.4.2 is an overarching obligation, which applies to *all* dumping calculations. To the extent that a dumping margin is effectively

[1] *See United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (adopted 23 January 2007) ("*US – Zeroing (Japan)*"), at paras. 137-138, 147, 166, 167-169, 177, 186-187.

calculated, such obligation must equally apply to administrative reviews. Korea notes that dumping margin calculation indeed takes place in an administrative review conducted by the USDOC. By adopting the zeroing methodology in administrative reviews, and by failing to abide by the requirements of Articles 2.4 and 2.4.2 in those proceedings, the USDOC therefore violated not only Articles 2.4 and 2.4.2 but also subsequently Article 9.3 with respect to its various administrative reviews identified in the EC's first written submission. The United States makes effort to show why administrative reviews are different from original investigations, but as long as artificially manipulated calculations are conducted, there is no reason to distinguish the two.

6. Korea submits that administrative reviews as conducted by the USDOC should not and cannot be separated from the original investigations, and almost identical calculations and evaluation occur in both proceedings. Korea does not find any reason to treat administrative reviews any differently. The use of zeroing by the United States in the administrative reviews at issue here, therefore, is inconsistent with the AD Agreement in *both* the calculation of a revised margin of dumping for cash deposit purposes and in the calculation of the amount of duty retrospectively assessed.

D. UTILIZATION OF ZEROING IN SUNSET REVIEWS ALSO CONSTITUTES VIOLATION AF ARTICLES 2.4, 2.4.2, 11.1 AND 11.3 OF THE AD AGREEMENT

7. The same rule should also apply to the sunset reviews. In light of the above reasoning, to the extent the USDOC conducts sunset reviews based on margins of dumping calculated in previous proceedings using the zeroing methodology, it inevitably constitutes violations of Articles 2.4, 2.4.2, 11.1 and 11.3 of the AD Agreement.

8. Logically and practically, the sunset reviews of the USDOC cannot be separated from previous anti-dumping proceedings. Rather, the sunset reviews are simply an extension of previous findings to the extent the USDOC relies on dumping margins calculated in a prior original investigation or an administrative review as the basis for the sunset review's likelihood determination. Therefore, Korea believes that the violation of these provisions is also unavoidable.

Again, Korea extends its appreciation to the Panel for this opportunity to present its views in this important dispute. Thank you.

ANNEX D-9

THIRD PARTY ORAL STATEMENT OF MEXICO AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, members of the Panel:

1. It is a pleasure to appear before you to present the views of Mexico concerning certain issues in this dispute. Although there are many points raised by the United States with which Mexico disagrees, I would today like to restrict my remarks to a few points that are of specific concern to Mexico regarding the use by the United States of zeroing in periodic reviews.

2. In particular, I would like to address: (1) the importance to this Panel of following the prior adopted Appellate Body decisions in this area; (2) the United States' mischaracterization of the Appellate Body decisions as having "shifted" its reasoning over time, when in fact the Appellate Body's reasoning has remained consistent; and (3) the United States' continuing confusion between the procedural rules that govern the conduct of review proceedings under Article 9.3 and the overarching substantive obligation under Article 9.3 that duty collections under such systems may not exceed the margin of dumping determined in accordance with Article 2.

The Significance of Prior Appellate Body Decisions

3. Mexico agrees with the reasons set out in the first written submission of the European Communities why this Panel should follow the findings and conclusions contained in previous adopted Appellate Body reports on zeroing.

4. Mexico also agrees with paragraph 2 of the European Communities' first written submission where it is stated that the "as such" WTO inconsistency of the methodology has already been successfully established in *US – Zeroing (EC)* and in *US – Zeroing (Japan)* and that, pursuant to Article 17.14 of the DSU, the United States must be considered to have unconditionally accepted the Appellate Body's findings on "as such" zeroing. Mexico would like to add that by allowing the "as such" claims, the reports of the Appellate Body serve the purpose of "preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated".[1] The actions and submissions of the United States in this dispute not only frustrate this purpose as they contradict clear findings of the Appellate Body, but also go counter to the objective of providing security and predictability to the multilateral trading system as provided for in Article 3.2 of the DSU.

5. In this dispute, not only are the *identical* measures and issues raised the subject of findings and conclusions in adopted Appellate Body reports, the responding party in those previous disputes is the *same* as the responding party in this dispute – i.e., the United States. Clearly in these circumstances the previous findings and conclusions of the Appellate Body should be followed.

6. At paragraph 29 of its first written submission, the United States incorrectly characterizes the European Communities' position as follows:

> "In essence, the EC is urging the Panel to rubber-stamp those prior reports that are favourable to the EC's position, to disregard those panel reports that demonstrate that the EC's position is contrary to the agreed text of the WTO agreements, and to

[1] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

> ignore the Panel's obligations under Article 11 of the DSU to conduct an objective assessment of the matter before it."

7. Relying on this characterization, the United States invokes Article 11 of the DSU as support for its position that this Panel must ignore prior, directly applicable, adopted Appellate Body rulings and, instead, follow a series of panel decisions that were never adopted by the DSB and were in fact specifically reversed by the Appellate Body.

8. Contrary to the argument of the United States, following prior Appellate Body reports in the circumstances of this dispute is entirely consistent with Article 11 of the DSU. The Appellate Body has made this clear in its report in *US – Oil Country Tubular Goods Sunset Reviews*, where it stated that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[2]

9. The United States refuses to acknowledge that its arguments regarding zeroing have been fully and fairly considered by the Appellate Body and, following such full and fair consideration, those arguments have been rejected. The rejection of those arguments is supported by detailed reasons given by the Appellate Body in its reports. Those reports have been adopted. There is absolutely no basis for the United States to continue to pursue its arguments and for its continued refusal to eliminate its WTO-inconsistent zeroing practices.

10. Herein lays the inconsistency with Article 3.2 of the DSU which sets out the central element of the WTO dispute settlement system - the security and predictability of the multilateral trading system. If WTO Members and panels refuse to acknowledge adopted Appellate Body reports which are directly on point as they are in this dispute, there is no security or predictability. As in this dispute, WTO Members will be caught up in a seemingly endless dispute settlement process over the same measure. There is an additional problem. In such circumstances, the creation of a series of panel reports that diverge in findings and conclusions from those in adopted Appellate Body reports interferes with the prompt settlement of disputes which, as recognized in Article 3.3 of the DSU, is essential to the effective functioning of the WTO. WTO Members will be forced to unnecessarily appeal findings and reasons that have already been overturned.

11. Mexico respectfully requests that this Panel put an end to this unnecessary process and follow the adopted Appellate Body reports on zeroing. At its heart, the United States problem is not with the adopted interpretations of the applicable WTO provisions but with the provisions themselves. If the United States has a concern regarding the provisions of the WTO Agreements, that concern is not a proper subject of the dispute settlement process.

Mischaracterization of the Appellate Body Findings

12. In an effort to persuade this Panel to ignore the prior, directly applicable adopted Appellate Body reports regarding simple zeroing, the United States at several points asserts that the reasoning applied by the Appellate Body with respect to zeroing "has shifted from dispute to dispute".[3] The apparent intention is to undermine the credibility of the Appellate Body's reasoning by suggesting that it has been inconsistent, or perhaps even contradictory.

13. For example, the United States claims in its First Written Submission that the "exclusive textual basis" identified by the Appellate Body for the principle that anti-dumping margins must be calculated for the product under investigation taken "as a whole" is the reference in the first sentence of Article 2.4.2 to the calculation of a weighted average of prices of "*all comparable export*

[2] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.
[3] *See, e.g.*, First Written Submission of the United States, para. 5.

transactions".[4] The United States asserts that while the "all comparable export transactions" phrase provided the textual basis for that finding in *US – Softwood Lumber Dumping (AB)* that margins of dumping relate to the product as a whole, the Appellate Body later "changed its interpretation of that phrase" in *US – Zeroing (Japan)* and found that the phrase relates solely to transactions within a model, and not across models of the product under investigation.

14. Mexico strongly rejects the United States' revisionist characterization of the Appellate Body's reasoning. Mexico submits that the reasoning applied by the Appellate Body has been consistent in all of the disputes brought before it involving zeroing, starting from the Appellate Body's first decision in *EC – Bed Linen*. In that case, and all subsequent cases, the key textual provisions and principles that have guided the Appellate Body's decisions have been the same. First, is the text of Articles VI and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* which define "dumping" and "margins of dumping" for all purposes under the agreement by reference to the "product" under investigation. The Appellate Body has consistently found in every dispute before it that while it may be permissible, or even necessary in certain circumstances, to conduct multiple comparisons at the level of individual transactions or models, "dumping" and "margins of dumping" can exist only with respect to the product under investigation, as defined by the investigating authorities, taken as a whole. Second, the Appellate Body has consistently found that the text of the agreements, for example Article 6.10 of the *Anti-Dumping Agreement*, define "dumping" of the product under investigation in reference to individual exporters or producers, not importers or individual transactions. Exporters or producers dump. Importers do not dump. Lastly, the Appellate Body has emphasized the need for consistency in the definitions of dumping used throughout the agreements. In particular, the Appellate Body has found that the same imports cannot be found to be "dumped" for purposes of injury, but not dumped for purposes of margin calculations, as is implied by the United States' position.

15. While these key principles, all of them textually based, have been further explained, amplified, and documented in successive disputes as the Appellate Body has responded to the ever-shifting arguments presented by the United States, the identification of the principles themselves and their textual basis has not shifted. They are the same principles identified in *EC – Bed Linen*, in *US – Softwood Lumber*, in *US – Zeroing (EC)*, and, most recently, in *US – Zeroing (Japan)*. They do not hinge upon application of Article 2.4.2 or the existence of the phrase "all comparable export transactions". The United States' claims to the contrary are simply incorrect.

The Difference Between Duty Collection Systems and "Margins of Dumping"

16. The last point I would like to raise today concerns the apparent confusion on the part of the United States between duty collection systems and margins of dumping. The United States argues that "[u]nlike investigations, which are subject to a single set of rules, the AD Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment phase".[5] The United States argues further that since, for example, Article 9.4(ii) provides for the collection of antidumping duties on a transaction-specific basis, the Agreement must likewise contemplate and support determinations of "margins of dumping" on a transaction-specific basis.[6] The United States also emphasizes the purported differences in the "functions of investigations and other proceedings under the AD Agreement", asserting that original investigations are concerned with the "existential question" of whether margins of dumping exist, whereas review proceedings under Article 9 are focused on "the amount of duty to be assessed on particular entries, an exercise that is separate and

[4] *Ibid*., para. 76.
[5] *Ibid.*, at para, 18.
[6] *Ibid*., paras. 125-126.

apart from the calculation of an overall dumping margin during the threshold investigation phase of an antidumping proceeding".[7]

17. However, the United States is simply wrong to suggest that the AD Agreement imposes a set of rules on investigations, but leaves anti-dumping duty assessments to the unfettered discretion of members. Certainly the agreement does provide "flexibility" to members to choose collection systems that suit their policy interests – whether they be administered on a retrospective or prospective basis. However – and this is the part that is ignored by the United States – regardless of the collection system chosen by a member, any duty assessments made are subject to the obligation imposed by the text of Article 9.3 limiting the amount of such antidumping duty assessment to "the margin of dumping as established under Article 2". This limitation on the amount of duties applies, without exception, to all possible duty collection systems permitted under the Agreements.

18. Properly understood, therefore, the AD Agreement does provide member countries with the flexibility to choose the system used to collect anti-dumping duties and impose liability. That flexibility extends to imposing such liability on an importer-specific or even a transaction-specific basis. However, the assessment of duties under all systems remains subject to the assessment cap imposed under Article 9.3, a cap that is determined by the exporter or producers' margin of dumping as determined under Article 2. As the Appellate Body in *US – Zeroing (Japan)* noted "[i]t is open to an importer to request a refund if the duties collected exceed the exporter's margin of dumping. Whether a refund is due or not will depend on the margin of dumping established for that exporter".[8]

Conclusion

19. Mexico again thanks this Panel for its service in this matter. The zeroing issue is of significant importance not only to Mexico, but quite obviously to the many other WTO members who are participating in this proceeding as Third Parties or merely observing. The issues are not new and the arguments have been heard several times before. Simple zeroing as applied by the United States is inconsistent with Article VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the AD Agreement. We urge the Panel to follow the reasoning of the Appellate Body in this regard and to rule accordingly in favor of the European Communities.

Thank you.

[7] *Ibid.*, para. 110.
[8] Appellate Body Report, *US – Zeroing (Japan)*, para 160.

ANNEX D-10

THIRD PARTY ORAL STATEMENT OF NORWAY AT THE FIRST MEETING OF THE PANEL

1. Norway would like to thank the Members of the Panel for the opportunity to make a statement at this meeting, and for opening up this part of the third party session to a public viewing.

Mr. Chairman, Members of the Panel,

2. Panels and the Appellate Body have dealt with the question of zeroing several times. The Appellate Body has in its previous cases ruled that all forms of zeroing in all forms of proceedings under the *Anti-dumping Agreement* are prohibited. This conclusion is founded on two premises: *Firstly*, that dumping shall be established for the "product as a whole" – which is not the case where zeroing is employed. And *secondly*, that zeroing is contrary to the "fair comparison" requirement of Article 2.4 of the *Anti-dumping Agreement*. The Appellate Body has made clear that these arguments also apply to reviews, including sunset reviews.

3. Norway firmly supports the Appellate Body's interpretation and careful reasoning with regard to zeroing. The detailed legal arguments are set out in our written submission, and will therefore not be repeated here.

Mr. Chairman,

4. There seems to be no real disagreement as to what the Appellate Body has ruled on the issue of zeroing. However, the United States disagrees with the content of the rulings, and sets forward alternative arguments that it asks the Panel to adopt – even if the Appellate Body has already rejected these arguments on many occasions. The question, thus, seems to be to what degree the Panel may depart from the former rulings of the Appellate Body.

5. The Panels and the Appellate Body do not operate under the legal doctrine of *stare decisis*, and the Panel is therefore not formally bound to follow previous rulings. However, in the interest of legal certainty, foreseeability and equality before the law, panels and the Appellate Body should not depart from precedents laid down in previous cases without very good reasons for doing so.

6. The United States suggests that the Panel should only take into account the legal interpretations set out in Appellate Body reports "to the extent that the reasoning is persuasive".[1]

7. I would like to make three comments to this: *First*, the Appellate Body's interpretation and underlying reasoning are, in our view, far more persuasive than the allegations advanced by the United States. *Second*, applying a subjective standard of "persuasiveness" does not sit well with a system of "lower courts" and "appeal courts" as we have in the WTO with Panels and the Appellate Body. A basic premise of a system with an appeal court is that lower judicial bodies defer to the judgments of the appeal court. *Third*, "persuasiveness" is a very subjective term, which leaves a lot to the "eye of the beholder".

8. Rather, if one is to accept that earlier precedents may in certain cases be overturned, then a far more exacting standard must be applied. In our view there must be "a manifest error of legal

[1] United States' First Written Submission para. 33.

interpretation" before a panel may depart from the legal interpretation of the Appellate Body regarding the same legal issue.

9. The panels that have departed from previous Appellate Body reports on zeroing have thereafter been overturned by the Appellate Body. It is thus eminently clear that those panels – and not the Appellate Body – committed serious errors of legal interpretation.

Mr. Chairman,

10. The United States has referred to two previous panels (*US – Zeroing (Japan) and US – Stainless Steel from Mexico)* in support of its argument that zeroing should be permitted in assessment reviews – and that there should be no methodological constraints on how the US calculate dumping margins and impose and collect duties.

11. The Panels in those two cases made a number of legal errors, two of which I would like to highlight here. Needless to say we trust that this Panel will not commit the mistakes of the two aforementioned Panels.

12. *First*, those Panels did not interpret the terms "product" or "margin of dumping" in the *Anti-dumping Agreement* in accordance with the Vienna Convention on the Law of Treaties. This is clear from the treatment in those reports.

13. Not only did they misunderstand the very purpose of treaty interpretation, they also ignored the elements of Articles 31 and 32 of the Vienna Convention. Rather than going through the elements of these articles they simply jumped at their own interpretation, and thereafter they declared their interpretation to be a permissible one.

14. Such an analysis completely misunderstands the purpose of treaty interpretation. 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. To do so, there are a number of elements that the treaty interpreter can rely upon, as specified in the various sub-paragraphs of Article 31 and Article 32. 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.

15. Should there still, *after* the application of the Vienna Convention, be unclear which of two interpretations is the correct one, then the principle of "in dubio mitius" – widely recognized in international law as "a supplementary means of interpretation" – would direct a treaty interpreter to prefer the meaning, which is less onerous to the party assuming an obligation.

16. By stating that there are two permissible interpretations up-front, those panels committed a legal error of treaty interpretation. By interpreting "product" and "margin of dumping" as they did, they made yet more mistakes.

17. The *second* legal error I want to highlight in those panel reports relate to the Standard of Review set out in Article 17.6 (ii) of the *Anti-dumping Agreement.*

18. What is important to always bear in mind is that the first sentence of Article 17.6(ii) requires a Panel to apply the rules of treaty interpretation of customary international law. This means to apply the rules of the Vienna Convention. Had the two aforementioned panels applied the Vienna Convention correctly, only one interpretation should remain (that of the Appellate Body) – not two permissible ones.

19. The second sentence of Article 17.6(ii) only kicks in *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*".

20. Applying the second sentence up-front, before applying correctly the Vienna Convention, is a grave legal error.

21. We are, of course, confident that this Panel will not commit the errors of the two panels mentioned by the United States.

Mr. Chairman, Members of the Panel,

22. The Appellate Body has rightly pointed out that adopted reports create legitimate expectations among WTO Members, and therefore should be taken into account where they are relevant to any subsequent dispute.[2] Furthermore, the Appellate Body has underscored that it would be expected from panels that they follow the Appellate Body's conclusions in earlier disputes, especially where the issues are the same.[3]

23. It cannot be doubted that the case we are discussing today involves the same factual basis, the same methodologies and the same provisions as the Appellate Body's earlier rulings on zeroing. Hence, it would be expected that this Panel follow the legal interpretations set out by the Appellate Body in the mentioned decisions.

24. Based on this, Norway respectfully requests the Panel to examine this case in accordance with previous Appellate Body rulings in order to secure a legally correct, cohesive and predictable outcome.

Thank you for your attention.

