

**UNITED STATES – LAWS, REGULATIONS AND  
METHODOLOGY FOR CALCULATING  
DUMPING MARGINS ("ZEROING")**

**AB-2006-2**

*Report of the Appellate Body*



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CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Canada – Dairy (Article 21.5 – New Zealand and US II)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report, WT/DS122/AB/R, DSR 2001:VII, 2741
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/AB/R, adopted 28 November 2005
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, 5

Short Title	Full Case Title and Citation
<i>US – Countervailing Measures on Certain EC Products</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report, WT/DS212/AB/R, DSR 2003:I, 73
<i>US – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323
<i>US – Zeroing (EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/R, 31 October 2005
<i>US – Zeroing (Japan)</i>	<i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Definition
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
Anti-Dumping Manual	1997 edition of the <i>Import Administration Antidumping Manual</i> (Exhibit EC-36 submitted by the European Communities to the Panel), available at: <a href="http://ia.ita.doc.gov/admanual/index.html">http://ia.ita.doc.gov/admanual/index.html</a>
Panel Report	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/R, 31 October 2005
Section 351.414(c)(2)	Section 351.414(c)(2) is found in <i>United States Federal Register</i> , Vol. 62, No. 96 (19 May 1997), Rules and Regulations, p. 27415 (Exhibit EC-35.3 submitted by the European Communities to the Panel), codified in <i>United States Code of Federal Regulations</i> , Title 19, Section 351.414(c)(2)
SPB	Sunset Policy Bulletin
Tariff Act	Tariff Act of 1930, codified in Title 19 of the <i>United States Code of Federal Regulations</i>
USDOC	United States Department of Commerce
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>



WORLD TRADE ORGANIZATION  
APPELLATE BODY

**United States – Laws, Regulations and  
Methodology for Calculating Dumping Margins  
("Zeroing")**

European Communities, *Appellant/Appellee*  
United States, *Appellant/Appellee*

Argentina, *Third Participant*  
Brazil, *Third Participant*  
China, *Third Participant*  
Hong Kong, China *Third Participant*  
India, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
Mexico, *Third Participant*  
Norway, *Third Participant*  
Separate Customs Territory of Taiwan, Penghu,  
Kinmen, and Matsu, *Third Participant*

AB-2006-2

Present:

Sacerdoti, Presiding Member  
Janow, Member  
Taniguchi, Member

**I. Introduction**

1. The European Communities and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (the "Panel Report").<sup>1</sup> The Panel was established to consider a complaint by the European Communities concerning the application by the United States of the so-called "zeroing methodology" when determining dumping margins in anti-dumping proceedings, including proceedings resulting in the imposition of anti-dumping measures as well as proceedings relating to the collection of anti-dumping duties.<sup>2</sup>

2. Before the Panel, the European Communities challenged, under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement"), the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement"):

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<sup>1</sup>WT/DS294/R, 31 October 2005.

<sup>2</sup>Panel Report, para. 2.1.

- (a) Sections 731, 751(a)(2)(A)(i)-(ii), 771(35)(A)-(B), and 777A(d) of the Tariff Act of 1930 (the "Tariff Act")<sup>3</sup>; Section 351.414(c)(2) of the United States Department of Commerce ("USDOC") Regulations ("Section 351.414(c)(2)")<sup>4</sup>; certain provisions of the 1997 edition of the *Import Administration Antidumping Manual* (the "Anti-Dumping Manual")<sup>5</sup>; the "Standard AD Margin Program"<sup>6</sup>, which includes the "Standard Zeroing Procedures"<sup>7</sup>; and the United States' "practice or methodology" of zeroing;
- (b) the use of "model zeroing"<sup>8</sup> in certain "original investigations"<sup>9</sup>; and
- (c) the use of "simple zeroing"<sup>10</sup> in certain "anti-dumping duty administrative reviews".<sup>11</sup>

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<sup>3</sup>These provisions are codified in *United States Code of Federal Regulations*, Title 19, Sections 1673, 1675, and 1677, respectively (Exhibit EC-33 submitted by the European Communities to the Panel).

<sup>4</sup>Section 351.414(c)(2) is found in *United States Federal Register*, Vol. 62, No. 96 (19 May 1997), Rules and Regulations, p. 27415 (Exhibit EC-35.3 submitted by the European Communities to the Panel), codified in *United States Code of Federal Regulations*, Title 19, Section 351.414(c)(2).

<sup>5</sup>See Exhibit EC-36 submitted by the European Communities to the Panel. The Anti-Dumping Manual is available at: <http://ia.ita.doc.gov/admanual/index.html>.

<sup>6</sup>The "Standard AD Margin Program" consists of computer programming used by the USDOC to calculate margins of dumping. More specifically, the USDOC uses lines of computer code contained in the "Standard AD Margin Program" whenever it develops a specific computer program to calculate a margin of dumping in a particular anti-dumping proceeding. (See Exhibits EC-43 and EC-46 submitted by the European Communities to the Panel)

<sup>7</sup>The term "Standard Zeroing Procedures" is used in the Panel Report to refer to certain lines of programming code contained in the USDOC's Standard AD Margin Program. More specifically, it refers to certain lines of programming code that incorporate the zeroing methodology by selecting (for inclusion in the numerator of the overall dumping margin) only those results of multiple comparisons that are greater than zero for purposes of calculating the aggregate amount of dumping. (European Communities' first written submission to the Panel, paras. 125 and 129) The term "Standard Zeroing Procedures" is not used in United States anti-dumping laws and regulations. (See Panel Report, paras. 7.71-7.72)

<sup>8</sup>The term "model zeroing" refers to the methodology described in paras. 2.3 and 2.10 of the Panel Report.

<sup>9</sup>In our discussion, we use the term "original investigations" to refer to investigations within the meaning of Article 5 of the *Anti-Dumping Agreement*. The original investigations challenged by the European Communities are listed in Exhibits EC-1 through EC-15 submitted by the European Communities to the Panel. Further details may be found in para. 2.6 and footnote 119 to para. 7.9 of the Panel Report.

<sup>10</sup>The term "simple zeroing" refers to the methodology described in paras. 2.5 and 2.12 of the Panel Report.

<sup>11</sup>In our discussion, we use the term "administrative review" to describe the "periodic review of the amount of anti-dumping duty" as required by Section 751(a) of the Tariff Act. That provision requires the USDOC to review and determine the amount of any anti-dumping duty at least once during each 12-month period beginning on the anniversary of the date of publication of an anti-dumping duty order if a request for such a review has been received. (Panel Report, footnote 236 to para. 7.142) The administrative reviews challenged by the European Communities are listed in Exhibits EC-16 through EC-31 submitted by the European Communities to the Panel. Further details may be found in para. 2.6 and footnote 202 to para. 7.110 of the Panel Report.

3. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 31 October 2005, the Panel made the following findings:

- (a) The United States acted inconsistently with Article 2.4.2 of the [*Anti-Dumping*] *Agreement* when in the anti-dumping investigations listed in Exhibits EC-1 to EC-15 USDOC did not include in the numerator used to calculate weighted average dumping margins any amounts by which average export prices in individual averaging groups exceeded the average normal value for such groups.
- (b) Sections 771(35)(A) and (B), 731 and 777(A)(d) of the Tariff Act are not as such inconsistent with Articles 2.4, 2.4.2, 5.8, 9.3, 1 and 18.4 of the [*Anti-Dumping*] *Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement with respect to the use of a zeroing methodology in the calculation of margins of dumping in original investigations.
- (c) The United States' zeroing methodology, as it relates to original investigations, is a norm which, as such, is inconsistent with Article 2.4.2 of the [*Anti-Dumping*] *Agreement*.
- (d) The United States did not act inconsistently with Article 2.4.2 of the [*Anti-Dumping*] *Agreement* when, in the administrative reviews listed in Exhibits EC-16 to EC-31, USDOC used a methodology that involved asymmetrical comparisons between export price and normal value and in which no account was taken of any amount by which export prices exceeded normal value.
- (e) The United States did not act inconsistently with Article 2.4 of the [*Anti-Dumping*] *Agreement* when in the administrative reviews listed in Exhibits EC-16 to EC-31 USDOC calculated dumping margins by comparing average monthly normal value with prices of individual export transactions and did not include in the numerator of the dumping margins any amounts by which export prices of individual transactions exceeded the normal value.
- (f) The United States did not act inconsistently with Articles 9.3, 11.1 and 11.2, 1 and 18.4 of the [*Anti-Dumping*] *Agreement*, Articles VI:1 and VI:2 of GATT 1994 and Article XVI:4 of the WTO Agreement in the administrative reviews listed in Exhibits EC-16 to EC-31.

- (g) The Standard Zeroing Procedures used by the United States in administrative reviews or the United States practice or methodology of zeroing and Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the USDOC Regulations are not as such inconsistent with Articles 2.4, 2.4.2, 9.3, 11.1 and 11.2, 1 and 18.4 of the [*Anti-Dumping*] Agreement, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.
- (h) The Standard Zeroing Procedures used or relied upon by the United States in new shipper reviews, changed circumstances reviews and sunset reviews and Sections 771(35)(A) and (B), 731, 777A(d) and 715(a)(2)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the USDOC Regulations are not as such inconsistent with Articles 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, 1 and 18.4 of the [*Anti-Dumping*] Agreement, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.<sup>12</sup> (footnotes omitted)

4. On 17 January 2006, the European Communities notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal<sup>13</sup> pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").<sup>14</sup> On 24 January 2006, the European Communities filed an appellant's submission.<sup>15</sup> On that same day, Japan filed a third participant's submission.<sup>16</sup> On 30 January 2006, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the DSU, and filed a Notice of

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<sup>12</sup>Panel Report, para. 8.1. The Panel decided to exercise judicial economy and did not rule on the European Communities' claim that the application of model zeroing in the investigations listed in Exhibits EC-1 through EC-15 was inconsistent with Articles 1, 2.4, 3.1, 3.2, 3.5, 5.8, 9.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*. The Panel also exercised judicial economy on the European Communities' claim that the Standard Zeroing Procedures used by the USDOC in original investigations are inconsistent, as such, with Articles 1, 2.4, 3.1, 3.2, 3.5, 5.8, 9.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*. (*Ibid.*, para. 8.2)

<sup>13</sup>WT/DS294/12 (attached as Annex I to this Report).

<sup>14</sup>WT/AB/WP/5, 4 January 2005.

<sup>15</sup>Pursuant to Rule 21 of the *Working Procedures*.

<sup>16</sup>Pursuant to Rule 24(1) and (3) of the *Working Procedures*. Concerning the timing of its submission, Japan stated that, given that it has brought its own dispute regarding the United States' zeroing methodology (*US – Zeroing (Japan)*, WT/DS322), "its interests in this appeal are, essentially, those of an appellant, even though it is a third participant." Japan went on to say that it was, therefore, taking "the unusual step of filing its third participant's submission on the same day as the appellant, that is, considerably 'within 25 days after the date of filing of the Notice of Appeal'." (Japan's third participant's submission, para. 3)

Other Appeal<sup>17</sup> pursuant to Rule 23(1) and (2) of the *Working Procedures*. On 1 February 2006, the United States filed an other appellant's submission.<sup>18</sup> On 13 February 2006, the European Communities and the United States each filed an appellee's submission<sup>19</sup> and Brazil, China, Korea, Mexico, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu each filed a third participant's submission.<sup>20</sup> On the same day, Argentina, India, and Hong Kong, China each notified its intention to appear at the oral hearing as a third participant and to make an oral statement.<sup>21</sup>

5. The oral hearing in this appeal was held on 1 and 2 March 2006. The participants and third participants presented oral arguments and responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

## II. Arguments of the Participants and the Third Participants

### A. *Claims of Error by the European Communities – Appellant*

#### 1. Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994

6. The European Communities requests the Appellate Body to reverse the Panel's finding that the United States did not act inconsistently with Article 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994. The European Communities notes that Article 9.3 provides that the amount of anti-dumping duty shall not exceed the margin of dumping established under Article 2. The European Communities claims that, in the administrative reviews at issue, the United States did not correctly establish the anti-dumping duty amount or the margin of dumping because the United States did not comply with its obligation to ensure that the amount of anti-dumping duty collected did not exceed the margin of dumping.

7. For the European Communities, the disagreement between the parties flows, in essence, from their respective interpretations of the terms "dumping" and "margin of dumping" in the *Anti-Dumping Agreement*, and whether these terms apply at the level of the product as a whole, or at the level of a comparison between a weighted-average normal value and an individual export transaction. The European Communities submits that these terms are defined in relation to a product *as a whole*.

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<sup>17</sup>WT/DS294/13 (attached as Annex II to this Report).

<sup>18</sup>Pursuant to Rule 23(3) of the *Working Procedures*.

<sup>19</sup>Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

<sup>20</sup>Pursuant to Rule 24(1) and (3) of the *Working Procedures*.

<sup>21</sup>Pursuant to Rule 24(2) of the *Working Procedures*.

Thus, "dumping" and "margin of dumping" within the meaning of the *Anti-Dumping Agreement* cannot, according to the European Communities, be found to exist only for a type, model, or category of that product, including a "category"<sup>22</sup> consisting of one or more relatively low-priced export transactions.

8. The European Communities underscores that 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 such multiple comparisons are not "margins of dumping", but, rather, reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product as a whole. The investigating authority is under the obligation to aggregate all of the results of these multiple intermediate comparisons. The European Communities maintains that, aside from the exception provided for by the second sentence of Article 2.4.2, as well as by Articles 2.2.1, 2.7, and 9.4 of the *Anti-Dumping Agreement*, there is no basis in the *Anti-Dumping Agreement* that would justify taking into account the results of some multiple comparisons, in the process of calculating margins of dumping, while disregarding others.

9. According to the European Communities, the Panel erred in concluding that the Appellate Body's findings in *EC – Bed Linen*<sup>23</sup> and *US – Softwood Lumber V*<sup>24</sup> were based on Article 2.4.2 of the *Anti-Dumping Agreement* and limited to the consistency of zeroing as applied in the original proceedings. The European Communities submits that 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. For the European Communities, it is clear that the obligations that apply when a margin of dumping is calculated or relied upon are the same throughout the *Anti-Dumping Agreement*, and this use of zeroing by the United States in the present case is inconsistent with the *Anti-Dumping Agreement*.

10. The European Communities argues that the United States' calculation of a revised cash deposit rate is identical in all relevant respects to the margin calculation performed in the original proceedings. For the European Communities, there is no basis on which the United States can plausibly argue that zeroing, which is prohibited in original proceedings, somehow becomes permitted when done in an administrative review.

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<sup>22</sup>European Communities' appellant's submission, paras. 59 and 61.

<sup>23</sup>See Appellate Body Report, *EC – Bed Linen*, para. 53.

<sup>24</sup>See Appellate Body Report, *US – Softwood Lumber V*, paras. 91-103.

11. According to the European Communities, the use of zeroing in the calculation of either the cash deposit rate or the amount of duty finally assessed "systematically"<sup>25</sup> inflates the amount of the anti-dumping duty. The European Communities claims that, as a result of the use of zeroing in the administrative reviews at issue, the amount of the anti-dumping duty assessed exceeds the margin of dumping determined for the product as a whole and, therefore, the use of zeroing is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

2. Article 2.4 of the *Anti-Dumping Agreement*

12. The European Communities claims that the Panel erred in finding that the United States did not act inconsistently with the first sentence of Article 2.4 of the *Anti-Dumping Agreement*. The European Communities first indicates that it agrees with the Panel that Article 2.4 establishes an "overarching and independent obligation"<sup>26</sup> to make a fair comparison between normal value and export price. However, the European Communities contends that the Panel erred because—absent targeted dumping—a comparison between normal value and export price that does not fully take into account all export transactions does not result in the calculation of a margin of dumping for the product as a whole and "is therefore not a fair comparison within the meaning of Article 2.4, first sentence."<sup>27</sup> Furthermore, the European Communities contends that the methodology employed by the USDOC in the administrative reviews at issue is inconsistent with Article 2.4, because it inflates the margin of dumping and, therefore, is inherently biased. The European Communities also refers to the Appellate Body's statement in *EC – Bed Linen* that "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."<sup>28</sup> In the European Communities' view, the findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*<sup>29</sup> and *US – Softwood Lumber V*<sup>30</sup> also confirm that the zeroing methodology is unfair and, therefore, inconsistent with the first sentence of Article 2.4 of the *Anti-Dumping Agreement*.

13. With respect to the third to fifth sentences of Article 2.4, the European Communities appeals the Panel's finding that zeroing is not an impermissible allowance or adjustment for a difference other than one affecting price comparability. For the European Communities, the third to fifth sentences of

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<sup>25</sup>European Communities' appellant's submission, para. 68.

<sup>26</sup>*Ibid.*, para. 71.

<sup>27</sup>*Ibid.*, para. 75.

<sup>28</sup>Appellate Body Report, *EC – Bed Linen*, para. 55 (original emphasis) (quoted in European Communities' appellant's submission, para. 95).

<sup>29</sup>See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 127-128, 130, and 135.

<sup>30</sup>See Appellate Body Report, *US – Softwood Lumber V*, paras. 93, 96-97, 99, and 101.

Article 2.4 do not only impose obligations on Members to make adjustments for differences that affect price comparability, but also impose an obligation not to make an adjustment when there is no such difference. The European Communities adds that, if the third to fifth sentences of Article 2.4 refer to certain differences for which adjustments are to be made, the list is illustrative, with the implication that the types of differences and adjustments referred to in the third to fifth sentences are not exhaustive. According to the European Communities, zeroing should be construed as an adjustment or allowance falling within the scope of the third sentence of Article 2.4, because the effect of the zeroing adjustment is to reduce the price at which particular export transactions were in fact made. For the European Communities, the Panel erred because, irrespective of whether the simple zeroing adjustment is conceptually different from the elements of the illustrative list of Article 2.4, third to fifth sentences, it is not an adjustment made for a "difference affecting price comparability"<sup>31</sup> and, therefore, it is inconsistent with Article 2.4, third to fifth sentences.

14. The European Communities submits that "[t]he scope of the obligations contained in the third to fifth sentences of Article 2.4 is not limited according to the point in time, or the stage of the calculation, at which the adjustment or allowance is introduced into the calculation of the margin of dumping."<sup>32</sup> Furthermore, the European Communities argues that the Panel erred when it stated that the European Communities' argument cannot be reconciled with Article 2.4.2; in the European Communities' view, the Panel failed to take into account the opening words of Article 2.4.2: "Subject to the provisions governing fair comparison in paragraph 4". According to the European Communities, it is clear, in particular, from the opening words of the second sentence of Article 2.4, that the third to fifth sentences of Article 2.4 are provisions "governing fair comparison". According to the European Communities, it follows that Article 2.4.2 is "subject to" the provisions in the third to fifth sentences of Article 2.4.

15. Finally, the European Communities submits that the "targeted dumping" provision in Article 2.4.2 need not be considered in resolving the legal issues in this case, and that, in any event, this provision does not support the Panel's finding that zeroing is not an impermissible allowance or adjustment for a difference other than a difference affecting price comparability.

3. Article 2.4.2 of the *Anti-Dumping Agreement*

16. The European Communities "conditionally" appeals the Panel's finding that the United States did not act inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by using, in the administrative reviews at issue, a methodology that involves asymmetrical comparisons between

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<sup>31</sup>European Communities' appellant's submission, para. 132.

<sup>32</sup>*Ibid.*, para. 129.

monthly "normal values" established on a weighted average basis and prices of individual export transactions. The second sentence of Article 2.4.2 provides that such asymmetrical comparisons may be made "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." According to the European Communities, the United States acted inconsistently with this provision because it used the asymmetrical comparison method even though the conditions for the application of the second sentence of Article 2.4.2 were not fulfilled.

17. The European Communities underlines, however, that the Appellate Body need not consider the appeal on this issue if it agrees with the European Communities' appeal from the Panel's findings on Article 9.3 of the *Anti-Dumping Agreement*, Article VI:2 of the GATT 1994, Article 2.4, first sentence, or Article 2.4, third to fifth sentences, of the *Anti-Dumping Agreement*.

18. In the European Communities' view, the reference in Article 2.4.2 to "the existence of margins of dumping during the investigation phase" requires investigating authorities to establish margins of dumping "on the basis of data arising during the investigation period".<sup>33</sup> The European Communities claims that, in rejecting this view, the Panel failed to properly consider the ordinary meaning of Article 2.4.2 "as a whole". In particular, the Panel erred in finding that the terms "period" and "phase" cannot be equated. The European Communities underscores that "during the investigation phase" refers to the "existence" and not to the "establishment" of margins of dumping. Therefore, according to the European Communities, "the phrase refers to a distinct period in which margins of dumping exist, i.e. an investigation period; and not ... a period of time in which margins of dumping are established"<sup>34</sup> and thus does not limit the applicability of Article 2.4.2 to original proceedings. Furthermore, the term "investigation" describes a "systematic examination or inquiry or a careful study of or research into a particular subject"<sup>35</sup>; in Article 2.4.2, that particular subject is "margins of dumping".

19. In the European Communities' view, the Panel incorrectly read the phrase at issue as "the establishment of margins of dumping during the investigation phase".<sup>36</sup> The European Communities adds that the term "investigation" is not synonymous with the term "investigation to determine the existence, degree and effect of any alleged dumping".<sup>37</sup> The ordinary meanings of the terms "during

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<sup>33</sup>European Communities' appellant's submission, para. 317.

<sup>34</sup>*Ibid.*, para. 175. (original emphasis)

<sup>35</sup>*Ibid.*, para. 186.

<sup>36</sup>*Ibid.*, paras. 176, 184, and 207.

<sup>37</sup>*Ibid.*, para. 159.

the ... period" and "during the ... phase" coincide, indicating a determinate temporal stage in the passage of time, or "a distinct period".<sup>38</sup> In the European Communities' view, the Panel put too much emphasis on the word "phase": it erred by "selectively and subjectively *beginning* with this word and *mechanistically* elevating it to a position of such paramount and overwhelming importance in its analysis".<sup>39</sup>

20. Relying on the context of Article 2.4.2, the European Communities argues that the use of the term "margins of dumping" in the phrase "the existence of margins of dumping during the investigation phase", together with the defined term "margin of dumping" in Article VI:2 of the GATT 1994, support its position that the requirements set out in the first sentence of Article 2.4.2 do not apply only to original proceedings. In addition, Articles 9.3 and 9.3.3 confirm its interpretation of the phrase because the reference to Article 2 in these provisions must be taken to be a reference to the whole of Article 2. The European Communities also argues that Articles 1, 5, and 18 provide no support for the position that the application of Article 2.4.2 is limited to original proceedings. The European Communities also relies on the *Anti-Dumping Agreement* as a whole in arguing that the term "investigation phase" in Article 2.4.2 does not have the particular meaning ascribed to it by the Panel.

21. The European Communities argues that the word "normally" in Article 2.4.2 "is at odds with"<sup>40</sup> the Panel's interpretation of that provision. In addition, the European Communities asserts that the Panel's interpretation of the phrase "during the investigation phase" is inconsistent with rules of English grammar. In support of its claim, the European Communities provides a list of references to grammatical units, phrases, and elements of an English sentence or clause, accompanied by citations to extracts of an English grammar text.<sup>41</sup>

22. With respect to the object and purpose of the *Anti-Dumping Agreement*, the European Communities takes issue with the Panel's view that the limited application of Article 2.4.2 to proceedings under Article 5 results from qualitative differences between the purpose of original proceedings and the purpose of anti-dumping duty assessment proceedings. The European Communities also argues that the Panel confused the "import-specific" argument and the "importer-specific" argument, which are fundamentally different. While Article 9.3 may allow duty assessment on an importer-specific basis, it does not permit zeroing when aggregating the results of comparisons between weighted-average normal values and the prices of individual export transactions for a

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<sup>38</sup>European Communities' appellant's submission, paras. 203-204.

<sup>39</sup>*Ibid.*, para. 204. (emphasis added)

<sup>40</sup>*Ibid.*, para. 220.

<sup>41</sup>*Ibid.*, paras. 163, 177, and 180.

particular importer. In this regard, the European Communities considers that "[i]t is perfectly possible to make a calculation of a dumped amount in relation to each importer without zeroing in such a way that the rule in Article 9.3 is respected."<sup>42</sup> The European Communities submits that the United States failed to prove that WTO Members intended to impart a "special meaning" on the term "investigation phase" in Article 2.4.2, within the meaning of Article 31(4) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").<sup>43</sup> The European Communities also argues that subsequent practice and preparatory works do not support the Panel's interpretation.

#### 4. Other Claims

23. First, the European Communities challenges the Panel's finding that Section 351.414(c)(2) of the USDOC Regulations, as it relates to administrative reviews, is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*. The European Communities considers that Section 351.414(c)(2) is inconsistent with Article 2.4.2 because "it permits the use of an asymmetrical method without any of the cumulative conditions set out in Article 2.4.2 having been met", and because "it provides that the normal rule is asymmetry, when Article 2.4.2 provides that the normal rule is symmetry."<sup>44</sup>

24. The European Communities also appeals the Panel's finding that Section 351.414(c)(2), as it relates to new shipper reviews, changed circumstances reviews, and sunset reviews, is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.

25. Secondly, the European Communities argues that the Panel erred in finding that the zeroing methodology used or relied upon by the United States in administrative reviews is not, as such, inconsistent with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*. The European Communities further contends that the Panel erred in finding that the zeroing methodology used or relied upon by the United States in new shipper reviews, changed circumstances reviews, and sunset reviews, is not, as such, inconsistent with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the

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<sup>42</sup>European Communities' appellant's submission, para. 288. (original underlining)

<sup>43</sup>Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

<sup>44</sup>European Communities' appellant's submission, para. 347.

*WTO Agreement*. According to the European Communities, the zeroing methodology is inconsistent with the stated provisions because it reflects the instruction "to zero systematically".<sup>45</sup>

26. Thirdly, the European Communities appeals the Panel's exercise of judicial economy with respect to the question whether administrative reviews based on model zeroing are inconsistent with Article 9.3 of the *Anti-Dumping Agreement*. The European Communities argues that, in cases where there is no request for an administrative review, the USDOC issues assessment instructions to United States Customs to collect final anti-dumping duties at the cash deposit rate, that is at the rate that was set in the original investigation using model zeroing. The European Communities contends that, in such cases, the application of model zeroing in an assessment review will necessarily be inconsistent with Article 9.3 of the *Anti-Dumping Agreement*. The European Communities refers, in particular, to the first sample case presented by the European Communities to the Panel regarding anti-dumping duties on stainless steel from Italy.<sup>46</sup> According to the European Communities, the final anti-dumping duties in that case were assessed, in part, on the basis of a margin of dumping established by using model zeroing.

27. The European Communities also appeals the Panel's decision to exercise judicial economy with respect to the question of whether model zeroing, as applied in the original investigations at issue, is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.

28. The European Communities further argues that the Panel erred in exercising judicial economy with respect to the question of whether the Anti-Dumping Manual is a measure that is, as such, inconsistent with Articles 1, 2.4, 2.4.2, 5.8, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*. In support of its claim, the European Communities submits that "[t]he parties agree that the [Anti-Dumping] Manual is a measure."<sup>47</sup> The European Communities further explains that the Anti-Dumping Manual "directs the use of the Standard Zeroing Procedures, Methodology and Practice [and] provides a link between the relevant provisions of the Tariff Act and the Regulations, and the Standard Zeroing Procedures, Methodology and Practice."<sup>48</sup>

29. Fourthly, the European Communities "conditionally" appeals the Panel's conclusions regarding the Standard Zeroing Procedures and requests the Appellate Body "to complete the

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<sup>45</sup>European Communities' appellant's submission, para. 341.