[2] Appellate Body Report, *Japan – Alcoholic Beverages II*, at 108 (as regards adopted panel reports) and Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 107-109 (as regards adopted Appellate Body reports).

[3] Appellate Body Report, *United States – OCTG Sunset Reviews*, para. 188.

ANNEX D-11

THIRD PARTY ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, Members of the Panel:

The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, (or TPKM), would like to thank the Panel for this opportunity to present our views in this third party session.

TPKM stands by its written submission of 19 September, 2007. Because the mechanisms of zeroing have already been fully described by the parties to the dispute, we are not going to repeat them here. We believe there is common understanding of how zeroing affects the calculation of dumping margins. Today, we would like to draw the Panel's attention to the illegitimacy of measures as a consequence of their reliance on zeroing.

At the start, may we respectfully remind the Panel that the multilateral trading system under the WTO aims at the reduction of trade barriers on a non-discriminatory basis. While Article VI of GATT 1994, which recognizes the legitimacy of anti-dumping measures, is a departure from this basic principle, its purpose is clearly stipulated as to "offset" injurious dumping. For this reason, the duty imposed may not be excessive than the margin of dumping with respect to that specific product.

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 states at the outset that Members agree that "*An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994*". In other words, no anti-dumping measure shall be applied that is beyond the mandate of Article VI of GATT 1994.

However, the use of the zeroing method creates the potential for overcorrecting the injury caused by dumping, which places it beyond the mandate of Article VI of GATT 1994.

Under the zeroing methodology, the prices of certain export transactions are not taken fully into account. As the Appellate Body has noted in previous disputes, there is an "inherent bias in a zeroing methodology". Such bias could, in some instances, turn a negative dumping margin into a positive one, and may systematically inflate the magnitude of dumping margins. It is evident that a margin calculated by the zeroing method can never be a legitimate foundation for either the determination of dumping or the assessment of dumping duty.

If, for example, an affirmative determination of dumping were made on a product that was not being dumped, or a dumping duty was applied at an inflated rate, these measures would inevitably be deemed beyond the mandate of Article VI of GATT 1994.

It follows that any measure relying on a dumping margin calculated by the zeroing method, whether in investigations or reviews and regardless of the type of comparison employed, would necessarily result in an inaccurate determination of dumping or the excessive imposition of dumping duty, and as such would be deemed inconsistent with the WTO anti-dumping disciplines.

Mr. Chairman, Members of the Panel:

The objectives of anti-dumping duty are not to curb the imports of a product that is not being

dumped, but to stop a product being imported at dumped prices and to remedy the injury. To tolerate the use of the zeroing method in the calculation of a dumping margin is to deny the very basis and spirit of the anti-dumping mechanism.

TPKM respectfully requests the Panel to take into account its observations and comments. In the interests of ensuring security and predictability in the multilateral trading system, we would expect the Panel to make findings and proper interpretations consistent with the previous findings of the Appellate Body.

Thank you for listening to our views.

ANNEX D-12

OPENING STATEMENT OF THE EUROPEAN COMMUNITIES AT THE SECOND MEETING OF THE PANEL

Mr. Chairman, distinguished Members of the Panel:

The EC does not have an opening oral statement.

We believe that we have made our case, as it was made in DS294, in DS322 and most recently in DS344.

I have two documents in front of me: the text of the ADA and the text of the Vienna Convention, which speak for themselves. We do not believe that the submissions we hear coming back from the United States – such as the assertion that the ADA is a hotch potch of obscurity, are legal arguments. And we are anxious to get to any questions the panel might have. For this reason, we have no opening oral statement.

Thank you, Mr Chairman.

ANNEX D-13

OPENING STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

Mr. Chairman, Members of the Panel:

1. The United States welcomes this opportunity to meet with the Panel again to discuss the issues raised in this dispute. In particular, we will respond to some of the arguments made by the European Communities ("EC") in response to the Panel's questions and in its second written submission. And we wish to thank you once again for opening this panel meeting to WTO Members and the public.

2. Today we will first explain why determining the margin of dumping in reviews makes sense on a transaction-specific basis. We will then comment on the relevant standard of review, discuss the proper role of adopted Appellate Body reports in the WTO dispute settlement system, and respond to the EC's continued attempt to have imposed on the United States an independent international obligation to eliminate so-called "zeroing". Second, we will briefly address our objection that the "application or continued application" of duties in 18 separate cases is not properly within the scope of this proceeding because the EC's identification of "duty as a measure" does not identify the specific measures at issue as required by Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Third, we will respond to the EC's argument that Article 2.4.2 of the Antidumping Agreement applies to periodic reviews, refute the erroneous concept of "product as a whole", and demonstrate how a the EC's reading of Article 2.4.2 would render the targeted dumping provision *inutile*. Lastly, we offer a few words on the negotiating history of the Antidumping Agreement, which shows that no common understanding to prohibit zeroing could be reached in the Uruguay Round and that multiple attempts to include a prohibition on zeroing failed.

The US Retrospective Duty System

3. The US retrospective duty assessment system is more complex to operate, and requires a larger expenditure of administrative resources and personnel. However, it allows US authorities to closely calibrate the imposition of antidumping duties to the actual levels of dumping during the period covered by a periodic review. In addition, it encourages exporters and importers to adjust prices on their own – either through the exporter reducing prices in their home market to bring down the "normal value", the importer and exporter agreeing to a higher "export price", or in the case of a related importer, if the importer raises its US sales price – in order to eliminate dumping margins and avoid paying antidumping duties. Thus, in the United States the level of antidumping duties actually collected from importers typically declines sharply during the period covered by an order. This means that prices in the marketplace can adjust without the actual collection of duties.

Standard of Review

4. As the parties agree, the task of this Panel is set not only by Article 11 of the DSU, but also by the special standard of review found in Article 17.6(ii) of the Antidumping Agreement. Under Article 17.6(ii), when a panel, in applying the customary rules of interpretation of public international law, "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 existence of such a provision in the Antidumping Agreement confirms that WTO Members were aware that the antidumping text would pose particular challenges. In many instances, the antidumping text permits more than one interpretation because it was drafted to cover multiple antidumping systems around the world and long-standing differences regarding methodology. Thus, the negotiators indicated that panels and the Appellate Body should respect a permissible interpretation of the Antidumping Agreement, even if that interpretation would not be the one favoured by the panel or Appellate Body.

6. Here, the EC asserts that in applying the customary rules of interpretation to the provisions at issue, there is no question that the only permissible interpretation is one which finds a blanket requirement to average together in all types of proceedings the price margins for all import transactions of a particular product.[1] The United States has demonstrated that there is no text, nor any necessary implication in the text, that establishes any such general requirement in the Agreement. As the United States has demonstrated, the correct interpretation, applying the rules in the Vienna Convention, is one which does not lead to such a general requirement. But even were the interpretation proposed by the EC permissible, the interpretation advanced by the United States would be equally permissible for purposes of Article 17.6(ii).

The Role of Adopted Appellate Body Reports

7. The EC would like this Panel to believe that *stare decisis* exists in the WTO dispute settlement system, at the very least on a *de facto* basis. In its second written submission, the EC claims that it "is not arguing that the DSU contains an express rule providing that panels are legally bound" by prior Appellate Body reports, but then asserts that "panels ... should follow the findings of the Appellate Body in prior cases".[2] The EC even appears to argue that the WTO is a common law system by referring to the "substantial and consistent case-law of the Appellate Body".[3]

8. The Appellate Body has stated that its reports are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[4] To the extent that the reasoning in prior Appellate Body reports is persuasive, those reports may be taken into account, but they have no *stare decisis* effect. The Ministerial Conference and the General Council have *exclusive authority* to adopt binding interpretations of the covered agreements under Article IX:2 of the WTO Agreement.

9. Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the covered agreements. And under Articles 3.2 and 19.2 of the DSU, the findings and recommendations of a panel or the Appellate Body, or the rulings and recommendations of the DSB, cannot add to or diminish the rights and obligations provided in the covered agreements. A panel cannot simply adopt prior findings on an issue without undertaking its own objective assessment of the matter before it. Nor can a panel follow prior findings if the panel considers that those prior findings would add to or diminish the rights or obligations of the parties to the dispute before the panel.

10. The panels in *US – Zeroing (Japan)* and more recently *US – Zeroing (Mexico)* have rejected the rationale of prior Appellate Body reports finding zeroing in reviews inconsistent with the Antidumping Agreement and GATT 1994.[5] Both panels recognized their obligation to carry out an objective assessment under Article 11 of the DSU. As the panel concluded in *US – Zeroing (Mexico)*, "[i]n light of our obligation under Article 11 of the DSU ... we have felt compelled to depart from the

[1] EC Second Written Submission, para. 19.
[2] EC Second Written Submission, paras. 39-40.
[3] EC Second Written Submission, para. 19.
[4] *US – Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan – Alcohol Taxes (AB)* and *US – Shrimp (Art. 21.5)(AB)*).
[5] *US – Zeroing (Japan) (Panel)*, para. 7.99 and n. 733; *US – Zeroing (Mexico) (Panel)*, para. 7.106.

Appellate Body's approach".[6] This Panel likewise is charged under Article 11 with undertaking an objective assessment of the matter before it and cannot make findings or recommendations that add to or diminish the rights and obligations in the covered agreements.

11. Attempting to respond to the US argument that adopted Appellate Body reports may be taken into account to the extent that they are persuasive, the EC asserts that "[e]ither findings in prior cases are legally relevant, or they are not".[7] The EC believes that once reports have been adopted by the Dispute Settlement Body ("DSB"), they are "legally relevant" to the disposition of a dispute, and no other interpretation of the covered agreements is allowed. The EC has invented its notion of "legally relevant" out of whole cloth: as just explained, if a prior report's reasoning is persuasive or helpful, it should be taken into account, but that does not mean that a panel is bound by it.

12. The EC tries to find support in the text of Article 11 of the DSU for its view on the binding nature of prior Appellate Body reports.[8] An interpretation under the customary rules of treaty interpretation supports no such reading. It is difficult to see how Article 11, which calls for an "objective assessment", means that panels should blindly follow adopted Appellate Body reports, particularly in light of Article IX:2 of the WTO Agreement by which only the Ministerial Conference and General Council may adopt authoritative interpretations.

13. The EC relies on the first sentence of Article 11, which states that "the function of panels is to assist the DSB in discharging its responsibilities under this understanding and the covered agreements".[9] To the EC, this sentence means that by following adopted Appellate Body reports, panels will somehow assist the DSB in meeting its responsibilities. The DSB's role, however, is to help Members resolve individual disputes, and not to adopt binding interpretations of the covered agreements outside the context of a specific dispute, which would run counter to the prohibition in DSU Article 3.2 on adding to Members' obligations. It is by adopting working procedures, hearing the parties, and making findings and recommendations on claims that panels help the DSB "administer these rules and procedures and ... the consultation and dispute settlement provisions of the covered agreements".[10] The first sentence in Article 11 does not say or imply anything about a need or requirement to follow past Appellate Body reports, nor does any other provision of the DSU.

14. The EC, in interpreting Article 11, also relies for contextual support on the reference to "security and predictability" in Article 3.2 of the DSU. However, the reference to "security and predictability" in Article 3.2 does not support the EC's mis-reading of Article 11. Rather, Article 3.2 explains that the dispute settlement system is a central element in providing security and predictability to the *multilateral trading system*. The dispute settlement system serves that function by following both the procedural and substantive rules to which WTO Members have agreed. That is, the system serves that objective when panels make the "objective assessment" with which Members have tasked them (as opposed to the rote acceptance of prior reports that the EC urges), and when panels do not add to or diminish the rights or obligations of Members. By contrast, the security and predictability of the multilateral trading system is not preserved when a panel or the Appellate Body creates rights or obligations to which the Members did not agree. When the Appellate Body has departed from the proper interpretation of the covered agreements, as in disputes on zeroing, panels should be mindful of the obligation under DSU Articles 3.2 and 19.2 to preserve the rights and obligations of Members when interpreting and applying the covered agreements. Article 3.2 of the DSU therefore does not assist the EC's argument with respect to the meaning of Article 11.

[6] *US – Zeroing (Mexico) (Panel)*, para. 7.106.
[7] EC Second Written Submission, para. 20.
[8] EC Second Written Submission, para. 26.
[9] EC Second Written Submission, para. 29.
[10] DSU Article 2.1.

Article XVI:4 of the WTO Agreement

15. The EC once again repeats its expansive and erroneous argument that under Article XVI:4 of the WTO Agreement, the adopted Appellate Body reports on zeroing impose an "independent international obligation" on the United States to eliminate zeroing.[11] We will not repeat all of our arguments in this regard today[12], but emphasize a few key points. Most importantly, there is no support for the EC's interpretation in the DSU or elsewhere in the covered agreements. The EC's proposed interpretation is also inconsistent with the well-established proposition that Appellate Body and panel reports "'are not binding, except with respect to resolving the particular dispute between the parties to that dispute"'.[13] The Appellate Body cannot adopt authoritative interpretations of the covered agreements, nor can its reports create an obligation independent of the covered agreements. Treating prior Appellate Body reports as binding outside the scope of the original dispute would add to the obligations of the United States and other Members, inconsistent with Articles 3.2 and 19.2 of the DSU.

16. The EC would like the Panel to believe that Articles 3.2, 3.4, 3.8, and 17.14 of the DSU actually support its reading of Article XVI:4.[14] The EC's argument distorts the plain text of the DSU. As we have just explained, Article 3.2 cannot justify a reading of Article XVI:4 that adds to a Member's obligations under the covered agreements. In addition, Article 3.4 only relates to the "matter" under consideration in a specific dispute, and requires that the DSB's "settlement of the matter" shall be "in accordance with the rights and obligations under this Understanding and under the covered agreements". In other words, a finding under Article XVI:4 that adds to a Member's obligations under the covered agreements cannot be reconciled with Article 3.4. Article 3.8 is concerned with the rebuttal of the presumption of nullification and impairment by the responding Member in cases where there is an infringement of the covered agreements. The EC is wrong to assert that under Article 3.8, "any WTO Member can invoke nullification and impairment when an infringement has been found and adopted by the DSB".[15] Lastly, Article 17.14 only states that an adopted Appellate Body report shall be "unconditionally accepted by the parties to the dispute", which means acceptance of the findings and recommendations in the context of that specific dispute, and not in any and all future disputes that appear to be, or are asserted to be, similar. No other reading is possible. And in making its argument, the EC has blatantly ignored prior Appellate Body language on this issue while arguing that Appellate Body findings are binding.

17. The EC argues that "treating [Article XVI:4] as a purely consequential claim when a violation of another measure has been found would render this provision inutile".[16] As panels have recognized, there is no "independent" basis for a claim under Article XVI:4.[17] Instead, a finding of inconsistency with a provision of the covered agreements automatically gives rise to a finding of inconsistency with Article XVI:4. Neither panels nor the Appellate Body have ever treated Article XVI:4 differently.

[11] EC Second Written Submission, para. 63.
[12] *See, e.g.*, US First Written Submission, paras. 157-64.
[13] *US – Softwood Lumber Dumping (AB)*, para. 111 (*quoting Japan – Alcohol Taxes (AB)*).
[14] EC Second Written Submission, para. 64.
[15] EC Second Written Submission, para. 64.
[16] EC Second Written Submission, para. 66.
[17] *US – OCTG from Mexico (Panel)*, para. 7.189; *US – Antidumping Act of 1916 (EC) (Panel)*, para. 6.223; *US – Antidumping Act of 1916 (Japan) (Panel)*, para. 6.287.

Scope of this Dispute

18. The United States will not repeat today its three preliminary objections to the scope of the EC's claims. Instead, we will focus on one set of alleged "measures" that are the subject of the US objection that under Article 6.2 of the DSU, the EC has failed to identify the specific measures at issue. Those alleged "measures" are the so-called "application or continued application" of antidumping duties pursuant to the antidumping duty orders in 18 cases as identified in the EC's panel request.

19. The EC has introduced the concept of "duty as a measure".[18] It now would like the Panel to treat any application or continued application of duties – at whatever level and whenever and however determined – in the 18 identified cases as some type of free-standing measure that has a life of its own beyond the 52 particular determinations identified in its panel request.[19] The EC ignores the fact that, for any given importation, the antidumping duty imposed or assessed depends on a particular administrative determination, whether that be an original investigation, assessment review, new shipper review, or changed circumstances review. Separately, the continued existence of an antidumping duty order depends on an underlying sunset review.[20] In other words, individual determinations are the focus of dispute settlement because the duty assessed, or the decision to continue imposing that duty pursuant to an antidumping order, is dependent on the actions of the administering authority in the relevant proceeding.

20. The EC's panel request, to fulfil the requirements of DSU Article 6.2, must identify the specific determination leading to the particular application or continued application of an antidumping duty, and cannot merely refer to the application or continued application of a duty in a general and detached way. The EC did not identify such determinations, nor could it have, because, by its own admission, the EC is trying to sweep in any subsequent and not-yet-taken determinations related to the application or continued application of duties in 18 cases.[21] As prior panels have recognized, a measure that did not even exist at the time of panel establishment cannot be within a panel's terms of reference.[22] Nor can the EC have consulted on a measure that does not exist at the time of the consultation request, yet such consultations on a measure are a precondition for requesting a panel with respect to that measure.[23] This Panel should reject the EC's attempt to include in the scope of this proceeding indefinite subsequent measures that did not exist at the time of panel establishment.

21. My colleague will now discuss issues related to the EC's claims under the Antidumping Agreement and the GATT 1994.

Article 2.4.2 of the Antidumping Agreement

22. The EC has focused much attention on the alleged proper reading of Article 2.4.2 of the Antidumping Agreement under the Vienna Convention. It is the EC's position that any time a Member makes "a systemic examination or inquiry" as to dumping, that Member is conducting an investigation subject to the disciplines of Article 2.4.2. Such an approach fails to appreciate the fundamental distinctions between investigations that determine the *existence* of dumping, and assessment reviews in which *final liability* is determined, even though such distinctions are recognized in the Antidumping Agreement.

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[18] EC Answer to Panel Question 1(a), para. 7; EC Second Written Submission, paras. 54, 57.

[19] EC Answer to Panel Question 2, para. 17; *see also* EC Answer to Panel Question 2, para. 13; EC Answer to Panel Question 3, para. 20; EC Answer to Panel Question 5(b), para. 28.

[20] AD Agreement, Articles 1, 5, 7, 9, 11.

[21] EC Response to Request for Preliminary Rulings, para. 47.

[22] *US – Upland Cotton (Panel)*, paras. 7.158-7.160.

[23] DSU Art. 4.7.

23. The requirements of Article 2.4.2 of the Antidumping Agreement do not extend beyond Article 5 investigations. It is only "during" an Article 5 "investigation phase", that a Member establishes "the existence of margins of dumping".[24] The US interpretation, applying the rules of interpretation as reflected in Article 31 of the Vienna Convention, is supported by the text of the Antidumping Agreement. Articles 1, 2.4.2 and 5, read together, establish that a unique determination as to the "existence" of dumping is made in Article 5 investigations. Outside of the Article 5 investigation phase, the task of an authority is not to determine whether dumping "exists". Instead, the Antidumping Agreement provides that in Article 9.3.1 assessment proceedings challenged by the EC, the task of the United States is to determine "the amount of the anti-dumping duty" and the "final liability for payment of anti-dumping duties".

24. To read, as the EC would have it, "during the investigation phase" as synonymous with "period of investigation", denies meaning to the unique "investigation phase" terminology in Article 2.4.2. Although numerous provisions in the Antidumping Agreement refer, for example, to the "period of investigation", the term "investigation phase" appears only in Article 2.4.2. The word "phase" in the context of the Antidumping Agreement recognizes that authorities will determine dumping margins in distinct contexts. Specifically, the "investigation phase" refers to the distinct phase in which the existence of dumping sufficient to justify the imposition of an antidumping duty is determined. The relationship between the term "investigation phase" and "the existence of margins of dumping" must be given meaning and may not be read out of the Agreement.

25. Because Article 2.4.2 is, by its terms, limited to establishing the existence of margins of dumping "during the investigation phase", it has no bearing on any segment of an antidumping proceeding other than the original investigation phase. Under Article 9.3, the collection and assessment of antidumping duties on specific entries has a separate and distinct purpose that necessarily occurs after the imposition of an antidumping duty order in the original investigation.

26. To force the requirements of Article 2.4.2 with respect to the *existence* of margins of dumping during the investigation phase, into Article 9.3, the EC seeks to impose an obligation whereby dumping liability would be determined on an exporter-wide basis in assessment reviews.[25] This approach divorces the amount of antidumping duty assessed on an import from the dumping margin associated with that import transaction. Nothing in the text of Article 9.3 supports such a result.

27. Interpreting Article 9.3.1 to require that final liability be assessed based on the totality of the exporter's transactions ignores a key commercial reality. In the real world, it is the *importers* to whom the sales at less than normal value are made, and it is the importers who actually pay the antidumping duties. This commercial reality is recognized explicitly in Article 9.3.2, and implicitly throughout Article 9.3. This cannot be ignored if the antidumping duties are to be an effective remedy to "offset or prevent" dumping.

The Erroneous Concept of "Product as a Whole"

28. The EC's erroneous argument that zeroing is prohibited depends on margins of dumping calculated in periodic reviews relating solely and exclusively to the "product as a whole" – and that margins of dumping *not* be calculated based on individual transactions. The concept of "product as a whole", however, was originally derived from the phrase "all comparable export transactions" in the first sentence of Article 2.4.2. The Appellate Body in *US – Softwood Lumber Dumping* based its finding on the phrase "all comparable export transactions" by interpreting the term "margins of dumping" and the "all comparable export transactions" language in an "integrated manner".[26] By asserting that the "obligation not to zero primarily derives from the requirements in Article VI of the

[24] AD Agreement, Article 2.4.2.
[25] EC Second Written Submission, paras. 117,119; EC Answer to Panel Question 8, para. 45.
[26] *US – Softwood Lumber Dumping (AB)*, paras. 85-93.

GATT 1994 and in Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*", but *not* Article 2.4.2[27], the EC applies "product as a whole" in a manner that is detached from the underlying textual basis in the first sentence of Article 2.4.2 of the Antidumping Agreement.

29. Furthermore, the EC's own arguments prove too much. The EC states: "Thus, it is only on the basis of aggregating all these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole".[28] And the EC further states: "The European Community fails to see how margins of dumping can properly be established for the product as a whole without aggregating all of the 'results' of the multiple comparisons".[29] If that were true, then a margin of dumping could never be determined for there could always be another import to average into the margin. If anything less than all transactions is not a proper margin of dumping, then when would an administering authority have all the transactions? The Antidumping Agreement does not specify a particular time period that may be used to define the universe of transactions to be averaged. If it is necessary to average "all" the transactions, then first, the margin would always be changing as new transactions were averaged together with all transactions since the beginning of the antidumping duty order. And second, the margin would never be final as there could always be new import transactions occurring that would need to be averaged in. Similarly, in considering Article 9.3.1 and 9.3.2, how could an importer ever know whether to ask for a refund when the margin of dumping is continually changing? And for imports during what period of time would the importer make such a request? In order to determine the margin of dumping, all the exporter's transactions would need to be averaged, not just with respect to that importer, and the list of transactions would never close.

30. Because of this problem, we should note that if negotiators had intended to use the "product as a whole" approach advocated by the EC, then they would have had to have specified the time period to consider. The simple fact that the negotiators did not deal with this time period issue is itself sufficient to show that the EC's approach is not provided for in the text.

31. Another fundamental problem with the EC's proposed "product as a whole" approach is that it is contrary to the way in which "product" is used in discussing antidumping duties. Other panels have correctly rejected the "product as a whole" approach by looking at the way in which "product" is used in Article VII of the GATT 1994. Perhaps even more directly relevant is the use of the term "product" in Article II:2 of the GATT 1994. There, it provides that:

> Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:
>
> ...
>
> (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI.

Here, the term "the importation of any product" must mean a particular transaction. A Member would not impose a duty on "the importation of any product as a whole". A duty imposed on "the importation" refers to the particular transaction. And we would note that this is the same manner in which product is used in Article II:1. Under the EC's reading that "product" means "product as a whole", a Member could impose higher ordinary customs duties on some transactions and lower duties on others and not breach the Member's tariff binding as long as the average of the ordinary customs duties applied to all transactions was less than the bound rate.

[27] EC Second Written Submission, paras. 117-18.
[28] EC Second Written Submission, para. 80.
[29] EC Second Written Submission, para. 81.

Targeted Dumping

32. While the targeted dumping provision might be an exception to the normal rules for establishing the existence of margins of dumping in Article 2.4.2, it is not an exception to the fair comparison requirement of Article 2.4. If zeroing is found to violate the fair comparison requirement of Article 2.4, as the EC advocates, then such a prohibition would also apply to the methodology listed in the second sentence in Article 2.4.2. Under the EC's interpretation, which would require the averaging of all transactions for any calculation of the dumping margin, the result under the targeted dumping provision is mathematically equivalent to the result under the first sentence of Article 2.4.2, thus rendering the targeted dumping provision a nullity. This outcome is to be avoided under the customary rules of treaty interpretation.

33. The EC does not deny the result of mathematical equivalence if zeroing is prohibited in both symmetrical and asymmetrical comparisons. Rather, the EC suggests that in a targeted dumping scenario, a Member might remedy the mathematical equivalency problem by "re-set[ting] the parameters of the investigation"[30] and only calculating a margin for transactions falling within the pattern. There is no textual support for this proposed interpretation, and it is flatly inconsistent with the EC's insistence that a margin of dumping may only be calculated for the totality of the exporter's sales, i.e., "the product as a whole". The language of Article 2.4.2 says nothing about selecting a subset of transactions when conducting a targeted dumping analysis. In other words, to the extent that there is any obligation to calculate a margin of dumping for the "product as a whole", or on an exporter-wide basis, as the Appellate Body has found, nothing in the text of the second sentence of Article 2.4.2 creates an exception to that obligation. Instead, the second sentence is only an exception to the first sentence's obligation to normally make symmetrical comparisons in an investigation.

Uruguay Round Negotiating History

34. During this dispute, the EC, in support of its argument that zeroing must be prohibited, has relied on a revisionist version of the negotiating history.[31] The key terms that have been cited by the Appellate Body in its zeroing reports for the most part date back to the GATT 1947, the Kennedy Round Antidumping Agreement, and the Tokyo Round Antidumping Code. The only new language is the phrase "all comparable export transactions" in Article 2.4.2, which is limited to investigations and thus should not be at issue here. The rest were part of long-standing antidumping terminology, which the negotiators turned to when developing the WTO Antidumping Agreement. As the negotiating history makes clear, these terms did not acquire a new meaning during the Uruguay Round.

35. During the Uruguay Round, the negotiators were well aware of zeroing, or as it was referred to at the time – "negative dumping". While the negotiations were underway, Japan and Brazil challenged the EC's zeroing practices in two disputes under the Tokyo Round Antidumping Code. In both cases, panels found that the Code did not prohibit zeroing. Several Members submitted proposals during the Uruguay Round, including detailed textual changes, designed to require WTO Members to consider "negative dumping" or "non-dumped transactions". None of their textual proposals appeared in the final Uruguay Round Antidumping Agreement. Instead, the provisions of the Antidumping Agreement that are at issue here reflect standard language from prior agreements that were interpreted by Tokyo Round Code dispute settlement panels as not requiring consideration of "negative dumping" or aggregation of individual transactions.

36. The lack of any explicit textual reference in the Antidumping Agreement to zeroing or "negative dumping" speaks for itself. No common understanding was reached on prohibiting zeroing in the Uruguay Round. No common understanding could be reached because, despite extensive efforts by some Members, their proposals were firmly opposed by the United States, Canada – and

[30] EC Second Written Submission, paras. 116, 246.
[31] *See, e.g.*, EC Second Written Submission, paras. 221-24.

even the EC – Members who continue to use zeroing today, either by assessing antidumping duties on an import-specific basis, or, in the case of the EC, pursuant to the application of the "targeted dumping" provision in Article 2.4.2.

Conclusion

37. Mr. Chairman, Members of the Panel, the EC has asked this Panel to read an obligation into the Antidumping Agreement and GATT Article VI, notwithstanding the lack of any textual basis for the obligation the EC proposes. The United States respectfully urges the Panel to reject the EC's claims. Dispute settlement plays a major role in the WTO system, but it cannot, and should not, seek to substitute for the WTO Members, who ultimately must bear the final responsibility for negotiating agreements to further open markets and strengthen the global trading system. If WTO Members left out certain provisions for lack of consensus, Article 3.2 of the DSU makes it plain that it is *not* the job of panels or the Appellate Body to write them into the Agreement. Indeed, interpretations that go beyond the existing text of the WTO agreements – whatever the good intentions of those advancing the interpretations – fundamentally undermine the willingness of Members to agree to further market-opening commitments as some Members will simply refuse to negotiate mutually beneficial commitments and instead seek unilateral gain through the dispute settlement system.

38. This concludes our opening statement. We would be pleased to respond to any questions you may have.

ANNEX D-14

CLOSING STATEMENT OF THE EUROPEAN COMMUNITIES AT THE SECOND MEETING OF THE PANEL

Mr. Chairman, distinguished Members of the Panel:

The EC requests the panel to make a suggestion under the second sentence of Article 19(1) of the DSU, not, as is typically done, in order to make a substantive proposal to the defending Member as to how to implement – such as withdrawing the measure. But rather to avoid unnecessary discussions about what might or might not fall within the scope of a compliance panel. In particular, we would like the panel to suggest to the US that, when implementing, the US should take all necessary steps of a general or particular nature to ensure that any further specific action against dumping by the US in relation to the same products from the EC as referenced in the present dispute, be WTO consistent, and specifically with reference to the question of zeroing. We believe that such suggestion might considerably reduce the need for protracted and unnecessary discussions about the scope of any compliance panel, and thus facilitate the further work of the panel.

Thank you, Mr Chairman.

ANNEX D-15

CLOSING STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

Mr. Chairman, Members of the Panel:

1. The United States would like to thank the Panel for its hard work and for its questions today. We also would like to thank the Panel again for opening the meeting to WTO Members and to the public. The United States appreciates these steps towards greater transparency at the WTO.

2. The United States will be brief but would like to emphasize a few points in closing.

3. The United States strongly objects to the EC's attempt to have the Panel consider as measures at issue the "application or continued application" of antidumping duties in 18 separate cases. The EC never included these alleged measures as part of its consultation request, and the United States was denied the opportunity to consult with the EC on them. The EC appears to have used the time after its consultation request to devise a theory on how to get at antidumping determinations not yet taken by the United States, and it then introduced the so-called "18 measures" in its panel request.

4. These alleged measures cannot properly be before the Panel under Article 6.2 of the DSU. The EC would like the Panel to treat the duties as some sort of organism, with a life of its own, stretching into the indefinite future. However, the EC ignores the fact that the duty imposed or assessed depends on the underlying administrative determination, whether an original investigation, an administrative review, a changed circumstances review, or a new shipper review. The EC had to identify the specific determination in its panel request that resulted in a given application or continued application but could not do so because these determinations were not even in existence at the time of panel establishment. The "application or continued application" of antidumping duties cannot fall within the Panel's terms of reference and should be rejected.

5. We would now like to say a few words about the EC's substantive zeroing claims. The EC has repeatedly emphasized its arguments on the application of the Vienna Convention. It has accused the United States of neglecting the customary rules of interpretation of public international law, just because we have not always said the words "Vienna Convention". However, as demonstrated in our written submissions, at the first panel meeting, and before you today, we have applied the customary rules of interpretation to the covered agreements. The ordinary meaning of the text of the Antidumping Agreement and GATT 1994 makes clear that there is no general prohibition on zeroing. To find such a prohibition where there is none would add to the US obligations under the covered agreements, inconsistent with Articles 3.2 and 19.2 of the DSU.

6. The United States would like to remind the Panel of its obligation to make an objective assessment under Article 11 of the DSU. Other panels, in doing so, have found that there is no prohibition on zeroing in periodic reviews. We hope that this Panel will find the same, as a proper interpretation of the covered agreements would lead it to do.

7. Thank you again, Mr. Chairman, and members of the Panel.

ANNEX E

PARTIES' COMMENTS ON THE APPELLATE BODY REPORT IN *US – STAINLESS STEEL (MEXICO)* (DS344)

Contents		Page
Annex E-1	Comments of the European Communities on the Appellate Body Report in *US – Stainless Steel (Mexico)* (DS344)	E-2
Annex E-2	Comments of the United States on the Appellate Body Report in *US – Stainless Steel (Mexico)* (DS344)	E-3
Annex E-3	Comments of the European Communities on the United States' Comments on the Appellate Body Report in *US – Stainless Steel (Mexico)* (DS344)	E-25
Annex E-4	Comments of the United States on the Comments of the European Communities on the Appellate Body Report in *US – Stainless Steel (Mexico)* (DS344)	E-28

ANNEX E-1

COMMENTS OF THE EUROPEAN COMMUNITIES ON THE APPELLATE BODY REPORT IN *US – STAINLESS STEEL (MEXICO)* (DS344)

The European Communities refers to the Panel's letter inviting the Parties to comment on the Appellate Body Report in DS344. The European Communities observes that, as was entirely foreseeable, the Appellate Body has once again confirmed that the correct interpretation of the *Anti-Dumping Agreement* precludes the zeroing methodology used by the United States in the measures at issue.

The European Communities agrees with the Appellate Body's analysis and respectfully invites the Panel, in making an "objective assessment of the matter before it" under Article 11 of the DSU to adopt the same approach. We draw the Panel's particular attention to the statement that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" (para. 160); and that "the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case" (para. 161).

The European Communities considers that, if the Panel were not to follow the Appellate Body, its findings would inevitably be reversed on appeal. We therefore fail to see what useful purpose could possibly be served by prolonging discussion of what has already been decided.

ANNEX E-2

COMMENTS OF THE UNITED STATES ON THE APPELLATE BODY REPORT IN *US – STAINLESS STEEL (MEXICO)* (DS344)

TABLE OF REPORTS

Short Form	Full Citation
US – Softwood Lumber V (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan) (Panel)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007
US – Stainless Steel (Mexico) (Panel)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by the Appellate Body Report, WT/DS344/AB/R
US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008

I. INTRODUCTION

1. The United States thanks the Panel for the opportunity to address the Appellate Body report in *US – Stainless Steel (Mexico)*. In that report, the Appellate Body reversed the panel and found that simple zeroing by the United States in periodic reviews is, as such, inconsistent with Article 9.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and Article VI:2 of the GATT 1994.[1] The Appellate Body also reversed the panel and found that the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by applying simple zeroing in the five periodic reviews at issue.[2] The United States has demonstrated in its submissions to the Panel, and at the Panel's substantive meetings, that the text of the AD Agreement and the GATT 1994 do not prohibit zeroing in periodic reviews. As set out more fully below, the United States believes that the Appellate Body's most recent report on the issue of zeroing in *US – Stainless Steel (Mexico)* is deeply flawed and should not be treated as persuasive by this Panel.[3]

2. The Appellate Body Division that heard *US – Stainless Steel (Mexico)* would like this Panel to abandon its obligation to undertake an objective assessment of the matter before it under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Instead, the Division has indicated that panels need to follow prior Appellate Body reports on zeroing, all in the name of "security and predictability" of the WTO dispute settlement system and a "coherent and predictable body of jurisprudence", even if such past reports add to or diminish the rights and obligations of Members under the covered agreements. There is no support in the DSU for the Division's approach, which would undermine the security and predictability of the multilateral trading system and expand the legal effect of Appellate Body reports beyond what was agreed by Members.

3. The Division's finding that zeroing in periodic reviews is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement lacks a basis in the text of the covered agreements, and contradicts what the negotiating history of the AD Agreement confirms. The Division claims that its interpretation is the only permissible one under Article 17.6(ii) of the AD Agreement, but in reality, it represents a modification of the reasons for the prohibition on zeroing in periodic reviews, thereby contradicting its conclusion that there is only one permissible interpretation. The United States urges this Panel to find that the AD Agreement and the GATT 1994 allow the calculation of transaction-specific margins of dumping, and that there is no requirement for the provision of offsets in the assessment proceedings at issue.

II. THE PANEL IN *US – STAINLESS STEEL (MEXICO)* PROPERLY FULFILLED ITS OBLIGATIONS UNDER THE DSU

4. Mexico argued on appeal that the panel in *US – Stainless Steel (Mexico)* acted inconsistently with Article 11 of the DSU by "failing to follow well-established Appellate Body jurisprudence" on the issue of zeroing.[4] Although the Appellate Body Division ultimately declined to make a finding on Mexico's claim, in *obiter dicta* it expressed its deep concern over the panel's "departing from" prior Appellate Body reports addressing the same legal issues.[5] The United States respectfully disagrees with the Division's approach, which would transform Appellate Body reports into authoritative

[1] *US – Stainless Steel (Mexico) (AB)*, para. 165(a). The United States notes that the European Communities ("EC") does not make an as such claim of inconsistency in the present dispute.