<sup>46</sup>See Panel Report, para. 2.9.

<sup>47</sup>European Communities' appellant's submission, para. 343 and footnote 340 to para. 342 (referring to United States' first written submission to the Panel, para. 84).

<sup>48</sup>*Ibid.*, para. 343.

analysis"<sup>49</sup> by finding that the Standard Zeroing Procedures are, as such, inconsistent with Articles 1, 2.4, 2.4.2, 5.8, 9.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*. The European Communities' request is conditioned on the Appellate Body reversing the Panel's finding that the zeroing methodology is inconsistent, as such, with Article 2.4.2. According to the European Communities, its request would also be triggered if the Appellate Body considers that the Standard Zeroing Procedures are not "condemned" (as a result of the Panel's finding on the zeroing methodology, as such) in the sense that "compliance [by the United States] would necessitate modification of the Standard Zeroing Procedures".<sup>50</sup> The European Communities also "conditionally" appeals the Panel's exercise of judicial economy with respect to the United States' "practice" of zeroing in original investigations, administrative reviews, new shipper reviews, changed circumstances reviews, and sunset reviews. This appeal is triggered if the European Communities does not prevail on appeal with respect to either its claim regarding the zeroing methodology or its claim regarding the Standard Zeroing Procedures.

30. Fifthly, the European Communities argues that the Panel acted inconsistently with Article 11 of the DSU by "demonstrat[ing] insufficient reasoning, or internal inconsistency, or the making of a case"<sup>51</sup> for the United States. In the alternative, the European Communities submits that, to the extent that the Panel's findings can be considered findings of fact, the Panel acted inconsistently with Article 11 of the DSU in that it did not make an objective assessment of the facts.

31. Finally, the European Communities submits that the Panel erred in concluding that, in the administrative reviews at issue, the USDOC did not act inconsistently with Articles 11.1 and 11.2 of the *Anti-Dumping Agreement*. The European Communities argues that, contrary to what the Panel stated, its challenge under Articles 11.1 and 11.2 of the *Anti-Dumping Agreement* does not presuppose that its claims under Articles 2.4 and 2.4.2 would succeed. The European Communities submits that "[t]he re-investigation of the cash deposit rate, which is carried out in conjunction with the retrospective assessment proceeding, must ... be consistent with the obligations set out in Articles 11.1 and 11.2."<sup>52</sup> According to the European Communities, "[t]hose provisions go to the question of the re-investigation of the margin of dumping calculated during the original proceeding"<sup>53</sup> and do not allow an investigating authority to change the basic methodology for calculating a margin

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<sup>49</sup>European Communities' appellant's submission, paras. 374 and 376.

<sup>50</sup>*Ibid.*, para. 372.

<sup>51</sup>*Ibid.*, para. 370 and footnote 360 thereto (referring to European Communities' replies to questions posed by the Panel at the first Panel meeting, para. 1; and European Communities' second written submission to the Panel, para. 18).

<sup>52</sup>*Ibid.*, para. 365.

<sup>53</sup>*Ibid.*

of dumping, as defined in Article VI of the GATT 1994 and in Article 2 of the *Anti-Dumping Agreement*.

B. *Arguments of the United States – Appellee*

1. Article 9.3 of the *Anti-Dumping Agreement*, Article VI:2 of the GATT 1994, and Article 2.4.2 of the *Anti-Dumping Agreement*

32. The United States requests the Appellate Body to dismiss the European Communities' appeal concerning Article 9.3 of the *Anti-Dumping Agreement*. The main issue, in the United States' view, is whether, pursuant to Article 9.3, the United States was required to reduce the amount of dumping duties levied on particular import transactions to account for other import transactions in which merchandise was sold at more than normal value. The *Anti-Dumping Agreement* does not, according to the United States, require such an offset when assessing anti-dumping duties with respect to a particular importer.

33. The United States agrees with the Panel that "the concept of 'margin of dumping' in GATT Article VI is defined in terms of a *price difference* in a situation in which a product is introduced into the commerce of another country at less than its normal value i.e. when the export price of the product *is less* than the normal value of the product."<sup>54</sup> According to the United States, the "product" must be the "product as a whole" when the "price" involves the average of "all comparable export transactions." However, when a Member uses a comparison methodology other than the average-to-average methodology, the price of an individual export transaction is the price that is compared to the normal value. Thus, during the investigation phase, Article 2.4.2 authorizes the use of transaction-to-transaction comparisons, or, in specified circumstances, comparisons of individual export transactions to weighted-average normal values. In either case, the "price" is the price of an individual export transaction. According to the United States, in these circumstances, the "product" being introduced into the commerce of the importing Member is the product involved in the particular export transaction. Moreover, Article 2.4.2 does not require that the results of those multiple comparisons be aggregated to represent what the European Communities would consider the "product as a whole", or to be expressed as a percentage.

34. Regarding the findings of the Appellate Body in *US – Softwood Lumber V*, the United States notes that "the Appellate Body expressly recognized that the only issue before it was whether offsets were required under the average-to-average comparison method found in Article 2.4.2."<sup>55</sup> The United

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<sup>54</sup>Panel Report, para. 7.59. (original emphasis)

<sup>55</sup>United States' appellee's submission, para. 175 (referring to Appellate Body Report, *US – Softwood Lumber V*, paras. 104-105 and 108).

States further points out that the Appellate Body clarified in that case that the terms "all comparable export transactions" and "margins of dumping" should be interpreted "in an integrated manner".<sup>56</sup> Accordingly, the Appellate Body's conclusion that there was an obligation to calculate a margin of dumping for the product as a whole was limited to the use of the average-to-average comparison method during the investigation phase.

35. Moreover, the United States argues that the fact that the "margin of dumping" need not always refer to a calculation for the "product as a whole," as the European Communities claims, is confirmed by the text of the first paragraph of Ad Article VI:1 of the GATT 1994. That provision uses the term "margin of dumping" in a manner that can reasonably be interpreted as applying only on a transaction-specific basis.

36. The United States argues that Article 2.4.2 applies only to investigations and, by virtue of its text, is limited to the establishment of the existence of margins of dumping during the investigation phase. The Panel correctly concluded that the reference to Article 2 in Article 9.3 does not override any limitation contained in Article 2.4.2 itself. In the United States' view, the Panel also properly interpreted the ordinary meaning of the phrase "the existence of margins of dumping during the investigation phase". The analysis of the limitation in Article 2.4.2 must consider the entire term "investigation phase" and not only the word "investigation". In the United States' view, the term "investigation phase" refers to that stage in which an authority establishes the existence of margins of dumping, namely, the phase pursuant to Article 5, which, in comparison with other "phases", has a "unique function".<sup>57</sup> The Appellate Body has previously recognized that the purpose of an investigation is different from the purpose of other proceedings that follow the investigation phase. The United States submits that the function of an investigation is "to determine whether injurious dumping exists so as to warrant the imposition of an antidumping duty", and the function of an assessment proceeding is "to determine the amount of antidumping duties that should be assessed".<sup>58</sup> As an example of the different nature of investigations and assessment proceedings, the United States argues that, once an anti-dumping duty is imposed, even if the level of dumping falls below *de minimis*, a Member is not automatically obligated to terminate an anti-dumping duty. Contrary to the European Communities' arguments, the use of different methodologies in investigations and assessment proceedings does not lead to an "intolerable inconsistency"<sup>59</sup> in the concept of dumping that would apply in different stages of the proceedings.

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<sup>56</sup>Appellate Body Report, *US – Softwood Lumber V*, para. 85.

<sup>57</sup>United States' appellee's submission, para. 57.

<sup>58</sup>*Ibid.*, para. 62.

<sup>59</sup>*Ibid.*

37. The United States considers that its view is supported by the use of the term "investigation" throughout the *Anti-Dumping Agreement*. Articles 5.7 and 5.8 expressly refer to the "investigation". For instance, Article 5.8, requiring the termination of an "investigation" where the authorities determine that the margin of dumping is *de minimis*, applies only to the investigation phase and not also to some subsequent action, such as sunset reviews. As another example, the United States points to Article 6, which concerns "evidence" and uses the word "investigations". The United States then refers to Article 11.4, which "specifically cross-references the obligations concerning evidence and procedure contained in Article 6".<sup>60</sup> In the United States' view, if the obligations of Article 6 were to apply to all proceedings under the *Anti-Dumping Agreement*, such a cross-reference would serve no purpose.

38. The United States submits that, in contrast to investigations, Article 9.3 assessment proceedings are not investigations and are not concerned with the "existential question" of whether injurious dumping exists. Instead, Article 9 assessment proceedings are concerned with the measurement of dumping in order to establish the precise amount of an anti-dumping duty that an importer must pay. If, during an assessment proceeding, the margin of dumping is determined to be zero, the Member is not entitled to assess, but is obligated to refund, the amount of anti-dumping duties for the import transactions subject to that proceeding. Given the different functions of an Article 5 investigation and an Article 9 assessment proceeding, obligations that apply with respect to an Article 5 investigation do not necessarily apply to an Article 9 assessment proceeding.

39. The United States also takes the view that the Panel correctly examined and considered the ordinary meaning of Article 2.4.2 in its context and in the light of the object and purpose of the *Anti-Dumping Agreement*. The Panel also correctly applied prior panel and Appellate Body reports, notably, *US – Carbon Steel*, *EC – Bed Linen*, and *US – Corrosion-Resistant Steel Sunset Review*. These reports support the Panel's finding that there are distinctions, "both in legal obligations and in purpose"<sup>61</sup>, between original investigations, on the one hand, and other actions in anti-dumping or countervailing duty proceedings, on the other hand. Contrary to the European Communities' arguments, the Panel did not treat any of the reports as determinative of the issue before it, but rather recognized a pattern throughout these reports consistent with its own findings. The Panel also correctly rejected the European Communities' alternative interpretations of the phrase "during the investigation phase" in Article 2.4.2, that is, that this phrase refers to the "period of investigation". In the United States' view, there is no reason why, after using the term "period of investigation" several times in Article 2, the drafters would not have used the same term in Article 2.4.2 if they had

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<sup>60</sup>United States' appellee's submission, para. 67.

<sup>61</sup>*Ibid.*, para. 78.

wished to refer to the same concept. With respect to the European Communities' argument that the phrase places a limit on the amount of time in which the investigating authority must make its determination, the United States argues that the Panel correctly found that Article 2 does not address procedural aspects, such as the timing of determinations.

40. Furthermore, in the United States' view, the Panel was correct in rejecting the European Communities' arguments relating to the object and purpose of Article 9.3 and the *Anti-Dumping Agreement*. The United States argues that only a treaty can have an object and purpose as understood under the customary rules of interpretation; the purpose or function of a specific provision can be determined only by ascertaining what the provision means, a process that requires a consideration of the treaty's object and purpose. Furthermore, the European Communities' approach to Article 9.3—namely, that the purpose of a duty assessment proceeding under Article 9.3.1 is simply "to update the temporal frame for normal value" and that, therefore, there is no reason to apply a different comparison methodology in an assessment proceeding—would prohibit the assessment of anti-dumping duties on an importer- or import-specific basis. According to the United States, the Panel also correctly rejected the European Communities' arguments concerning subsequent practice; the evidence adduced by the European Communities fails to demonstrate a uniform intention that the obligations contained in Article 2.4.2 apply beyond Article 5 investigations. The Panel was also correct in rejecting the European Communities' arguments concerning supplementary means of treaty interpretation.

41. The United States also requests the Appellate Body to reject the European Communities' additional arguments regarding Article 2.4.2. Concerning the use of the word "normally" in the first sentence of Article 2.4.2, the United States argues that, contrary to the European Communities' view, the use of that word does not undermine the Panel's interpretation of Article 2.4.2. The fact that the "normal" rule for investigations might not be the "normal" rule for assessment proceedings, sunset reviews, and other reviews, does not detract from it being the "normal" rule for investigations. Finally, the "rules of grammar" referred to by the European Communities, do not, in the United States' view, invalidate the Panel's interpretation of Article 2.4.2: there is no basis or rule that the phrase "during the investigation phase" must modify the word "existence" rather than "establishment" of the margin of dumping.

2. Article 2.4 of the *Anti-Dumping Agreement*

42. The United States requests the Appellate Body to reject the European Communities' appeal concerning Article 2.4. The United States argues that the issue of whether a certain methodology is fair must be determined "based upon the substantive rules contained within the [*Anti-Dumping*]

Agreement."<sup>62</sup> Article 2.4 is not "indeterminate"; the elements of what constitutes a fair comparison are contained in Article 2.4. The United States considers it "not credible"<sup>63</sup> that WTO Members would have agreed that Article 2.4 requires what the United States terms "offsets"<sup>64</sup>, but decided not to mention this agreement expressly in the text of Article 2.4. Moreover, the simple fact that one methodology results in a higher dumping margin than another is an insufficient basis to conclude that the first methodology is "unfair" within the meaning of Article 2.4. Rather, the term "fair" must be interpreted in a manner consistent with other obligations contained in the *Anti-Dumping Agreement*.

43. The United States submits that the text of Article 2.4 does not require the calculation of a dumping margin with respect to the "product as a whole". Such a requirement cannot be read into the concept of "fair comparison". The obligation to calculate margins of dumping for the product as a whole is limited to the use of the average-to-average comparison methodology during the investigation phase under Article 2.4.2. If the fair comparison requirement were interpreted so as to impose the same obligation, the first sentence of Article 2.4.2 would be redundant. The Appellate Body, in the United States' view, has never found an obligation to provide for "offsets" stemming from the "fair comparison" requirement in Article 2.4, and its report in *EC – Bed Linen* contains no textual analysis of the "fair comparison" requirement or a finding with respect to Article 2.4. The United States also refers to the Appellate Body Reports in *EC – Bed Linen*, *US – Corrosion-Resistant Steel Sunset Review*, and *US – Softwood Lumber V* as providing no basis for a conclusion that "the fair comparison requirement establishes an independent obligation to provide offsets."<sup>65</sup>

44. The European Communities' interpretative approach to Article 2.4 would, in the United States' view, nullify the second sentence of Article 2.4.2. The comparison method in that sentence is an exception to the methods in the first sentence, but it is not an exception to the "fair comparison" requirement in Article 2.4. If Article 2.4 requires offsets, then offsets must be made under the targeted dumping provision of the second sentence of Article 2.4.2. However, according to the United States, the average-to-transaction comparison method with offsets will yield mathematically the same result as the average-to-average comparison method. The European Communities' interpretation, argues the United States, denies the second sentence of Article 2.4.2 "the very function for which it was created".<sup>66</sup>

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<sup>62</sup>United States' appellee's submission, para. 116.

<sup>63</sup>*Ibid.*, para. 117.

<sup>64</sup>*Ibid.*

<sup>65</sup>*Ibid.*, para. 140.

<sup>66</sup>*Ibid.*, para. 150 (quoting Panel Report, para. 7.266).

45. Next, the United States contends that "the denial of offsets is not an undue price adjustment"<sup>67</sup> pursuant to Article 2.4. If the denial of offsets is considered an undue price adjustment, it would be an undue adjustment for all three comparison methods described in Article 2.4.2. However, again, such an approach would have the effect of nullifying the second sentence of Article 2.4.2. Concerning the European Communities argument—that Article 2.4.2, second sentence, does not specify in every detail how an investigating authority might conduct its targeted dumping analysis and that, if an authority finds a significant pattern of export price differences with respect to two regions, the authority could simply calculate a margin of dumping for the region in which the pattern occurs—the United States argues that there is no textual support for the European Communities' suggestion that a WTO Member may calculate separate anti-dumping duty margins based on subsets of export transactions.<sup>68</sup>

46. The United States further argues that there is no obligation relating to the "product as a whole" that requires "offsets" in assessment proceedings. The European Communities is seeking "to elevate a phrase that has been discussed in certain dispute settlement reports in one specific context"<sup>69</sup>, but that is not contained in the *Anti-Dumping Agreement*, into an obligation that informs the interpretation of numerous other provisions of that Agreement. In the United States' view, the Panel did not err in its interpretation of the obligation to determine the margin of dumping and correctly found that the term "margin of dumping" could be applied on a transaction-specific basis. The United States further submits that the fact that, in an investigation, an individual margin of dumping must be calculated on an exporter- or producer-specific basis, does not preclude, in the context of Article 9, that the margin of dumping may be calculated on an importer- or import-specific basis.

47. The United States further takes the view that the *Anti-Dumping Agreement* does not recognize "negative" margins of dumping. In that Agreement, the word "margin" is modified by the word "dumping", giving it a special meaning—the price difference when a product has been "introduced into the commerce of an importing country at *less than* its normal value."<sup>70</sup> Thus, if the price of the export transaction exceeds normal value, there is no margin of dumping. The United States finds support for its view in Article 9.4 and the use of the terms "zero and *de minimis* margins" therein. Finally, the United States argues that the special standard of review applicable according to Article 17.6(ii) of the *Anti-Dumping Agreement* confirms the permissibility of the

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<sup>67</sup>United States' appellee's submission, section IV.C.4, pp. 74-78.

<sup>68</sup>*Ibid.*, para. 160.

<sup>69</sup>*Ibid.*, para. 167.

<sup>70</sup>*Ibid.*, para. 191 (quoting Article VI:1 of the GATT 1994). (emphasis added by the United States)

United States' approach. The United States requests the Appellate Body to consider that "there may be multiple permissible interpretations of particular provisions in the [*Anti-Dumping*] Agreement and that, at a minimum, the [United States'] approach to assessment proceedings is a permissible one."<sup>71</sup>

### 3. Other Claims

48. The United States argues that the Panel properly rejected the European Communities' "as such" claims that Section 351.414(c)(2) of the USDOC Regulations as well as the zeroing methodology are inconsistent with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*. In the United States' views, the Panel correctly found that the European Communities' claims were dependent on a finding of an inconsistency with Articles 2.4 and 2.4.2. Given that the Panel properly rejected that interpretation, it also correctly rejected these "dependent" claims of the European Communities. The United States point out that the European Communities does not take issue with the Panel's characterization of these claims as "dependent"<sup>72</sup> upon a finding of breach of Article 2.4 and/or Article 2.4.2.

49. Even if the Appellate Body were to reverse the Panel's findings concerning Articles 2.4 and 2.4.2 with respect to the assessment proceedings at issue, the United States submits that the Appellate Body should decline to complete the Panel's legal analysis and should not examine the European Communities' "as such" claims. The Appellate Body has previously declined to complete a panel's analysis in circumstances where doing so would involve addressing claims "which the panel has not addressed at all".<sup>73</sup> Moreover, completing the legal analysis is "particularly inappropriate"<sup>74</sup> where a party has failed to establish a *prima facie* case, such as in the present case.

50. Next, according to the United States, the Panel properly exercised judicial economy with respect to the consistency of "model zeroing" with Article 9.3 of the *Anti-Dumping Agreement*. The United States takes issue with the European Communities' argument that a finding on this issue was necessary "in order to effectively resolve the dispute between the parties"<sup>75</sup>, because, when the European Communities requests the United States to bring the measure at issue into conformity with Article 2.4.2, the United States "will respond that the measure at issue is already in conformity with

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<sup>71</sup>United States' appellee's submission, para. 198.

<sup>72</sup>*Ibid.*, para. 200.

<sup>73</sup>Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 337 (quoted in United States' appellee's submission, para. 201).

<sup>74</sup>United States' appellee's submission, para. 202.

<sup>75</sup>European Communities' appellant's submission, para. 356.

Article 9.3."<sup>76</sup> According to the United States, this argument "simply invites speculation as to how the United States might implement the recommendations and rulings of the ... DSB"<sup>77</sup>; the European Communities has not explained or demonstrated why a finding on this point is necessary to resolve the dispute.

51. Concerning the Panel's exercise of judicial economy with respect to the European Communities' claim that model zeroing, as applied in the original investigations at issue, is inconsistent with Article 2.4, the United States rejects the European Communities' contention that further findings on this matter are necessary because the United States might implement by "switching"<sup>78</sup> to a different comparison methodology, thereby potentially introducing an adjustment that is inconsistent with Article 2.4. In the United States' view, the Appellate Body should not opine on how "any potentially changed measure"<sup>79</sup> could be WTO-inconsistent.

52. The United States further argues that the Appellate Body should decline to rule on the European Communities' conditional claim regarding the Panel's exercise of judicial economy regarding the United States' "practice" of zeroing in original investigations, administrative reviews, new shipper reviews, changed circumstances reviews, and sunset reviews. The United States emphasizes that the European Communities simply alleges error on the part of the Panel without any argumentation or citation to arguments contained in its submissions to the Panel, and thus failed to set out a "precise statement" of the grounds for its appeal, as required by Rule 21(2)(b) of the *Working Procedures*.

53. The United States furthermore requests the Appellate Body to reject the European Communities' claim under Article 11 of the DSU. According to the United States, the European Communities did not properly identify this claim in its Notice of Appeal and did not provide requisite notice to the United States, the third participants, and the Appellate Body. Secondly, the European Communities' appellant's submission is "devoid"<sup>80</sup> of any arguments in support of its claim. Thirdly, the European Communities does not reference "a single Panel finding that evinces the asserted flaws"<sup>81</sup>, and has therefore not substantiated its claim that the Panel failed to act consistently with Article 11 of the DSU.

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<sup>76</sup>European Communities' appellant's submission, para. 355.

<sup>77</sup>United States' appellee's submission, para. 211.

<sup>78</sup>*Ibid.*, para. 214 (quoting European Communities' appellant's submission, para. 363).

<sup>79</sup>*Ibid.*, para. 214.

<sup>80</sup>*Ibid.*, para. 227.

<sup>81</sup>*Ibid.*, para. 230.

54. The United States furthermore rejects the European Communities' contention that the Panel erred in concluding that, in the administrative reviews at issue, the USDOC did not act inconsistently with Articles 11.1 and 11.2 of the *Anti-Dumping Agreement*. The European Communities does not explain what it perceives to be the obligations set forth in Articles 11.1 and 11.2 and how those obligations relate to Article 9.3 assessment proceedings. Furthermore, the European Communities "never reconciled"<sup>82</sup> its claims under Articles 11.1 and 11.2 with its own recognition that the duty assessment proceedings conducted by the United States "correspond to and fit within"<sup>83</sup> Article 9.3 of the *Anti-Dumping Agreement*.

C. *Claims of Error by the United States – Appellant*

55. The United States appeals the Panel's finding that the zeroing methodology is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*. The United States' appeal is based on four main arguments.

56. First, according to the United States, the Panel erred in finding that the zeroing methodology is a measure that can be challenged, as such, in dispute settlement proceedings. The United States emphasizes that the Panel's conclusion is not supported by the text of the DSU or by previous rulings by the Appellate Body regarding the types of measures that can be challenged, as such, in dispute settlement proceedings. The United States refers, in particular, to Article 3.3 of the DSU which speaks of "measures taken by another Member". The United States further recalls that the Appellate Body has previously recognized 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."<sup>84</sup> Thus, according to the United States, "a measure may exist where, at a minimum, a Member acts, or where it fails to act where it has an obligation to do so."<sup>85</sup> The United States acknowledges that measures can "consist[ ] not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application."<sup>86</sup> The United States argues, however, that it is clear from these previous rulings of the Appellate Body that there is a distinction between an act, or instrument, on the one hand, and rules or norms, on the other hand. The latter, in the sense of a principle or standard, are not themselves "measures".

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<sup>82</sup>United States' appellee's submission, para. 219.

<sup>83</sup>*Ibid.*

<sup>84</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

<sup>85</sup>United States' other appellant's submission, para. 11.

<sup>86</sup>*Ibid.*, para. 12 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

57. In the United States view, the Panel erred in finding that the zeroing methodology is a "norm" and, thus, a "measure", even though it did not identify any act or instrument creating or containing this "norm". "The standard applied by the Panel obviates the need for any sort of act or instrument ..., binding or non-binding."<sup>87</sup> Moreover, under the Panel's standard, according to the United States, "abstractions can be measures."<sup>88</sup> The United States submits that this approach "would start the WTO dispute settlement system down the path of legislating 'norms' rather than resolving disputes concerning measures."<sup>89</sup> The United States further submits that a *description* of what a WTO Member has "typically"<sup>90</sup> done is not the same as a separate measure that *prescribes* that Member to act in that manner.

58. Secondly, the United States argues that "the Panel did not identify any act or instrument of the United States setting forth or creating that rule or norm"<sup>91</sup> and there was no evidence that such acts or instruments exist. The United States emphasizes that, the evidence relied upon by the Panel "was historical, and related to what the USDOC has done in the past, not what it does."<sup>92</sup> The United States adds that the Panel's reliance on the past use of certain lines of computer code "does not help to identify the act or instrument, if any, that is causing the use of these lines of code."<sup>93</sup> Instead, the evidence before the Panel "did not suggest anything other than that the decision-makers in past cases"<sup>94</sup> simply considered zeroing to be an appropriate response to the facts.

59. The United States also contends that the Panel's reliance on the findings of the panel in *Japan – Film* is inapt. In *Japan – Film*, the United States challenged certain laws and regulations, as well as "less formal or less concrete forms of governmental *action*."<sup>95</sup> The question before the panel in that case was "whether informal 'action', such as 'administrative guidance' (*gyōsei shidō*), could constitute a measure."<sup>96</sup> The panel concluded that it could. However, "'administrative guidance', even though informal, is still an 'act', and, thus, satisfies the minimum requirement for a 'measure'."<sup>97</sup> The panel in *Japan – Film* was not presented with the question of whether something other than an act or an instrument could constitute a measure. Therefore, according to the United States, the findings of

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<sup>87</sup>United States' other appellant's submission, para. 27.

<sup>88</sup>*Ibid.*, para. 4.

<sup>89</sup>*Ibid.*

<sup>90</sup>*Ibid.*, para. 19.

<sup>91</sup>*Ibid.*, para. 33.

<sup>92</sup>*Ibid.*, para. 36.

<sup>93</sup>*Ibid.*, para. 37.

<sup>94</sup>*Ibid.*

<sup>95</sup>*Ibid.*, para. 40 (quoting Panel Report, *Japan – Film*, para. 10.42).

<sup>96</sup>*Ibid.*, para. 40.

<sup>97</sup>*Ibid.* (footnote omitted)

the panel in that case provide no support for the Panel's conclusion that zeroing methodology is a measure.

60. In sum, on this point, according to the United States, "the Panel neither attempted to identify an act or instrument of the United States that might constitute a measure subject to an 'as such' challenge, nor did its analysis reveal any such measure."<sup>98</sup>

61. Thirdly, the United States submits that, even assuming, *arguendo*, that the zeroing methodology could constitute a "measure", the Panel failed to apply the correct standard and failed to make an objective assessment of the matter as required under Article 11 of the DSU.

62. The United States argues that, "[i]n order to conclude that a measure, as such, is inconsistent with a WTO obligation, that measure must mandate a breach of that obligation."<sup>99</sup> The United States contends, moreover, that "[t]he standard for determining whether a measure as such breaches a WTO obligation is that the measure either mandates WTO-inconsistent action or precludes WTO-consistent action."<sup>100</sup> To the extent the Panel failed to apply the mandatory/discretionary distinction in analyzing and finding a breach of Article 2.4.2, the Panel erred.