[2] *US – Stainless Steel (Mexico) (AB)*, para. 165(b).

[3] The United States has attached copies of its statement at the meeting of the Dispute Settlement Body on the DSB's consideration for adoption of the panel and Appellate Body reports in *US – Stainless Steel (Mexico)* as Annex 1 to these comments and its separate written communication to the DSB on those reports as Annex 2.

[4] *US – Stainless Steel (Mexico) (AB)*, para. 154.

[5] *US – Stainless Steel (Mexico) (AB)*, para. 161-62.

interpretations of the covered agreements. Drawing similar conclusions to prior panel and Appellate Body reports, the panel in *US – Stainless Steel (Mexico)* recognized the proper role of prior Appellate Body reports in the WTO dispute settlement system, correctly understood what was required of it under the DSU, and acted consistently with its obligations.

5. The panel, before proceeding to a consideration of Mexico's substantive claims, observed that it was "not bound by previous Appellate Body or panel decisions that have addressed the same issue, i.e. simple zeroing in periodic reviews, which is before us in these proceedings".[6] As the panel affirmed, "[t]here is no provision in the DSU that requires WTO panels to follow the findings of previous panels or the Appellate Body on the same issues brought before them. In principle, a panel or Appellate Body decision only binds the parties to the relevant dispute."[7] The Division at first also recalled the well-established understanding that there is no *stare decisis* in the WTO dispute settlement system[8], but then appears to have suggested the contrary.[9]

6. The panel was fully mindful of its obligation under Article 11 of the DSU to undertake an "objective assessment" of the matter before it. Recalling the panel report in *US – Zeroing (Japan)*, the panel noted that "the concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law".[10] After a "careful consideration" of the matter before it, the panel decided that "we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews".[11] Likewise, the panel concluded that "[i]n light of our obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB ... we have felt compelled to depart from the Appellate Body's approach".[12] It is clear that the panel approached its job seriously, that it conducted a very critical and thorough examination of prior Appellate Body reports on the issue of zeroing, and that it did not lightly deviate from those reports.

7. The Division, in criticizing the panel for departing from past Appellate Body reports, failed to acknowledge that the panel did what was required under Article 11 of the DSU – that is, the panel undertook an "objective assessment" of the matter before it.[13] The Division also suggested that:

> consistency and stability in the interpretation of [Members'] rights and obligations under the covered agreements is essential to promote 'security and predictability' in the dispute settlement system. ... The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.[14]

The Division's discussion cannot be reconciled with the text of Article 3.2 of the DSU. The "security and predictability" referred to in Article 3.2 is the "security and predictability" of the "multilateral

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[6] *US – Stainless Steel (Mexico) (Panel)*, para. 7.102.

[7] *US – Stainless Steel (Mexico) (Panel)*, para. 7.102.

[8] *US – Stainless Steel (Mexico) (AB)*, para. 158 (quoting *Japan – Alcoholic Beverages II (AB)*, pp. 12-15).

[9] *US – Stainless Steel (Mexico) (AB)*, paras. 161-62.

[10] *US – Stainless Steel (Mexico) (Panel)*, para. 7.105.

[11] *US – Stainless Steel (Mexico) (Panel)*, para. 7.106.

[12] *US – Stainless Steel (Mexico) (Panel)*, para. 7.106.

[13] Ironically, the panel did offer "cogent reasons" for departing from prior Appellate Body findings on zeroing, which makes the Division's criticism all the more misplaced according to the Division's own criteria.

[14] *US – Stainless Steel (Mexico) (AB)*, para. 161.

trading system", and not the "'security and predictability' in the dispute settlement system".[15] Under Article 3.2, the DSB's recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements".[16] Recommendations and rulings that add to or diminish such rights and obligations undermine the very security and predictability of the multilateral trading system that is mentioned in Article 3.2. What is more, to the extent such rulings are followed without hesitation, the security and predictability of the agreements that Members negotiated will be even further undermined.

8. The Division has essentially found that "security and predictability" in the dispute settlement system and the need for "a coherent and predicable body of jurisprudence" should trump other provisions of the DSU, including the requirement under Article 3.2 that the DSB's recommendations and rulings not add to or diminish Members' rights and obligations under the covered agreements, and a panel's obligation under Article 11 to conduct an objective assessment. Indeed, carried to its logical extreme, the Division's reasoning would mean the Appellate Body could never change its mind or should never have a dissenting opinion since either would detract from "security and predictability".

9. While the Appellate Body has an undeniably important role in the WTO dispute settlement system, the Appellate Body was not set up to issue authoritative interpretations on the covered agreements; only the Ministerial Conference and General Council may do that.[17] The Division, in discussing the Appellate Body's "distinct" role in the alleged "hierarchical structure" of the WTO dispute settlement system[18], appears to downgrade the very important role of panels and panels' fundamental responsibilities as agreed by Members in the DSU.

10. The United States wishes to recall that despite the Division's *dicta* to the contrary, prior Appellate Body reports on zeroing are not binding. This Panel, like the panel in *US – Stainless Steel (Mexico)*, should undertake an objective assessment of the matter before it, as required by Article 11 of the DSU.[19] We also ask this Panel to remain mindful of the proper interpretation of Articles 3.2 and 19.2 of the DSU and ensure that its findings do not add to or diminish the rights and obligations of Members under the covered agreements.[20] The Panel should decline any invitation to adopt uncritically the reasoning in Appellate Body reports simply in the name of consistent jurisprudence or "security and predictability".

III. THE APPELLATE BODY DIVISION'S REASONING IS FLAWED AND SHOULD NOT BE FOLLOWED BY THIS PANEL

11. The United States is deeply troubled by the Appellate Body Division's evaluation of the issue of zeroing. **The question before the Division was whether the Members agreed to prohibit zeroing as part of their WTO obligations. Any such agreement could only be manifest in the text of the AD Agreement. However, the text of the AD Agreement is silent on the issue of zeroing. Faced with agreement language that does not address zeroing at all, let alone include a broad prohibition on zeroing, the Division has drawn inferences that the text cannot support about what it is that Members intended with respect to zeroing.**

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[15] *US – Stainless Steel (Mexico) (AB)*, para. 160.

[16] Likewise, Article 19.2 ensures that the findings and recommendations of panels and the Appellate Body cannot add to or diminish the rights and obligations of Members under the covered agreements.

[17] WTO Agreement, Art. IX:2.

[18] *US – Stainless Steel (Mexico) (AB)*, para. 161.

[19] *See, e.g.*, US First Written Submission, paras. 24, 28-29; US Opening Statement at First Substantive Meeting of the Panel, paras. 4, 6, 9.

[20] *See, e.g.*, US First Written Submission, paras. 28, 32; US Opening Statement at First Substantive Meeting of the Panel, paras. 7-8.

12. **The difficulties and problems of the Appellate Body's approach are illustrated by the individual Appellate Body reports on the issue. Over several reports, the Appellate Body has modified its analysis in mutually contradictory ways. The Appellate Body's most recent effort in** *US – Stainless Steel (Mexico)* **is no less flawed. In particular, the Appellate Body report largely assumes its conclusion, relying not on the text of the AD Agreement but on language from its previous reports removed from its context. The Appellate Body's shifting rationales throughout its successive zeroing reports detracts from its conclusion that under Article 17.6(ii) of the AD Agreement, only one permissible interpretation exists of the AD Agreement and Article VI of the GATT 1994.**[21]

The Appellate Body's Shifting Explanation for the Prohibition on Zeroing

13. **In *US – Softwood Lumber V*, the Appellate Body interpreted the term "margins of dumping" in the first sentence of Article 2.4.2 in an integrated manner with the phrase "all comparable export transactions" to derive a concept of the "product as a whole" as distinguished from sub-groups or models of a product.**[22] **The phrase "all comparable export transactions" appears only in connection with average-to-average comparisons, but Article 2.4.2 also provides for the calculation of a margin of dumping on a transaction-to-transaction or average-to-transaction basis. Thus, in *US – Softwood Lumber V* the Appellate Body had concluded that zeroing was not permitted in the context of "multiple averaging", but did not explain how zeroing could be prohibited in the context of "multiple comparisons" generally. Indeed, it specifically refrained from making a finding concerning the other two methods of comparison.**

14. Then, in contrast to *US – Softwood Lumber V*, in *US – Zeroing (EC)* the Appellate Body appeared to embrace a new interpretation, such that a new concept of the "product as a whole" led to the conclusion that zeroing is prohibited whenever "multiple comparisons" are made.[23] **Again, these phrases do not appear in the AD Agreement, but were derived from interpretations based on the phrase "all comparable export transactions", which appears only in connection with average-to-average comparisons in investigations. In considering this, the panel in *US – Zeroing (Japan)* found that the Appellate Body had provided:**

> **[N]o explanation of this shift from the use of the "product as a whole" concept as context to interpret the term "margins of dumping" in the first sentence of Article 2.4.2 of the AD Agreement in connection with multiple averaging, on the one hand, to the use of this concept as an autonomous legal basis for a general prohibition of zeroing, on the other. In this regard, we note, in particular, that the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms "dumping"and "margins of dumping" cannot apply to a *sub-group* of a product logically leads to the broader conclusion that Members may not distinguish between *transactions* in which export prices are less than normal value and *transactions* in which export prices exceed normal value.**[24]

15. Then, in *US – Zeroing (Japan)*, the Appellate Body reinterpreted the "all comparable export transactions" language to relate solely to all transactions within a model, and not across models of the product under investigation.[25] Previously, the Appellate Body relied on the word "all" in "all

[21] *US – Stainless Steel (Mexico) (AB)*, para. 136.
[22] *US – Softwood Lumber V (AB)*, paras. 86-103.
[23] *US – Zeroing (EC) (AB)*, para. 127.
[24] ***US – Zeroing (Japan) (Panel)*, para. 7.101.**
[25] ***US – Zeroing (Japan) (AB)*, para. 124.**

comparable export transactions" as the textual basis for requiring the results of all model-average-to-model-average comparisons to be included in the margin of dumping in the average-to-average context.[26] The Appellate Body insisted that the word "all" was not necessary to its finding that a single overall margin of dumping must be calculated and must include the results of all transaction-to-transaction comparisons. Because the Appellate Body has concluded that there is a single permissible interpretation of these provisions of the AD Agreement, the term "all" is either relevant, or it is not. The Appellate Body cannot adopt one permissible interpretation in one instance, and then adopt a contradictory interpretation with regard to the same issue, and still continue to maintain that there is only one permissible interpretation provided for in the text.

16. Finally, and most recently, in *US – Stainless Steel (Mexico)*, the Appellate Body, shifting its emphasis yet again, relied on Article VI of the GATT 1994, and on Articles 2.1 and 9.3 of the AD Agreement, for its conclusion that because "dumping" and "margins of dumping" carry one rigid, identical meaning throughout the AD Agreement regardless of the context in which the terms are placed, transaction-specific calculations are prohibited.

17. In attempting to reach a desired result on the issue of zeroing, the Appellate Body's reasoning varies from one dispute to the next. Such varying conclusions defy common sense. Considering the text of the AD Agreement and the various contradictory interpretations offered on the issue of zeroing, this Panel, when making its own objective assessment of the matter before it, should find that at the very least, an alternative interpretation – that the AD Agreement does not prohibit the calculation of dumping on a transaction-specific basis in assessment reviews – is permissible.

The Division's Flawed Reasons for the Prohibition on Zeroing in Periodic Reviews

18. The Division's finding that zeroing is inconsistent with Articles 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 lacks a textual basis and is without support in the negotiating history of the Uruguay Round Agreements. The AD Agreement and the GATT 1994 do not prohibit the calculation of transaction-specific antidumping margins, nor do they require offsets to be provided for non-dumped transactions. The United States respectfully refers the Panel to, and incorporates the comments set out in, the attached Communication of the United States to the Dispute Settlement Body, dated 20 May 2008, in which we explain in more detail the errors in the Division's reasoning.[27]

IV. CONCLUSION

19. The United States thanks the Panel once again for the opportunity to comment on the recent Appellate Body report in *US – Stainless Steel (Mexico)*. We respectfully ask the Panel to remain mindful of its obligation to undertake an objective assessment as required by Article 11 of the DSU. To the extent that the Panel takes the Appellate Body report into account, the United States believes that for the reasons discussed above, and in the comments set out in the attached documents, the Panel will find that report unpersuasive and incorrect, and will agree that the AD Agreement and the GATT 1994 do not prohibit zeroing as applied in the assessment proceedings challenged by the EC.

[26] *US – Softwood Lumber V (AB)*, paras. 86-103.
[27] *See* Annex 2.

ANNEX 1

US COMMENTS ON *US – STAINLESS STEEL (MEXICO) (AB)*

Oral Statement of the United States on the DSB's Consideration for Adoption of the Reports of the Panel and Appellate Body in *United States – Final Antidumping Measures on Stainless Steel from Mexico* (WT/DS344)

Mr. Chairman, the United States would first like to welcome the panel report being adopted today. We commend the Panel for the professional job that it performed in this dispute, for its careful analysis of the relevant provisions of the Antidumping Agreement and the GATT 1994 and for taking so seriously its responsibility to Members to conduct an objective examination of the matter placed before it.

It is clear from the Panel's report that the Panel did not lightly choose not to follow the earlier Appellate Body reports on zeroing. It would have been far simpler, not to mention I suspect far more popular, for the Panel just to go along with what the Appellate Body had said on this subject. However, the Panel clearly was deeply troubled by the flaws in the logic and approach of those previous reports.

In light of the Panel's careful examination and obvious struggle in attempting to reconcile the agreed text of the WTO agreements with statements made by the Appellate Body in its prior reports, it would have seemed that this Appellate Body Division would have felt called upon to address most carefully the issues raised and the Panel's concerns. Thus, it is even more troubling that the Appellate Body Division on this appeal not only summarily rejected the Panel's points, but also took the Panel to task simply for taking the Panel's duties to heart and trying to ensure that the Panel's findings were consistent with the agreed text of the WTO agreements.

The United States is deeply troubled by the Appellate Body Division's response on two levels, each of them posing serious systemic problems for us, the Members. First, once again a Division has devised a new basis to justify findings against zeroing in reviews – this time that the margin of dumping is exporter based and that somehow this precludes finding a margin of dumping with respect to an individual transaction. The reasoning under this approach continues to be deeply flawed and fails to comport with the actual, agreed treaty text.

Second, the Division has significantly departed from the established understanding of the relationship between panel and Appellate Body reports and the role of the Appellate Body and that of Members. This report purports to create a new legal effect for Appellate Body reports, one that would appear to grant to the Appellate Body the very authority to issue authoritative interpretations of the covered agreements that is reserved by the WTO Agreement exclusively to Members.

With respect to the first systemic level of concern, let me simply note that there are numerous flaws in the Appellate Body's reasoning in this latest report, including in particular its rejection of the fact that the Uruguay Round negotiators did not agree to prohibit zeroing in assessment reviews. No common understanding was reached on zeroing in the Uruguay Round because, despite extensive efforts by many participants, proposals to prohibit zeroing were firmly opposed by many others, including several users of antidumping measures.

However, if the Members of the WTO never agreed to ban zeroing, then the DSU does not empower the Appellate Body to create new obligations that impose such a ban. The Appellate Body's approach ought to be of concern to every single WTO Member, any one of which may someday be called upon to defend its own laws and regulations, and every one of which will want to rely on the

negotiated outcome of the Uruguay Round, the Doha Round, or other WTO negotiations – and not be held to rules found nowhere in those outcomes.

We will not dwell on those points further this afternoon. Instead, we have prepared a written statement that addresses the continuing and evolving flaws with the Appellate Body's analysis of zeroing; a copy will be available in the room after the meeting and will be circulated to all delegations.

The second level of systemic concern is of such enormous institutional significance for the dispute settlement system that we are compelled to elaborate on our concerns today.

In this dispute, the Panel correctly noted its obligations under DSU Articles 11, 3.2 and 19.1 and **undertook its work in accordance with those obligations. And, in carrying out its task, this Panel – like another panel before it – carefully considered, and ultimately disagreed with, the various versions of the Appellate Body's reasoning in prior disputes involving zeroing in assessment reviews. On appeal, Mexico raised a claim under DSU Article 11.**

The first few paragraphs of the Appellate Body report's discussion of that appeal are unexceptional. The Division first recalls the task of the Panel under DSU Article 11: to assist the DSB in discharging its responsibilities, and to make an objective assessment of the matter, including the applicability of and conformity with the covered agreements. It further recalls that under DSU Article 3.2, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". And, it recalls that the original members of the Appellate Body, in one of the very first appeals it heard, clarified the status of prior adopted reports: they are not binding, except with respect to the particular dispute between the parties, but they "should be taken into account where they are relevant to any dispute". We have no quarrel with any of this, and we believe that all Members share that view.

The discussion then turns, however, in a significantly different direction – one that no longer relies on WTO Agreement text or even on prior adopted reports. The discussion begins to use terms such as "'security and predictability' in the dispute settlement system" – which is a misstatement of the text, since the DSU only speaks to the dispute settlement system providing security and predictability to the "multilateral trading system". The discussion also asserts that the Panel's "failure to follow previously adopted Appellate Body reports ... undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements".

The Division closes by expressing its concern about "the Panel's decision to depart from" the Appellate Body's prior rulings on these issues, stating that the Panel's approach has "serious implications for the proper functioning of the WTO dispute settlement system".

Mr. Chairman, with respect, the Appellate Body Division is mistaken. This second part of the Appellate Body's discussion misperceives the WTO Agreement and this Member-driven organization. It is WTO Members that negotiate and agree to obligations, and we do so by consensus. We have also established one and only one means for adopting binding interpretations of the obligations that we agree to: Article IX:2 of the WTO Agreement provides that the Ministerial Conference and the General Council have the exclusive authority to adopt such interpretations.

Yet the approach in this Appellate Body report would appear to mean that Appellate Body reports should be treated as authoritative interpretations of the covered agreements – they are to be followed by panels regardless of whether a panel in a particular dispute agrees with those prior reports. In other words, panels are simply to abdicate their responsibility to conduct an objective assessment of the matters before them and should simply follow prior Appellate Body reports.

This does a disservice to panels and the serious responsibility that the DSB assigns to them.

What is more, WTO Members have made it clear – in fact, the DSU says it twice – that the findings of panels and the Appellate Body cannot add to or diminish the rights and obligations in the covered agreements. Perhaps unlike some other institutions, the WTO does not rely on adjudication to advance its objectives. However, this Appellate Body report's approach, including its references to a "coherent and predictable body of jurisprudence", would appear to transform the WTO dispute settlement system into a common law system. But that was nowhere agreed among Members.

And what is more, this Division raised all of these systemic concerns unnecessarily, some might even say gratuitously. The report rejected Mexico's Article 11 appeal, so all of this discussion was mere *dicta* by the Division.

We do, of course, share the Appellate Body's interest in having similar cases treated similarly. We expect that all Members do likewise. We do not, however, share this report's view that this means that panels must follow Appellate Body reports in different disputes. Rather, to cite again to the *Japan – Alcoholic Beverages* Appellate Body report, we would expect any panel to take account of any other relevant adopted report, whether authored by the Appellate Body or by a different panel.

To take account of an adopted report, of course, does not mean to follow it without hesitation. To the contrary, to take account of such a report means to examine it, to consider it, and to engage with its reasoning. We recall that an *objective* assessment is one that is critical and searching. Such an assessment can lead, in fact, to further or greater clarification.

Mr. Chairman, the WTO dispute settlement system functions properly when the rules that Members established for that system are respected. One of those rules is that a panel must make an objective assessment of the matter before it, including an objective assessment of the "applicability of and conformity with the relevant covered agreements". Whatever one's views of the substantive issues in this dispute, there is no question but that the Panel did so here.

We therefore strongly believe that the Appellate Body's concerns about the Panel's approach are misplaced. Rather than presenting "serious implications" for the dispute settlement system, the Panel's actions in this dispute affirm the strength of that system.

ANNEX 2

US COMMENTS ON *US – STAINLESS STEEL (MEXICO) (AB)*

Communication to the DSB by the United States on *United States – Final Antidumping Measures on Stainless Steel from Mexico* (WT/DS344)

1. On 20 December 2007, the Panel in *United States – Final Antidumping Measures on Stainless Steel from Mexico* ("*US – Stainless Steel*") circulated its final report. In that report, the Panel engaged in a lengthy analysis of the legal relationship under the WTO dispute settlement system between panel reports and Appellate Body reports. The Panel recalled "that this is not the first case in the WTO in which simple zeroing in periodic reviews has been challenged. The WTO-consistency of simple zeroing in periodic reviews was questioned before the panels in *US - Zeroing (EC)* and *US - Zeroing (Japan)*. In both cases, the panels found this practice not to be inconsistent with the obligations set out in the relevant provisions cited by the complaining parties. We also recall that the Appellate Body reversed the decisions of both panels and found simple zeroing in periodic reviews to be WTO-inconsistent."[1]

2. Indeed, the Panel correctly noted "that, although adopted panel reports only bind the parties to the dispute that they concern, the Appellate Body expects future panels to take them into account to the extent that the issues before them are similar to those addressed by previous panels".[2] Furthermore, the Panel accurately concluded "that even though the DSU does not require WTO panels to follow adopted panel or Appellate Body reports, the Appellate Body *de facto* expects them to do so to the extent that the legal issues addressed are similar".[3]

3. At the same time, the Panel stated:

> We also note, however, that the panel in *US - Zeroing (Japan)*, while recognizing the need to provide security and predictability to the multilateral trading system through the development of a consistent line of jurisprudence on similar legal issues, drew attention to the provisions of Articles 11 and 3.2 of the DSU and implied that the concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law. We also share the concern raised by the panel in *US - Zeroing (Japan)* regarding WTO panels' obligation to carry out an objective examination of the matter referred to them by the DSB.[4]

4. Despite all of this, the Panel finally concluded that:

> After a careful consideration of the matters discussed above, we have decided that we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews. We are cognizant of the fact that in two previous cases, *US – Zeroing (EC)* and *US – Zeroing (Japan)*, the decisions of panels that

[1] Panel Report, para. 7.101.
[2] Panel Report, para. 7.104.
[3] Panel Report, para. 7.105.
[4] Panel Report, para. 7.105.

> found simple zeroing in periodic reviews to be WTO-consistent were reversed by the Appellate Body and that our reasoning set out below is very similar to these panel decisions. In light of our obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB, however, we have felt compelled to depart from the Appellate Body's approach for the reasons explained below.[5]

5. These passages demonstrate the Panel's awareness of likelihood that the Appellate Body would reverse the Panel's findings while underscoring the seriousness of the Panel's disagreement with the prior Appellate Body reports. Despite that risk of reversal, the Panel ultimately concluded that:

> We are not convinced that the treaty provisions cited by Mexico, on which the Appellate Body based its reasoning, necessarily compel a definition of 'dumping' based on an aggregation of all export transactions.[6]

In particular, the Panel was "troubled by the fact that the principal basis of the Appellate Body's reasoning in the zeroing cases seems to be premised on an interpretation that does not have a solid textual basis in the relevant treaty provisions".[7] Ultimately, the Panel stated that "we find the Appellate Body's reasoning not to be convincing".[8]

6. The Panel correctly assessed the likelihood that the Appellate Body would reverse its findings. On 30 April 2008, the Appellate Body Division hearing the appeal circulated its report[9], reversing the Panel's findings.

7. The United States wishes to offer its views on the Appellate Body Division's report. In light of the fact that the Appellate Body had previously reversed a panel's findings on this issue, despite the panel's respectful (and unprecedented) disagreement with the Appellate Body and despite the US comments offered on an even earlier Appellate Body report, the United States offers its comments only after careful consideration – the United States does not offer these comments lightly.[10]

8. At the outset, the United States would note that some Members have argued that zeroing is "unfair". But many people do not know what zeroing is. A brief explanation may be helpful. If an import is dumped, the Member collects a duty. If the import is not dumped, the Member collects nothing. That is zeroing: treating a non-dumped import as – not dumped.

9. Thus, simple common sense confirms that zeroing does not "inflate" the margin of dumping but rather simply treats non-dumped imports neutrally. That logic is reflected in Article VI of the GATT 1994 and the Antidumping Agreement, which recognize that Members may calculate a margin of dumping on a transaction-by-transaction basis, and, thus, collect duties on dumped imports, while collecting no duties on non-dumped imports.

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[5] Panel Report, para. 7.106 (footnote omitted).
[6] Panel Report, para. 7.117.
[7] Panel Report, para. 7.119.
[8] Panel Report, para. 7.121.
[9] WT/DS344/AB/R.
[10] For the comments of the United States on prior Appellate Body reports regarding the issues of zeroing in assessment proceedings, see *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, Communication by the United States, WT/DS294/16 (17 May 2006); *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, Communication from the United States, WT/DS294/18 (19 June 2006); and *United States – Measures Relating to Zeroing and Sunset Reviews*, Communication from the United States, WT/DS322/16 (26 February 2007).

10. Four times the DSB has been presented with the question of whether margins of dumping can be calculated on a transaction-specific basis and zeroing is thus permissible in contexts such as assessment proceedings. Four times panels – that have included in their membership antidumping administrators and negotiators – have concluded that zeroing is permitted in such circumstances. Four times the Appellate Body has disagreed. And each time that the Appellate Body has done so, it has presented a new rationale for its position that does not withstand close scrutiny. Thus, it is not surprising that *two* panels have taken the unprecedented step of examining, and then rejecting, the Appellate Body's reasoning.

11. Panels have not been alone in critiquing the Appellate Body's reasoning. Academics – including those who are not necessarily supporters of the antidumping remedy – have acknowledged that the Appellate Body's findings have no sound basis in the text of the agreements, and they recognize the danger to the WTO system of such extra-legal behaviour.[11] They rightly perceive that whatever one's personal views on antidumping in general, or zeroing in particular, if the Appellate Body is perceived to be arrogating to itself the authority to make policy, it would pose a far greater danger to trade than antidumping authorities declining to make adjustments for so-called negative dumping margins. This is because the Antidumping Agreement, like all of the covered agreements, reflects a balance of interests negotiated by the Members. When the Appellate Body alters the negotiated balance, it acts beyond its authority and jeopardizes Members' confidence that the bargains that are negotiated are the bargains that will be respected.

12. In this regard, the Appellate Body Division responsible for *Stainless Steel* has for the first time suggested that if a panel should decline to follow Appellate Body reasoning – regardless of how flawed that reasoning may be – the panel acts at odds with the "promotion of security and predictability" and the "prompt settlement of disputes".[12] This Division's view of its role is deeply disturbing. Members have agreed that the "dispute settlement system of the WTO is a central element in providing security and predictability of the multilateral trading system".[13] The Appellate Body Division misstates this provision by arguing that it refers to "'security and predictability' in the dispute

[11] *See e.g.* Professor Chad P. Bown and Professor Alan O. Sykes, *The Zeroing Issue: A Critical Analysis of Softwood V*, revised version forthcoming in *World Trade Review*, ("[T]he legal foundation for the Appellate Body's ruling is somewhat dubious, doubly so in the face of the standard of review applicable under the ADA ... . The danger of such decisions is that they will undermine confidence in the Appellate Review process and make it more difficult for WTO Members in the future to reach agreement on contentious issues." (p. 30)) <http://people.brandeis.edu/~cbown/papers/Bown-Sykes-ALI.pdf>; Terence P. Stewart, Amy S. Dwyer & Elizabeth Hein, *"Trends in the Last Decade of WTO Trade Remedy Decisions: Problems and Opportunities for the WTO Dispute Settlement System*", 24 ARIZONA J. COMP. L. 251 (2007); Professor Roger P. Alford, "*Reflections on U.S.– Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*", 45 COLUM. J. TRANSNAT'L L. 196 (2006-2007), ("The Appellate Body's report in *US – Zeroing* crystallizes some of the concerns that have been expressed in the past regarding judicial excess in the WTO dispute settlement regime." (p. 220)); Professor Phoenix X.F. Cai, "*Between Intensive Care and Crematorium: Using Standard of Review to Restore Balance to the WTO*", 15 TULANE J. INT'L & COMP. L. 465 (2006-2007); Professor Richard H. Steinberg, *"Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*", 98 AM. J. INT'L L. 247 (2004); Professor Daniel K. Tarullo, *"Paved with good intentions: the dynamic effects of WTO review of anti-dumping action*", 2 WORLD TRADE REVIEW 373 (2003); John Greenwald, "*WTO Dispute Settlement: An Exercise in Trade Law Legislation*", 6 J. INT'L ECON. L. 113 (2003); John Ragosta, Navin Joneja, and Mikhail Zeldovich, "*WTO Dispute Settlement System Is Flawed and Must Be Fixed*", 37 INT'L LAWYER 697(2003); Professor Daniel K. Tarullo, "*The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-dumping Decisions*," 34 L. & POLICY INT'L BUS. 109 (2002-2003); Geert A. Zonnekeyn, "*The Bed Linen Case and its Aftermath*," 36 J. WORLD TRADE 993 (2002); Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 U. CHI. J. OF INT'L L. 403 (2001).

[12] Appellate Body Report, para. 161.

[13] DSU Article 3.2.

settlement system".[14] Instead, the dispute settlement system only provides "security and predictability" to the multilateral trading system when the Dispute Settlement Body ("DSB"), and the panels and the Appellate Body that serve it, respect the parameters set out in Article 3.2 – that the recommendations and rulings of the DSB cannot add to, or diminish, the rights and obligations in the covered agreements. Suggesting, as this Division did, that panels are required blindly to follow erroneous Appellate Body conclusions in the name of security and predictability is simply inconsistent with Article 3.2. The Panel recognized this, and should be commended for its devotion to Articles 3.2 and 11 of the DSU.

13. With that backdrop, it is important to examine the particular reasoning used this time by the Appellate Body Division and its approach to zeroing in assessment reviews.

A. THE APPELLATE BODY'S REJECTION OF NEGOTIATING HISTORY

14. On appeal, the United States explained that, even assuming *arguendo* there was any ambiguity in the text regarding a prohibition on zeroing, an examination of the negotiating history would confirm that Members did not agree to prohibit it. In light of the absence of a textual prohibition on zeroing – neither "zeroing" nor "negative dumping margins" appears anywhere in the Antidumping Agreement – one would have expected the Division to have wanted to consult the negotiating history if the Division were considering viewing the text as implicitly dealing with zeroing. Surprisingly, however, the Division's view was that recourse to the negotiating history was not "strictly necessary".[15] Moreover, although the Division did in the end examine the US explanations of the negotiating history, the Division's conclusions regarding the negotiating history simply cannot be reconciled with that history.

The Tokyo Round Antidumping Code permitted zeroing

15. For example, in 1979, certain contracting parties concluded the Agreement on Implementation of Article VI of the GATT. Because the title is identical to the title of the WTO agreement, and the agreement resulting from the Kennedy Round, we will refer to the 1979 Agreement by its colloquial name, the Tokyo Round Anti-Dumping Code ("Code"). As its name indicates, drawing on Article VI of the GATT, the Code set out further disciplines on the imposition of antidumping measures, including disciplines on the assessment of antidumping duties. Signatories twice brought disputes, arguing that zeroing was inconsistent with the Code. Those claims failed.

16. During the Uruguay Round, further disciplines were negotiated, resulting in yet another Agreement on Implementation of Article VI of the GATT, which we will refer to as the Antidumping Agreement. While some aspects of the Code were radically altered, the provisions governing assessment proceedings – found not to have prohibited zeroing – were not.[16] In fact, the two key provisions were identical.

17. Article 8:3 of the Tokyo Round Anti-Dumping Code provides that:

> The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2.

18. Article 9.3 of the Antidumping Agreement provides that:

[14] Appellate Body Report, paras. 160-161.
[15] Appellate Body Report, para. 128.
[16] For example, the United States has accepted that there is a colorable argument that Article 2.4.2 prohibits zeroing in average-to-average comparisons in investigations, through its use of the phrase "all comparable export transactions". There was no corresponding provision in the Code.

> The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

19. Yet the Division examined the negotiating history and drew the extraordinary conclusion that "we are not persuaded that the [Tokyo Round Code] provide[s] guidance as to whether simple zeroing is permissible under Article 9.3. of the *Anti-Dumping Agreement*".[17] At least one panel had declined to find a prohibition in Article 8.3 itself. That provision is directly incorporated into the Antidumping Agreement as Article 9.3. Even in light of these facts, the Division concluded that Article 9.3 of the Antidumping Agreement prohibits zeroing in assessment proceedings.[18]

20. The Appellate Body Division's report finds that "the relevance of" the panel reports under the Code "is diminished by the fact that the" Code was separate from the GATT 1947 and has been "terminated". Both of these statement are quite puzzling when referring to negotiating history. It is completely unclear what legal significance attaches to the termination of a previous agreement that served as part of the negotiating history of the Antidumping Agreement. By definition, negotiating history is just that – it is "history" and so in the past. There is no requirement that negotiating history only consist of agreements or documents still in force at the time an agreement is being interpreted. And while the Code was separate from the GATT 1947, the negotiators of the Antidumping Agreement relied on and drew from its provisions, so the interpretation of those provisions would be directly relevant to understanding the Antidumping Agreement. The Marrakesh Agreement reflects this understanding, noting in Article XVI:1 that the "WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947". And ironically, later in its report the Appellate Body Division extols the persuasive value of panel reports.

Article VI of the GATT did not bar zeroing

21. Japan was one of the contracting parties that challenged zeroing – unsuccessfully – under the Tokyo Round Code. While Japan challenged zeroing as being inconsistent with Article 2 of the Code, and, consequentially, with Article 8:3, Japan did *not* challenge zeroing as being inconsistent with

[17] Appellate Body report, para. 130.

[18] The Division dismissed the relevance of panel reports interpreting the Tokyo Round Code because those disputes involved Article 2.6 of that Code – the fair comparison provision – which changed in the Antidumping Agreement. However, the Division failed to take into account that in *EEC – Antidumping Duties on Audiocassettes Originating in Japan*, ADP/136 (28 April 1995) (unadopted). Japan *did* challenge zeroing under Article 8.3 of the Code and did not prevail. *EC – Audiocassettes*, para. 11. This renders puzzling Japan's comment that the negotiators did not include a prohibition on zeroing in Article 9.3 because they already considered it to be prohibited. Appellate Body Report, para. 130. Even more surprising then is the Division's reliance on that comment, which is plainly inconsistent with the historical record.

Likewise, it is surprising to the United States that the Division credits the EC's submission for the proposition that "there is a 'strong indication of consensus that the interests of both parties in the asymmetry and zeroing debate could be accommodated in the targeted dumping provisions that eventually became the second sentence of Article 2.4.2". Appellate Body Report, para. 130 (quoting EC Third Participant's Submission, para. 226). The United States struggles to comprehend how, if the EC considered that the Antidumping Agreement prohibits zeroing in all but the targeted dumping situation, the EC nevertheless continued to zero until the *EC – Bed Linen* dispute, in which the DSB recommendations and rulings were adopted in 2001. *EC – Antidumping Duties on Cotton-Type Bed Linen from India*, DS141 (adopted 12 March 2001). If the EC were sincere, then it would appear that the EC is acknowledging that it intentionally breached its WTO obligations from 1995 to 2001.

Article VI:1. The same is true for Brazil in its dispute against the EEC involving Cotton Yarn.[19] The latter is an adopted panel report and thus forms part of the GATT *acquis.*[20]

22. This history confirms that the Uruguay Round negotiators operated from a premise that zeroing was *not* prohibited under Article VI of the GATT or Article 8:3 of the Tokyo Round Code. Japan's view that the negotiators understood zeroing to be prohibited already is impossible to reconcile with its own unsuccessful pursuit of pre-WTO dispute settlement on that very topic. The EC did not agree that the text prohibited zeroing, as its defense in *EC – Audiocassettes* confirms. Article 8:3 was directly incorporated into Article 9.3 of the Antidumping Agreement. In this context, there is simply no basis for the Appellate Body's conclusion that Article VI:1 of the GATT or Article 9.3 of the Antidumping Agreement prohibits zeroing in assessment proceedings.

23. In light of the foregoing discussion, it is clear that the Division has not based its "prohibition" of zeroing on language that is differently phrased or new. It has based its prohibition on Article VI of the GATT and Article 9.3, both of which existed (the latter as Article 8.3) at the time of the Tokyo Round Code.