63. The United States notes that the Appellate Body has confirmed that "in order to determine whether a measure is 'as such' inconsistent, reliance solely on statistics or aggregate results is not enough."<sup>101</sup> Nor is it enough, according to the United States, to say that results are "predictable".<sup>102</sup> Instead, "it has to be established that the measure causes the results."<sup>103</sup> As the Appellate Body explained in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, in the context of the Sunset Policy Bulletin (the "SPB"), it has to be "demonstrate[d] that the SPB *instructs* the USDOC to treat dumping margins and import volumes as conclusive" and that the USDOC "made a final determination ... *due to* the SPB".<sup>104</sup> The United States underlines that the Panel engaged in no comparable analysis with respect to the zeroing methodology in the present case. The United States

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<sup>98</sup>United States' other appellant's submission, para. 41.

<sup>99</sup>*Ibid.*, para. 43.

<sup>100</sup>*Ibid.*, para. 44.

<sup>101</sup>*Ibid.*, para. 50 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 215; and Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 202).

<sup>102</sup>*Ibid.*, para. 50.

<sup>103</sup>*Ibid.*

<sup>104</sup>Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 206.

emphasizes that the "lack of rigor" in the Panel's analysis is "disturbing", in particular because the Panel itself recognized that "as such" challenges are "serious challenges".<sup>105</sup>

64. Fourthly, according to the United States, the Panel erred in allocating the burden of proof regarding this claim and in finding that the European Communities had established a *prima facie* case. The Panel stated that it would consider "whether there exists what the European Communities terms methodology and whether this methodology can be found to be WTO-inconsistent"<sup>106</sup>, even though the Panel did not explain what the European Communities "meant by 'methodology'"<sup>107</sup>; the Panel, in the United States' view, could not do so, because the European Communities never explained how "methodology" properly could be considered a measure. The Panel effectively relieved the European Communities from its burden to demonstrate, as part of its *prima facie* case, an act or instrument that required the USDOC to "zero" in anti-dumping investigations.

D. *Arguments of the European Communities – Appellee*

65. The European Communities requests the Appellate Body to dismiss the United States' appeal that the Panel erred in finding that the zeroing methodology is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*.

66. The European Communities disagrees with the United States' arguments regarding the issue of "act or instrument". A measure need not be an "act or instrument"; it can be an omission. The Appellate Body has previously stated that there are no limitations on the types of measures that may, as such, be subject to WTO dispute settlement.<sup>108</sup> In any event, the European Communities considers that the "Standard AD Margin Program", which contains the Standard Zeroing Procedures, is correctly characterized as an "act or instrument".<sup>109</sup> In the European Communities' view, the Panel ultimately considered that the Standard Zeroing Procedures are an "instrument" and, in fact, a "measure", or "evidence of a measure".<sup>110</sup>

67. Secondly, the European Communities requests the Appellate Body to reject the United States' claim under Article 11. According to the European Communities, the United States, in its other appeal, inappropriately focuses on the so-called mandatory/discretionary "rule", rather than addressing the question of whether the measure is in conformity with WTO provisions. The

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<sup>105</sup>United States' other appellant's submission, para. 51 (quoting Panel Report, para. 7.102).

<sup>106</sup>Panel Report, para. 7.98.

<sup>107</sup>United States' other appellant's submission, para. 55.

<sup>108</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, pars. 81-89.

<sup>109</sup>European Communities' appellee's submission, para. 27.

<sup>110</sup>*Ibid.*

European Communities expresses doubts concerning the correctness and usefulness of the mandatory/discretionary rule. Referring to findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, the European Communities states that it does not agree with the United States that the mandatory/discretionary rule exists. The European Communities suggests that the Appellate Body "could confirm, once and for all, that there is, in truth, no such [rule]."<sup>111</sup> In the European Communities' view, this is what the Appellate Body "has effectively done by finding that such a 'rule' is not to be mechanistically applied."<sup>112</sup> Alternatively, according to the European Communities, the Appellate Body "may, in one successive case after another, explain why the rule does not avert an 'as such' finding of inconsistency in the particular case."<sup>113</sup> For the European Communities, "[w]hether it's a quick execution or a slow and painful death, the end result is the same."<sup>114</sup>

68. The European Communities also submits that there are several reasons "why the mechanistic application of the mandatory/discretionary rule cannot avert a finding of inconsistency in this particular case."<sup>115</sup> The European Communities argues that a municipal measure need not "be framed in the strongest 'compelling' language ... in order to be found [WTO] inconsistent."<sup>116</sup> In any event, in the European Communities' view, the measure at issue is mandatory because the Anti-Dumping Manual directs the use of the computer programs, and the Standard Zeroing Procedures "automatically and directly"<sup>117</sup> effect the zeroing methodology challenged by the European Communities. The European Communities also suggests that the Standard Zeroing Procedures do not, in any event, provide for the exercise of discretion: "applied as they stand they will effect model zeroing."<sup>118</sup>

69. In addition, in response to the United States' contention that the Panel relieved the European Communities of its burden of proof, the European Communities submits that the Panel also did not rely exclusively on evidence of past behaviour of the United States. The European Communities further emphasizes that it set out with sufficient clarity and precision its arguments before the Panel.

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<sup>111</sup>European Communities' appellee's submission, para. 76 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

<sup>112</sup>*Ibid.*, para. 76.

<sup>113</sup>*Ibid.*

<sup>114</sup>*Ibid.*

<sup>115</sup>*Ibid.*, para. 77.

<sup>116</sup>*Ibid.*, para. 79.

<sup>117</sup>*Ibid.*, para. 81.

<sup>118</sup>*Ibid.*, para. 85.

E. *Arguments of the Third Participants*

1. Argentina

70. Pursuant to Rule 24(2) of the *Working Procedures*, Argentina chose not to submit a third participant's submission. Argentina's statement at the oral hearing focused on Articles 9.3 and 2.4 of the *Anti-Dumping Agreement*.

2. Brazil

71. Brazil argues that the Panel erred in finding that zeroing is permitted in the various proceedings under the *Anti-Dumping Agreement*. According to Brazil, the principles established previously by Appellate Body rulings<sup>119</sup> condemning zeroing in the context of original investigations apply equally to administrative and new shipper reviews. Brazil, therefore, finds the Panel's view that zeroing is permitted in these reviews "rather astounding", given that "this is when the full effect of the duty is felt by the importer and the effect of zeroing is more pronounced than it is in an original investigation."<sup>120</sup> Brazil further argues that the Panel failed to "determine whether its interpretation of Article 2.4.2 [of the *Anti-Dumping Agreement*] made sense in light of the context, object, and purpose of the Agreement."<sup>121</sup> The obligation to calculate a margin of dumping for the product as a whole and the principle of "fair comparison" "are not specific to original investigations"<sup>122</sup> and, therefore, apply also to administrative and new shipper reviews. The Panel's concerns over possible interference of such a conclusion with variable/prospective normal value systems are, according to Brazil, also groundless; according to Brazil, under United States law, duty assessment is determined "for all product entered by an importer at the same average rate; there are no sale-specific duties assessed."<sup>123</sup> Because the USDOC calculates margins for the "product as a whole" in administrative and new shipper reviews, the analysis of whether zeroing is permitted must be identical between these types of reviews and original investigations.

72. Regarding changed circumstances and sunset reviews, Brazil submits that the Panel did not truly address the question of whether zeroing is permitted in changed circumstances and sunset reviews because, instead of fully examining the various issues associated with these types of reviews,

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<sup>119</sup>See Brazil's third participant's submission, paras. 8-11 (referring to Appellate Body Report, *US – Softwood Lumber V*, paras. 93, 98, and 101; and Appellate Body Report, *EC – Bed Linen*, paras. 53 and 55).

<sup>120</sup>*Ibid.*, para. 13.

<sup>121</sup>*Ibid.*

<sup>122</sup>*Ibid.*, para. 15.

<sup>123</sup>*Ibid.*, para. 14.

the Panel "chose simply to cross reference its analysis"<sup>124</sup> made in the context of administrative reviews. In doing so, the Panel misunderstood the purpose of these administrative reviews and ignored existing jurisprudence on the subject. Brazil observes that the Appellate Body, in *US – Corrosion-Resistant Steel Sunset Review*, "made statements making quite clear its view on the applicability of various principles to sunset reviews (and, by extension, changed circumstance[s] reviews)"<sup>125</sup>, which effectively prohibit the practice of zeroing in these reviews.

73. Brazil further submits that the Appellate Body should uphold the Panel's finding that zeroing in original investigations is inconsistent, as such, with the *Anti-Dumping Agreement*. The United States' argument that the zeroing methodology is not a measure, but rather a mere "abstraction"<sup>126</sup>, is "disingenuous".<sup>127</sup> Indeed, the Appellate Body should "go further" than the Panel and find that the zeroing methodology applied "in any context" is, as such, inconsistent with the *Anti-Dumping Agreement*.<sup>128</sup>

74. Regarding the issue of whether the zeroing methodology is challengeable, as such, Brazil contends that the United States erroneously interprets previous Appellate Body findings as confining challengeable practices to situations where a Member has explicitly codified a practice, "separate and apart from the case-specific decisions themselves".<sup>129</sup> Brazil recalls that the Appellate Body stated, in *US – Corrosion-Resistant Steel Sunset Review*, that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."<sup>130</sup> According to Brazil, the view that the zeroing methodology is a measure is supported by Article 18.4 of the *Anti-Dumping Agreement*, which, according to the Appellate Body, covers "the entire body of generally applicable rules, norms, and standards adopted by Members in connection with the conduct of anti-dumping proceedings."<sup>131</sup> Further, Brazil submits that, in *US – Hot-Rolled Steel* and *US – Countervailing Measures on Certain EC Products*, the Appellate Body "reach[ed] the conclusion that a measure of general and prospective application—like the zeroing methodology—is inconsistent with

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<sup>124</sup>Brazil's third participant's submission, para. 16.

<sup>125</sup>*Ibid.*, para. 18 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 109, 126-127, 130, and 135).

<sup>126</sup>*Ibid.*, para. 20 (quoting United States' other appellant's submission, para. 8).

<sup>127</sup>*Ibid.*, para. 20.

<sup>128</sup>*Ibid.*

<sup>129</sup>*Ibid.*, para. 21.

<sup>130</sup>*Ibid.* (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81).

<sup>131</sup>*Ibid.* (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87).

WTO obligations."<sup>132</sup> The zeroing methodology, according to Brazil, is no different from the "arm's length test or the 'same person' methodology"<sup>133</sup>, which were of concern in those two cases.

### 3. China

75. China argues that the Panel erred in finding that the word "investigation" in Article 2.4.2 of the *Anti-Dumping Agreement* refers only to original investigations pursuant to Article 5, and that, consequently, the disciplines contained in Article 2.4.2 apply only to those investigations. China submits that the meaning of the word "investigation" in Article 2.4.2 should be determined with reference to the ordinary meaning of the word, which suggests "systematic examination" or "careful study of a particular subject".<sup>134</sup> Moreover, in China's view, the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2, when read as a whole, cannot limit the application of Article 2.4.2 to original investigations. Absent any explicit "qualification or cross-reference"<sup>135</sup>, the word "investigation" in Article 2.4.2 should be read as referring to the entire anti-dumping investigation, including reviews. China also disagrees that it is only in original investigations that the investigating authority needs to determine the "existence of margins of dumping". In administrative reviews, the United States assesses the final liability for payment of anti-dumping duty amounts, but at the same time determines the new cash-deposit rate. In such a proceeding, the investigating authority must also determine the existence and magnitude of dumping margins. In China's view, the "existence" and "magnitude" of dumping are not "mutually exclusive".<sup>136</sup>

76. China also argues that the term "margins of dumping" should be applied consistently throughout the *Anti-Dumping Agreement*. Thus, the correct interpretation of Article 2.4.2 is that any investigation with respect to margins of dumping should be subject to the rules of comparison set forth in that provision. China further argues that the Appellate Body ruled, in *US – Corrosion-Resistant Steel Sunset Review*<sup>137</sup>, that an anti-dumping proceeding relying upon dumping margins must conform to the disciplines of Article 2.4.

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<sup>132</sup>Brazil's third participant's submission, para. 23 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 137, 147, and 151; and Appellate Body Report, *US – Hot-Rolled Steel*, paras. 131, 148, and 158).

<sup>133</sup>*Ibid.*, para. 25.

<sup>134</sup>China's third participant's submission, para. 8 (quoting dictionary definitions from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993)).

<sup>135</sup>*Ibid.*, para. 9.

<sup>136</sup>*Ibid.*, para. 11.

<sup>137</sup>See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127 (quoted in China's third participant's submission, para. 13).

77. China submits that the cross-references contained in the texts of Articles 2 and 9.3 of the *Anti-Dumping Agreement* demonstrate that the disciplines of Article 2 apply to Article 9.3 assessment proceedings. Furthermore, the reference in Article 9.4(ii) of the *Anti-Dumping Agreement* to the calculation of anti-dumping duties based on prospective normal value does not exclude the applicability of Article 2 to assessment proceedings under Article 9.3. The chapeau of Article 9.4 indicates that Article 9.4 is "a special provision applying in a particular situation"<sup>138</sup>—that is, with respect to sampling and prospective assessments—with respect to particular subject matters, namely, imports from exporters or producers not included in the examination. Article 9.4(ii) should be interpreted in the light of Article 2.4, which sets forth certain "general principles"; the "export prices of exporters or producers not individually examined", referred to in Article 9.4(ii) should be interpreted as referring to average export prices of such exporters or producers. China observes that, "even if a provisional duty might be collected on the basis of [an] asymmetrical comparison under Article 9.4(ii)"<sup>139</sup>, final duty liability must be determined in accordance with the provisions of Article 2 of the *Anti-Dumping Agreement*, including Article 2.4.2.

4. Hong Kong, China

78. Pursuant to Rule 24(2) of the *Working Procedures*, Hong Kong, China chose not to submit a third participant's submission. Hong Kong, China's statement at the oral hearing focused on Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.

5. India

79. Pursuant to Rule 24(2) of the *Working Procedures*, India chose not to submit a third participant's submission. India's statement at the oral hearing focused on Article 2.4.2 of the *Anti-Dumping Agreement*.

6. Japan

80. Japan submits that the Appellate Body should reverse the Panel's finding that the United States did not act inconsistently with Articles 2.4, 9.3, and 18.4 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 by applying the zeroing methodology in duty assessment proceedings under Article 9.3 of the *Anti-Dumping Agreement*.

81. Japan asserts that zeroing methodology necessarily prevents a determination of the margin of dumping for the product as a whole and, therefore, is inconsistent, as such, with Article 2.1 of the

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<sup>138</sup>China's third participant's submission, para. 17.

<sup>139</sup>*Ibid.*, para. 20.

*Anti-Dumping Agreement* and Article VI of the GATT 1994. The inclusion of solely positive results means that the determination of the amount of "dumping" is made for a sub-group of transactions that comprises only a part of the product, and not for the product as a whole. In Japan's view, the requirement that a margin of dumping be determined for the product as a whole applies to the entire *Anti-Dumping Agreement*. Consequently, the zeroing methodology is inconsistent with Article 9.3 when applied in duty assessment proceedings; with Article 9.5 when applied in new shipper reviews; with Article 11.2 when applied in changed circumstances reviews; and with Article 11.3 when applied in sunset reviews.

82. Japan argues that the text, context, and the object and purpose of the *Anti-Dumping Agreement*, as well as the Appellate Body's ruling in *US – Softwood Lumber V*, confirm that the existence and amount of "dumping" are defined, in Article 2.1, for the product as a whole and not for individual transactions or group of transactions.

83. Furthermore, according to Japan, the definition of dumping in Article 2.1 applies to all types of reviews. The Panel failed to recognize that a uniform definition of dumping exists and governs the determination of the existence and amount of dumping in all forms of reviews and, thus, erroneously rejected the "product as a whole" definition for duty assessment proceedings. The Panel's finding that zeroing is permissible in duty assessment proceedings was based, to a large extent, on its finding that the purpose of original investigations is different from the purpose of duty assessment proceedings. Japan submits that the purpose of a duty assessment proceeding is not to determine the amount of duty on "particular import transactions"<sup>140</sup>; rather, it is to determine "whether the amount of duties *initially imposed on the product* is appropriate"<sup>141</sup> in the light of the amount of dumping for the review period. Moreover, a dumping margin determination in any anti-dumping proceeding involves a determination whether dumping exists, even if the legal consequences of the determination in original investigations and duty assessment proceedings may differ.

84. Japan also submits that the Panel incorrectly rejected an exporter-oriented approach. The Panel did so on the basis of what Japan considers to be the Panel's mistaken perception that "dumping" is determined, and duties are imposed, on individual transactions and not on the product as a whole. Contrary to the Panel, Japan does not consider that the rules in Article 9.4(ii) of the *Anti-Dumping Agreement* on the imposition of variable anti-dumping duties demonstrate that margins of dumping can be determined for individual transactions.

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<sup>140</sup>Japan's third participant's submission, para. 89 (quoting Panel Report, para. 7.274).

<sup>141</sup>*Ibid.*, para. 89. (original emphasis)

85. Finally, Japan argues that the Panel was also wrong in rejecting the "product as a whole" definition for new shipper reviews, changed circumstances reviews, and sunset reviews. Even if the Panel's findings regarding the purpose of duty assessment proceedings were correct, the Panel would still be wrong in assuming that this purpose applies to new shipper reviews, changed circumstances reviews, and sunset reviews. In Japan's view, in a new shipper review, the investigating authority determines whether a producer or exporter that was not shipping during the original investigations is engaging in "dumping". If this is found to be the case, the investigating authority imposes duties based on individually determined dumping margins. For the new shipper, this determination is similar to the dumping determination made in the original investigations for the individually examined producers and exporters. The word "dumping" also has the same meaning in Article 2.1 and Articles 11.2 and 11.3 of the *Anti-Dumping Agreement*—the provisions governing changed circumstances reviews and sunset reviews.

86. Japan submits that the Appellate Body should reverse the Panel's finding that "zeroing is consistent with Article 2.4 in all reviews".<sup>142</sup> In Japan's view, zeroing does not involve a "fair comparison" within the meaning of Article 2.4.

87. In Japan's view, the Panel erred in finding that the "fair comparison" requirement does not create any obligations additional to the express requirements of Article 2. According to Japan, the ordinary meaning of the word "fair" requires the investigating authority to conduct an unbiased, even-handed comparison that does not favour particular interests or outcomes, or otherwise distort the facts, in particular, to the detriment of exporters or foreign producers.<sup>143</sup> In contrast, zeroing excludes all negative multiple comparison results produced by high-priced export transactions, thereby making an affirmative dumping determination considerably more likely, as well as inflating the level of any such determination. Japan points to several consequences of zeroing: it "may lead to an affirmative determination of dumping" where no determination of dumping would have been made in the absence of zeroing; it "inflates" any dumping margin because the excluded negative values would otherwise reduce the amount of dumping; and it treats the export prices in excluded transactions as if they were less than what they are in reality.<sup>144</sup>

88. Japan argues that, furthermore, the zeroing methodology involves a form of adjustment to the prices compared that is not permitted under the third sentence of Article 2.4. According to Japan, zeroing is "unfair" when used in any kind of proceedings. Japan bases its assertion on the fact that the Appellate Body has held that Article 2.4 applies to duty assessment proceedings and sunset

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<sup>142</sup>Japan's third participant's submission, heading VI, p. 42.

<sup>143</sup>*Ibid.*, para. 157.

<sup>144</sup>*Ibid.*, para. 158.

reviews.<sup>145</sup> Japan submits that the absence of a formal finding by the Appellate Body that zeroing is not "fair" within the meaning of Article 2.4 is not due to the "fairness" of zeroing; rather, in previous disputes, particular circumstances prevented or obviated the need for the Appellate Body to make a formal ruling under Article 2.4. Japan finally adds that, because the Panel incorrectly articulated the purpose of duty assessment proceedings, it also erred in finding that zeroing is "fair" in the light of that alleged purpose.

89. In Japan's view, contrary to the Panel's finding, the second sentence of Article 2.4.2 does not permit an authority to engage in zeroing. The second sentence does not prescribe how the average-to-transaction comparison should be structured; however, "the distinguishing features of the comparison must be rooted in the particular conditions that justify its use."<sup>146</sup> That comparison methodology is based on a targeted selection of the export transactions that constitute a particular pricing pattern. Japan suggests that the use of such a comparison methodology does not prescribe the treatment of transactions outside that pattern; nonetheless, zeroing is prohibited in those circumstances. Japan maintains that, even if, *arguendo*, the second sentence allowed zeroing, such zeroing would be permitted exclusively when the conditions in the second sentence of Article 2.4.2 are satisfied. The Panel failed to explain why it is appropriate to extend the alleged permissibility of zeroing from the second sentence of Article 2.4.2 to all reviews under Articles 9 and 11.

90. Although, in Japan's view, the Appellate Body could decline to rule on whether zeroing is permitted under the second sentence of Article 2.4.2, a finding that zeroing is not permitted under the second sentence of Article 2.4.2 would, in its view, assist the parties in the implementation of the DSB's recommendations and rulings in this dispute.

## 7. Korea

91. Korea agrees with the Panel that the zeroing methodology is a measure inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*. However, Korea disagrees with the Panel that zeroing is permitted in administrative reviews. In Korea's view, the zeroing methodology must be prohibited in all types of anti-dumping proceedings—including original investigations as well as administrative reviews—because that methodology constitutes a violation of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, as held previously by the Appellate Body in *EC – Bed Linen*, *US – Corrosion-Resistant Steel Sunset Review*, and *US – Softwood Lumber V*.

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<sup>145</sup>Japan's third participant's submission, para. 176 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 127 and 135).

<sup>146</sup>*Ibid.*, para. 191.

92. Korea submits that the amount of the anti-dumping duty must never exceed the margin of dumping. As a result, an investigating authority, in calculating a dumping margin, must consider the entire set of data from the investigation period and must calculate a margin of dumping for the "product as a whole". The investigating authority may compare only normal value and export price adjusted for differences affecting price comparability. Korea argues that an investigating authority must conform to these rules in all types of anti-dumping proceedings "in which a margin of dumping is investigated or relied on, whether it is an original investigation or subsequent reviews."<sup>147</sup> Therefore, one cannot argue that the authority is exempt, in the course of an administrative review, from the obligation to ensure that the amount of the anti-dumping duty does not exceed the margin of dumping. Hence, the Panel erred in finding that different sets of rules apply to original investigations and to administrative reviews. Moreover, it "defies common sense"<sup>148</sup> to prohibit zeroing in original investigations, but to permit it in administrative reviews, when the latter "constitutes an extension of the former".<sup>149</sup> In Korea's view, applying what it considers to be "two different rules" in an original investigation, on the one hand, and in an administrative review, on the other hand, "would render the key principle of the [*Anti-Dumping*] Agreement simply meaningless."<sup>150</sup>

93. Korea also submits that the "fair comparison" requirement of Article 2.4 is an "overarching and independent obligation"<sup>151</sup> that goes beyond the obligation to make "due allowances" described in the other sentences of Article 2.4 and that applies to all dumping calculations. This is confirmed by the negotiating history of the *Anti-Dumping Agreement*, and by the fact that the first sentence of the corresponding provision of the Tokyo Round Anti-Dumping Code read "in order to effect a fair comparison"; it should not be presumed that the drafters of the new agreement would have made this change without a specific intent. As a result, the wording of Article 2.4 of the *Anti-Dumping Agreement*, in contrast, contains "a separate and explicit command"<sup>152</sup> requiring a "fair comparison". By virtue of zeroing, the investigating authority methodically fails to take into account all export transactions for the product as a whole, which, therefore, inevitably leads to an "unfair comparison", contrary to Article 2.4. Korea further argues that, "[t]o the extent that a dumping margin is effectively calculated"<sup>153</sup>, the "fair comparison" requirement is also applicable in administrative reviews.

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<sup>147</sup>Korea's third participant's submission, para. 13.

<sup>148</sup>*Ibid.*, para. 15.

<sup>149</sup>*Ibid.*

<sup>150</sup>*Ibid.*, para. 14.

<sup>151</sup>*Ibid.*, para. 17.

<sup>152</sup>*Ibid.*, para. 20.

<sup>153</sup>*Ibid.*, para. 24.

94. Finally, Korea submits that reviews under Article 9.3 are part of "the investigation phase" referred to in Article 2.4.2. The ordinary meaning of the word "investigation" indicates "a systematic examination or inquiry or a careful study or research into a particular subject"<sup>154</sup>, rather than referring to the original investigation. This is not a specialized meaning of the word, as argued by the United States. Korea also submits that several panel and Appellate Body reports have used the term "original investigations"—as opposed to "investigations"—to refer to Article 5.1 investigations, and that the adjective "original" carries some specific meaning in all these instances.<sup>155</sup> Rather, it is the United States itself, in Korea's view, that has failed to prove the more special meaning it seeks to ascribe to this word. Moreover, in Korea's view, the Appellate Body's findings in *US – Corrosion-Resistant Steel Sunset Review* suggest that the term "investigation phase" in Article 2.4.2 refers to the portion of any proceeding—original investigation or review—in which an authority "investigates" whether dumping has occurred.

#### 8. Mexico

95. Mexico argues that the Panel failed to take proper account of the meaning of the terms "dumping" and "margin of dumping" as used in Article VI of the GATT 1994 and in the *Anti-Dumping Agreement*. Mexico notes that, in *EC – Bed Linen*<sup>156</sup> and *US – Softwood Lumber V*<sup>157</sup>, the Appellate Body held that dumping can be found only for the product "as a whole", and that the results of intermediate comparisons are not actually "margins of dumping". At the same time, Mexico argues that the Appellate Body's analysis in *EC – Bed Linen* is not limited to Article 2.4.2 of the *Anti-Dumping Agreement*, or to any particular type of proceeding governed by that Agreement. The United States' and the Panel's insistence that "margins" and "margins of dumping" may be determined at the level of individual import transactions in administrative reviews are "totally unsupported"<sup>158</sup> in the text and context of the *Anti-Dumping Agreement*. According to Mexico, the definitions of "margins" and "margin of dumping" also apply in administrative reviews. The Panel's contrary view does not even reflect the real nature of the measures applied by the United States, which, according to Mexico, are not "import-specific", because, "for both assessment purposes and for purposes of

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<sup>154</sup>Korea's third participant's submission, para. 30 (citing dictionary definitions in *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993)).

<sup>155</sup>*Ibid.*, para. 31 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews* (54 instances); Panel Report, *US – DRAMS*, para. 2.3; and Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.114 and footnote 295).

<sup>156</sup>See Mexico's third participant's submission, paras. 11-12 (referring to Appellate Body Report, *EC – Bed Linen*, paras. 51 and 53).

<sup>157</sup>See *ibid.*, paras. 13-15 (referring to Appellate Body Report, *US – Softwood Lumber V*, paras. 93 and 96-103).

<sup>158</sup>*Ibid.*, para. 18.

updating the [cash-deposit rate] for future entries"<sup>159</sup>, the United States calculates an average margin of dumping for the product as a whole.