24. At best, there was *no* consensus that zeroing was already prohibited by the text of the agreements in question. Given that fact, and the fact that Article 8:3 of the Tokyo Round Code is replicated in Article 9.3 of the Antidumping Agreement, and the presence of Article 17.6(ii) of the Antidumping Agreement, it is difficult to understand the Division's refusal to acknowledge the relevance of the negotiating history.

25. The implications of the Division's creation of new obligations in the absence of textual changes is particularly troubling as the Membership strives to conclude the Doha Round. What this Division is saying to the Membership is that it is insufficient to remain silent in the text in the face of a disagreement in the negotiations. Such silence may be construed at some future date by the Appellate Body as agreement to change the meaning of the text. Thus, if the disagreement cannot be bridged with affirmative text, the continuing disagreement should be reflected in text confirming the lack of consensus - a task that is likely to prove difficult, if not impossible, for the negotiators.

26. If the Division did not rely on the negotiating history, then the natural question is: what did it rely on? The Division primarily relied upon a three-part analysis:

a) the margin of dumping is exporter related;
b) dumping and margin of dumping can only be found to exist at the level of multiple transactions; and
c) it is obligatory to include all transactions, dumped and non-dumped, in those multiple transactions.

B. THE APPELLATE BODY'S MISGUIDED EMPHASIS ON EXPORTER MARGINS OF DUMPING

27. The Division spends a significant portion of its report on the question of whether a margin of dumping is exporter or importer related. However, it is not clear why this matters or why it must be exclusively one or the other. The Division itself acknowledges that any dumped price results from a negotiation involving the exporter *and* the importer.

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[19] *EEC – Imposition of Anti-Dumping Duties on Cotton Yarn from Brazil*, ADP/137, 42S/17, adopted by the ADP Committee 30 October 1995.

[20] Further, even after implementation of the Antidumping Agreement, India's challenge to zeroing in *EC – Bed Linen* did not involve a claim of inconsistency with Article VI, nor did Canada's challenge to zeroing in *US – Final Lumber AD Determination*, WT/DS264, adopted 31 August 2004 (*"Softwood Lumber")*, or *US – Final Lumber AD Determination (21.5)*, WT/DS264, adopted 1 September 2006 ("*Softwood Lumber (21.5)").*

28. In any event, the question of whether a margin of dumping is exporter related does not resolve the question of whether it can be determined on the basis of individual transactions or must always be determined on the basis of multiple transactions. A margin determined on the basis of an exporter's action with respect to an individual transaction is no less exporter-related than one determined on the basis of multiple transactions by that exporter.[21]

29. The emphasis on "exporter-related" misses the point. The purpose of collecting antidumping duties is to counteract dumping. Importers pay the duties. Thus, duties counteract dumping by dissuading the importer from having any interest in a dumped price. The importer will try to avoid dumped prices by recognizing that there is an export price below which the importer will derive no benefit if negotiations with the exporter result in an even lower price. The antidumping duty, paid by the importer, would erase any gain netted by such negotiation because the importer could not profitably resell the merchandise at a price less than its normal value.

30. More importantly, the Division's conclusion about an exporter-wide margin of dumping is at odds with Article 9.3.2. According to the Appellate Body, the *exporter's* margin of dumping, calculated on the basis of *all* of that exporter's transactions, establishes the ceiling for assessment of duties. Under Article 9.3.2, the *importer* may request a refund if that request is "duly supported by evidence ...". If the amount of the liability is capped by the margin of dumping, and the margin of dumping is calculated on the basis of the *exporter's* transactions, how can the *importer* duly support its request with evidence? The importer only knows what that importer's *own* transactions are. Nor does the importer necessarily have information about transactions handled by *other importers*.

31. In fact, the Division's affirmation that margins of dumping must be calculated on an exporter-wide basis unwittingly authorizes Members with prospective ad valorem systems to *decline to provide full refunds*. The importer best positioned to request a refund is an importer who has engaged in non-dumped transactions. It can support its refund with evidence from its own transactions. But if another importer has engaged in dumped transactions with the same exporter, those transactions *will offset the first importer's refund.* Take an example: the margin of dumping for an exporter in the investigation is 5 per cent. Normal value is 5 per cent higher than the export price. An importer knows that all of his export prices have risen, some well beyond the 5 per cent differential. That importer requests a refund. A second importer's export prices have all declined, some well beyond the 5 per cent differential. The result is that the first importer does not get a refund. Moreover, the second importer cannot provide evidence on which to base a request for a refund. He is only owed a

[21] In this regard, it is interesting that the Division begins its analysis with the concept of the exporter-wide margin of dumping and only then proceeds to the transaction-specific margin of dumping. In its discussion of whether a margin of dumping is exporter- or importer-specific, the report appears to collapse the question of whether a dumping margin is exporter- or importer-specific with the question of whether such a margin comprises multiple transactions. Thus, the report states that there is "nothing in Articles 5.8, 6.10, and 9.5 of the *Anti-Dumping Agreement* to suggest that it is permissible to interpret the term 'margin of dumping' under those provisions as referring to multiple 'dumping margins' occurring at the level of individual importers". However, the question the Division sought to address in that section of the report was not the issue of *multiple* margins of dumping, but rather whether the margin is calculated for the exporter, rather than the importer.

There are also questions about the Division's interpretation of the French and Spanish texts. At note 200 of the report, the Division states that the French version of Article 6.10 of the Agreement, "une marge de dumping individual" translates into "'one' single margin of dumping". In fact, the French text translates into "an individual margin of dumping". It does not refer to "one" margin or to one "single" margin of dumping. The report's translation of the Spanish version is no better. The Spanish text – not reproduced in the footnote – refers to "el margen de dumping que corresponda a cada exportador". This translates as "a margin of dumping corresponding to each exporter". In any event, there is no reason Article 6.10 would refer to multiple margins. Article 6.10 imposes an obligation to calculate an individual margin of dumping for each exporter, as opposed to one margin for *all exporters.* It has nothing to do with the question of whether one may calculate multiple margins of dumping for each such exporter.

refund on the basis of the first importer's transactions, evidence the second importer does not have and cannot supply to the investigating authority to "duly substantiate" his request. Thus, in requiring a margin of dumping to be calculated on the basis of all of the exporter's transactions, *the Division has authorized prospective systems to deny importers full refunds.*

C. TRANSACTION-SPECIFIC MARGIN OF DUMPING

32. The Division then devotes all of two paragraphs to the central question of whether the margin can be at the transaction-specific level.[22]

33. As the United States has noted before, and as four panels have found, the calculation of a transaction-specific margin of dumping for purposes of the assessment of antidumping duties is a permissible interpretation of the Antidumping Agreement. That a margin of dumping may be calculated on a transaction-specific basis leads to the conclusion that authorities are not required to offset a dumping margin calculated for one transaction with a negative dumping margin calculated in a separate transaction.

34. Canada agrees:

> An investigating authority assesses antidumping duties when the export price is lower than the weighted-average normal value, *but applies no anti-dumping duties to non-dumped transactions when the opposite is true*. It is not the same as the practice of zeroing ... .[23]

35. Put differently, a permissible interpretation of the Antidumping Agreement is that a Member may calculate a margin of dumping on the basis of individual transactions, is not obligated to provide offsets for one transaction as compared to another, and thus zeroing is not prohibited in such circumstances. Under Article 17.6 of the Antidumping Agreement, if an interpretation is permissible, a measure based on it must be allowed to stand.

36. If a margin of dumping can be calculated on the basis of an individual transaction, then the exporter's margin of dumping is the *same* as the importer's antidumping liability, and the various provisions of the Antidumping Agreement fit together neatly.[24] Article 6 and its focus on margins of dumping for *exporters* – in which the Appellate Body has attempted to find a prohibition on zeroing for purposes of antidumping duty assessment – melds seamlessly with Article 9 and its emphasis on duty assessment for *importers*. It is useful to bear this concept in mind when evaluating the conclusions of the Division that the Antidumping Agreement prohibits the calculation of a margin of dumping on a transaction-specific basis.

37. The Division states that:

> [T]he *notion* that a "product is introduced into the commerce of another country at less than its normal value" ... *suggests* to us that the determination of dumping with respect to an exporter is properly made not at the level of individual export transactions, but on the basis of the totality of an exporter's transactions of the subject merchandise over the *period of investigation*.[25]

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[22] Appellate Body Report, paras. 98-99.

[23] Quoted in *US – Softwood Lumber (21.5) (Panel)*, para. 5.55 (emphasis added).

[24] The Appellate Body report acknowledges this fact, but in a footnote. *See* Appellate Body Report, n.219.

[25] Appellate Body Report, para. 98 (emphasis).

38. There are two important aspects of this conclusion, in particular, that require comment.

1. Lack of Textual Basis for Prohibition

39. What jumps out at the reader is that the Division does not cite to any actual text that directs the calculation of a margin of dumping at a particular level (transaction-specific or multiple transactions). Instead, the Division relies on a "notion" that "suggests" a particular result. However, a "notion" that "suggests" a particular interpretation is not sufficient to conclude that the text of a covered agreement prohibits particular action. This is especially true in the case of the Antidumping Agreement, Article 17.6(ii) of which provides:

> 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.

40. Moreover, a closer examination of the language upon which the Division's report relies does not support its interpretation of Article VI:1 as precluding the calculation of margins of dumping on a transaction-specific basis. Article VI:1 provides:

> a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another ... is less than the comparable price ... for the like product ... .

41. The Division fails to offer a meaningful explanation as to why this sentence *precludes* the calculation of a margin of dumping on a transaction-specific basis. Indeed, the ordinary meaning of the text, read in context, does not support the conclusion that the *only* interpretation of Article VI:1 is one involving *multiple transactions*.[26]

42. The Division's reliance on the word "product" is misplaced. "Product" in Article VI is not confined to meaning all transactions of that product. Such a reading cannot be reconciled with the use of "product" in Article II:2(b) of the GATT 1994: "Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

> ...
> (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI... .

43. For a duty to be applied "on the importation of any product" it will be applied on a particular transaction. A duty is not applied only after there have been multiple transactions. Nor would the Division's reading of "product" work for the other elements of Article II:2.

44. The Panel considered carefully Mexico's arguments, which relied on one of the lines of reasoning advanced in prior Appellate Body reports; namely, the notion that margins of dumping

[26] If the Appellate Body were correct that the term "product" refers not to individual importations of the product, but the "product as a whole", then it stands to reason that the term "product" would *always* appears in the singular in the Antidumping Agreement. However, the term "product" *does* appear in the plural. Thus, Article 2.3 refers to "the price at which the imported products are first resold ... ". Similarly, Article 2.5 refers to "where products are not imported directly ...". Thus, the Appellate Body's view that "product" can *only* refer to multiple importations of the product, as opposed to an individual importation, is simply not supported by the text.

must be calculated on the basis of the "product as a whole". The Panel noted – as had other panels before it – that the term "product as a whole" does not appear in the GATT 1994 or the Antidumping Agreement.[27] The Panel also agreed with the following analysis of the *US – Zeroing (Japan)* panel:

> We fail to see why the notion that a "product is introduced into the commerce of another country" cannot apply to a particular export sale and would necessarily require an examination of different export sales at an aggregate level.[28]

45. Thus, the Panel engaged in a careful analysis of the *actual words* in the relevant provision. However, in lieu of explaining *why* the Panel's careful analysis was flawed, the Division *simply dismissed it* – "Contrary to what the Panel indicates ..."[29] – without addressing *any* of the arguments the Panel made. Indeed, the Appellate Body report offered *no textual analysis of the provision.*

46. Taken to its logical extreme, the Division's reading of Article VI:1 suggests that there is in fact only *one* product, *one* normal value, and *one* export price, for *all* goods exported from the country in question. Article VI:1 does not even use the term "*exporter*." There is no textual basis for the Divisions' conclusion that Article VI:1 "suggests ... that the determination of dumping ... is properly made ... on the basis of the totality of *an exporter's* transactions ...".[30]

47. Indeed, it would require that no margin could be determined until all imports had stopped. The Division appears to overlook this problem with its reference to the "totality of an exporter's transactions of the subject merchandise over the period of investigation".[31] But that fails to address the question of the relevant time period. Nothing in the text specifies the time period as being the period of investigation, nor does the text specify the period to be used after the period of investigation. The Division was imputing into the text words that are not there.

48. In summary, the Division was unsuccessful in its struggle to identify something in the text of the GATT 1994 or the Antidumping Agreement that would support that the margin of dumping cannot be transaction-specific.

2. Erroneous Reliance on Calculations in Other Proceedings

49. The Division also relied on "contextual" references. For instance, it referred to the fact that *"whether* an exporter is dumping 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".[32] The Division also refers to the "purpose" of an antidumping duty, which is to "counteract the injury caused or threatened to be caused by 'dumped imports' to the domestic industry".[33]

50. However, to the extent that these arguments are relevant at all, they pertain to antidumping *investigations.* The "determination of dumping" occurs in an investigation. The "determination of injury" occurs in an investigation. The *US – Stainless Steel* appeal did not involve an investigation: it involved an *assessment proceeding*.

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[27] For a more detailed discussion of the flaws in the "product as a whole" rationale, *see United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, Communication by the United States, 12 June 2006.

[28] *US – Measures Relating to Zeroing and Sunset Reviews (Panel)*, WT/DS322, adopted 23 January 2007, para. 7.105, quoted in Panel Report, para. 7.117 (*US – Zeroing (Japan*)).

[29] Appellate Body Report, para. 98.

[30] Appellate Body Report, para. 98 (emphasis added).

[31] Appellate Body Report, para. 98.

[32] Appellate Body Report, para. 98. As noted above, the idea that the text provides guidance as to this period of time is mistaken.

[33] Appellate Body Report, para. 98.

51. Panels, and the Appellate Body itself, have repeatedly noted that different antidumping proceedings serve "different purposes".[34] It is not clear why, even if the analysis of multiple transactions is required in an investigation, such analysis is *also* required in assessment proceedings, which serve an entirely different purpose. As the Appellate Body has stated, "[t]he disciplines applicable to original investigations cannot, therefore, be automatically imported into review processes".[35]

52. Further, in a footnote, the Division addressed a report issued in 1960 by the Group of Experts, which, as the name indicates, comprised a group of antidumping experts. According to the Group of Experts, "the ideal method [for making a dumping determination] was to make a determination in respect of *each single importation of the product concerned".*[36] Thus, as far back as 1960, antidumping experts recognized that margins of dumping would ideally be calculated on the basis of individual transactions. As a result, it is clear that a permissible interpretation of Article VI of the GATT 1994 is to determine a margin of dumping on a transaction-specific basis.

53. The Division's basis for rejecting the interpretation inherent in the Group of Experts statement was the following: the Group of Experts recognized that such a method was impracticable, particularly with respect to an injury determination[37], and perhaps most remarkably, that the WTO Agreement entered into force "long after" the Group of Experts Report. In other words, the Division considered that a report by experts far closer in time to the conclusion of the agreement at issue was "of little relevance" because it was old.[38] This approach would appear to reverse the customary rules of interpretation of public international law.

54. The Division appears to have misunderstood the relevance of the Group of Experts' statement. That statement is relevant for purposes of understanding the permissible interpretation of Article VI.

55. The Division has failed to explain why the fact that a particular system is *administratively impracticable* leads to the conclusion that Members necessarily agreed to another system with *a completely different concept of a margin of dumping, i.e,* one that is numerically different. Members did no such thing. Instead, they devised an *administratively practicable* system that allows them to assess a duty with the *same* margin of dumping. Thus, investigations may be conducted on the basis of multiple transactions, and so may assessment proceedings and reviews.[39] Whether the system described by the Group of Experts is possible or not, it provides critical insight into how the concept of a margin of dumping has been viewed under the GATT 1947 and the WTO regime.

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[34] *See, e.g., United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (AB),* WT/DS213/AB/R, adopted 19 December 2002, para. 87; *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico,* WT/DS282/AB/R, adopted 28 November 2005, para. 170; *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina,* WT/DS268/AB/R, adopted 17 December 2004, para. 359 ("*US – OCTG from Argentina")*; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan,* WT/DS244/AB/R, adopted 9 January 2004, para. 106; *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice,* WT/DS295/R, adopted 20 December 2005, as modified by the Appellate Body Report, WT/DS295/AB/R, para. 7.144, citing *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea,* WT/DS99/R, adopted 19 March 1999, para. 6.90.

[35] *US – OCTG from Argentina,* para. 359.

[36] Appellate Body Report, n. 213.

[37] Appellate Body Report, n. 213.

[38] Appellate Body Report, para. 132.

[39] The United States recalls that the basis for the prohibition on zeroing in average-to-average comparisons in investigations came not from the definition of dumping but from the language "all comparable export transactions" in Article 2.4.2. Thus, the existence of multiple transactions does not of itself require offsets.

56. As required by Article 17.6 of the Agreement, the question is whether a transaction-specific margin of dumping is a *permissible* interpretation. The Panel report that respected the requirements of Article 17.6.

57. Finally, the Division further bases its rejection of the concept of a transaction-specific margin of dumping on the fact that it does not believe that such a margin "can be done" for purposes of Articles 5.8, 6.10, 6.10.2, 9.4, 9.5, 11.2, and 11.3. The United States has not taken the position that a margin of dumping *must always* be calculated on a transaction-specific basis, but rather that the Agreement *allows* it to be calculated on a transaction-specific basis, and also *allows* it to be calculated on the basis of multiple transactions. Thus, in an investigation using an average-to-average comparison, there will of course be multiple transactions, and the overall margin of dumping will ultimately be calculated on the basis of those transactions. But the Division has failed to explain how the text requires in every instance that the calculation be made on the basis of multiple transactions, particularly in light of the negotiating history and practice under the GATT 1947, Tokyo Round Code, and the WTO.

58. It is clear, therefore, that the text does not support the Division's view that Article VI prohibits calculating a margin of dumping on a transaction-specific basis, and that its analysis is too summary, conclusive, and dismissive of the contrary evidence. In this light, it was unnecessary and largely irrelevant for the Division to engage in the analysis under its third part of its analysis: whether it is permissible when using multiple transactions to disregard the amount by which the export price exceeds the normal value is unnecessary. Given that the text does not prohibit the calculation of margins of dumping on a transaction-specific basis, there is no need to examine whether the text expressly authorizes "disregarding" certain transactions.