96. Mexico further argues that the Appellate Body has "clearly established that the 'fair comparison' requirement of Article 2.4, which is equally applicable in original investigations and administrative reviews, is sufficient in itself to condemn zeroing."<sup>160</sup> Article 2.4 does not proscribe asymmetrical methods of comparison as "unfair". Moreover, Article 2.4 also addresses zeroing, because failure to take into account all transactions in calculating a "margin of dumping" is inherently "unfair" within the meaning of that provision. Mexico argues that previous rulings of the Appellate Body have recognized the "inherent bias" in the practice of zeroing and, thus, contrary to what the Panel suggested, condemned zeroing not only under Article 2.4.2, but also under Article 2.4.

97. Mexico next argues that zeroing, as applied in administrative reviews, effectively constitutes an adjustment to the export price that is not authorized under the second through fifth sentences of Article 2.4 of the *Anti-Dumping Agreement*. Mexico also disagrees with the Panel that such "elimination of zeroing from the average-to-transaction methodology 'would as a matter of mathematics produce a result that was *identical* to that of the first, average-to-average, methodology.'"<sup>161</sup> Such mathematical equivalence does not apply if the monthly weighted-average-to-transaction methodology is employed—which, according to Mexico, is the case in the present dispute.

98. Finally, Mexico agrees with the European Communities that the application of Article 2.4.2 of the *Anti-Dumping Agreement* is not restricted to original investigations but, rather, applies to all types of anti-dumping proceedings. Mexico argues that a prohibition of zeroing in administrative reviews is not contingent upon whether Article 2.4.2 is found to be applicable to administrative reviews. This is because the obligation not "to zero" negative results in aggregating the results of comparisons is derived from Article VI of the GATT 1994; Article 2.1 of the *Anti-Dumping Agreement*; the requirement that margins of dumping be calculated for the product as a whole; as well as from the "fair comparison" in Article 2.4 and the third through fifth sentences of Article 2.4 that permit adjustments only for differences affecting price comparability—all independently of Article 2.4.2. In any event, Mexico submits that the ordinary meaning, the grammatical construction

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<sup>159</sup>Mexico's third participant's submission, para. 33.

<sup>160</sup>*Ibid.*, para. 51 (referring to Appellate Body Reports in *EC – Bed Linen*; *US – Corrosion-Resistant Steel Sunset Reviews*; and *US – Softwood Lumber V*).

<sup>161</sup>*Ibid.*, para. 65 (quoting Panel Report, para. 7.266). (Panel's emphasis)

of "material terms", as well as the context of the phrase "during the investigation phase" suggest that the scope of application of Article 2.4.2 is not restricted to original investigations.

9. Norway

99. Norway argues that Articles 2.1, 6.10, and 9.3 of the *Anti-Dumping Agreement*, Article VI of the GATT 1994, as well as previous findings of the Appellate Body support its position that dumping must be calculated for the product "as a whole" in all proceedings under the *Anti-Dumping Agreement*, except for proceedings under the second and third method contemplated under Article 2.4.2.<sup>162</sup> Exceptions to this principle must be clearly provided for in the *Anti-Dumping Agreement* or in Article VI of the GATT 1994. According to Norway, the only legal basis for deviating from establishing dumping margins based on the product as a whole can be found in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. In the absence of such exceptions, "there is no basis for not calculating the dumping margin based on the product as a whole."<sup>163</sup> Furthermore, even where such exceptions apply, the calculations must fulfil the "fair comparison" requirement in Article 2.4, which also prohibits the practice of zeroing.

100. The Appellate Body has previously found that model zeroing, used in the weighted-average-to-weighted-average methodology, is prohibited.<sup>164</sup> According to Norway, the same approach should be applied to other forms of zeroing, such as simple zeroing, because this methodology results in margins that are not based on the product "as a whole". Norway further submits that zeroing is contrary to the requirement of "fair comparison" in Article 2.4 of the *Anti-Dumping Agreement*. A calculation of the dumping margin that is not based on the product as a whole, but, rather, based on "fractions" of the product, is "inherently unfair in itself."<sup>165</sup> In this respect, Norway notes that the Appellate Body has already stated on two occasions that there is an "inherent bias" in the zeroing methodology, and that zeroing does not involve a "fair comparison".<sup>166</sup> Moreover, according to Norway, Article 9.3.1 of the *Anti-Dumping Agreement* provides no textual basis for the Panel's conclusions concerning specific asymmetrical methodologies, or for an assertion that an asymmetrical methodology necessarily involves zeroing, or for an assertion that "Article 9.3.1 implies an importer

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<sup>162</sup>See Norway's third participant's submission, paras. 16-17 (referring to Appellate Body Report, *EC – Bed Linen*, para. 53; and Appellate Body Report, *US – Softwood Lumber V*, paras. 93 and 99).

<sup>163</sup>*Ibid.*, para. 24.

<sup>164</sup>See *ibid.*, paras. 26-27 (referring to Appellate Body Report, *EC – Bed Linen*, para. 55; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135; and Appellate Body Report, *US – Softwood Lumber V*, para. 98).

<sup>165</sup>*Ibid.*, para. 32.

<sup>166</sup>See *ibid.*, paras. 33-34 (referring to Appellate Body Report, *EC – Bed Linen*, para. 55; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135).

focus".<sup>167</sup> In any event, Norway submits, "Article 9.3.1 ... cannot be used to override the 'fair comparison' requirement or lead to an interpretation that permits zeroing in assessment reviews."<sup>168</sup>

101. Furthermore, according to Norway, the Panel erred in permitting a methodology in administrative reviews based on importer-focused and asymmetrical comparisons with zeroing. Regardless of the particular point in time at which the relevant determination is made, all determinations of dumping and all calculations of dumping margins must follow Article 2 of the *Anti-Dumping Agreement*. In other words, according to Norway, "[d]umping margins can only be established by applying the methodologies provided for in Article 2."<sup>169</sup> Calculating them differently in administrative reviews, Norway argues, "is a clear violation of the chapeau of Article 9.3 [as well as] the basic principle of 'security and predictability' in international trading relations".<sup>170</sup>

102. Norway disagrees with what it considers to be an implication of the Panel's finding, namely, that "there are no specifics as to the methodologies to be applied in determining dumping margins in reviews and [this] effectively abolish[es] ... the 'due process rights' for the exporter."<sup>171</sup> This is a "manifestly absurd"<sup>172</sup> result, and is contrary to the object and purpose of the treaty. Norway also notes that "[a]ll departures from Article 2 will be breaches of the [*Anti-Dumping Agreement*] as also specifically provided for in Article 18.1"<sup>173</sup> of that Agreement. Norway therefore disagrees with the Panel's interpretation that the phrase "the existence of margins of dumping during the investigation phase" limits the application of Article 2.4.2 to the original investigations and is not applicable to reviews, including administrative reviews under Article 9.3 of the *Anti-Dumping Agreement*.

#### 10. Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu

103. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu disagrees with the Panel's finding that Article 2.4.2 of the *Anti-Dumping Agreement* applies exclusively to original investigations, as opposed to the subsequent phases of duty assessment proceedings and reviews. The word "investigation" in this Article must be interpreted in the light of its "specific context".<sup>174</sup> The

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<sup>167</sup>Norway's third participant's submission, para. 42 (referring to Panel Report, paras. 7.204-7.206).

<sup>168</sup>*Ibid.*, para. 55.

<sup>169</sup>*Ibid.*, para. 56.

<sup>170</sup>*Ibid.*

<sup>171</sup>*Ibid.*, para. 63.

<sup>172</sup>*Ibid.*

<sup>173</sup>*Ibid.*, para. 56.

<sup>174</sup>Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 13.

term is used in a "large number"<sup>175</sup> of provisions of the *Anti-Dumping Agreement*, but does not have the same meaning in all cases: in certain provisions it must be interpreted "narrowly" (as referring only to original investigations); in other provisions it should be read as having a broader meaning (covering original investigations as well as duty assessment proceedings and reviews). The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu observes that Article 2.1 of the *Anti-Dumping Agreement* defines "dumping" "[f]or the purpose of this Agreement". Therefore, "the purpose of Article 2 would be frustrated if Article 2, including Articles 2.4 and 2.4.2, is not generally applicable."<sup>176</sup>

104. Moreover, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu agrees with the dissenting opinion of one Panel member that the term "investigation phase" should be understood to mean "investigation period". This is supported by the fact that the existence of dumping is established not only in the original investigation, but also in duty assessment proceedings and reviews. Moreover, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that administrative reviews are periodic reviews of the amount of the anti-dumping duty, in which investigating authorities analyze past transactions that took place in a given period and ascertain "whether there was actually dumping and the amount of such dumping."<sup>177</sup>

105. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu disagrees with the Panel's finding that Article 2.4.2 of the *Anti-Dumping Agreement* does not apply to duty assessment proceedings pursuant to Article 9.3. Article 9.3 makes an explicit reference to Article 2 of the *Anti-Dumping Agreement*. Cross-references in the *Anti-Dumping Agreement*, according to the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, are "highly relevant and should not be ignored".<sup>178</sup> Furthermore, prohibiting zeroing in original investigations, but not in duty assessment proceedings, "would lead to absurd results"<sup>179</sup> and undermine the effectiveness of Article 2.4.2. The investigating authority would be *required* to determine dumping margins without using zeroing only in original investigations, but would be *allowed* to apply such zeroing in duty assessment proceedings with respect to the same product in subsequent reviews. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the Appellate Body's ruling in *US – Corrosion-Resistant Steel Sunset Review* demonstrates that, "to the extent that investigating

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<sup>175</sup>Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 11.

<sup>176</sup>*Ibid.*, para. 13.

<sup>177</sup>*Ibid.*, [second] para. 16.

<sup>178</sup>*Ibid.*, para. 19.

<sup>179</sup>*Ibid.*, para. 22.

authorities rely on dumping margins, they must conform to the disciplines of Article 2.4, including Article 2.4.2."<sup>180</sup>

106. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu furthermore disagrees that the obligation to make a "fair comparison" does not preclude zeroing in duty assessment proceedings under Article 9.3. Article 2.4 of the *Anti-Dumping Agreement* embodies an overarching and independent principle that "must be followed in any dumping determination".<sup>181</sup> The "fair comparison" requirement "necessarily implies an unbiased comparison"<sup>182</sup>, that is, a comparison that takes into account all data related to normal value and to the export price for purposes of calculating a margin of dumping for an exporter.

### III. Issues Raised in This Appeal

107. The following issues are raised in this appeal:

- (a) with respect to the administrative reviews at issue in this case:
  - (i) whether the Panel erred in finding that the United States did not act inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994;
  - (ii) whether the Panel erred in finding that the United States did not act inconsistently with the obligation in the first sentence of Article 2.4 of the *Anti-Dumping Agreement* to make a "fair comparison" between the export price and the normal value;
  - (iii) whether the Panel erred in finding that zeroing is not an impermissible allowance or adjustment under Article 2.4 of the *Anti-Dumping Agreement*, third to fifth sentences;
  - (iv) whether the Panel erred in finding that the United States did not act inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* when, in the administrative reviews at issue, it used a methodology that involved asymmetrical comparisons between export prices and

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<sup>180</sup>Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 25.

<sup>181</sup>*Ibid.*, para. 30.

<sup>182</sup>*Ibid.*, para. 32.

- normal value, and in which no account was taken of any amount by which export prices exceeded normal value;
- (v) whether the Panel erred in finding that zeroing, as applied in the administrative reviews at issue, is not inconsistent with Articles 11.1 and 11.2 of the *Anti-Dumping Agreement*; and
  - (vi) whether the Panel erred in finding that the zeroing methodology, as applied in the administrative reviews at issue, is not inconsistent with Articles 1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*;
- (b) whether, the Panel erred in finding that the zeroing methodology, as it relates to original investigations, is a "norm" that is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*, specifically:
- (i) whether the Panel erred in finding that the zeroing methodology can be challenged, as such, in WTO dispute settlement;
  - (ii) whether the Panel failed to conduct an objective assessment of the matter before it, including an objective assessment of the facts of the case, as required by Article 11 of the DSU; and
  - (iii) whether the Panel erred in finding that the European Communities had made out a *prima facie* case with respect to the zeroing methodology;
- (c) whether the Panel erred in finding that the zeroing methodology used by the United States in administrative reviews is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*;
- (d) whether the Panel erred in finding that the United States' Standard Zeroing Procedures are not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*;
- (e) whether the Panel erred in exercising judicial economy with respect to whether the 1997 edition of the *Import Administration Antidumping Manual* (the "Anti-Dumping Manual") is a measure that is inconsistent, as such, with Articles 1, 2.4, 2.4.2, 5.8,

9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*;

- (f) whether the Panel erred in exercising judicial economy concerning the consistency of the United States' "practice" of zeroing;
- (g) whether the Panel erred in finding that Section 351.414(c)(2) of the United States Department of Commerce (the "USDOC") Regulations, is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*;
- (h) whether the Panel erred in exercising judicial economy:
  - (i) with respect to whether administrative review proceedings, based on "model zeroing"<sup>183</sup>, are consistent with Article 9.3 of the *Anti-Dumping Agreement*; and
  - (ii) with respect to whether zeroing, as applied in the original investigations at issue, is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*; and
- (i) whether the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the matter before it, including an objective assessment of the facts of the case.

#### **IV. "As Applied" Claims Brought on Appeal by the European Communities**

##### *A. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994*

108. We examine, first, the issue of whether the Panel erred in finding that the United States did not act inconsistently with the requirement, in Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, that the amount of the anti-dumping duty "shall not exceed" or be "greater in amount than" the margin of dumping. This issue relates to the European Communities' challenge of the zeroing methodology, as applied by the United States in the administrative reviews of anti-dumping duty orders listed in Exhibits EC-16 through EC-31. This zeroing methodology is one aspect of the assessment and collection of anti-dumping duties in the United States.

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<sup>183</sup>See *supra*, footnote 8.

1. Assessment and Collection of Anti-dumping Duties in the United States

109. The assessment and collection of anti-dumping duties in the United States can be broadly described in the following terms.<sup>184</sup> The United States system of duty assessment operates on a retrospective basis. Under this system, the United States collects security in the form of a cash deposit at the time a product enters the United States, and determines the amount of duty due on the entry at a later date. Specifically, once a year (during the anniversary month of the order) interested parties may request an administrative review, that is to say, a review to determine the amount of duties owed on entries made during the previous year.<sup>185</sup> The amount of anti-dumping duties owed by each individual importer is calculated on the basis of a comparison of the price of each individual export transaction with a monthly average normal value. The results of these comparisons are then aggregated and expressed as a percentage of each importer's United States imports. This constitutes the assessment rate that is then applied to the entries that occurred during the period reviewed. The amount of dumping found on all imports from a given exporter is also used to derive a cash-deposit rate that will apply on future entries from that exporter. If no administrative review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties and serve as the basis for the cash deposit for the following period. Final anti-dumping duty liability for past entries and the new cash-deposit rate for future entries are calculated by the USDOC and published in a Notice of Final Results of Antidumping Duty Administrative Reviews.

110. When assessing an importer's final liability for paying anti-dumping duties and any future cash-deposit rate, the United States applies a methodology that the European Communities refers to as "simple zeroing".<sup>186</sup> When comparing a weighted-average normal value with the price of an individual export transaction, the amount by which the normal value exceeds the export price is considered to be the "dumped" amount for that export transaction. If the export price exceeds normal value, the result of that particular comparison is considered to be zero. The total amount of dumping for each importer is calculated by aggregating the results of each comparison for which the average normal value exceeds the export price.<sup>187</sup> For each importer, the assessment rate is expressed as a

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<sup>184</sup>This description is based on the description contained in paragraphs 2.4-2.5 of the Panel Report.

<sup>185</sup>The period of time covered by the USDOC's duty assessment proceedings is normally 12 months. However, in the case of the first assessment proceeding following the issuance of the Notice of Antidumping Duty Order, 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 anti-dumping measures.

<sup>186</sup>See *supra*, footnote 10.

<sup>187</sup>In other words, while the value of all export transactions is included in the denominator of the fraction used to calculate an overall margin of dumping, the results of the comparisons for which export prices exceed the average normal value are excluded from the numerator of that fraction.

percentage of the value of all of its imports. The importer is liable to pay the final anti-dumping duty so assessed.

## 2. Panel Report

111. As the Panel noted, it is not disputed that administrative reviews fall within the scope of Article 9 of the *Anti-Dumping Agreement* ("Imposition and Collection of Anti-Dumping Duties") and, in particular, Article 9.3. Article 9.3 provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." The Panel considered that "the threshold legal question before [it] is whether the obligations contained in Article 2.4.2 apply to duty assessment proceedings provided for in Article 9.3."<sup>188</sup> According to the Panel, finding a violation of Article 9.3 presupposes that the zeroing methodology applied by the USDOC in the administrative reviews at issue is inconsistent with Article 2.4 and/or Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>189</sup> The Panel was of the view that the obligations contained in Article 2.4.2 do not apply to duty assessment proceedings provided for in Article 9.3.<sup>190</sup> The Panel also found that, in the administrative reviews at issue, the United States did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement*.<sup>191</sup> Accordingly, the Panel found that the USDOC did not act inconsistently with the requirement set out in Article 9.3. On the basis of this reasoning, the Panel came to the conclusion that the United States also did not act inconsistently with the requirement contained in Article VI:2 of the GATT 1994, that an anti-dumping duty shall not be "greater in amount than the margin of dumping".<sup>192</sup>

112. The Panel considered that the rules for determining the existence of margins of dumping are distinct and separate from the rules for the imposition and collection of anti-dumping duties, and that the amount of duty to be assessed in a proceeding under Article 9.3 is the amount of duty payable on

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<sup>188</sup>Panel Report, para. 7.145.

<sup>189</sup>*Ibid.*, para. 7.287.

<sup>190</sup>*Ibid.*, para. 7.220. In analyzing the issue of whether the obligations contained in Article 2.4.2 apply to duty assessment proceedings provided for in Article 9.3, the Panel examined the phrase "the existence of margins of dumping during the investigation phase shall normally be established on the basis of [certain comparison methods]" in Article 2.4.2. For the Panel, the term "investigation phase" in Article 2.4.2 is the key term and should be read as referring to the concept of "investigation" as used in Article 5. The Panel also reviewed the use of "investigation" and "investigations" in Articles 1, 3, 6, 7, 8, 10, and 12 of the *Anti-Dumping Agreement*. From this review of the context, the Panel concluded that, where these words refer to a proceeding or a phase of a proceeding, they are limited to investigations within the meaning of Article 5.1 of the *Anti-Dumping Agreement*, and that the *Anti-Dumping Agreement* typically does not use the words "investigation" and "investigations" in relation to proceedings that take place after an anti-dumping measure has been imposed. (See also Section IX of the Panel Report for the dissenting opinion of one member of the Panel on the interpretation of Article 2.4.2)

<sup>191</sup>*Ibid.*, para. 7.284. For a summary of the Panel's reasoning, see *infra*, paras. 138-141 and 150.

<sup>192</sup>Panel Report, paras. 7.287-7.288.

imports of the product subject to the anti-dumping order (the "subject product"). For the Panel, the three methods for establishing the existence of margins of dumping set out in Article 2.4.2 apply only in the context of an investigation within the meaning of Article 5, and this may be explained by qualitative differences between the purpose of an investigation under Article 5 and the purposes of subsequent phases of anti-dumping proceedings.<sup>193</sup> The Panel reasoned that considerations relevant to an appropriate comparison methodology in investigations to determine whether dumping exists "may not apply with equal force to the design of a methodology for determining the final liability for payment of anti-dumping duties."<sup>194</sup> According to the Panel, the fact that, in an assessment proceeding under Article 9.3, the margin of dumping must be related to the liability incurred in respect of particular import transactions, distinguishes Article 9.3 proceedings from investigations within the meaning of Article 5. The Panel reasoned that, in an investigation within the meaning of Article 5, the focus is on the overall pricing behaviour of exporters, because the objective is to determine whether dumping exists in order to conclude whether or not the imposition of an anti-dumping measure is justified. The Panel considered that investigations carried out pursuant to Article 5 must be contrasted with proceedings governed by Article 9.3, in which "the extent of dumping found with respect to a particular exporter must be translated into an amount of liability for payment of anti-dumping duties by importers in respect of specific import transactions."<sup>195</sup>

113. The Panel rejected the European Communities' argument that "Article 9.3 must be interpreted in light of Article 2.4.2 and therefore prohibits duty assessment on a transaction-specific and importer-specific basis [and] that all export transactions that fall within the time period covered by a review must be treated as a whole rather than being treated individually."<sup>196</sup> The Panel reasoned that if this contention were accepted, an importer might incur liability for payment of anti-dumping duties on an individual import transaction when the exporter's average export price is below the average normal value, regardless of the export price of that particular transaction.<sup>197</sup> The Panel considered that there is no textual support in Article 9.3 for the view that the *Anti-Dumping Agreement* requires an exporter-oriented assessment of anti-dumping duties<sup>198</sup>, and that, if that were the case, an importer would be liable to pay anti-dumping duties on an import of the subject product when the export price in that transaction exceeds the average normal value.<sup>199</sup>

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<sup>193</sup>Panel Report, para. 7.200.

<sup>194</sup>*Ibid.*, para. 7.201.

<sup>195</sup>*Ibid.*

<sup>196</sup>*Ibid.*, para. 7.203.

<sup>197</sup>*Ibid.*

<sup>198</sup>*Ibid.*, para. 7.204.

<sup>199</sup>*Ibid.*, para. 7.207.

3. Submissions of the Participants

114. On appeal, the European Communities challenges the Panel's findings with respect to Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. For the European Communities, the disagreement between the parties flows, in essence, from their respective interpretations of the terms "dumping" and "margin of dumping" in the *Anti-Dumping Agreement*, and whether these terms apply at the level of the product as a whole, or at the level of a comparison between a weighted-average normal value and an individual export transaction.<sup>200</sup> The European Communities contends that the terms "dumping" and "margin of dumping" are defined in relation to a product as a whole, and that, accordingly, these terms cannot, in principle, apply only for a type, model, or category of that product, including a "category" of one or more relatively low-priced export transactions.<sup>201</sup>

115. According to the European Communities, an investigating authority may undertake multiple intermediate comparisons when establishing margins of dumping. However, the European Communities argues that, because the margins of dumping must be established for the product under investigation as a whole, the investigating authority is required to aggregate the results of all of these multiple intermediate comparisons. According to the European Communities, not taking into account the full amounts by which the individual export price exceeds normal value in the aggregation process is tantamount to disregarding these results. The European Communities maintains that, aside from the exception for targeted dumping in the second sentence of Article 2.4.2, there is no basis in the *Anti-Dumping Agreement* that would justify taking into account the results of some of the multiple comparisons, while disregarding others.<sup>202</sup>

116. The European Communities contends that the Panel erred in concluding that the Appellate Body's findings on zeroing in *EC – Bed Linen* and *US – Softwood Lumber V* were limited to the issue of the use of model zeroing in original investigations when the margin of dumping is calculated using the weighted-average-to-weighted-average methodology provided for in the first sentence of Article 2.4.2.<sup>203</sup> The European Communities submits that "dumping" and "margins of dumping" can only be established for the product under investigation as a whole, and that this is in consonance with the need for consistent treatment of a product in an anti-dumping proceeding.<sup>204</sup> For the European

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<sup>200</sup>European Communities' appellant's submission, para. 57.

<sup>201</sup>*Ibid.*, paras. 59-61.

<sup>202</sup>*Ibid.*, paras. 62-63.

<sup>203</sup>*Ibid.*, paras. 64-65 (referring to Appellate Body Report, *EC – Bed Linen*, para. 53; and Appellate Body Report, *US – Softwood Lumber V*, paras. 91-103).

<sup>204</sup>*Ibid.*, para. 66.

Communities, it is clear that "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' proceedings, and that the use of zeroing by the [United States] in the [administrative reviews] at issue is thus inconsistent with the [*Anti-Dumping Agreement*]"<sup>205</sup>

117. The European Communities recalls that the United States' calculation of revised margins of dumping in administrative reviews, for purposes of establishing the cash-deposit rates, is identical in all relevant respects to the margin calculation performed in original investigations. For the European Communities, there is no basis on which the United States can plausibly argue that zeroing, which is prohibited in original investigations, somehow becomes permitted when the same calculation is carried out in administrative reviews.<sup>206</sup>

118. According to the European Communities, the use of zeroing, in the computation of either the margin of dumping for cash-deposit purposes, or the amount of duty in the final assessment, inflates the amount of the anti-dumping duty, as compared to a computation without zeroing.<sup>207</sup> The European Communities claims that, as a result of the use of zeroing in the administrative reviews at issue, the amount of the anti-dumping duty exceeds the margin of dumping for the product as a whole. Therefore, the use of zeroing constitutes a violation of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.<sup>208</sup>

119. The United States requests the Appellate Body to dismiss the European Communities' appeal concerning Article 9.3 of the *Anti-Dumping Agreement*. The main issue, in the United States' view, is whether, pursuant to Article 9.3, the United States was required to reduce the amount of dumping duties levied on particular import transactions to account for other import transactions in which merchandise was sold at more than normal value. For the United States, the *Anti-Dumping Agreement* does not require such an "offset" when assessing anti-dumping duties. As a result, the United States considers that it is permitted to determine such duties on an import-specific basis.<sup>209</sup>

120. The United States agrees with the Panel that "the concept of 'margin of dumping' in GATT Article VI is defined in terms of a *price difference* in a situation in which a product is introduced into the commerce of another country at less than its normal value i.e. when the export price of the product

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<sup>205</sup>European Communities' appellant's submission, para. 68.

<sup>206</sup>*Ibid.*, para. 69.

<sup>207</sup>*Ibid.*, para. 68.

<sup>208</sup>*Ibid.*, para. 70.

<sup>209</sup>United States' appellee's submission, para. 40.

is less than the normal value of the product."<sup>210</sup> According to the United States, the "product" must be the "product as a whole" when the "price" involves the average of "all comparable export transactions". However, when a Member uses a comparison methodology other than the average-to-average methodology, the "price" to which normal value is compared is the price of an individual export transaction. More specifically, during the investigation phase, Article 2.4.2 authorizes the use of transaction-to-transaction comparisons, or, in specified circumstances, comparisons of individual export transactions to weighted-average normal values. In either case, the "price" is the price of an individual export transaction. According to the United States, in these circumstances, the "product" being introduced into the commerce of the importing Member is the product involved in the particular export transaction. Moreover, Article 2.4.2 does not require that the results of those multiple comparisons be aggregated to represent what the European Communities would consider the "product as a whole", or to be expressed as a percentage.<sup>211</sup>

121. Regarding the findings of the Appellate Body in *US – Softwood Lumber V*, the United States notes that the Appellate Body expressly recognized that the only issue before it was whether "offsets" were required under the average-to-average comparison method found in Article 2.4.2. For the United States, the Appellate Body's findings in that case were limited to the use of the weighted-average-to-weighted-average comparison methodology during the investigation phase.<sup>212</sup>

122. The United States argues that Article 2.4.2 is limited to the establishment of the existence of margins of dumping during the investigation phase. For the United States, the Panel correctly concluded that the reference to Article 2 in Article 9.3 does not override any limitation contained in Article 2.4.2 itself.<sup>213</sup> The United States submits that, in contrast to investigations, Article 9.3 assessment proceedings are not investigations and are not concerned with the "existential question" of whether injurious dumping exists. Instead, Article 9 assessment proceedings are concerned with the measurement of dumping in order to establish the precise amount of an anti-dumping duty that an importer must pay.<sup>214</sup> Given the different functions of an Article 5 investigation and an Article 9 assessment proceeding, obligations that apply with respect to an Article 5 investigation do not necessarily apply to an Article 9 assessment proceeding.<sup>215</sup> For the United States, the European Communities' approach to Article 9.3—namely, that the purpose of a duty assessment proceeding

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<sup>210</sup>Panel Report, para. 7.59 (quoted in United States' appellee's submission, para. 171). (original emphasis)

<sup>211</sup>United States' appellee's submission, paras. 174 and 176.