D. PROSPECTIVE NORMAL VALUE SYSTEMS

59. Panels have repeatedly relied on the existence of prospective normal value systems to confirm that a margin of dumping may be calculated on a transaction-specific basis. The first panel to do so was in the *Softwood Lumber (21.5)*, where Canada – a Member with a prospective normal value system – was the complaining party. In that dispute, Canada itself recognized that prospective normal value systems operate on the basis of a *transaction-specific margin of dumping*, as noted in the quotation from Canada in Section C above.

60. Each panel, including this Panel, that has found zeroing to be permissible on the basis of a transaction-specific margin of dumping has explained that prospective normal value systems confirm the calculation of margins of dumping on such a basis.

61. The Division errs in stating that "if the prospective normal value has been *improperly* determined, a review can be requested ...".[40] The Division presumes that in PNV systems, a "proper" PNV can be determined such that a retrospective review of all export transactions will be unnecessary. This is despite the fact that the Division is imposing an obligation for imports priced *above* the PNV to offset imports priced *below* the PNV. Under the Division's own view of zeroing, whether the "proper" PNV has been determined or not, any transactions above even the "proper" PNV would have to be offset against those below the "proper" PNV in a review under Article 9.3.2. Thus, the Division's arguments about zeroing are inconsistent with its arguments about PNV systems. Moreover, this would simply transform a PNV system into a retrospective system.

62. In addition, the key element of a prospective normal value system is that it uses a *prospective* normal value, not a *contemporaneous* normal value. It informs the importer of the prospective normal

[40] Appellate Body report, para. 121 (emphasis added).

value so that the importer has a basis for knowing whether the export price will suffice to eliminate dumping. However, the Division's views on PNV systems undo that certainty by suggesting that the prospective normal value is subject to retrospective recalculation.

63. There is a flaw even with this aspect of the Division's analysis. Article 9.3.2 conditions a request for a refund on a request *by the importer*, duly substantiated with evidence. Assuming such a thing as a "proper" normal value exists, the importer does not know what it is. The normal value is established in the country of export. It would have been illogical for the Agreement to authorize an importer to request a refund without any basis for knowing whether he is in fact entitled to any such refund to begin with and to require him to do so on the basis of evidence that is not in his possession.

E. CONCLUSION

64. Like the panels before it, the Panel in this dispute provided a very careful, text-based analysis of whether zeroing is permitted in assessment proceedings. The Division should at a minimum have conceded that there is more than one permissible interpretation of the Antidumping Agreement. However, the Division instead:

- asserts that the text of Article VI prohibits zeroing, but without providing any textual analysis of that provision;

- fails to recognize that, before the Division decided that zeroing was prohibited on the basis of Article VI, *five* zeroing disputes had been brought and decided, under both the Tokyo Round Code and the Antidumping Agreement, without a single Article VI claim;

- fails to recognize that zeroing had *not* been found inconsistent in assessment proceedings under the Tokyo Round Code, despite Japan's claim to the contrary;

- fails to recognize that the key Tokyo Round Code provision at issue in that dispute was incorporated wholesale into the Antidumping Agreement; and

- despite all these facts, concludes the negotiating history is of "little relevance" to the questions in this dispute.

65. The Division's casual dismissal of the negotiating history and imputing into the agreed text obligations that do not appear there should give every Member pause, particularly at a time when Members are negotiating a new set of rights and obligations and are, naturally, basing those negotiations on the rights and obligations they know to be in existence today and relying on the fact that they are only taking on those obligations that appear in the text they negotiate.

ANNEX E-3

COMMENTS OF THE EUROPEAN COMMUNITIES ON THE UNITED STATES' COMMENTS ON THE APPELLATE BODY REPORT IN *US – STAINLESS STEEL (MEXICO)* (DS344)

1. The European Communities hesitates to make any comment at all on the United States' comments on the Appellate Body Report in DS344. The legal arguments have been re-iterated so many times; and the matter is so clearly decided, that one wonders about the usefulness of continuing the exchange. Not least because the United States' submissions are increasingly bereft of legal argument, preferring in instead the endless repetition of: misrepresentations of the arguments; other statements that are little more than slogans; and irrelevant non-legal assertions. It appears to the EC that the United States is just playing for time, under pressure from protectionist internal constituencies, which is a matter of regret, and hardly consistent with the United States' DSU obligations. However, in order to try to assist the Panel to the greatest extent possible, here, once again, are the pertinent points, as they emerge from the latest US submission.

2. First, the United States often repeats – as if it were a slogan – that reports *cannot add to or diminish the rights and obligations* of Members. Two can play at that game. The European Communities has explained that, in the view of the EC, the US position diminishes the obligations of the US and the rights of the other WTO Members on the question of zeroing. Bandying this slogan backwards and forwards does little to address, in legal terms, the *legal claims* that have been made against the measures at issue, which legal claims and arguments the US continues to simply ignore. Rhetoric such as this is no substitute for proper legal argument – although one might, from a litigator's perspective, have some sympathy with the US, since it is clear that, in legal terms, the US has nothing left to say, which is why it resorts to this style of submission.

3. More specifically, the US simply ignores the other half of the equation: reports *clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law*. And Appellate Body reports deal specifically with "issues of law" and "legal interpretations".[1] It is, of course, a basic feature of any law expressed in abstract terms, and subjected to binding judicial review, that its meaning will have to be clarified or interpreted in subsequent litigation. That is the whole point of having a system of litigation, and specifically one whose results are *binding* and should be *unconditionally* accepted. *Together*, these two statements encapsulate a basic truth and feature about the law: we must have interpretation; we do not want judicial legislation. To repeatedly cite one half of this equation is, of course, to say precisely nothing in legal terms – and would not pass muster in a first year law school paper – never mind a court of international law.

4. In this respect, fundamentally, the US goes against one of the backbone principles of the dispute settlement system, which is to provide "security and predictability". What can bring more security and predictability to the system than four Appellate Body reports consistently ruling against zeroing? The US assertion that taking the Appellate Body's logic to the extreme would mean that the Appellate Body would never change its mind because this would detract from "security and predictability" is simply rhetoric. Indeed, the Appellate Body has articulated the possibility for adjudicatory bodies to change previous legal interpretations in light of *cogent reasons*. Needless to say, repeated attempts by the US to bring the same legal arguments do not amount to cogent reasons.

[1] DSU, Article 17(6).

5. Second, the EC has noted the documents circulated by the US to the DSB in relation to the Appellate Body Report, as in past zeroing cases. The EC is not at all impressed by these documents. The EC notes that Article 17(14) of the DSU, final sentence, states that the adoption procedure is without prejudice to the rights of Members to 'express their views' on an Appellate Body Report. Naturally, one would not wish to preclude Members from doing that in general terms. However, the EC is of the view that it is hardly appropriate, pursuant to this provision, for a Member to circulate a lengthy document that contains what is in reality a legal submission containing a re-hash of the submissions previously made to the panel and the Appellate Body. The EC takes the view that such documents serve no useful purpose, and are hardly consistent with a Member's obligation to unconditionally accept the report. It appears to the EC that the US appears to believe that by "shouting" in procedural terms it might get its way. However, in the view of the EC, this kind of activity – which amounts to little more than propaganda – has precisely the opposite effect: it simply confirms that the US has no further legal arguments on which to rely.

6. Third, we note that the US repeatedly refers to the Appellate Body "division". It is not clear what the US intent is here, but we have three comments. First, we note that the Appellate Body has decided several cases on zeroing, in which the three persons serving on the case, within the meaning of Article 17(1) of the DSU, have been different. Thus, these several reports do not represent the views of one "division" – they represent the views of many individuals – and of the Appellate Body as a whole. Second, and following on from the preceding point, Appellate Body reports are attributable to the Appellate Body itself, and not a particular "division" of the Appellate Body. In fact, according to Rule 4 of the Appellate Body Working Procedures on collegiality, all Appellate Body Members convene on a regular basis to discuss matters of policy, practice and procedure and exchange views before a division finalises a report. Third, the reports are in any event adopted by the DSB – that is, the whole WTO Membership. Thus, the US' repeated references to the "division" simply serve no useful purpose, and may and should be disregarded.

7. Fourth, on the question of "permissible interpretation" – another US slogan. The Appellate Body has rightly clarified that this is a tie-breaker that operates *after* the application of the agreed rules of interpretation of public international law. Nor could it be otherwise. As any lawyer would confirm, it is *possible* to *argue anything*, however absurd or counter-factual it might be (as the US submissions in the zeroing cases bear witness). Just because something is "possible or permissible" in this sense does not make it consistent with the agreed rules of interpretation in the Vienna Convention. The US view of this provision amounts to saying that the disciplines in the *Anti-Dumping Agreement* might as well not be there at all – since, according to the US, it can interpret them as it wishes. The WTO Members would not have gone to the trouble of negotiating bound tariff rates and a set of complex agreements, if an importing Member could, in effect unilaterally, impose additional anti-dumping duties at will, based on the US proposition that the *Anti-Dumping Agreement* is a "hotch-potch of obscurity", and thus means all things to all persons. The *Anti-Dumping Agreement* is not a religious tract. It is an international agreement that exhaustively regulates in considerable detail the limited circumstances in which an anti-dumping duty can be applied, over and above the bound tariff rate. Furthermore, the concept of "permissible interpretation" has nothing to do with the US *Chevron* doctrine, which regulates the relationship between the legislature, executive and judiciary within the US – a problem that has nothing to do with centralised and binding dispute settlement in a multilateral organisation of 152 Members.

8. Fifth, the US repeatedly refers to the term "text" – another US slogan – as if to suggest that the EC is not relying on the text of the *Anti-Dumping Agreement*. In fact, the US appears to use this term to refer either to the text containing the specific obligation in question, or to the ordinary meaning of that text – in both instances the usage is erroneous. The term "text" appears once in Article 31 of the Vienna Convention, and clearly refers at least to the entire *Anti-Dumping Agreement*, thus necessarily encompassing also the context and the object and purpose. It is thus the EC that

bases its case on the text – all the text – of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*; and the US that seeks to ignore the text of those agreements.

9. Sixth, as the EC has explained at length, this case has nothing to do with "offsets" (it is no defence to alter the claim, and then argue that there is no "text" prohibiting offsets). Nor does the term "zeroing" fully capture the essence of the problem, which is the selection of the relatively low-priced export transactions as the only or preponderant basis of the calculation, without any relevant targeting dumping pattern being identified. The US thus continues to simply refuse to respond to the actual legal claims made against it.

10. Seventh, the US complains that the Appellate Body does not respect the will of the legislator. But it is of course the US that flatly ignores the significance of the targeted dumping provisions, within the context of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* as a whole. Even when the truth of the matter is apparent from the implied admission in the US' own municipal law (the SAA). And even when the US is incapable of rebutting the EC submissions regarding the correct interpretation of the phrase "the existence of margins of dumping during the investigation phase". Thus, it is the US, not the Appellate Body, which demonstrates an absence of any respect for the will of the legislator.

11. Eighth, how it is that the US continues to make the bare assertion that its position is supported by the negotiating history can only continue to astonish. The EC has explained precisely why the opposite is the case; and the US has simply not responded.

12. Ninth, the US assertion that the Appellate Body has changed its analysis in different cases is wholly without merit. What the Appellate Body has done is to limit itself in any given case to interpreting the legal provisions that need to be interpreted in order to resolve the specific dispute before it. One does not have to decide everything before one can decide anything. In the context of zeroing, there are different ways of expressing the same basic point, according the specific measure at issue and the specific claims and arguments that have been made. Thus, what the Appellate has demonstrated is a highly intelligent exercise of great judicial *restraint*. For the United States to present this as "inconsistency" and, in the same breath, accuse the Appellate Body of judicially legislating is ironic in the extreme.

13. In short, the US comments are, once again, the world turned on its head – this really is Alice Through the Looking Glass stuff. So much so that the US position hardly represents one articulated within the context of a rules-based approach; it is just a veneer beneath which a thinly veiled power-oriented expression of will is readily apparent. The EC expects it to be dealt with accordingly.

ANNEX E-4

COMMENTS OF THE UNITED STATES ON THE COMMENTS OF THE EUROPEAN COMMUNITIES ON THE APPELLATE BODY REPORT IN *US – STAINLESS STEEL (MEXICO)* (DS344)

TABLE OF REPORTS

Short Form	Full Citation
US – Softwood Lumber Dumping (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Stainless Steel (Mexico) (Panel)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by the Appellate Body Report, WT/DS344/AB/R
US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008

1. The United States thanks the Panel for this opportunity to provide these comments on the comments of the European Communities ("EC") on the Appellate Body report in *US – Stainless Steel (Mexico)*.

2. The EC asks the Panel, when making its "objective assessment" under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), to "adopt the same approach" as the Appellate Body report in *US – Stainless Steel (Mexico)*. The EC drew "the Panel's particular attention to the statement that 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case' (para. 160)".

3. In this regard, the United States recalls the finding of the panel in *US – Stainless Steel (Mexico)*: "We are cognizant of the fact that in two previous cases, *US – Zeroing (EC)* and *US – Zeroing (Japan)*, the decisions of panels that found simple zeroing in periodic reviews to be WTO-consistent were reversed by the Appellate Body and that our reasoning set out below is very similar to these panel decisions. In light of our obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB, however, we have felt compelled to depart from the Appellate Body's approach for the reasons explained below."[1] The United States appreciates that the EC's approach would have the Panel here resolve the legal question of zeroing in the same way as the equivalent adjudicatory body – the panel in *US – Stainless Steel (Mexico)* – and depart from the Appellate Body's approach.

4. As the Appellate Body itself has noted, and as the panel in *US – Stainless Steel (Mexico)* recognized, prior Appellate Body reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[2] To the extent that the reasoning in prior Appellate Body reports is persuasive, those reports may be taken into account, but they have no *stare decisis* effect under the DSU. Indeed, to find otherwise would conflict with Article IX:2 of the WTO Agreement, under which only the Ministerial Conference and General Council may issue authoritative interpretations under the covered agreements. The Appellate Body cannot create such an authority in itself.

5. The EC warns the Panel that if it were not to follow the Appellate Body, "its findings would inevitably be reversed on appeal". However, the panel in *US – Stainless Steel (Mexico)* was also "cognizant of the fact that in two previous cases, *US – Zeroing (EC)* and *US – Zeroing (Japan)*, the decisions of panels that found simple zeroing in periodic reviews to be WTO-consistent were reversed by the Appellate Body and that our reasoning set out below is very similar to these panel decisions", yet decided that its responsibility under DSU Article 11 to conduct an objective assessment meant that it needed to depart from the Appellate Body's prior reasoning. This Panel should also, in the EC's words, "in making an 'objective assessment of the matter before it' under Article 11 of the DSU … adopt the same approach".[3]

6. The EC also believes that "the Appellate Body has once again confirmed that the correct interpretation of the *Anti-Dumping Agreement* precludes the zeroing methodology used by the United States in the measures at issue". As the United States has demonstrated in its comments to the Panel, the Appellate Body report in *US – Stainless Steel (Mexico)* is deeply flawed.[4] Its findings lack

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[1] *US – Stainless Steel (Mexico)(Panel)*, para. 7.106.

[2] *US – Softwood Lumber Dumping (AB)*, para. 111 (quoting *Japan – Alcohol Taxes (AB)*); *see also US – Stainless Steel (Mexico) (Panel)*, para. 7.102.

[3] It also is presumptuous of the EC to assert with such certainty that the Panel would be reversed. The EC is not the Appellate Body, and does not know what a different division of the Appellate Body would do on appeal.

[4] Comments of the United States on the Appellate Body Report in *US – Stainless Steel (Mexico)* (WT/DS344), paras. 11-18 & Annex 2.

a basis in the text of the Antidumping Agreement and the GATT 1994 and contradict the negotiating history of the Antidumping Agreement. To the extent the Panel takes into account the Appellate Body report in *US – Stainless Steel (Mexico)*, we believe that for the reasons specified in our comments, this Panel will find that report unpersuasive, as previous panels have found the prior Appellate Body reports unpersuasive.

7. For all the reasons provided by the United States in its comments on the Appellate Body report and these comments on the EC's comments, the United States respectfully requests the Panel to find that the Appellate Body report is unpersuasive and, in conducting an objective assessment of the matter before it, the Panel should depart from the Appellate Body's approach.

ANNEX F

REQUEST FOR THE ESTABLISHMENT OF A PANEL

Contents		Page
Annex F-1	Request for the Establishment of a Panel by the European Communities	F-2

ANNEX F-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN COMMUNITIES

WORLD TRADE ORGANIZATION

WT/DS350/6
11 May 2007

(07-1999)

Original: English

UNITED STATES – CONTINUED EXISTENCE AND APPLICATION OF ZEROING METHODOLOGY

Request for the Establishment of a Panel by the European Communities

The following communication, dated 10 May 2007, from the delegation of the European Communities to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

The European Communities hereby requests that a panel be established by DSB action pursuant to Articles 2.1 and 6.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"); Article XXII:2 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"); and Articles 17.4 and 17.5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*AD Agreement*") with regard to an "as such" measure or measures providing for the practice or methodologies for calculating dumping margins involving the use of zeroing, and the application of zeroing in certain specified anti-dumping measures maintained by the United States of America (the "United States"). On 2 October 2006, the European Communities requested consultations with the United States with a view to reaching a mutually satisfactory solution of the matter. The request was circulated in document WT/DS350/1 dated 3 October 2006. The consultations were held on 14 November 2006 and 28 February 2007 by video-conference on the above-mentioned measures. They have not led to a satisfactory resolution of the matter.

1. The facts

(a) When carrying out assessment and review proceedings of anti-dumping measures (so-called annual "administrative reviews"), the United States re-investigates and determines the margin of dumping on the basis of a comparison of a weighted average "normal value" for each "averaging group" and the prices of individual export transactions. When aggregating the results of these comparisons to determine the total amount or margin of dumping of the product under investigation, the

United States puts at zero any negative amounts of "dumping". As a result, the United States calculates a margin of dumping and collects an amount of anti-dumping duty in excess of the actual margin of dumping practised by the exporters concerned. The United States uses this methodology systematically in all its annual administrative reviews of anti-dumping orders, and indeed in all types of review proceedings (including new shipper and changed circumstances review proceedings) in which it calculates a dumping margin.