<sup>212</sup>*Ibid.*, para. 175.

<sup>213</sup>*Ibid.*, paras. 47-50.

<sup>214</sup>*Ibid.*, para. 73.

<sup>215</sup>*Ibid.*, para. 75.

under Article 9.3.1 is simply "to update the temporal frame for the normal value" and that, therefore, there is no reason to apply a different comparison methodology in an assessment proceeding<sup>216</sup>— would improperly prohibit the assessment of anti-dumping duties on an importer- or import-specific basis.<sup>217</sup>

4. Analysis

123. The claim brought by the European Communities raises the question whether the Panel erred in finding that, in the administrative reviews at issue, the United States did not act inconsistently with the requirement in Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 that the amount of the anti-dumping duty shall not exceed or be greater in amount than the margin of dumping. These provisions provide, in relevant part:

*Article 9*<sup>218</sup>

*Imposition and Collection of Anti-Dumping Duties*

...

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

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<sup>216</sup>Panel Report, para. 7.199.

<sup>217</sup>United States' appellee's submission, paras. 91-93.

<sup>218</sup>Articles 9.3.1 and 9.3.2 of the *Anti-Dumping Agreement* provide:

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, 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. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested. (footnote omitted)

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

*Article VI*<sup>219</sup>

*Anti-dumping and Countervailing Duties*

...

2. In 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. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1. (footnote omitted)

124. We begin our analysis with an examination of the meaning of the term "margin of dumping" in Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Article 9.3 refers to the margin of dumping as established under Article 2. Article 2.1 of the *Anti-Dumping Agreement*, which is part of the context of Article 9.3 of the *Anti-Dumping Agreement*, provides:

*Determination of Dumping*

2.1 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.

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<sup>219</sup>Article VI:1 of the GATT 1994 reads:

Members recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry. For the purposes of this Article, 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 when destined for consumption in the exporting country, or,
- (b) in the absence of such domestic price, is less than either
  - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
  - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability. (footnote omitted)

125. The Appellate Body stated, in *US – Softwood Lumber V*, that "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".<sup>220</sup> The Appellate Body also indicated that "the term 'margin of dumping' refers to the magnitude of dumping".<sup>221</sup> Furthermore, we note that Article VI:1 of the GATT 1994 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 of dumping in Article VI:1 of the GATT 1994 is an element of the context of Article VI:2, which refers to the "margin of dumping". In Article VI:2, the correspondence between "dumping" and "margin of dumping" is clear because Article VI:2 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." (emphasis added)

126. In *EC – Bed Linen* and *US – Softwood Lumber V*, the Appellate Body indicated that, under the *Anti-Dumping Agreement* and Article VI of the GATT 1994, "dumping" and "margins of dumping" must be established for the product under investigation as a whole. In particular, in *US – Softwood Lumber V*, the Appellate Body ruled on a claim regarding the calculation of a margin of dumping in an original investigation based on the weighted-average-to-weighted-average methodology as provided for in the first sentence of Article 2.4.2.<sup>222</sup> The Appellate Body confirmed 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 (which, as we mentioned above, 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") indicate clearly that "dumping is defined in relation to a product as a whole".<sup>223</sup> The Appellate Body specified that, while an investigating authority may choose to undertake multiple comparisons or multiple averaging at an intermediate stage to establish margins of dumping, "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."<sup>224</sup> The Appellate Body added that, in the context of the weighted-average-to-weighted-average methodology, there is no justification for "taking into account the 'results' of only some multiple comparisons in the process of

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<sup>220</sup>Appellate Body Report, *US – Softwood Lumber V*, para. 93. Similarly, the Appellate Body had previously stated in *US – Corrosion-Resistant Steel Sunset Review* that, as a result of the opening words of Article 2.1, the word "dumping", as used in Article 11.3 of the *Anti-Dumping Agreement* (a provision regarding sunset reviews), has the meaning described in Article 2.1. (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 108-109 and 126-127)

<sup>221</sup>Appellate Body Report, *US – Softwood Lumber V*, para. 96.

<sup>222</sup>*Ibid.*, paras. 63 and 76.

<sup>223</sup>*Ibid.*, paras. 92-93.

<sup>224</sup>*Ibid.*, para. 97. (original emphasis)

calculating margins of dumping, while disregarding other 'results'.<sup>225</sup> Thus, "[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 under Article 2.4.2."<sup>226</sup> Although, in *US – Softwood Lumber V*, the Appellate Body dealt with a claim regarding the determination of a margin of dumping in an original investigation when using the weighted-average-to-weighted-average methodology provided for in the first sentence of Article 2.4.2, it stated unambiguously that "the terms 'dumping' and 'margins of dumping' in Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the product under investigation as a whole".<sup>227</sup> This finding was based not only on Article 2.4.2, first sentence, but also on the context found in Article 2.1 of the *Anti-Dumping Agreement*.

127. 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".<sup>228</sup> Therefore, 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. If the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not allowed to take into account the results of only some multiple comparisons, while disregarding others. We recall however, that in *US – Softwood Lumber V*, the Appellate Body stated that the investigating authority is required to take into account the results of all multiple comparisons in order to establish margins of dumping for the product as a whole in the specific context of the weighted-average-to-weighted-average methodology, and that it did not address the issue of zeroing in the context of the other methodologies set out in Article 2.4.2.

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<sup>225</sup> Appellate Body Report, *US – Softwood Lumber V*, para. 98.

<sup>226</sup> *Ibid.* (original emphasis)

<sup>227</sup> *Ibid.*, para. 102.

<sup>228</sup> See also *ibid.*, para. 99, where the Appellate Body stated:

Our 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 investigation. 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 anti-dumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole[.] (original emphasis)

128. We move now to the United States' contention that, in duty assessment proceedings, the term "margins of dumping" can be interpreted as applying on a transaction-specific basis.<sup>229</sup> We disagree with this contention. Article 6.10 of the *Anti-Dumping Agreement* provides relevant context for the interpretation of the term "margin of dumping" in Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Article 6.10, which is part of the context of Article 9.3, provides that "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." Therefore, under the first sentence of 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 we see no reason why this rule would not be relevant to duty assessment proceedings governed by Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

129. 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.<sup>230</sup> 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."<sup>231</sup> 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."<sup>232</sup> The Appellate Body noted that there are "no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins".<sup>233</sup> 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 is

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<sup>229</sup>United States' appellee's submission, paras. 171-178; United States' response to questioning at the oral hearing.

<sup>230</sup>Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 208 and 217.

<sup>231</sup>Appellate Body Report, *US – Hot-Rolled Steel*, para. 118. (footnote omitted)

<sup>232</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

<sup>233</sup>*Ibid.*

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.

130. Thus, pursuant to Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, investigating 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 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.

131. Although Article 9.3 sets out a requirement regarding the amount of the assessed anti-dumping duties, it does not prescribe a specific methodology according to which the duties should be assessed. 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.<sup>234</sup>

132. We move now to the question of whether the zeroing methodology applied by the USDOC in the administrative reviews at issue is consistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. It follows from our analysis that, in order to make this determination, it is necessary to compare the anti-dumping duties collected on all entries of the subject product from a given exporter or foreign producer with that exporter's or foreign producer's margin of dumping for the product as a whole. We recall that, if a margin of dumping is calculated on the basis of multiple comparisons made at an intermediate stage, it is only on the basis of aggregating all these intermediate results that an investigating authority can establish margins of dumping for the product as a whole. Therefore, the margins of dumping with which the assessed anti-dumping duties have to be compared

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<sup>234</sup>We understand that, under the methodology currently applied by the USDOC to assess anti-dumping duties, the aggregation of the results of the multiple comparisons performed at an intermediate stage might result in a negative value, for a given importer, if zeroing is not allowed. Of course, this would not mean that the authorities would be required under the *Anti-Dumping Agreement* or Article VI of the GATT 1994 to compensate an importer for the amount of that negative value (that is, when export prices exceed normal value). Nor does it mean that liability for payment of anti-dumping duties may not be based on a prospective normal value as contemplated by Article 9.4(ii) of the *Anti-Dumping Agreement*.

under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 are foreign producers' or exporters' margins of dumping that reflect the results of all of the multiple comparisons carried out at an intermediate stage of the calculation.

133. Furthermore, we recall that, in the administrative reviews at issue, the USDOC assessed the anti-dumping duties according to a methodology in which, for each individual importer, comparisons were carried out between the export price of each individual transaction made by the importer and a contemporaneous average normal value. The results of these multiple comparisons were then aggregated to calculate the anti-dumping duties owed by each individual importer. If, for a given individual transaction, the export price exceeded the contemporaneous average normal value, the USDOC, at the aggregation stage, disregarded the result of this individual comparison. Because results of this type were systematically disregarded, 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 under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Accordingly, the zeroing methodology, as applied by the USDOC 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.

134. 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."

135. In the light of the above, we *reverse* the Panel's finding, in paragraphs 7.288 and 8.1(f) of the Panel Report, that the United States did not act inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in the administrative reviews at issue, and find,

instead, that the United States acted inconsistently with those provisions. We note that the Panel made a finding on Article VI:1 of the GATT 1994, and that this finding was consequential to its finding on Article VI:2 of the GATT 1994. Accordingly, we declare moot, and of no legal effect, the Panel's finding, in paragraphs 7.288 and 8.1(f) of the Panel Report, that the United States did not act inconsistently with Article VI:1 of the GATT 1994.

B. *Article 2.4 of the Anti-Dumping Agreement*

1. Fair Comparison

136. We turn now to the issue of whether the Panel erred in finding that, in the administrative reviews at issue, the USDOC did not act inconsistently with the obligation in the first sentence of Article 2.4 of the *Anti-Dumping Agreement* to make a "fair comparison" between the export price and the normal value.

137. The first sentence of Article 2.4 of the *Anti-Dumping Agreement* provides:

A fair comparison shall be made between the export price and the normal value.

138. The Panel found that the United States did not act inconsistently with the requirement set out in the first sentence of Article 2.4 when, in the calculation of margins of dumping and anti-dumping duties in the administrative reviews at issue, the USDOC compared, at an intermediate stage of the calculation, the average monthly normal value with prices of individual export transactions, and did not include in the calculation any amounts by which export prices of individual transactions exceeded the normal value.

139. The Panel was of the view that the "fair comparison" language in the first sentence of Article 2.4 creates an independent obligation with the implication that this "fair comparison" requirement is not defined exhaustively by the specific requirements set out in the remainder of that paragraph.<sup>235</sup> Relying on the Appellate Body's finding in *EC – Bed Linen* that the obligation to make a fair comparison under the first sentence of Article 2.4 is a "general obligation" that "informs all of Article 2"<sup>236</sup>, the Panel considered that the scope of application of this "fair comparison" requirement is not limited to the general subject matter expressly addressed by paragraph 4 (how to ensure price comparability by selecting comparable transactions or making appropriate adjustments). For the

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<sup>235</sup>Panel Report, para. 7.253.

<sup>236</sup>Appellate Body Report, *EC – Bed Linen*, para. 59.

Panel, the scope of application of the "fair comparison" requirement extends beyond paragraph 4; in particular, it applies to the issue of the calculation of margins of dumping.<sup>237</sup>

140. Moving to the substantive meaning of the term "fair comparison" in the first sentence of Article 2.4, the Panel noted that this sentence sets out a standard that, by its very nature, is "more abstract and less determinate" than most other rules in the *Anti-Dumping Agreement*.<sup>238</sup> According to the Panel, "[t]he meaning of 'fair' in a legal rule must necessarily be determined having regard to the particular context within which that rule operates."<sup>239</sup> In the light of these considerations, the Panel was of the view that, in order to determine what is "fair" under the *Anti-Dumping Agreement* in relation to the calculation of margins of dumping, the analysis must take into account Article 2.4.2 of that Agreement, which specifically addresses the subject of methods of determining margins of dumping, as well as the relevant rules and concepts in Article 9 regarding the imposition and collection of anti-dumping duties.<sup>240</sup>

141. The Panel noted that the second sentence of Article 2.4.2 expressly permits the use of an asymmetrical average-to-transaction method of comparing export price and normal value as an exception to the symmetrical comparison methods in the first sentence of Article 2.4.2. The Panel also recalled its previous finding that the application of Article 2.4.2 does not extend beyond investigations within the meaning of Article 5 of the *Anti-Dumping Agreement*. On that basis, the Panel reasoned that, although zeroing effectively is prohibited under the average-to-average methodology in the first sentence of Article 2.4.2, "the non-application of Article 2.4.2 outside 'the investigation phase' shows that zeroing was not treated as a practice to be banned in all circumstances."<sup>241</sup> The Panel noted that "Article 9 of the [*Anti-Dumping*] *Agreement* clearly permits the use of an asymmetrical method of comparing normal value and individual export prices in the context of a system of variable anti-dumping duties, which necessarily involves zeroing."<sup>242</sup> In the light of these considerations, the Panel expressed the view that the "fair comparison" requirement in Article 2.4 cannot be interpreted to entail a prohibition of asymmetry and zeroing. The Panel added that, given its previous finding that Article 2.4.2 is limited in its application to investigations within the meaning of Article 5 of the *Anti-Dumping Agreement* by virtue of the phrase "the existence of margins of dumping during the investigation phase", "[t]o interpret Article 2.4 as prohibiting asymmetry and zeroing not only in investigations within the meaning of Article 5 but also in duty

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<sup>237</sup>Panel Report, para. 7.255.

<sup>238</sup>*Ibid.*, para. 7.260.

<sup>239</sup>*Ibid.*

<sup>240</sup>*Ibid.*, para. 7.262.

<sup>241</sup>*Ibid.*, para. 7.263.

<sup>242</sup>*Ibid.*, para. 7.264.

assessment proceedings under Article 9 ..., would render ineffective the language in Article 2.4.2 that limits its scope of application to investigations."<sup>243</sup>

142. On appeal, the European Communities challenges the Panel's finding that the United States did not act inconsistently with the first sentence of Article 2.4 of the *Anti-Dumping Agreement*. The European Communities indicates that it agrees with the Panel that Article 2.4 establishes an overarching and independent obligation to make a fair comparison between normal value and export price. Also, the European Communities does not take issue with the Panel's view that the "fair comparison" obligation is not limited to paragraph 4 of Article 2. However, the European Communities contends that the Panel erred because, "absent targeted dumping, a comparison between normal value and export price that does not fully take into account all export transactions does not result in the calculation of a margin of dumping for the product as a whole, and is therefore not a fair comparison within the meaning of Article 2.4, first sentence."<sup>244</sup> Furthermore, the European Communities argues that the USDOC did not make fair comparisons because the methodology it used was performed at the transaction level, which is inconsistent with the logic resulting from the "temporal parameters" the USDOC itself fixed in defining the investigation period for the administrative reviews at issue.<sup>245</sup>

143. The European Communities contends that the methodology employed by the USDOC in the administrative reviews at issue is inconsistent with the first sentence of Article 2.4 because it inflates the margin of dumping and, therefore, is inherently biased. For the European Communities, an inherent bias is built into the methodology used by the USDOC 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, including in the original proceeding."<sup>246</sup> The European Communities adds that the methodology at issue is also unfair because it introduces "unjustified ... discrimination" between exporters or producers that are assessed at the rate resulting from the original proceedings and those that are assessed at a rate calculated in administrative reviews on the basis of the methodology at issue.<sup>247</sup> The European Communities refers to the Appellate Body's statement in *EC – Bed Linen* that "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

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<sup>243</sup>Panel Report, para. 7.267.

<sup>244</sup>European Communities' appellant's submission, para. 75. (footnote omitted)

<sup>245</sup>*Ibid.*, para. 80.

<sup>246</sup>*Ibid.*, para. 86.

<sup>247</sup>*Ibid.*, para. 92.

Article 2.4.2."<sup>248</sup> In the European Communities' view, findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*<sup>249</sup> and *US – Softwood Lumber V*<sup>250</sup> also confirm that the methodology used by the USDOC in this case is unfair and, therefore, inconsistent with the first sentence of Article 2.4 of the *Anti-Dumping Agreement*.

144. The United States requests the Appellate Body to reject the European Communities' appeal concerning Article 2.4. For the United States, the simple fact that one methodology results in a higher dumping margin than another is an insufficient basis to conclude that the first methodology is "unfair" within the meaning of Article 2.4. Rather, the term "fair" must be interpreted in a manner consistent with other obligations in the *Anti-Dumping Agreement*.<sup>251</sup> The United States submits that the text of Article 2.4 does not require the calculation of a margin of dumping with respect to the "product as a whole", because such a requirement cannot be read into the concept of "fair comparison", and the obligation to calculate margins of dumping for the product as a whole is limited to the use of the average-to-average comparison methodology during the investigation phase under Article 2.4.2. If the fair comparison requirement were interpreted so as to impose the same obligation, the United States argues, the first sentence of Article 2.4.2 would be redundant.<sup>252</sup>

145. For the United States, the comparison method in the second sentence of Article 2.4.2 is an exception to the methods in the first sentence, but it is not an exception to the "fair comparison" requirement in Article 2.4. If Article 2.4 requires "offsets", as the United States contends, then "offsets" must be made under the targeted dumping provision of the second sentence of Article 2.4.2. However, according to the United States, applying the average-to-transaction comparison method with "offsets" will yield mathematically the same result as the average-to-average comparison method. Thus, the European Communities' interpretative approach to Article 2.4 would, in the United States' view, nullify the second sentence of Article 2.4.2.<sup>253</sup>

146. We recall that the Panel found, first, 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

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<sup>248</sup>Appellate Body Report, *EC – Bed Linen*, para. 55 (quoted in European Communities' appellant's submission, para. 95). (original emphasis)

<sup>249</sup>Appellate Body Report, *US – Corrosion Resistant-Steel Sunset Review*, paras. 127-128, 130, and 135 (referred to in European Communities' appellant's submission, paras. 96-97).

<sup>250</sup>Appellate Body Report, *US – Softwood Lumber V*, paras. 93, 96-97, 99, and 101 (referred to in European Communities' appellant's submission, para. 99).

<sup>251</sup>United States' appellee's submission, para. 118.

<sup>252</sup>*Ibid.*, paras. 135-136.

<sup>253</sup>*Ibid.*, paras. 143-150.

comparability). The European Communities agrees with these two Panel findings and, accordingly, does not challenge them on appeal. For our part, we see nothing incorrect in the Panel's reasoning with respect to these two specific findings.<sup>254</sup> On the substantive meaning of the term "fair comparison", we also agree with the Panel that the legal rule set out in the first sentence of Article 2.4 is expressed in terms of a general and abstract standard. One implication of this is that this requirement is also applicable to proceedings governed by Article 9.3.

147. We have already found that zeroing, as applied by the USDOC 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. Therefore, an additional finding that the use of the same methodology in the administrative reviews at issue is inconsistent with the "fair comparison" requirement contained in the first sentence of Article 2.4 of the *Anti-Dumping Agreement* does not appear to us necessary for solving this dispute. Accepting the European Communities' claim with respect to Article 2.4, first sentence, would lead to the same result that we have reached after examining zeroing, as applied by the USDOC in the administrative reviews at issue, in the light of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Therefore, we decline to rule on whether the Panel erred in finding that zeroing, as applied by the USDOC in the administrative reviews at issue, is not inconsistent with the "fair comparison" requirement contained in the first sentence of Article 2.4 of the *Anti-Dumping Agreement*. Moreover, the Panel's reasoning with respect to the first sentence of Article 2.4 depends to a large extent on its findings on Article 2.4.2 and Article 9.3.<sup>255</sup> We recall that we reversed the Panel's finding on Article 9.3. In these circumstances, we declare moot, and of no legal effect, the finding of the Panel, in paragraphs 7.284 and 8.1(e) of the Panel Report, that zeroing, as applied by the USDOC in the administrative reviews at issue, is not inconsistent with the first sentence of Article 2.4 of the *Anti-Dumping Agreement*.

2. Whether Zeroing is an Impermissible Allowance or Adjustment under Article 2.4

148. We turn now to the issue of whether the United States acted inconsistently with Article 2.4, third to fifth sentences, of the *Anti-Dumping Agreement* in the administrative reviews at issue. On appeal, the European Communities argues that the Panel erred in rejecting its argument that, in attributing a value of zero to results of comparisons for which the export price exceeds the normal value, the USDOC makes an allowance or adjustment for a difference not affecting price comparability and, therefore, acts inconsistently with Article 2.4, third to fifth sentences, of the *Anti-Dumping Agreement*.

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<sup>254</sup>The Panel's reasoning is set out in paragraphs 7.253-7.258 of the Panel Report.

<sup>255</sup>Panel Report, para. 7.275.

149. The appeal of the European Communities with respect to this issue refers to Article 2.4, third to fifth sentences, which read as follows:

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. (footnote omitted)

150. The Panel rejected the argument of the European Communities that zeroing is inconsistent with Article 2.4 of the *Anti-Dumping Agreement* because it is an allowance or adjustment for a difference other than a difference affecting price comparability. The Panel was of the view that differences in price comparability in Article 2.4 are differences between the product as sold in the export market and the product as sold in the domestic market with respect to factors such as level of trade, taxation, or quantities<sup>256</sup>, and that zeroing is conceptually different from the allowances or adjustments falling within the scope of the third to fifth sentences of Article 2.4. For the Panel, "the argument that zeroing is an impermissible allowance or adjustment for a difference not affecting price comparability cannot be reconciled with the fact that Article 2.4.2 specifically does not deal with zeroing other than in the context of original investigations and that the second sentence of Article 2.4.2 specifically permits an asymmetrical comparison method that would be without any useful effect if zeroing were prohibited."<sup>257</sup> If zeroing is characterized as an impermissible allowance or adjustment, the Panel reasoned, "there is no rational basis to explain why an allowance or adjustment that is prohibited because it does not correspond to a difference affecting price comparability is no longer prohibited in the context of the asymmetrical comparison method provided for in the second sentence of Article 2.4.2 or in the context of a duty assessment proceeding under Article 9."<sup>258</sup>

151. The European Communities appeals the Panel's finding that zeroing is not an impermissible allowance or adjustment for a difference other than a difference affecting price comparability. For the European Communities, the third to fifth sentences of Article 2.4 do not only impose obligations on

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<sup>256</sup>Panel Report, para. 7.279.

<sup>257</sup>*Ibid.*, para. 7.277.

<sup>258</sup>*Ibid.*

Members to make an adjustment for a difference that affects price comparability, they also impose an obligation not to make an adjustment when there is no such difference.<sup>259</sup> The European Communities adds that, if Article 2.4, third to fifth sentences, refer to certain differences for which an adjustment is to be made, the list is illustrative, with the implication that the types of differences and adjustments referred to in the third to fifth sentences are not exhaustive.<sup>260</sup> According to the European Communities, zeroing should be construed as an adjustment or allowance falling within the scope of the third sentence of Article 2.4, because the effect of the zeroing adjustment is to reduce the price at which particular export transactions were in fact made.<sup>261</sup> The European Communities adds that it is "clear that the simple zeroing adjustment... is not made for a 'difference affecting price comparability'".<sup>262</sup> For the European Communities, the Panel erred because, irrespective of whether the simple zeroing adjustment is conceptually different from the elements of the illustrative list of Article 2.4, third to fifth sentences, it is an adjustment not made for a "difference affecting price comparability" and, therefore, it is inconsistent with Article 2.4, third to fifth sentences.<sup>263</sup>

152. The European Communities submits that "[t]he scope of the obligations contained in the third to fifth sentences of Article 2.4 is not limited according to the point in time, or the stage of the calculation, at which the adjustment or allowance is introduced into the calculation of the margin of dumping."<sup>264</sup> Furthermore, the European Communities argues that the Panel erred when it stated that the European Communities' argument cannot be reconciled with Article 2.4.2, because the Panel failed to take into account the opening words of that provision: "Subject to the provisions governing fair comparison in paragraph 4". For the European Communities, these opening words imply that, assuming there is a conflict between, on the one hand, Article 2.4.2 and, on the other hand, the third to fifth sentences of Article 2.4 (a conflict that the European Communities assumes but of which it does not recognize the existence), this conflict should be settled in favour of the third to fifth sentences of Article 2.4.<sup>265</sup> Also, the European Communities submits that the second sentence of Article 2.4.2, relating to targeted dumping, does not support the Panel's finding that zeroing is not an impermissible allowance or adjustment for a difference other than a difference affecting price comparability.<sup>266</sup>

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<sup>259</sup>European Communities' appellant's submission, para. 114.

<sup>260</sup>*Ibid.*, para. 125.

<sup>261</sup>*Ibid.*, para. 128.

<sup>262</sup>*Ibid.*, para. 134.

<sup>263</sup>*Ibid.*, para. 132.

<sup>264</sup>*Ibid.*, para. 129.

<sup>265</sup>*Ibid.*, paras. 136-137.

<sup>266</sup>*Ibid.*, paras. 141-142.

153. The United States contends that the denial of "offsets" is not an undue price adjustment pursuant to Article 2.4, third to fifth sentences. If it were, it would be an undue adjustment for all three comparison methods described in Article 2.4.2. However, such an approach would have the effect of nullifying the second sentence of Article 2.4.2.<sup>267</sup> For the United States, Article 2.4, third to fifth sentences, should be interpreted narrowly "to address pre-comparison price adjustments that affect the comparability of prices between markets."<sup>268</sup> The United States contends that an adjustment is an addition or subtraction made to a specific price due to some characteristic of the sale in order to make the price comparable to some other price.<sup>269</sup>

154. The United States argues that, in the assessment proceedings at issue, no price adjustments were made to account for the extent to which an export price was greater than normal value. The United States adds that the USDOC could not have known if a particular export transaction was sold at a price greater than normal value until it had compared that price with another price, after adjustments had been made for conditions affecting price comparability. For the United States, the USDOC was simply determining which export transactions were sold at less than normal value, and thus, which export transactions gave rise to anti-dumping duties for which the importer was liable. Not reducing that duty because other sales were made at greater than normal value, the United States argues, is not a price adjustment.<sup>270</sup>

155. The European Communities' challenge is based mainly on the third sentence of Article 2.4, according to which "[d]ue allowance shall be made ... for *differences* which affect price comparability". (emphasis added) Although the European Communities refers also to the fourth and fifth sentences of Article 2.4, these sentences constitute specific variants of the principle set out in the third sentence. Accordingly, we will focus in our analysis on the third sentence of Article 2.4.

156. We begin our analysis with the question whether the third sentence of Article 2.4 implies that due allowance should not be made for differences that do not affect price comparability. In our view, if allowances could be made for differences not affecting price comparability, the purpose of the requirement of the third sentence of Article 2.4 would be undermined. Therefore, we are of the view that the third sentence of Article 2.4 also applies *a contrario*: this sentence implies that allowances should not be made for differences that do not affect price comparability. Having said that, the principle set out in the third sentence of Article 2.4, including its *a contrario* application, does not

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<sup>267</sup>United States' appellee's submission, paras. 143-150 and 154.

<sup>268</sup>*Ibid.*, para. 156.

<sup>269</sup>*Ibid.*, para. 157.

<sup>270</sup>*Ibid.*, para. 158.

cover all adjustments, but only adjustments made for those differences that fall within the scope of that principle.

157. The illustrative list in the third sentence of Article 2.4 provides indications as to the nature of the differences covered by the principle set out in that sentence, which refers to differences that include "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics". The elements of this list are all features, or characteristics, of the transactions that are compared. Although the list is illustrative and not exhaustive, it suggests that the adjustments, or allowances, covered by the third sentence are those that are made to take into account the differences relating to characteristics of the compared transactions (export transactions and domestic transactions). Article 2.4 specifies that the differences for which due allowance shall be made are those "which affect price comparability". In our view, this refers to differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transaction. Likewise, the *a contrario* application of this principle prohibits only those adjustments made in relation to differences in characteristics of the compared transactions that do *not* affect price comparability. These are differences that do not have an impact, or are unlikely to have an impact, on the price of the transaction. Therefore, adjustments or allowances made in relation to *differences in price* between export transactions and domestic transactions—such as zeroing—cannot be adjustments or allowances covered by the third sentence of Article 2.4, including its *a contrario* application. Indeed, whether or not a factor affects the price comparability between export and domestic transactions should be determined before this comparison is made, and not after.

158. We recall that, in assessing anti-dumping duties, the USDOC compares the export price of individual transactions with the normal value, and aggregates the results of these comparisons. In the aggregation process, the USDOC disregards the results when the export price exceeds the normal value. The European Communities contends that in doing so, the USDOC makes an allowance or an adjustment for a difference that does not affect price comparability and, therefore, acts inconsistently with the third sentence of Article 2.4. We disagree with this argument of the European Communities. In our view, disregarding a result when the export price exceeds the normal value (zeroing) cannot be characterized as an allowance or an adjustment covered by the third sentence of Article 2.4, including its *a contrario* application. Indeed, this is not undertaken to adjust to a difference relating to a characteristic of the export transaction in comparison with a domestic transaction. Accordingly, we agree with the Panel that, conceptually, zeroing is not an adjustment or an allowance falling within the scope of Article 2.4, third to fifth sentences.

159. In the light of the above, we *uphold* the Panel's finding, in paragraph 7.280 of the Panel Report, that zeroing is not an impermissible allowance or adjustment under Article 2.4, third to fifth sentences.

C. *Article 2.4.2 of the Anti-Dumping Agreement*

160. We turn now to the issue of whether the Panel erred in finding that the United States did not act inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in the administrative reviews at issue.

161. This appeal of the European Communities is conditional. In the event that we reverse the Panel's conclusions either on Article 9.3 of the *Anti-Dumping Agreement* (as well as Article VI:2 of the GATT 1994), or on Article 2.4 of the *Anti-Dumping Agreement*, the European Communities does not appeal the Panel's findings on Article 2.4.2 of the *Anti-Dumping Agreement*.

162. We recall that we reversed the Panel's finding that the United States did not act inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Thus, the condition on which the European Communities' conditional appeal is predicated is not fulfilled. Accordingly, the issue raised by the European Communities' conditional appeal under Article 2.4.2 of the *Anti-Dumping Agreement* is not before us.

163. Having so concluded, we note that, before the Panel, the parties argued at length on the applicability of Article 2.4.2 to administrative reviews under Article 9.3. We also note that the Panel made findings on this issue and that there was also a dissenting opinion on the interpretation of Article 2.4.2.

164. We recognize that the issue of the applicability of Article 2.4.2 to administrative reviews is an important issue, but we consider that the central focus of this appeal is the issue of zeroing, both as it relates to original investigations and administrative reviews. As our reasoning shows, we did not find it necessary to resolve the issue of zeroing in the administrative reviews at issue in this case through an examination of Article 2.4.2. We wish to emphasize that we are not expressing any view in this appeal as to whether Article 2.4.2 is applicable or not to administrative reviews under Article 9.3. Thus, the Panel's findings, in paragraphs 7.223 and 8.1(d) of the Panel Report, should not be considered to have been endorsed by the Appellate Body.

D. *Articles 11.1 and 11.2 of the Anti-Dumping Agreement*

165. Before the Panel, the European Communities argued that, in the administrative reviews at issue, the USDOC acted inconsistently with Articles 11.1 and 11.2 of the *Anti-Dumping Agreement* "as a consequence of the unlawful zeroing method used" in the calculation of margins of dumping.<sup>271</sup> The Panel concluded from this that the European Communities' claims under Articles 11.1 and 11.2 "are dependent in that they presuppose that the zeroing method used by [the] USDOC in these administrative reviews is inconsistent with Article[] 2.4 and/or Article 2.4.2 of the [*Anti-Dumping Agreement*]." <sup>272</sup> Having found no violation of those provisions<sup>273</sup>, the Panel rejected the European Communities' claims under Articles 11.1 and 11.2 of the *Anti-Dumping Agreement* without further analysis.<sup>274</sup>

166. The European Communities challenges the Panel's finding on appeal. According to the European Communities, its claims under Articles 11.1 and 11.2 do not "presuppose" that zeroing, as applied by the USDOC in the administrative reviews at issue, was inconsistent with Article 2.4 and/or Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>275</sup> The European Communities submits that "[t]he re-investigation of the cash deposit rate, which is carried out in conjunction with the retrospective assessment proceeding"<sup>276</sup>, must be consistent with the obligations set out in Articles 11.1 and 11.2. On these grounds, the European Communities contends that the Panel erred in concluding that, in the administrative reviews at issue, the USDOC did not act inconsistently with Articles 11.1 and 11.2 of the *Anti-Dumping Agreement*.

167. The United States rejects the European Communities' contention that the Panel erred in concluding that, in the administrative reviews at issue, the USDOC did not act inconsistently with Articles 11.1 and 11.2 of the *Anti-Dumping Agreement*. According to the United States, the European Communities does not explain what it perceives to be the obligations set forth in Articles 11.1 and 11.2 and how these obligations relate to Article 9.3 assessment proceedings. Furthermore, the European Communities "never reconciled" its claims under Articles 11.1 and 11.2

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<sup>271</sup>European Communities' first written submission to the Panel, paras. 183-210.

<sup>272</sup>Panel Report, para. 7.287.

<sup>273</sup>*Ibid.*, paras. 7.223 and 7.284.

<sup>274</sup>*Ibid.*, para. 7.288.

<sup>275</sup>European Communities' appellant's submission, para. 368. For instance, before the Panel, the European Communities argued that the United States "periodic reviews" of the amount of anti-dumping duties fall under Article 9.3 of the *Anti-Dumping Agreement*. The European Communities argued that "in relation to these matters, the United States was obliged to comply, in particular, with the provisions of Articles 2 and 9 of the *Anti-Dumping Agreement*." (European Communities' first written submission to the Panel, paras. 183-186 and 204-210)

<sup>276</sup>European Communities' appellant's submission, para. 365.

with its own recognition that the duty assessment proceedings conducted by the United States "correspond to and fit within" Article 9.3 of the *Anti-Dumping Agreement*.<sup>277</sup>

168. The European Communities has not, in our view, established that Articles 11.1 and 11.2 of the *Anti-Dumping Agreement* apply to the reassessment of the cash-deposit rate in the context of administrative reviews.<sup>278</sup> In particular, we fail to see how the reassessment of a cash-deposit rate to be applied to future entries could constitute a review of whether the continued imposition of the anti-dumping duty is necessary to counteract dumping that is causing injury.

169. In the light of the above, we *uphold* the Panel's finding, in paragraphs 7.288 and 8.1(f) of the Panel Report, that zeroing, as applied by the USDOC in the administrative reviews at issue, is not inconsistent with Articles 11.1 and 11.2 of the *Anti-Dumping Agreement*.

E. *Articles 1 and 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement*

170. Before the Panel, the European Communities argued that, in the administrative reviews at issue, the USDOC acted inconsistently with Articles 1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* "as a consequence of the unlawful zeroing method used in the calculation of margins of dumping."<sup>279</sup> The Panel concluded from this that the European Communities' claims under those provisions "are dependant in that they presuppose that the zeroing method used by [the] USDOC in these administrative reviews is inconsistent with Article[] 2.4 and/or Article 2.4.2" of the *Anti-Dumping Agreement*.<sup>280</sup> Having found no violation of Article 2.4 or Article 2.4.2<sup>281</sup>, the Panel concluded that the United States had also not violated Articles 1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.<sup>282</sup>

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<sup>277</sup>United States' appellee's submission, para. 219 (referring to European Communities' first written submission to the Panel, para. 183).

<sup>278</sup>We note that, in any event, the European Communities argued before the Panel that administrative reviews are not subject to the provisions of Article 11.2 of the *Anti-Dumping Agreement*. Instead, they "correspond to and fit within" Article 9.3 of the *Anti-Dumping Agreement*. The European Communities further emphasized that, in referring to Articles 11.1 and 11.2, it was "[a]ssuming, only for the sake of argument, that part of the measure (the decision to apply a revised estimated anti-dumping duty deposit rate for the future) ... was a 'review' within the meaning of Article 11.2 of the *Anti-Dumping Agreement*." (See European Communities' first written submission to the Panel, paras. 183, 185 and 187)

<sup>279</sup>*Ibid.*, paras. 183-210.

<sup>280</sup>Panel Report, para. 7.287.

<sup>281</sup>*Ibid.*, paras. 7.223 and 7.284.

<sup>282</sup>*Ibid.*, para. 7.288.

171. The European Communities challenges the Panel's finding on appeal. According to the European Communities, the Panel erred in stating that the European Communities' claims under Articles 1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* were "dependent" on a finding of violation of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.<sup>283</sup> Instead, according to the European Communities, it argued before the Panel that the United States' zeroing methodology "results, simultaneously, in the violation of several different obligations" in the covered agreements, including Articles 2.4, 2.4.2, and 9.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 of the GATT 1994.<sup>284</sup>

172. Given that we have found that the zeroing methodology, as applied by the USDOC 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, it is not necessary, for purposes of resolving this dispute, for us to rule on whether the zeroing methodology, as applied in the administrative reviews at issue, is also inconsistent with Articles 1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.

## V. Consistency of Zeroing "As Such"

### A. *The Panel's Consideration of the Standard Zeroing Procedures, the Anti-Dumping Manual, and the "Practice or Methodology" of Zeroing*

173. Before the Panel, the European Communities challenged, as being inconsistent, as such, with Articles 1, 2.4, 2.4.2, 5.8, 9.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*, a measure "consisting of or including"<sup>285</sup> the Standard Zeroing Procedures<sup>286</sup>, the United States' "practice or methodology" of zeroing, and the Anti-Dumping Manual.

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<sup>283</sup>European Communities' appellant's submission, para. 368.

<sup>284</sup>*Ibid.*; European Communities' first written submission to the Panel, paras. 204-210.

<sup>285</sup>European Communities' first written submission to the Panel, para. 125.

<sup>286</sup>We briefly describe the "Standard Zeroing Procedures" as identified by the European Communities in this case. Standard programming used by the USDOC to calculate margins of dumping contains the following line of computer code: "WHERE EMARGIN GT 0". The European Communities explains that this line contains the instruction to select only the results of intermediate comparisons that are positive, and to ignore those that are negative. The European Communities further explains that this is "the key feature of the architecture that the [European Communities] refers to as 'zeroing'." (European Communities' appellee's submission, para. 14) The European Communities describes this line of computer code, along with the lines surrounding it as the "Standard Zeroing Procedures". (Panel Report, paras. 7.70 and 7.91; European Communities' first written submission to the Panel, paras. 16, 21-22, 37-38; European Communities' response to Question 51 posed by the Panel; and European Communities' second written submission to the Panel, para. 69) The Panel noted that the term "Standard Zeroing Procedures" is not used in United States anti-dumping laws and regulations. (Panel Report, para. 7.71)

174. The Panel began its analysis by reviewing the findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*. The Panel recalled that the Appellate Body has found 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, as such, that is, independently from their application in specific cases.<sup>287</sup> The Panel further noted that the Appellate Body has found that:

... there is no basis either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measures can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*.<sup>288</sup>

175. Next, the Panel noted that the Appellate Body had confirmed, in *US – Oil Country Tubular Goods Sunset Reviews*, that the USDOC's Sunset Policy Bulletin (the "SPB") is a measure that can be challenged, as such.<sup>289</sup> For the Panel, it follows from the Appellate Body's reasoning in that case that a measure can be challenged as an "act" or "instrument", even where the measure in question is not "a legal instrument" under the law of the responding party and does not bind the relevant authorities.<sup>290</sup> On this basis, the Panel stated that:

... to characterize the "Standard Zeroing Procedures" as an act or instrument that sets forth rules or norms intended to have general and prospective application is somewhat difficult to reconcile with the fact that the "Standard Zeroing Procedures" are only applicable in a particular anti-dumping proceeding as a result of their inclusion in the computer program[] used in that particular proceeding. The need to incorporate these lines of computer code into each individual program[] indicates that it is not the "Standard Zeroing Procedures" *per se* that set forth rules or norms of general and prospective application. For this reason, we also question whether these "Standard Zeroing Procedures" are "administrative procedures" within the ordinary meaning of that term as used in Article 18.4 of the [*Anti-Dumping Agreement*]. The "Standard Zeroing Procedures" by themselves do not create anything and are simply a reflection of something else.<sup>291</sup>

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<sup>287</sup>Panel Report, para. 7.93 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87).

<sup>288</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88.

<sup>289</sup>Panel Report, paras. 7.94-7.96 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187).

<sup>290</sup>*Ibid.*, para. 7.96.

<sup>291</sup>*Ibid.*, para. 7.97.

176. Although the Panel did not focus on the Standard Zeroing Procedures as a measure *per se*, it considered that "they can be relevant evidence to ascertain the existence of a methodology."<sup>292</sup>

177. The Panel then turned to consider the European Communities' claim regarding the United States' "practice or methodology" of zeroing. In doing so, the Panel proceeded, first, to consider whether there exists what the European Communities terms "methodology", and whether this methodology can be found to be WTO-inconsistent.<sup>293</sup> According to the Panel, if a non-binding policy instrument, such as the SPB, "is a measure that can be challenged as such, it must logically also be possible to challenge as a measure a norm that is not expressed in the particular form of an official written statement but the existence of which is made manifest on the basis of other evidence."<sup>294</sup> For the Panel, the objective of protecting the security and predictability of the multilateral trading system could be frustrated "if well-established norms that systematically and predictably lead to WTO-inconsistent actions cannot be challenged or if they can be challenged only if they are embodied in a particular type of instrument."<sup>295</sup>

178. Based on these considerations, the Panel went on to determine whether "what is challenged by the European Communities as methodology constitutes a norm that is WTO-inconsistent as such."<sup>296</sup> The Panel underscored that "a finding that a norm is as such WTO-inconsistent must rest on solid evidence that enables a panel to determine the precise content of that norm and the conduct to which that norm will necessarily give rise in [the] future."<sup>297</sup> According to the Panel, "[i]n the case of the SPB, the necessary precision and predictability resulted from the availability of an official policy statement that set out with a considerable degree of detail the methodology the USDOC intended to apply in certain situations."<sup>298</sup> The Panel added, however, that there are also "other types of evidence that can be used to establish with the necessary degree of precision the content of a norm and the future conduct it will generate."<sup>299</sup>

179. Turning to the evidence that was before it, the Panel found that "the instruction not to include comparison results with negative margins in the numerator of the dumping margin is reflected in certain lines of computer code that are *always* included in the computer program[s] used by [the]

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<sup>292</sup>Panel Report, para. 7.102. (footnote omitted)

<sup>293</sup>*Ibid.*, para. 7.98.

<sup>294</sup>*Ibid.*, para. 7.99.

<sup>295</sup>*Ibid.*, para. 7.100 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

<sup>296</sup>*Ibid.*, para. 7.101.

<sup>297</sup>*Ibid.*, para. 7.102.

<sup>298</sup>*Ibid.*

<sup>299</sup>*Ibid.*

USDOC in anti-dumping proceedings."<sup>300</sup> The Panel also noted that "the United States does not contest that the lines of computer code identified by the European Communities as 'Standard Zeroing Procedures' are *a constant feature* of the computer program[s] used by [the] USDOC to perform dumping margin calculations."<sup>301</sup> On this basis, the Panel stated that the evidence before it "indicates that this exclusion of comparison results with negative margins has been invariably performed by [the] USDOC for an extended period of time."<sup>302</sup> The Panel added that the United States had been "unable to identify any instance where [the] USDOC had given a credit for non-dumped sales"<sup>303</sup> and that the United States "ha[d] not contested in this proceeding that [the] USDOC's zeroing methodology reflects a deliberate policy."<sup>304</sup>

180. Based on this analysis, the Panel concluded that "the zeroing methodology manifested in the 'Standard Zeroing Procedures' represents a well-established and well-defined norm followed by [the] USDOC and that it is possible based on this evidence to identify with precision the specific content of that norm and the future conduct that it will entail."<sup>305</sup> For the Panel, the situation was "the same as in the case of the [SPB], except that the zeroing methodology is not expressed in writing."<sup>306</sup> Against this background, and recalling its previous finding that the use of model zeroing in the original investigations at issue is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, the Panel found that the United States' zeroing methodology, as it relates to original investigations, is a "norm" that is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>307</sup>

181. Having reached this conclusion, the Panel declined to rule on the European Communities' claim that the Anti-Dumping Manual is WTO-inconsistent "as such".<sup>308</sup> In doing so, the Panel explained that the Anti-Dumping Manual "ha[d] been referred to by the European Communities principally as evidence to confirm the 'standard' character of the 'Standard Zeroing Procedures'."<sup>309</sup>

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<sup>300</sup>Panel Report, para. 7.103. (emphasis added)

<sup>301</sup>*Ibid.* (emphasis added)

<sup>302</sup>*Ibid.*

<sup>303</sup>*Ibid.*

<sup>304</sup>*Ibid.*

<sup>305</sup>*Ibid.*, para. 7.104. (footnote omitted)

<sup>306</sup>*Ibid.*

<sup>307</sup>*Ibid.*, para. 7.106.

<sup>308</sup>The parties agreed before the Panel that the Anti-Dumping Manual is a measure. (European Communities' appellant's submission, para. 342 and footnote 340 thereto (referring to United States' first written submission to the Panel, para. 83)) In the words of the United States, "[f]or purposes of this dispute, the United States does not contest the [European Communities'] assertion that the [Anti-Dumping] Manual is a 'measure' for purposes of a WTO dispute." (United States' first written submission to the Panel, para. 83)

<sup>309</sup>Panel Report, para. 7.107. We examine the European Communities' appeal regarding the Panel's decision not to rule on the WTO-consistency of the Anti-Dumping Manual *infra*, in paragraphs 223-225.

182. We turn next to address the claims raised by the United States in its other appeal.

B. *The Zeroing Methodology "As Such" – Other Appeal by the United States*

183. The United States requests the Appellate Body to reverse the Panel's finding that the United States' zeroing methodology, as it relates to original investigations, is a "norm" that is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*. The United States points to several alleged errors in the Panel's reasoning.<sup>310</sup> It argues, in particular, that:

- (i) the Panel erred in finding that the zeroing methodology is a measure that can be challenged, as such, in dispute settlement proceedings;
- (ii) the Panel failed to make an objective assessment of the matter before it (including an objective assessment of the facts of the case) as required by Article 11 of the DSU; and
- (iii) the Panel erred in allocating the burden of proof regarding this claim and in finding that the European Communities had established a *prima facie* case.

184. We examine each of these allegations in turn below. We start by examining the issue of whether the zeroing methodology, as put forth by the European Communities in this dispute, can be challenged, as such, in dispute settlement proceedings.

1. Whether the Zeroing Methodology Can be Challenged, As Such, in Dispute Settlement Proceedings

185. The United States claims that the Panel erred in finding that the zeroing methodology is a measure that can be challenged, as such, in dispute settlement proceedings. According to the United States, the Panel's conclusion is not supported by the text of the DSU or by previous rulings by the Appellate Body regarding the types of measures that can be challenged, as such, in dispute settlement proceedings.<sup>311</sup> In particular, the Panel erred in finding that the zeroing methodology is a "norm" and, thus, a "measure" even though it "did not identify any act or instrument of the United States setting forth or creating that rule or norm."<sup>312</sup> The United States further submits that the Panel applied an improper standard in assessing the types of measures that can be subject to dispute settlement

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<sup>310</sup>We note that the United States has not appealed the Panel's finding that "model zeroing", *as applied* in the original investigations listed in Exhibits EC-1 through EC-15, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. Therefore, in this appeal, we are not required to, and we do not address that issue.

<sup>311</sup>United States' other appellant's submission, paras. 11-12 (referring to Article 3.3 of the DSU and to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-82).

<sup>312</sup>*Ibid.*, para. 33.

proceedings, such that its analysis was not of the kind required by the Appellate Body in previous disputes. According to the United States, the evidence relied upon by the Panel to reach that conclusion was "historical"<sup>313</sup> and "did not suggest anything other than that the decision-makers in past cases simply considered zeroing to be an appropriate response to the facts."<sup>314</sup>

186. In contrast, the European Communities underscores that the Appellate Body has previously stated that there are no limitations on the types of measures that may, as such, be subject to WTO dispute settlement.<sup>315</sup> The European Communities also contests the United States' assertion that the Panel relied exclusively on evidence of past behaviour to support its conclusion that the zeroing methodology is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*. The European Communities emphasizes that the evidence before the Panel included the Anti-Dumping Manual, the standard programs used by the USDOC to calculate margins of dumping, and the Standard Zeroing Procedures. In addition, the European Communities points out that the Panel had before it other "supporting and corroborating" evidence, including the expert opinions<sup>316</sup>, and the "as applied" documents<sup>317</sup>, "which themselves systematically refer to the [United States'] consistent methodology or practice".<sup>318</sup>

187. We begin our analysis by examining the concept of "measure". Article 3.3 of the DSU provides that the dispute settlement system exists to deal with "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". (emphasis added) As the United States correctly points out, the Appellate Body has previously stated that "[t]his phrase identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'".<sup>319</sup>

188. In previous cases, the Appellate Body has addressed, in the context of the *Anti-Dumping Agreement*, the scope of "measures" that may, as such, be the subject of WTO dispute settlement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated 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."<sup>320</sup> The Appellate Body also noted that measures that can be subject

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<sup>313</sup>United States' other appellant's submission, para. 36.

<sup>314</sup>*Ibid.*, para. 37.

<sup>315</sup>European Communities' appellee's submission, para. 26 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 86).

<sup>316</sup>Exhibits EC-44 and EC-46 submitted by the European Communities to the Panel.

<sup>317</sup>Exhibits EC-1 through EC-31 submitted by the European Communities to the Panel.

<sup>318</sup>European Communities' appellee's submission, para. 11. (original emphasis and footnote omitted)

<sup>319</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

<sup>320</sup>*Ibid.* (emphasis added; footnote omitted)

to WTO dispute settlement can include, not only acts applying a law in a specific situation, but also "acts setting forth rules or norms that are intended to have general and prospective application."<sup>321</sup> Moreover, "instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance."<sup>322</sup>

189. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body emphasized the seriousness of "as such" claims:

"[A]s such" challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing "as such" challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than "as applied" claims.<sup>323</sup>

In the same case, the Appellate Body further confirmed its finding that "'acts setting forth rules or norms that are intended to have general and prospective application' are measures subject to WTO dispute settlement".<sup>324</sup> Applying this standard explicitly to the issue of whether the SPB is a measure that can be challenged, as such, the Appellate Body found that:

... the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance. Thus, ... the SPB, as such, is subject to WTO dispute settlement.<sup>325</sup> (footnote omitted)

190. Having recalled the previous findings of the Appellate Body regarding the types of measures that can be subject to an "as such" challenge, we now turn to examine whether the zeroing methodology, as framed by the European Communities in this dispute, constitutes such a measure. In

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<sup>321</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82. (footnote omitted)

<sup>322</sup> *Ibid.*, para. 82.

<sup>323</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

<sup>324</sup> *Ibid.*, para. 187 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

<sup>325</sup> *Ibid.*, para. 187.

particular, we consider whether the zeroing methodology, which, as the Panel said, "is not expressed in writing"<sup>326</sup>, can be subject to dispute settlement under the *Anti-Dumping Agreement*.

191. In the context of the *Anti-Dumping Agreement*, the Appellate Body has said that Article 17.3<sup>327</sup> "underlines that a measure attributable to a Member may be submitted to dispute settlement *provided only* that another Member has taken the view, in good faith, that the measure nullifies or impairs benefits accruing to it under the *Anti-Dumping Agreement*."<sup>328</sup> In other words, "[t]here is no threshold requirement, in Article 17.3, that the measure in question be of a certain type."<sup>329</sup>

192. Article 18.4 of the *Anti-Dumping Agreement* is also relevant to the question of the type of measures that can, as such, be submitted to dispute settlement under the *Anti-Dumping Agreement*. That provision contains an explicit obligation for Members to ensure that their "laws, regulations and administrative procedures" are in conformity with the obligations set forth in that Agreement. The phrase "laws, regulations and administrative procedures" encompasses, in our view, "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings."<sup>330</sup> As the Appellate Body has previously explained, the determination of the scope of "laws, regulations and administrative procedures" must be based on the "content and substance" of the alleged measure, and "not merely on its form."<sup>331</sup> Accordingly, the mere fact that a "rule or norm" is not expressed in the form of a written instrument, is not, in our view, determinative of the issue of whether it can be challenged, as such, in dispute settlement proceedings. Rather, as the Appellate Body has stated, "there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure[s] can, as such, be challenged in dispute settlement proceedings under the *Anti-*

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<sup>326</sup>Panel Report, para. 7.104.

<sup>327</sup>Article 17.3 of the *Anti-Dumping Agreement* provides, in relevant part:

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. (emphasis added)

<sup>328</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 86. (emphasis added)

<sup>329</sup>*Ibid.*

<sup>330</sup>*Ibid.*, para. 87 and footnote 87 thereto.

<sup>331</sup>*Ibid.*

*Dumping Agreement*.<sup>332</sup> This is, moreover, consistent with the comprehensive nature of the right of Members to resort to dispute settlement to "preserve [their] rights and obligations ... under the covered agreements, and to clarify the existing provisions of those agreements" as provided for in Article 3.2 of the DSU.

193. For all these reasons, and based on our review of the DSU and the *Anti-Dumping Agreement*, we see no basis to conclude that "rules or norms" can be challenged, as such, *only* if they are expressed in the form of a written instrument.

194. We note that the participants in this case agree that an "as such" challenge can, in principle, be brought against a measure that is not expressed in the form of a written document.<sup>333</sup> Thus, according to the European Communities, there is nothing in the covered agreements or in WTO jurisprudence to suggest that a measure must be in written form.<sup>334</sup> The European Communities further argues that there are measures that can be just as effective, normative, and as much a rule that are not transposed into writing.<sup>335</sup> In the present case, the European Communities insists that, before the Panel, it had not relied merely on "repeat action" as evidence of the existence of an "as such" measure.<sup>336</sup> Instead, referring, *inter alia*, to the standard programs used by the USDOC to calculate margins of dumping and the Standard Zeroing Procedures, the European Communities suggests that, in this case, there is "overwhelming" evidence of the existence of the zeroing methodology as a "norm".<sup>337</sup>

195. Although the United States agrees with the European Communities that an unwritten measure can, in principle, be challenged, as such, it emphasizes that, to hold a WTO Member accountable for such a measure requires much more evidence and analysis than that in which the Panel engaged in this case.<sup>338</sup> The United States takes issue with the standard adopted by the Panel arguing that it would mean that "abstractions can be measures".<sup>339</sup> Moreover, the Panel's approach would mean that when a Member does something in a particular instance, the Member's action results in a separate measure that may be subject to an "as such" challenge, at least if the Member repeats the action with some

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<sup>332</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88. We note that Article XXVIII(a) of the *General Agreement on Trade in Services* defines a "measure", for the purposes of that Agreement, to be "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form".