The Appellate Body, in the case *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("*Zeroing*") (WT/DS294/AB/R), found that the United States' use of zeroing in its "administrative reviews" was inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of GATT 1994. In the same case and in the subsequent case of *United States – Measures relating to Zeroing and Sunset Reviews* (DS 322) it was also confirmed that the United States Department of Commerce (the "DOC") employed a "zeroing methodology" in calculating the margin of dumping in its "administrative reviews" as described above and that that this was inconsistent with Articles 2.4 and 9.3 of the AD Agreement..

This zeroing practice or methodology is applied pursuant, in particular, to:

– DOC's interpretation of Sections 771(35)(A) and (B), Section 731, Section 777A(d), and Section 751(a)(2)(A)(i) and (ii) of the United States Tariff Act of 1930, as interpreted by the United States Statement of Administrative Action, which accompanied the adoption of the United States Uruguay Round Agreements Act, giving effect in the United States to the WTO Agreements, and as upheld by US municipal courts;[1]

– the implementing regulation[2] of the DOC, in particular section 351.414(c)(2);

– the Import Administration Antidumping Manual (1997 edition) (the "IA AD Manual") including the computer program(s) to which it refers;

– DOC's consistent and established practice; and

– DOC's zeroing methodology.

Since the WTO inconsistency of this practice or methodology is already established (notably in DS322) the European Communities does not ask the Panel to rule on the WTO inconsistency of this practice.

(b) The United States uses this practice or methodology in calculating dumping amounts or dumping margins, and in setting and collecting anti-dumping duties. The level of such anti-dumping duties is set in original proceedings, revised in administrative review proceedings or changed circumstances proceedings, and the need for the continued application of anti-dumping duties is decided in sunset review proceedings. In the latter DOC may determine that dumping is likely to continue or recur if the

[1] United States Court of Appeals for the Federal Circuit (04-1107) Corus Staal BV and Corus Steel USA INC. v Department of Commerce and Others, 21 December 2005, applying a US municipal law doctrine of judicial deference to executive interpretations of statute (the so-called "Chevron doctrine"), to the exclusion of a US municipal law doctrine which states that US courts should interpret US law whenever possible in a manner consistent with international obligations (the so-called "Charming Betsy doctrine").

[2] 19 CFR Section 351.

anti-dumping order were revoked, notably because dumping has continued at levels above de minimis after the issuance of the order. To find that dumping has continued after the issuance of the order, DOC relies on dumping margins calculated in the original proceeding and in administrative review proceedings using zeroing[3]. The EC has identified in the annex to this request a number of anti-dumping orders where duties are set and/or maintained on the basis of the above-mentioned zeroing practice or methodology with the result that duties are paid by importers either in excess of the dumping margin which would have been calculated using a WTO consistent methodology or are paid when no such duty would have resulted from the use of a WTO-consistent methodology.

2. The measures at issue and the legal basis of the complaint

The measures at issue and the legal basis of the complaint include, but are not limited to, the following:[4]

The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure).

In addition to these measures, the administrative reviews, or, as the case may be, original proceedings or changed circumstances or sunset review proceedings listed in the Annex (numbered 1 to 52) with the specific anti-dumping orders and are also considered by the EC to be measures subject to the current request for establishment of the panel in addition to the anti-dumping orders.

This includes the determinations in relation to all companies and includes any assessment instructions, whether automatic or otherwise, issued at any time pursuant to any of the measures listed in the Annex. The anti-dumping duties maintained (in whatever form) pursuant to these orders, and the administrative reviews, or, as the case may be, original proceedings and changed circumstances or sunset review proceedings listed in the Annex are inconsistent with the following provisions:

- Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, because the US did not determine a dumping margin for the product as a whole ;

- Articles 2.4 and 2.4.2 of the *AD Agreement*, whether considered in isolation or together with the obligations referred to in the first bullet point, insofar as the comparison made by the United States is unfair, uses an unjustified comparison method, employs zeroing, fails to calculate a margin of dumping for the product, and is otherwise inconsistent with those provisions;

[3] These dumping margins will normally have been established in original proceedings, in which the zeroing methodology condemned in DS 294 will usually have been used; Section 752(c)(3) of the Tariff Act of 1930, Section 315.218(e)(2)(i) of the DOC implementing regulation and paragraphs II.B of the Sunset Policy Bulletin.

[4] The measures at issue include all Issues and Decision Memorandums, and any similar documents; any computer programmes; any calculation memorandums; any other document that is part of the measure or record; and any assessment instructions.

- Article 5.8 of the *AD Agreement* insofar as a *de minimis* dumping margin is erroneously determined not to be *de minimis*;
- Articles 9.1 and 9.3 of the *AD Agreement*, whether considered in isolation or together with the obligations referred to in the first and second bullet points, insofar as there the imposition and collection of an anti-dumping duty in excess of the margin of dumping determined pursuant to Article 2 of the *AD Agreement*;

- Articles 9.5 and 11 (including Articles 11.1, 11.2 and 11.3) of the *AD Agreement*, whether considered in isolation or together with the obligations referred to in the first and second bullet points, insofar as the determinations of dumping made or relied upon by the United States in review investigations are not made in compliance with Article 2 of the *AD Agreement*;

- Articles 11.1 and 11.3 of the AD Agreement insofar as the United States relied on a dumping margin which was not established for the product as a whole and not in conformity with Articles 2.4 and 2.4.2 of the *AD Agreement*;

- Articles 1 and 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 insofar as there is the imposition and collection of an anti-dumping duty which is inconsistent with the *AD Agreement*; and

- Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization and Article 18.4 of the *AD Agreement* insofar as the United States has not taken all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of GATT 1994 and the *AD Agreement*.

The European Communities asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 22 May 2007.

ANNEX

CASE I. **STEEL CONCRETE REINFORCING BARS – LATVIA** **US DOC NO A-449-804**[5]	**ADMINISTRATIVE REVIEWS**					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 September 2004 –31 August 2005	71 FR 74900, 13 December 2006		Liepajas Metalurgs	5,94%	1
	1 September 2003–31 August 2004	71 FR 7016, February 10, 2006		Liepajas Metalurgs	5,24%	2
	1 September 2002–31 August 2003	69 FR 74498, December 14, 2004		Liepajas Metalurgs	3,01%	3
	SUNSET REVIEWS					
	DOC Final determination	**ITC Case number**	**ITC Determination**	**Continuation order**		
	72 FR 16767, April 5, 2007	731-TA-878				4

CASE II. **BALL BEARINGS AND PARTS THEREOF – ITALY** **US DOC NO A-475-801**[6]	**ADMINISTRATIVE REVIEWS**					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 May 2004–30 April 2005	71 FR 40064, July 14, 2006		FAG Italy SKF Italy	2,52% 7,65%	5
	1 May 2003–30 April 2004	70 FR 54711, September 16, 2005		FAG Italy SKF Italy	5,88% 2,59%	6
	1 May 2002–30 April 2003	69 FR 55574, September 15, 2004	69 FR 62023, October 22, 2004	Numerous	68,29% to less than 5%	7
	1 May 2001–30 April 2002	68 FR 35623, June 16, 2003		FAG SKF	2,87% 5,08%	8
	SUNSET REVIEWS					
	DOC Final determination	**ITC Case number**	**ITC Determination**	**Continuation order**		
	70 FR 58383, October 6, 2005	731-TA-393	71 FR 51850, August 31, 2006	71 FR 54469, September 15, 2006		9

[5] Original Order: 66 FR 46777, 7 September 2001.
[6] Original Order: 15 May 1989; Continuation Order: 71 FR 54469, 15 September 2006.

CASE III. **BALL BEARINGS AND PARTS THEREOF – GERMANY** **US DOC NO A-428-801**[2]	**ADMINISTRATIVE REVIEWS**					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 May 2004–30 April 2005	71 FR 40064, July 14, 2006		FAG/INA GRW SKF Germany	4,04% 1,14% 7,35%	10
	1 May 2003–30 April 2004	70 FR 54711, September 16, 2005		FAG/INA GRW SKF Germany	5,65% 4,58% 16,06%	11
	1 May 2002–30 April 2003	69 FR 55574, September 15, 2004	69 FR 63507, November 2, 2004	Numerous	70,41% to less than 1%	12
	1 May 2001–30 April 2002	68 FR 35623, June 16, 2003		FAG Torrington Paul Mueller SKF	1,45% 70,41% 0,19% 3,38%	13
	SUNSET REVIEWS					
	DOC Final determination	**ITC Case number**	**ITC Determination**	**Continuation order**		
	70 FR 58383, October 6, 2005	731-TA-392	71 FR 51850, August 31, 2006	71 FR 54469, September 15, 2006		14

CASE IV. BALL BEARINGS AND PARTS THEREOF – FRANCE US DOC NO A-427-801[2]	ADMINISTRATIVE REVIEWS					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 May 2004–30 April 2005	71 FR 40064, July 14, 2006		SKF France SNR	12,57% 11,75%	15
	1 May 2003–30 April 2004	70 FR 54711, September 16, 2005		SKF SNR	8,41% 11,93%	16
	1 May 2002–30 April 2003	69 FR 55574, September 15, 2004	69 FR 62023, October 22, 2004	Numerous	66,42% to less than 7%	17
	1 May 2001–30 April 2002	68 FR 35623, June 16, 2003	68 FR 43712, July 24, 2003	France SNR Roulements SKF	3,52% 6,70%	18
	SUNSET REVIEWS					
	DOC Final determination	**ITC Case number**	**ITC Determination**	**Continuation order**		
	70 FR 58383, October 6, 2005	731-TA-391	71 FR 51850, August 31, 2006	71 FR 54469, September 15, 2006		19

CASE V. STAINLESS STEEL BAR – FRANCE US DOC NO A-427-820[7]	ADMINISTRATIVE REVIEWS					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 March 2004–28 February 2005	71 FR 30873, May 31 2006		Ugitech S.A.	9,68%	20
	1 March 2003–29 February 2004	70 FR 46482, August 10, 2005		Ugitech S.A.	14,98%	21

[7] Original Order: 67 FR 10385, 7 March 2002.

CASE VI. STAINLESS STEEL SHEET AND STRIP IN COILS – GERMANY US DOC NO A-428-825[8]	ADMINISTRATIVE REVIEWS					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 July 2004 – 30 June 2005	71 FR 74897, December 13, 2006		Thyssen Krupp Nirosta Gmbh	2,45%	22
	1 July 2003–30 June 2004	70 FR 73729 December 13, 2005		TKN	9,5%	23
	1 July 2002–30 June 2003	69 FR 75930, December 20, 2004		Thyssen Krupp Nirosta	7,03%	24
	1 July 2001–30 June 2002	69 FR 6262, February 10, 2004		TKN	3,72%	25
	SUNSET REVIEWS					
	DOC Final determination	**ITC Case number**	**ITC Determination**	**Continuation order**		
	69 FR 67896, November 22,2004	731-TA-798	70 FR 41236, July 18, 2005	70 FR 44886, August 4, 2005		26

CASE VII. STAINLESS STEEL PLATE IN COILS – BELGIUM US DOC NO A-423-808[9]	ADMINISTRATIVE REVIEWS					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 May 2003–30 April 2004	70 FR 72789, December 7 2005		Ugine & ALZ Belgium NV	2,96%	27
	1 May 2002–30 April 2003	69 FR 74495, December 14, 2004	70 FR 2999, January 19, 2005	U&A Belgium	2,71%	28
	SUNSET REVIEWS					
	DOC Final determination	**ITC Case number**	**ITC Determination**	**Continuation order**		
	69 FR 61798, October 21 2004	731-TA-788	70 FR 38710, July 5, 2005	70 FR 41202, July 18 2005		29

[8] Original Order : 64 FR 40557, 27 July 1999; Continuation Order: 70 FR 44886, 4 August 2005.
[9] Original Order : 64 FR 25288, 11 May 1999; Continuation Order: 70 FR 41202, 18 July 2005.

CASE VIII. BALL BEARINGS AND PARTS THEREOF – UK US DOC NO A-412-801[2]	ADMINISTRATIVE REVIEWS					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 May 2003–30 April 2004	70 FR 54711, September 16, 2005		Barden/FAG SKF IK	2,78% 61,14%	30
	1 May 2002–30 April 2003	69 FR 55574, September 15, 2004	69 FR 62023, October 22, 2004	Aeroengine Bearings Barden/FAG	61,14% 4,10%	31
	SUNSET REVIEWS					
	DOC Final determination	**ITC Case number**	**ITC Determination**	**Continuation order**		
	70 FR 58383, October 6, 2005	731-TA-399	71 FR 51850, August 31, 2006	71 FR 54469, September 15, 2006		32
CASE IX. **STAINLESS STEEL BAR – GERMANY** **US DOC A-428-830[10]**	**ADMINISTRATIVE REVIEWS**					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 March 2004–28 February 2005	71 FR 42802, July 28, 2006	71 FR 52063, September 1, 2006	BGH Group	0,73%	33
	2 August 2001–28 February 2003	69 FR 113, June 14, 2004		BGH	0,52%	34

[10] Original Order: 67 FR 10382, 7 March 2002.

CASE X. CERTAIN HOT ROLLED CARBON STEEL FLAT PRODUCTS – NETHERLANDS US DOC NO A-421-807[11]	ADMINISTRATIVE REVIEWS					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 November 2004–31 October 2005	70 FR 71523, December 11, 2006 (Preliminary results)		Corus	2.52%	35
	1 November 2002–31 October 2003	70 FR 18366, April 11, 2005		Corus	4,42%	36
	3 May 2001–31 October 2002	69 FR 115, June 16, 2004	69 FR 43801, July 22, 2004	Corus	4,80%	37
	SUNSET REVIEWS					
	DOC Final determination	**ITC Case number**	**ITC Determination**	**Continuation order**		
	72 FR 7604, February 16, 2007 (Preliminary Results)	731-TA-903				38

CASE XI. STAINLESS STEEL BAR – ITALY US DOC NO A-475-829[12]	ADMINISTRATIVE REVIEWS					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	2 August 2001–28 February 2003	69 FR 113, June 14, 2004		Foroni Ugine-Savoie-Imphy SA	4,03% 33,00%	39

[11] Original Order: 66 FR 55637, 2 November 2001.
[12] Original Order: 67 FR 10384, 7 March 2002.

CASE XII. STAINLESS STEEL SHEET & STRIP IN COILS – ITALY US DOC NO A-475-824[13]	ADMINISTRATIVE REVIEWS					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 July 2002 – 30 June 2003	70 FR 7472, February 14, 2005	70 FR 13009, March 17, 2005	Thyssen Krupp Acciai Speciali Terni SpA	3,73%	40
	1 July 2001–30 June 2002	68 FR 69382 December 12, 2003		Thyssenkrupp Acciai Terni SpA	1,62%	41
	SUNSET REVIEWS					
	DOC Final determination	**ITC Case number**	**ITC Determination**	**Continuation order**		
	69 FR 67896, November 22,2004	731-TA-799	70 FR 41236, July 18, 2005	70 FR 44886, August 4, 2005		42

[13] Original Order: 64 FR 40567, 27 July 1999; Continuation Order: 70 FR 44886, 4 August 2005.

CASE XIII. CERTAIN PASTA – ITALY US DOC NO A-475-818[14]	ADMINISTRATIVE REVIEWS					
	Period covered by the review	**Final Results (unless otherwise specified)**	**Amended Final Results**	**Company**	**Dumping margin**	**No.**
	1 July 2004 – 30 June 2005	72 FR 7011, February 14, 2007		Atar Corticella/Combattenti	18,18% 1,95%	43
	1 July 2003–30 June 2004	70 FR 71464, November 29, 2005		Barilla Corticella/Combattenti Indalco Pagani Riscossa	20,68% 3,41% 2,59% 2,76% 2,03%	44
	1 July 2002–30 June 2003	70 FR 6832, February 9, 2005		Barilla Corticella/Combattenti Indalco PAM Riscossa Russo	7,25% 4% 6,03% 4,78% 1,05% 7,36%	45
	1 July 2001–30 June 2002	69 FR 6255, February 10, 2004	69 FR 81, April 27, 2004	Garofalo Indalco PAM Tomasello Zaffiri	2,57% 2,85% 45,49% 4,59% 7,23%	46
	SUNSET REVIEWS					
	DOC Final determination	**ITC Case number**	**ITC Determination**	**Continuation order**		
	72 FR 5266, February 5, 2007	731-TA-734				47

[14] Original Order 61 FR 143, 24 July 1996; Continuation Order 66 FR 55160, 1 November 2001.

CASE XIV.	SUNSET REVIEWS				
	DOC Final determination	**ITC Case number**	**ITC Determination**	**Continuation order**	**No.**
BRASS SHEET & STRIP – GERMANY **US DOC NO A-428-602**[15]	71 FR 4348, January 26, 2006	731-TA-317	71 FR 14719, March 23, 2006	71 FR 16552, April 3, 2006	48

CASE XV.	ORIGINAL INVESTIGATIONS				
	DOC Final determination	**ITC Case number**	**ITC Determination**	**AD order**	**No.**
PURIFIED CARBOXYMETHYLCELLULOSE – SWEDEN **US DOC NO A-401-808**	70 FR 28278, May 17, 2005	731-TA-1087	70 FR 39334, July 7, 2005	70 FR 39734, July 11, 2005	49

CASE XVI.	ORIGINAL INVESTIGATIONS				
	DOC Final determination	**ITC Case number**	**ITC Determination**	**AD order**	**No.**
PURIFIED CARBOXYMETHYLCELLULOSE – NETHERLANDS **US DOC NO A-421-811**	70 FR 28275, May 17, 2005	731-TA-1086	70 FR 39334, July 7, 2005	70 FR 39734, July 11, 2005	50

CASE XVII.	ORIGINAL INVESTIGATIONS				
	DOC Final determination	**ITC Case number**	**ITC Determination**	**AD order**	**No.**
PURIFIED CARBOXYMETHYLCELLULOSE – FINLAND **US DOC NO A-405-803**	70 FR 28279, May 17, 2005	731-TA-1084	70 FR 39334, July 7, 2005	70 FR 39734, July 11, 2005	51

[15] Original Order: 6 March 1987

CASE XVIII. CHLORINATED ISOCYANURATES – SPAIN US DOC NO A-469-814	ORIGINAL INVESTIGATIONS				
	DOC Final determination	ITC Case number	ITC Determination	AD order	No.
	70 FR 24506, May 10, 2005	731-TA-1083	70 FR 36205, June 22, 2005	70 FR 36562, June 24, 2005	52