<sup>333</sup>United States' and European Communities' responses to questioning at the oral hearing.

<sup>334</sup>European Communities' response to questioning at the oral hearing.

<sup>335</sup>*Ibid.*

<sup>336</sup>*Ibid.*

<sup>337</sup>*Ibid.*

<sup>338</sup>United States' response to questioning at the oral hearing.

<sup>339</sup>United States' other appellant's submission, paras. 4 and 8.

indeterminate frequency.<sup>340</sup> According to the United States, this approach "would start the WTO dispute settlement system down the path of legislating 'norms' rather than resolving disputes concerning measures."<sup>341</sup>

196. We agree with the United States that a panel must not lightly assume the existence of a "rule or norm" constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document. If a panel were to do so, it would act inconsistently with its obligations under Article 11 of the DSU to "make an objective assessment of the matter" before it.

197. When an "as such" challenge is brought against a "rule or norm" that is expressed in the form of a written document—such as a law or regulation—there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged. The situation is different, however, when a challenge is brought against a "rule or norm" that is *not* expressed in the form of a written document. In such cases, the very existence of the challenged "rule or norm" may be uncertain.

198. In our view, when bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such. This evidence may include proof of the systematic application of the challenged "rule or norm". Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such.<sup>342</sup>

199. Turning to the specifics of this appeal, the Panel noted that the Standard Zeroing Procedures "can be relevant evidence to ascertain the existence of a methodology."<sup>343</sup> The Panel found that "the instruction not to include comparison results with negative margins in the numerator of the dumping

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<sup>340</sup>United States' opening statement at the oral hearing.

<sup>341</sup>United States' other appellant's submission, para. 4.

<sup>342</sup>This does not mean that a mere abstract principle would qualify as a "rule or norm" that can be challenged, as such.

<sup>343</sup>Panel Report, para. 7.102. (footnote omitted)

margin is reflected in certain lines of computer code that are *always* included in the computer program[s] used by [the] USDOC in anti-dumping proceedings."<sup>344</sup> Furthermore, the Panel noted that "the United States [did] not contest that the lines of computer code identified by the European Communities as 'Standard Zeroing Procedures' [were] *a constant feature* of the computer program[s] used by [the] USDOC to perform dumping margin calculations."<sup>345</sup> On this basis, the Panel stated that the evidence before it "indicates that this exclusion of comparison results with negative margins has been *invariably* performed by [the] USDOC for an extended period of time."<sup>346</sup> The Panel added that the United States had been "unable to identify any instance where [the] USDOC had given a credit for non-dumped sales"<sup>347</sup>, and that the United States "ha[d] not contested in this proceeding that [the] USDOC's zeroing methodology reflects a deliberate policy."<sup>348</sup>

200. Based on its assessment of this evidence, the Panel concluded that "the zeroing methodology manifested in the 'Standard Zeroing Procedures' represents a well-established and well-defined norm followed by [the] USDOC and that it is possible based on this evidence to identify with precision the specific content of that norm and the future conduct that it will entail."<sup>349</sup>

201. Based on our review, we observe that the evidence before the Panel consisted of the USDOC determinations in the "as applied" cases challenged by the European Communities<sup>350</sup>, as well as the standard programs used by the USDOC to calculate margins of dumping.<sup>351</sup> Furthermore, the Panel had before it expert opinions regarding the use and the content of the zeroing methodology.<sup>352</sup> In addition, we note that the Panel had before it the United States' recognition that it had been "unable to identify any instance where [the] USDOC had given a credit for non-dumped sales".<sup>353</sup> The Panel noted that the United States "ha[d] not contested in this proceeding that [the] USDOC's zeroing methodology reflects a deliberate policy."<sup>354</sup> Furthermore, the United States indicated in its opening statement at the oral hearing that it will soon be publicly announcing that it no longer will engage in

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<sup>344</sup>Panel Report, para. 7.103. (emphasis added)

<sup>345</sup>*Ibid.* (emphasis added)

<sup>346</sup>*Ibid.* (emphasis added)

<sup>347</sup>*Ibid.* (footnote omitted)

<sup>348</sup>*Ibid.*, para. 7.103.

<sup>349</sup>*Ibid.*, para. 7.104. (footnote omitted)

<sup>350</sup>Exhibits EC-1 through EC-15 submitted by the European Communities to the Panel.

<sup>351</sup>Exhibits EC-43 and EC-46 submitted by the European Communities to the Panel.

<sup>352</sup>Exhibits EC-44 and EC-46 submitted by the European Communities to the Panel.

<sup>353</sup>Panel Report, para. 7.103. (footnote omitted)

<sup>354</sup>*Ibid.*, para. 7.103.

zeroing when using the weighted-average-to-weighted-average methodology for purposes of calculating margins of dumping in original investigations.

202. The Anti-Dumping Manual has also been referred to by the European Communities as evidence of "the 'standard' character of the 'Standard Zeroing Procedures'".<sup>355</sup> The United States did not contest, before the Panel or on appeal, that the Anti-Dumping Manual characterizes the programs used by the USDOC to calculate anti-dumping margins as "standard", and explains that the USDOC's "calculation methodology" is "built into these programs".<sup>356</sup> The Anti-Dumping Manual further states that "[c]alculation consistency occurs when every program uses the same standard calculation methodology" and that "[c]onsistency is achieved by insuring that the standard programs conform with current AD calculation methodology."<sup>357</sup>

203. Reviewing the Panel's reasoning, it is evident that there are several features of the Panel's analysis that differ from our own. First, the Panel did not articulate the criteria for bringing an "as such" challenge in the same way as we have above.<sup>358</sup> Moreover, the Panel did not, in its analysis, clearly distinguish between the issue of ascertaining the existence of the challenged measure, which is especially important when unwritten measures are at issue, and the separate examination of its consistency with the relevant provisions of the covered agreements.<sup>359</sup> We are also of the view that the Panel did not articulate its ultimate conclusion regarding the consistency of the "zeroing methodology" with Article 2.4.2 with sufficient precision.<sup>360</sup> We wish to clarify, however, that we are not making any finding here with respect to the consistency of the zeroing methodology, as such, with the second or third methodology set forth in Article 2.4.2 for establishing the existence of margins of dumping.<sup>361</sup>

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<sup>355</sup>Panel Report, para. 7.107.

<sup>356</sup>Anti-Dumping Manual, chapter 9, p. 10.

<sup>357</sup>*Ibid.*, p. 8.

<sup>358</sup>See *supra*, para. 198.

<sup>359</sup>We note that the Panel referred to the Report of the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, expressing the view that if "a non-legally binding policy instrument such as the SPB is a measure that can be challenged as such, it must logically also be possible to challenge as a measure a norm that is not expressed in the particular form of an official written statement but the existence of which is made manifest on the basis of other evidence." (Panel Report, para. 7.99) The Appellate Body's analysis of the SPB does not, in our view, answer the question whether an *unwritten* "norm" can be challenged, as such.

<sup>360</sup>In particular, we note that the Panel's finding, on its face, is not clearly limited to a finding regarding the consistency of the zeroing methodology, as it relates to original investigations in which the weighted-average-to-weighted-average methodology contemplated in the first sentence of Article 2.4.2 is used to establish margins of dumping. Nevertheless, this is what we understand the Panel to have meant. (See Panel Report, para. 7.105)

<sup>361</sup>We note that the United States has not appealed the Panel's finding that "model zeroing" *as applied* in the original investigations listed in Exhibits EC-1 through EC-15 is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. Therefore, in this appeal, we are not required to, and we do not address that issue.

204. Notwithstanding these shortcomings in the Panel's reasoning, we believe that, in the specific circumstances of this case, the evidence before the Panel was sufficient to identify the precise content of the zeroing methodology; that the zeroing methodology is attributable to the United States, and that it does have general and prospective application. This evidence consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract. We therefore cannot agree with the United States that the Panel's approach, in this case, would mean that when a Member does something in a particular instance, the Member's action results in a separate measure that may be subject to an "as such" challenge, at least if the Member repeats the action with some indeterminate frequency.<sup>362</sup>

205. In the light of these considerations, we conclude, albeit for reasons different from those set out by the Panel, 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, can be challenged, as such, in WTO dispute settlement.

## 2. Article 11 of the DSU

206. We turn next to consider the United States' claim that the Panel acted inconsistently with Article 11 of the DSU in finding 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*.

207. The United States submits that, even assuming, *arguendo*, that the zeroing methodology could constitute a "measure", the Panel failed to make an objective assessment of the matter as required under Article 11 of the DSU. The United States advances two sets of arguments to support its claim.

208. First, the United States argues that, "[i]n order to conclude that a measure, as such, is inconsistent with a WTO obligation, that measure must mandate a breach of that obligation."<sup>363</sup> The United States contends, moreover, that "[t]he standard for determining whether a measure as such breaches a WTO obligation is that the measure either mandates WTO-inconsistent action or precludes WTO-consistent action."<sup>364</sup>

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<sup>362</sup>United States' opening statement at the oral hearing.

<sup>363</sup>United States' other appellant's submission, para. 43.

<sup>364</sup>*Ibid.*, para. 44.

209. Secondly, the United States argues that "in order to determine whether a measure is 'as such' inconsistent, reliance solely on statistics or aggregate results is not enough."<sup>365</sup> Instead, "it has to be established that the measure causes the results."<sup>366</sup> The United States finds support for its position in the Appellate Body Report in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, where the Appellate Body held, in the context of the SPB, that it had to be "demonstrate[d] that the SPB *instructs* the USDOC to treat dumping margins and import volumes as conclusive" and that the USDOC "made a final ... determination ... *due to* the SPB".<sup>367</sup> The United States argues that the Panel engaged in no comparable analysis with respect to the zeroing methodology in the present case. The United States also highlights the serious nature of an "as such" challenge, and the particular rigour required in assessing such a challenge. The United States submits that the Panel failed to reach the requisite level of rigour and thus acted inconsistently with Article 11 of the DSU.

210. The European Communities contests the United States' claim that the Panel acted inconsistently with Article 11 of the DSU in its analysis. Referring to findings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, the European Communities argues that the mandatory/discretionary distinction has not been recognized in Appellate Body jurisprudence. In any event, according to the European Communities, there are several reasons why "the mechanistic application of the mandatory/discretionary rule cannot avert a finding of inconsistency in this particular case."<sup>368</sup> The European Communities argues in this respect that a measure need not "be framed in the strongest 'compelling' language ... in order to be found [WTO-]inconsistent".<sup>369</sup> Moreover, in the European Communities' view, the measure at issue in this case is mandatory because the Anti-Dumping Manual directs the use of the computer programs and the Standard Zeroing Procedures "automatically and directly" effect the zeroing challenged by the European Communities.<sup>370</sup> In addition, according to the European Communities, the Panel's findings in this case were supported by uncontested facts and evidence, including the Standard Zeroing Procedures and other "supporting and corroborating evidence".<sup>371</sup> The European Communities adds that the

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<sup>365</sup>United States' other appellant's submission, para. 50 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 215; and Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 202).

<sup>366</sup>*Ibid.*, para. 50.

<sup>367</sup>Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 206. (emphasis added)

<sup>368</sup>European Communities' appellee's submission, para. 77.

<sup>369</sup>*Ibid.*, para. 79.

<sup>370</sup>*Ibid.*, para. 81.

<sup>371</sup>*Ibid.*, para. 11.

United States is, in fact, requesting the Appellate Body to reassess the evidence "and take a different view from that taken by the Panel".<sup>372</sup>

211. The Appellate Body explained in *US – Corrosion-Resistant Steel Sunset Review* that it had not, as yet, "pronounce[d] generally upon the continuing relevance or significance of the mandatory/discretionary distinction."<sup>373</sup> The Appellate Body went on to observe that:

... as with any such analytical tool, the import of the 'mandatory/discretionary distinction' may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion.<sup>374</sup>

212. Based on our review of the Panel's analysis, we do not believe that the Panel acted inconsistently with its obligations under Article 11 of the DSU. As the Appellate Body had said previously:

... Article 11 requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence. Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record.<sup>375</sup>

213. It seems to us that the Panel took into account all of the evidence placed before it and sought verification of its accuracy. Moreover, the Panel set out sufficiently the basis for its conclusions on the evidence.<sup>376</sup> We disagree with the United States that the Panel did not assess objectively the issue of whether 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. We also disagree with the United States that the Panel's analysis "relie[d] on nothing more than the fact that the USDOC has engaged in zeroing in the past using computers."<sup>377</sup> Instead, as discussed above<sup>378</sup>, the Panel had before it evidence including standard computer programs used by the USDOC to calculate margins of dumping, the Anti-Dumping Manual, expert opinions, and the Standard Zeroing Procedures. We therefore cannot agree with the

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<sup>372</sup>European Communities' appellee's submission, para. 95.

<sup>373</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

<sup>374</sup>*Ibid.*

<sup>375</sup>Appellate Body Report, *US – Carbon Steel*, para. 142. (footnote omitted)

<sup>376</sup>Although we have noted that there are areas in which the Panel's legal reasoning could have been more precise, we are not persuaded that the Panel failed to objectively assess the matter before it, as required under Article 11 of the DSU.

<sup>377</sup>United States' other appellant's submission, para. 52.

<sup>378</sup>See *supra*, para. 199.

United States that the Panel analysis "relie[d] on nothing more than the fact that the USDOC has engaged in zeroing in the past using computers."<sup>379</sup>

214. We, therefore, do not agree with the United States that the Panel erred simply because it did not apply the mandatory/discretionary distinction in analyzing and finding a violation of Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>380</sup> As the Appellate Body has said, "the import of the 'mandatory/discretionary distinction' may vary from case to case."<sup>381</sup> In the light of the above, we conclude that the Panel did not act inconsistently with its obligations under Article 11 of the DSU.

### 3. Prima Facie Case

215. The United States contends that the Panel erred in allocating the burden of proof regarding this claim and in finding that the European Communities had established a *prima facie* case. The Panel stated that it would consider "whether there exists what the European Communities terms methodology and whether this methodology can be found to be WTO-inconsistent", even though the Panel did not explain what the European Communities "meant by 'methodology'". The Panel, in the United States' view, could not do so, because the European Communities never explained properly how methodology could be considered a measure.<sup>382</sup> The Panel effectively relieved the European Communities from its burden to demonstrate, as part of its *prima facie* case, an act or instrument that required the USDOC to "zero" in anti-dumping investigations.<sup>383</sup>

216. In contrast, the European Communities emphasizes that it set out with sufficient clarity and precision its arguments before the Panel and that the Panel did not rely exclusively on evidence of past behaviour of the United States.

217. The Appellate Body has made clear that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."<sup>384</sup> Therefore, in determining whether the European Communities established a *prima facie* case that the zeroing methodology, as it relates to original investigations, is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*, we need to examine the evidence and arguments that the European Communities submitted to the

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<sup>379</sup>United States' other appellant's submission, para. 52.

<sup>380</sup>*Ibid.*, para. 47.

<sup>381</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

<sup>382</sup>United States' other appellant's submission, paras. 54-55 (referring to Panel Report, para. 7.98).

<sup>383</sup>*Ibid.*, para. 61.

<sup>384</sup>Appellate Body Report, *EC – Hormones*, para. 104. (footnote omitted)

Panel in relation to this claim.<sup>385</sup> At a minimum, the European Communities' evidence and arguments must have been sufficient "to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision."<sup>386</sup>

218. The United States does not dispute that the European Communities' evidence and arguments were sufficient to "identify the relevant WTO provision and obligation contained therein".<sup>387</sup> Instead, the United States emphasizes that the European Communities did not explain what it meant by "methodology", nor did it explain how a methodology could constitute an act or instrument, and properly be considered a measure.

219. In its submissions to the Panel, the European Communities set out the main elements of the zeroing methodology used by the USDOC in both original investigations and periodic reviews.<sup>388</sup> In addition, for both original investigations and periodic reviews, the European Communities described, in detail, "the method of comparing normal value and export price; the zeroing method; and the process of imposition and assessment."<sup>389</sup> We therefore do not agree with the United States' assertion that the European Communities failed to explain what it meant by "zeroing methodology".

220. Turning to the Panel's assessment of the evidence and arguments, we note that both the European Communities and the United States presented arguments, before the Panel, regarding whether the zeroing methodology can be challenged, as such, in dispute settlement proceedings.<sup>390</sup> In the present dispute, the Panel rightly conducted its own assessment of the evidence and arguments, rather than simply accepting the assertions of either party.<sup>391</sup> In doing so, the Panel took into account and carefully examined the evidence and arguments presented by the European Communities and the United States.

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<sup>385</sup>See Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, 323, at 338; Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66; Appellate Body Report, *US – Gambling*, para. 141.

<sup>386</sup>Appellate Body Report, *US – Gambling*, para. 141. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 263-264.

<sup>387</sup>Appellate Body Report, *US – Gambling*, para. 141.

<sup>388</sup>Panel Report, paras. 2.1-2.12.

<sup>389</sup>European Communities' first written submission to the Panel, paras. 12, 21-24, and 37. See also Exhibit EC-42 submitted by the European Communities to the Panel.

<sup>390</sup>See Panel Report, paras. 7.73-7.83.

<sup>391</sup>See Appellate Body Report, *Japan – Apples*, para. 166; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 82.

221. Under these circumstances, we do not agree with the United States' contention that the Panel erred in allocating the burden of proof regarding this claim and in finding that the European Communities had established a *prima facie* case.

4. Conclusion

222. In the light of the above, we *uphold* the Panel's conclusion, in paragraphs 7.106 and 8.1(c) of the Panel Report, albeit for reasons different from those set out by the Panel, 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*.

C. *The Anti-Dumping Manual – Appeal by the European Communities*

223. We turn next to the European Communities' contention that the Panel erred in exercising judicial economy with regard to whether the Anti-Dumping Manual is a measure that is inconsistent, as such, with certain provisions of the *Anti-Dumping Agreement*, the GATT 1994, and the *WTO Agreement*.

224. The Panel found that the Anti-Dumping Manual "ha[d] been referred to by the European Communities principally as evidence to confirm the 'standard' character of the 'Standard Zeroing Procedures'."<sup>392</sup> On this basis, the Panel concluded that it was not necessary to make a finding on whether the Anti-Dumping Manual is WTO-inconsistent as such.<sup>393</sup> The European Communities challenges this conclusion on appeal.

225. We see no error in the approach taken by the Panel. We note, moreover, that the European Communities has not provided specific arguments to support its claim that the Anti-Dumping Manual is inconsistent with Articles 1, 2.4, 2.4.2, 5.8, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*. Nor has the European Communities explained why additional findings regarding the Anti-Dumping Manual are necessary to resolve this dispute. We also note that we have upheld here the Panel's finding 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*. In these circumstances, we

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<sup>392</sup>Panel Report, para. 7.107.

<sup>393</sup>*Ibid.*

find that the Panel did not err in exercising judicial economy by not making findings with regard to the European Communities' claims concerning the Anti-Dumping Manual.

D. *Other Claims by the European Communities Regarding the Zeroing Methodology*

226. We now move to the issue of whether the Panel erred in finding that the zeroing methodology used by the United States in administrative reviews is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.

227. These findings were consequential to the Panel finding that Article 2.4 and/or Article 2.4.2 of the *Anti-Dumping Agreement* do not prohibit zeroing in administrative reviews.<sup>394</sup> We recall that we reversed the Panel's findings on Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.<sup>395</sup> We also declared moot, and of no legal effect, the Panel's finding that zeroing is not inconsistent with the first sentence of Article 2.4 of the *Anti-Dumping Agreement*<sup>396</sup>, and we declined to rule on the European Communities' conditional appeal under Article 2.4.2. In the light of the above, we declare moot, and of no legal effect, the Panel's finding, in paragraph 8.1(g) of the Panel Report, that the zeroing methodology used by the United States in administrative reviews is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.

228. This brings us to the question whether we can complete the analysis and determine whether the zeroing methodology, as it relates to administrative reviews, is a measure that is inconsistent, as such, with the provisions of *Anti-Dumping Agreement*, the GATT 1994, and the *WTO Agreement* referred to by the European Communities. We emphasized above that, to bring an "as such" challenge against a "rule or norm" that is *not* expressed in the form of a written document, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member, its precise content, and that it does have general and prospective application.<sup>397</sup> As indicated above<sup>398</sup>, it is only if the complaining party puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such. Furthermore, we concluded that the zeroing methodology, as it relates to original investigations, can be challenged, as such, in WTO dispute

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<sup>394</sup>Panel Report, para. 7.290.

<sup>395</sup>See *supra*, para. 135.

<sup>396</sup>See *supra*, para. 147.

<sup>397</sup>See *supra*, para. 198.

<sup>398</sup>See *supra*, para. 198.

settlement.<sup>399</sup> However, as we see it, the Panel's analysis and findings in paragraphs 7.91 to 7.106 of the Panel Report relate only to the existence and the consistency of 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. In these circumstances, and in the absence of factual findings by the Panel or undisputed facts in the Panel record regarding whether the zeroing methodology, as it relates to administrative reviews, is a measure that can be challenged, as such, we are unable to complete the analysis to determine whether the zeroing methodology, as it relates to administrative reviews, is inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.

E. *Conditional Appeal by the European Communities*

229. The European Communities has brought conditional claims with respect to: (1) the "Standard Zeroing Procedures"; and (2) the USDOC's "practice" of zeroing. We examine these conditional claims below.

1. The Standard Zeroing Procedures

230. The European Communities appeals the Panel's conclusions or the Panel's exercise of judicial economy regarding the Standard Zeroing Procedures<sup>400</sup> and requests the Appellate Body "to complete the analysis" by finding first, that the Standard Zeroing Procedures are a "measure" that can be challenged, as such, and secondly, that the Standard Zeroing Procedures are inconsistent, as such, with Articles 1, 2.4, 2.4.2, 5.8, 9.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.<sup>401</sup> The European Communities' request is conditioned on the Appellate Body reversing the Panel's finding that the zeroing methodology is inconsistent, as such, with Article 2.4.2. According to the European Communities, its request is also be triggered if we consider that the Standard Zeroing Procedures are not "condemned" as a result of the Panel's finding regarding the zeroing methodology in the sense that "compliance [by the United States] would necessitate modification of the Standard Zeroing Procedures".<sup>402</sup> The European Communities also appeals the Panel's finding that the Standard Zeroing Procedures, as used in new shipper reviews, changed circumstances reviews, and sunset reviews, are not inconsistent with

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<sup>399</sup>See *supra*, para. 205.

<sup>400</sup>Panel Report, para. 7.97. See also *supra*, footnote 286.

<sup>401</sup>European Communities' appellant's submission, paras. 374 and 376.

<sup>402</sup>*Ibid.*, para. 372.

Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.<sup>403</sup>

231. The Panel found that "to characterize the 'Standard Zeroing Procedures' as an act or instrument that sets forth rules or norms intended to have general and prospective application is somewhat difficult to reconcile with the fact that the 'Standard Zeroing Procedures' are only applicable in a particular anti-dumping proceeding as a result of their inclusion in the computer program[] used in that particular proceeding."<sup>404</sup> According to the Panel, "the need to incorporate these lines of computer code into each individual program[] indicates that it is not the 'Standard Zeroing Procedures' *per se* that set forth rules or norms of general and prospective application."<sup>405</sup> We agree with the Panel. Therefore, we find that the Standard Zeroing Procedures are not a measure that can be challenged, as such, in WTO dispute settlement.

232. Because the Standard Zeroing Procedures are not a measure that can be challenged, as such, it follows that they cannot be found to be either consistent or inconsistent with a Member's obligations under the covered agreements. Accordingly, we declare moot, and of no legal effect, the Panel's findings, in paragraphs 7.291, 7.294, 8.1(g), and 8.1(h) of the Panel Report, that the Standard Zeroing Procedures are not inconsistent, as such, with the provisions of the *Anti-Dumping Agreement*, the GATT 1994, and the *WTO Agreement*, referred to by the European Communities.

## 2. The "Practice" of Zeroing "As Such"

233. We move next to the European Communities' conditional appeal regarding the Panel's decision to exercise judicial economy with respect to what it refers to as the United States' "practice" of zeroing, as such.<sup>406</sup> This appeal is triggered if the European Communities does not prevail on appeal with respect to either its claim regarding the zeroing methodology, or its claim regarding the Standard Zeroing Procedures.

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<sup>403</sup>We note that, in paragraph 348 of its appellant's submission, the European Communities refers to the "Standard Zeroing Methodology". Because the Panel did not make any findings on the "Standard Zeroing Methodology", and because the references that the European Communities makes to paragraphs 7.292, 7.294, and 8.1(h) of the Panel Report—all of which speak of the "Standard Zeroing Procedures"—we understand the European Communities' appeal to relate to the latter.

<sup>404</sup>Panel Report, 7.97.

<sup>405</sup>*Ibid.*

<sup>406</sup>The European Communities' argument is simply that the Anti-Dumping Manual "directs the use of the 'Standard Zeroing Procedures', Methodology and Practice [and] provides a link between the relevant provisions of the Tariff Act and the Regulations, and the 'Standard Zeroing Procedures', Methodology and Practice." (European Communities' appellant's submission, para. 343)

234. We have upheld the Panel's finding that the zeroing methodology, as it relates to original investigations, is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. We have also declared moot, and of no legal effect, the Panel's finding that the zeroing methodology, as it relates to administrative reviews, is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.<sup>407</sup> We note, moreover, that the European Communities did not set out any specific arguments to support this aspect of its appeal. In these circumstances, we decline to rule on the European Communities' conditional appeal regarding the United States' "practice" of zeroing, as such.

## VI. Other Claims

### A. Section 351.414(c)(2) of the USDOC Regulations

235. We turn now to the issue of whether the Panel erred in finding that Section 351.414(c)(2) of the USDOC Regulations ("Section 351.414(c)(2)")<sup>408</sup> is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.

236. Section 351.414(c)(2) provides:

In a review, the Secretary will normally use the average-to-transaction method.

237. Section 351.414(b)(3) specifies that the average-to-transaction method:

... involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

238. The Panel found that Section 351.414(c)(2) is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.<sup>409</sup> The Panel considered that the

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<sup>407</sup>In addition, we declared moot the Panel's finding that the Standard Zeroing Procedures are not inconsistent, as such, with the provisions of the *Anti-Dumping Agreement*, the GATT 1994, and the *WTO Agreement*, referred to by the European Communities.

<sup>408</sup>Section 351.414(c)(2) is found in *United States Federal Register*, Vol. 62, No. 96 (19 May 1997), Rules and Regulations, p. 27415 (Exhibit EC-35.3 submitted by the European Communities to the Panel), codified in *United States Code of Federal Regulations*, Title 19, Section 351.414(c)(2).

<sup>409</sup>Panel Report, paras. 7.291, 7.294, 8.1(g), and 8.1(h).

European Communities' claim regarding Section 351.414(c)(2) was dependent upon a violation of Article 2.4 and/or Article 2.4.2, and that the claim of a violation of Article 2.4 and/or Article 2.4.2 was based on an interpretation of these provisions as prohibiting zeroing and the use of an asymmetrical comparison of export price and normal value in reviews. The Panel rejected that interpretation and found that Section 351.414(c)(2) was WTO-consistent.<sup>410</sup>

239. On appeal, the European Communities challenges the Panel's finding that Section 351.414(c)(2) is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*. For the European Communities, the "fair comparison" requirement in Article 2.4 precludes a measure providing that the average-to-transaction method is the "norm". The European Communities also considers that Section 351.414(c)(2) is inconsistent with Article 2.4.2 because "it permits the use of an asymmetrical method without any of the cumulative conditions set out in Article 2.4.2 having been met", and because "it provides that the normal rule is asymmetry, when Article 2.4.2 provides that the normal rule is symmetry."<sup>411</sup>

240. For the United States, because the claims regarding Section 351.414(c)(2) are dependent upon a finding of a violation of Article 2.4 and/or Article 2.4.2, and because the Panel properly found that Article 2.4 and/or Article 2.4.2 neither require offsets nor prohibit the use of an average-to-transaction comparison method once an anti-dumping duty has been imposed, the Appellate Body should reject the European Communities' claims regarding Section 351.414(c)(2).<sup>412</sup> The United States adds that the completion of the legal analysis would be particularly inappropriate because the European Communities failed to establish its *prima facie* case in the course of its submissions to the Panel.<sup>413</sup> In particular, the United States argues, the European Communities failed to demonstrate that Section 351.414(c)(2) mandates asymmetry or precludes symmetry, and, therefore, the European Communities' evidence and arguments were insufficient to explain the claimed inconsistency of the regulation with particular WTO provisions and obligations.<sup>414</sup>

241. We begin our analysis by noting that Section 351.414(c)(2) does not concern the "zeroing" aspect of the zeroing methodology. Section 351.414(c)(2) provides that the export price of an individual transaction should normally be compared with a normal value calculated on the basis of a contemporaneous weighted average of domestic prices. It does not set out any rule that would require

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<sup>410</sup>Panel Report, paras. 7.290 and 7.293.

<sup>411</sup>European Communities' appellant's submission, para. 347.

<sup>412</sup>United States' appellee's submission, para. 200.

<sup>413</sup>*Ibid.*, para. 202.

<sup>414</sup>*Ibid.*, para. 203.

the authorities to disregard the results of intermediate comparisons when the export price exceeds the normal value.

242. In essence, the Panel's finding concerning Section 351.414(c)(2) is consequential to its view that Article 2.4.2 does not apply to administrative reviews, new shipper reviews, changed circumstances reviews, and sunset reviews. The Panel reasoned that, because Article 2.4.2 does not apply to such reviews, comparisons between the export price of an individual transaction and a normal value calculated on the basis of a contemporaneous weighted average of domestic prices are not prohibited and, therefore, Section 351.414(c)(2) is WTO-consistent. We recall that we declined to rule on the European Communities' conditional appeal under Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>415</sup> Therefore, we declare moot, and of no legal effect, the Panel's finding, in paragraphs 7.291, 7.294, 8.1(g), and 8.1(h) of the Panel Report, that Section 351.414(c)(2) is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.

243. This brings us to the question whether it is appropriate for us to complete the analysis, and assess whether Section 351.414(c)(2) is inconsistent with the provisions of the *Anti-Dumping Agreement*, the GATT 1994, and the *WTO Agreement* referred to by the European Communities. As we understand it, the European Communities' argument is based on the assumption that Article 2.4.2 applies to all types of proceedings under the *Anti-Dumping Agreement*. We recall that we did not examine the issue of whether the scope of application of Article 2.4.2 is limited to original investigations. Furthermore, the European Communities' appeal in relation to this issue is conditional, and the condition on which the appeal is predicated was not fulfilled. Therefore, we considered that the issue was not before us. The Appellate Body has previously emphasized that "as such" challenges against a Member's measures in WTO dispute settlement proceedings are particularly "serious challenges" that seek to prevent a Member *ex ante* from engaging in a certain conduct.<sup>416</sup> The European Communities has submitted only limited arguments and evidence relating to the meaning of Section 351.414(c)(2), its scope of application, and its alleged inconsistency with the covered agreements. We also note that the Panel Report does not contain factual findings regarding the meaning of Section 351.414(c)(2). In these circumstances, we decline to complete the analysis to determine whether Section 351.414(c)(2) is inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.

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<sup>415</sup>*Supra*, para. 162.

<sup>416</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

B. *Judicial Economy*

244. The European Communities argues that the Panel erred in exercising judicial economy with respect to the question of whether administrative review proceedings based on model zeroing are inconsistent with Article 9.3 of the *Anti-Dumping Agreement*. The European Communities also appeals the Panel's exercise of judicial economy with respect to whether zeroing "as applied" in the original investigations at issue is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.

245. The United States contends that the Panel properly exercised judicial economy with respect to the consistency of model zeroing with Article 9.3 of the *Anti-Dumping Agreement*. The United States takes issue with the European Communities' argument that a finding on this issue was necessary "in order to effectively resolve the dispute between the parties"<sup>417</sup>, because, when the European Communities requests the United States to bring the measure at issue into conformity with Article 2.4.2, the United States "will respond that the measure at issue is already in conformity with Article 9.3."<sup>418</sup> According to the United States, "[t]his argument simply invites speculation as to how the United States might implement the recommendations and rulings of the ... DSB"<sup>419</sup>; the European Communities has not explained or demonstrated why a finding on this point is necessary to resolve the dispute.

246. Concerning the Panel's exercise of judicial economy with respect to the European Communities' claim that model zeroing is inconsistent with Article 2.4, the United States rejects the European Communities' contention that further findings on this matter are necessary because the United States might implement by "switching"<sup>420</sup> to a different comparison methodology, thereby potentially introducing an adjustment that is inconsistent with Article 2.4. In the United States' view, the Appellate Body should not opine on how "any potentially changed measure"<sup>421</sup> could be WTO-inconsistent.

247. With respect to the European Communities' claim that "model zeroing" applied in the original investigations at issue is inconsistent with Article 9.3 of the *Anti-Dumping Agreement*, the Panel stated that deciding that claim "would provide no additional guidance as to the steps to be undertaken by the United States in order to implement [the Panel's] recommendation regarding the violation on which it is dependent."<sup>422</sup> In other words, having found that "model zeroing" as applied by the United

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<sup>417</sup>European Communities' appellant's submission, para. 356.

<sup>418</sup>*Ibid.*, para. 355.

<sup>419</sup>United States' appellee's submission, para. 211.

<sup>420</sup>*Ibid.*, para. 214 (quoting European Communities' appellant's submission, para. 361).

<sup>421</sup>*Ibid.*, para. 214.

<sup>422</sup>Panel Report, para. 7.34. (footnote omitted)

States is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, the Panel took the view that an additional finding with respect to whether "model zeroing" is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* is not necessary to resolve the dispute.

248. In challenging this finding on appeal, the European Communities emphasizes that, in cases in which there is no request for an administrative review, the USDOC issues assessment instructions to US Customs to collect final anti-dumping duties at the cash-deposit rate, that is at the rate that was set in the original investigation using "model zeroing". The European Communities contends that, in such cases, the application of "model zeroing" in an assessment review, will necessarily be inconsistent with Article 9.3 of the *Anti-Dumping Agreement*. The European Communities refers, in particular, to the first sample case presented by the European Communities to the Panel regarding anti-dumping duties on stainless steel from Italy.<sup>423</sup> According to the European Communities, the final anti-dumping duties in that case were assessed, in part, on the basis of a margin of dumping established by using model zeroing.

249. With respect to the European Communities' claim that zeroing as applied in the original investigations at issue, is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*, the Panel found that it was not necessary to address that claim given that it had found that the United States' zeroing methodology, as applied in the original investigations at issue, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

250. We fail to see why additional findings on the European Communities' claims under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* would be necessary to secure a "positive solution"<sup>424</sup> to the dispute or a "satisfactory settlement of the matter".<sup>425</sup> In our view, the Panel did not commit an error of law in deciding to exercise judicial economy with regard to those claims, as it had already found that zeroing as applied by the United States in the original investigations at issue is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. Thus, in our view, the Panel had made sufficient findings to resolve the dispute once it had made this finding under Article 2.4.2.<sup>426</sup>

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<sup>423</sup>See Panel Report, para. 2.9.

<sup>424</sup>Article 3.7 of the DSU.

<sup>425</sup>Article 3.4 of the DSU.

<sup>426</sup>We note that the United States has not appealed the Panel's finding that "model zeroing" as applied in the original investigations listed in Exhibits EC-1 through EC-15 is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

C. *Article 11 of the DSU*

251. The European Communities argues that the Panel acted inconsistently with Article 11 of the DSU by "demonstrat[ing] insufficient reasoning, or internal inconsistency, or the making of a case" for the United States.<sup>427</sup> In the alternative, the European Communities submits that, to the extent that the Panel's findings can be considered findings of fact, the Panel acted inconsistently with Article 11 of the DSU in that it did not make an objective assessment of the facts.

252. The United States requests the Appellate Body to reject the European Communities' claim under Article 11 of the DSU. According to the United States, the European Communities' claim was not properly notified and did not provide the requisite notice to the United States, the third participants, and the Appellate Body. Secondly, the European Communities' appellant's submission is "devoid" of any arguments in support of its claim.<sup>428</sup> Thirdly, the European Communities does not reference "a single Panel finding that evinces the asserted flaws", and has therefore not substantiated its claim that the Panel failed to act consistently with Article 11 of the DSU.<sup>429</sup>

253. The Appellate Body has previously underscored that a claim under Article 11 of the DSU is a "very serious allegation"<sup>430</sup> and that:

[a] challenge under Article 11 of the DSU must not be vague or ambiguous. On the contrary, such a challenge must be clearly articulated and substantiated with specific arguments. An Article 11 claim is not to be made lightly, or merely as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement.<sup>431</sup>

254. We consider this finding apt and instructive in this case. We do not believe that the European Communities has "substantiated its claim" that the Panel acted inconsistently with Article 11. Its allusion to "insufficient reasoning" by the Panel, or "internal inconsistency", is vague and mentioned only in passing in its appellant's submission. The same applies to the European Communities' "alternative" argument regarding the alleged failure of the Panel to make "an objective assessment ...

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<sup>427</sup>European Communities' appellant's submission, para. 370 and footnote 360 thereto (referring to European Communities' response to Question 1 posed by the Panel at the first Panel meeting; and European Communities' second written submission to the Panel, para 18).

<sup>428</sup>United States' appellee's submission, para. 227.

<sup>429</sup>*Ibid.*, para. 230.

<sup>430</sup>Appellate Body Report, *EC – Poultry*, para. 133.

<sup>431</sup>Appellate Body Report, *US – Steel Safeguards*, para. 498.

of the facts of the case."<sup>432</sup> Moreover, "not every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts".<sup>433</sup>

255. We turn next to the European Communities' allegation that the Panel "made a case" for the United States. To understand the specifics of this claim, we look at the European Communities' rebuttal submission to the Panel and its response to the first set of questions posed by the Panel, to which the European Communities refers in paragraph 370 of its appellant's submission.

256. In its rebuttal submission, the European Communities argued that "the role of the Panel is not to make the case for either party, and that the Panel may pose questions only in order to clarify and distil the legal argument."<sup>434</sup> According to the European Communities, "[w]ith regard to certain questions (for example, questions 1 and 2) posed to the United States, it is not precisely clear to the European Communities what United States argument the Panel was seeking to clarify or distil, and in relation to these matters the European Communities fully reserves its legal position."<sup>435</sup> As we understand it, the European Communities appears to suggest that the Panel "made the case" for the United States by asking these questions of the United States.<sup>436</sup>

257. The Appellate Body observed, in *Thailand – H-Beams*, that "panels are entitled to ask questions of the parties that they deem relevant to the consideration of the issues before them."<sup>437</sup> The

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<sup>432</sup>European Communities' appellant's submission, para. 371.

<sup>433</sup>Appellate Body Report, *Japan – Agricultural Products II*, para. 141.

<sup>434</sup>European Communities' second written submission to the Panel, para. 18 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 136). As a "preliminary remark", in its responses to the first set of questions posed by the Panel the European Communities stated, in essence, the same thing as it did in its rebuttal submission. (See European Communities' response to Question 1 posed by the Panel)

<sup>435</sup>European Communities' second written submission to the Panel, para. 18 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 136).

<sup>436</sup>The questions posed by the Panel to the United States, to which the European Communities refers, read as follows:

- Does the [United States] have any specific observations on the factual accuracy of the [European Communities'] description of [the United States'] anti-dumping laws and regulations and of the cases at issue in this dispute?
- If, in the view of the [United States], the rules on the establishment of dumping margins in Article 2.4.2 do not apply to phases of an anti-dumping proceeding other than the investigation phase, what rules do apply? What is the relevance of Article 9.3 and its reference to "margin of dumping established under Article 2"? What is the relevance of the fact that identical language to that in Article 9.3 appeared in Article 8.3 of the Tokyo Round Anti-Dumping Code, which had no provision comparable to current Article 2.4.2?

<sup>437</sup>Appellate Body Report, *Thailand – H-Beams*, para. 135.

Appellate Body also noted that the panel in that case "did not err to the extent that it asked questions of the parties that it deemed necessary 'in order to clarify and distill the legal arguments'".<sup>438</sup>

258. In the present case, the European Communities has not explained why the questions posed by the Panel would have been inappropriate for purposes of "clarify[ing] and distil[ing] the legal arguments" advanced by the parties in this dispute.

259. Moreover, we note that the Appellate Body stated in *US – Shrimp* that:

... the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the 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 ...".<sup>439</sup>

260. Although the Appellate Body made these observations in the context of examining the rights of panels under Articles 12 and 13 of the DSU, we believe that they are also relevant to the situation here. The "ample and extensive" nature of a panel's authority "to undertake and control the process" by which it informs itself of the relevant facts of the dispute and of the legal norms and principles applicable to a case, would appear to suggest that a panel also has broad authority to pose such questions to the parties as it deems relevant for purposes of considering the issues that are before it. The asking of questions is, after all, part and parcel of the investigative function and duty of panels.

261. We note, moreover, that, when referring, in *Japan – Agricultural Products II*, to "making the case" for the complaining party, the Appellate Body was speaking to a situation in which a panel makes a ruling "in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it."<sup>440</sup> In contrast, asking questions to clarify the meaning of an argument does not, in our view, amount to "making the case".

262. For these reasons, we do not agree with the European Communities that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

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<sup>438</sup> Appellate Body Report, *Thailand – H-Beams*, para. 136 (referring to Panel Report, *Thailand – H-Beams*, para. 7.50).

<sup>439</sup> Appellate Body Report, *US – Shrimp*, para. 106.

<sup>440</sup> Appellate Body Report, *Japan – Agricultural Products II*, paras. 129-130.

## VII. Findings and Conclusions

263. For the reasons set forth in this Report, the Appellate Body:

- (a) with respect to the administrative reviews at issue in this case:
  - (i) reverses the Panel's finding, in paragraphs 7.288 and 8.1(f) of the Panel Report, that the United States did not act inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, and finds, instead, that the United States acted inconsistently with those provisions;
  - (ii) finds it unnecessary, for purposes of resolving this dispute, to rule on whether the United States acted inconsistently with the obligation contained in the first sentence of Article 2.4 of the *Anti-Dumping Agreement* to make a "fair comparison" between the export price and normal value;
  - (iii) upholds the Panel's finding, in paragraph 7.280 of the Panel Report, that zeroing is not an impermissible allowance or adjustment under Article 2.4 of the *Anti-Dumping Agreement*, third to fifth sentences;
  - (iv) declines to rule on the European Communities' conditional appeal under Article 2.4.2 of the *Anti-Dumping Agreement*;
  - (v) upholds the Panel's finding, in paragraphs 7.288 and 8.1(f) of the Panel Report, that the United States did not act inconsistently with Articles 11.1 and 11.2 of the *Anti-Dumping Agreement*;
  - (vi) finds it unnecessary, for purposes of resolving this dispute, to rule on whether the zeroing methodology, as applied in the administrative reviews at issue, is inconsistent with Articles 1 and 18 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*; and
  - (vii) declares moot the Panel's finding, in paragraphs 7.288 and 8.1(f) of the Panel Report, that the United States did not act inconsistently with Article VI:1 of the GATT 1994; and the Panel's finding, in paragraphs 7.284 and 8.1(e) of the Panel Report, that the United States did not act inconsistently with the first sentence of Article 2.4 of the *Anti-Dumping Agreement*;

- (b) finds, albeit for reasons different from those set out by the Panel, 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, can be challenged, as such, in WTO dispute settlement; and upholds the Panel's conclusion, in paragraphs 7.106 and 8.1(c) of the Panel Report, that this methodology is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*;
- (c) with respect to the zeroing methodology, as it relates to administrative reviews:
  - (i) declares moot the Panel's finding, in paragraph 8.1(g) of the Panel Report, that the zeroing methodology, as it relates to administrative reviews is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the *WTO Agreement*; and
  - (ii) finds that it is unable to complete the analysis to determine whether the zeroing methodology, as it relates to administrative reviews, is inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 11.1 and 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*;
- (d) finds that the Standard Zeroing Procedures are not a measure than can be challenged, as such, and, accordingly, declares moot the Panel's finding, in paragraphs 7.291, 7.294, 8.1(g), and 8.1(h) of the Panel Report, that the Standard Zeroing Procedures are not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the *WTO Agreement*;
- (e) finds that the Panel did not err in exercising judicial economy by not making findings with regard to whether the Anti-Dumping Manual is a measure that is inconsistent, as such, with Articles 1, 2.4, 2.4.2, 5.8, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*;
- (f) declines to rule on the European Communities' conditional appeal regarding the United States' "practice" of zeroing;

- (g) with respect to Section 351.414(c)(2):
- (i) declares moot the Panel's finding, in paragraphs 7.291, 7.294, 8.1(g), and 8.1(h) of the Panel Report, that Section 351.414(c)(2) is not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*;
  - (ii) declines to complete the analysis to decide whether Section 351.414(c)(2) is inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3 and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*; and
- (h) finds that the Panel did not err in exercising judicial economy by not making findings on whether administrative review proceedings based on model zeroing are inconsistent with Article 9.3 of the *Anti-Dumping Agreement*;
- (i) finds that the Panel did not err in exercising judicial economy by not making findings on whether zeroing "as applied" in the original investigations at issue is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*; and
- (j) rejects the European Communities' claim that the Panel acted inconsistently with its obligations under Article 11 of the DSU by failing to make an objective assessment of the matter before it, including an objective assessment of the facts of the case.

264. The Appellate Body recommends that the DSB request the United States to bring its measures, which have been found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and with the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 31st day of March 2006 by:

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Giorgio Sacerdoti  
Presiding Member

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Merit E. Janow  
Member

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Yasuhei Taniguchi  
Member

ANNEX I

**WORLD TRADE  
ORGANIZATION**

**WT/DS294/12**  
17 January 2006

(06-0246)

Original: English

**UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY  
FOR CALCULATING DUMPING MARGINS ("ZEROING")**

Notification of an Appeal by the European Communities  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 17 January 2006, from the Delegation of the European Commission, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the DSU the European Communities hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel report and certain legal interpretations developed by the Panel in the dispute *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (WT/DS294/R). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Communities simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

The European Communities considers that the Panel has failed to correctly apply customary rules of interpretation of public international law, as required by Article 3.2 of the DSU and Article 17.6(ii) of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*, particularly as reflected in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties.

For the reasons set out in its submissions to the Panel, and for the reasons to be further elaborated in its submissions to the Appellate Body, the European Communities appeals, and requests the Appellate Body to modify or reverse the legal findings and conclusions of the Panel, with respect to the following errors :

- (a) the Panel erred when it found that the United States did not act inconsistently with Articles 9.3 and 2.4 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, despite the fact that the United States did not ensure, in the measures at issue described in the third sentence of para 2.6 of the Panel Report, in the context of the "administrative review" proceedings listed in Exhibits EC-16 to EC-31, that the rate and amount of anti-dumping duty did not exceed the true margin of dumping established in accordance with Article 2, because the United States did not calculate a margin of dumping for the product as whole (Panel Report, paras 8.1(f) and (e), and 7.288, 7.284 and 7.248 to 7.285);

- (b) the Panel erred when it found that the United States did not act inconsistently with the obligation to make a fair comparison contained in the first sentence of Article 2.4 of the *Anti-Dumping Agreement* when, in the measures at issue described in the third sentence of para 2.6 of the Panel Report, in the context of the "administrative review" proceedings listed in Exhibits EC-16 to EC-31, the United States used a methodology that, absent targeted dumping, involved asymmetrical comparison between "normal value" and "export price", in which, at an intermediate stage in the calculation of the margins of dumping, the prices at which export transactions above "normal value" were made were effectively adjusted downwards ("zeroing" any negative intermediate results) (Panel Report, paras 8.1(e), 7.284, 7.248 to 7.275, 7.281 to 7.283 and 7.285);
- (c) the Panel erred when it found that the United States did not act inconsistently with the third to fifth sentences of Article 2.4 of the *Anti-Dumping Agreement* when, in the measures at issue described in the third sentence of para 2.6 of the Panel Report, in the context of the "administrative review" proceedings listed in Exhibits EC-16 to EC-31, the United States used a methodology that involved, at an intermediate stage in the calculation of the margins of dumping, a zeroing adjustment not demonstrated to have been made for a difference affecting price comparability (Panel Report, paras 8.1(e), 7.284, 7.276 to 7.283 and 7.285);
- (d) the Panel erred when it found that the United States did not act inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* when, in the measures at issue described in the third sentence of para 2.6 of the Panel Report, in the context of the "administrative review" proceedings listed in Exhibits EC-16 to EC-31, the United States used a methodology that involved asymmetrical comparison between "normal value" and "export price", and in which, at an intermediate stage in the calculation of the margins of dumping, the prices at which export transactions above "normal value" were made were effectively adjusted downwards ("zeroing" any negative intermediate amounts), without complying with the conditions and obligations set out in that provision (Panel Report, paras 8.1(d), 7.223, 7.142 to 7.222 and 7.285);
- (e) the Panel erred when it found that the Standard Zeroing Methodology used by the United States in "administrative review" proceedings is not inconsistent with Articles 2.4, 2.4.2, 9.3, 11.1, 11.2, 1 and 18.4 of the *Anti-Dumping Agreement*; Articles VI:1 and VI:2 of the GATT 1994; and Article XVI:4 of the *WTO Agreement* (Panel Report, paras 8.1(g) and 7.289 to 7.291);
- (f) the Panel erred when it exercised judicial economy on the question of whether the Manual is a measure inconsistent with Articles 2.4, 2.4.2, 5.8, 9.3, 9.5, 11.1, 11.2, 11.3, 1 and 18.4 of the *Anti-Dumping Agreement*; Articles VI:1 and VI:2 of the GATT 1994; and Article XVI:4 of the *WTO Agreement* (Panel Report, paras 7.107 and 7.289 to 7.294);
- (g) the Panel erred when it found, in the context of "administrative review" proceedings, that Section 351.414(c)(2) of the Regulations is not as such inconsistent with Articles 2.4, 2.4.2, 9.3, 11.1, 11.2, 1 and 18.4 of the *Anti-Dumping Agreement*; Articles VI:1 and VI:2 of the GATT 1994; and Article XVI:4 of the *WTO Agreement* (Panel Report, paras 8.1(g) and 7.289 to 7.291);
- (h) the Panel erred when it found, with respect to new shipper proceedings, changed circumstances proceedings, and sunset proceedings, that the Standard Zeroing Methodology and Section 351.414(c)(2) of the Regulations are not as such inconsistent with Articles 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3, 1 and 18.4 of the *Anti-*

*Dumping Agreement*; Articles VI:1 and VI:2 of the GATT 1994; and Article XVI:4 of the *WTO Agreement* (Panel Report, paras 8.1(h) and 7.292 to 7.294);

- (i) the Panel erred when it exercised judicial economy on the question of whether or not "administrative review" proceedings based on model zeroing are consistent with Article 9.3 of the *Anti-Dumping Agreement* (Panel Report, paras 6.4 to 6.6 and 7.34);
- (j) the Panel erred when it exercised judicial economy on the question of whether or not model zeroing is consistent with Article 2.4 of the *Anti-Dumping Agreement* (Panel Report, paras 8.2, 7.33 and 7.108);
- (k) the Panel erred when it dismissed the EC's claims under Articles 11.1 and 11.2 of the *Anti-Dumping Agreement* (Panel Report, paras 8.1(f), 7.143 and 7.286 to 7.288);
- (l) the Panel erred when it dismissed other of the EC's claims, considered by the Panel to be "dependent" (Panel Report, paras 8.1(f), 8.2, 7.34, 7.109 and 7.286 to 7.288); and
- (m) the Panel failed to make an objective assessment of the matter before it, including (as appropriate) an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, as required by Article 11 of the DSU.

The EC had also claimed before the Panel that the Standard Zeroing Procedures used by the United States are a measure or part of a measure and are inconsistent with Articles 2.4, 2.4.2, 5.8, 9.3, 1 and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the *WTO Agreement*. It appears to the EC that the Panel has considered these Standard Zeroing Procedures to be part of or a reflection of the methodology that it held to be as such inconsistent with the obligations of the US in the case of original proceedings (and consistent with the obligations of the US in the case of "administrative review" proceedings). However, this is not expressly stated by the Panel and if the Appellate Body should consider this not to be the case (and that bringing the methodology into conformity with the WTO obligations of the US would not necessarily require bringing the Procedures into conformity), the EC conditionally appeals and asks the Appellate Body to find that the Standard Zeroing Procedures are as such inconsistent with the obligations of the US in the case of original proceedings, "administrative review" proceedings, new shipper proceedings, changed circumstances proceedings and sunset proceedings. (Panel Report, paras 8.1(c), 7.106 and 7.96 to 7.97; Panel Report, paras 8.1(g) and 7.289 to 7.291; and Panel Report, paras 8.1(h) and 7.292 to 7.294).

With regard to Practice, the EC appeals the exercise of judicial economy by the Panel with respect to the US Practice of zeroing in original proceedings, "administrative review" proceedings, new shipper proceedings, changed circumstances proceedings and sunset proceedings.

The EC also requests the Appellate Body to complete the analysis of the Panel where it reverses or modifies findings of the Panel and completion of the analysis is necessary to resolve this dispute.

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ANNEX II

**WORLD TRADE  
ORGANIZATION**

**WT/DS294/13**  
1 February 2006

(06-0441)

Original: English

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**UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY  
FOR CALCULATING DUMPING MARGINS ("ZEROING")**

Notification of an Other Appeal by the United States  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU)  
and Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 30 January 2006, from the Delegation of the United States, is being circulated to Members.

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Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23(1) of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (WT/DS294/R) ("Panel Report") and certain legal interpretations developed by the Panel in this dispute.

The United States seeks review of the Panel's legal conclusion that the United States maintains a "zeroing methodology" that, as it relates to original investigations, is a norm which, as such, is inconsistent with Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").<sup>1</sup> This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations, including the following:

1. The standard used by the Panel to identify "zeroing methodology" as a purported measure for purposes of determining whether there was a breach of Article 2.4.2 of the AD Agreement is erroneous as a matter of law.<sup>2</sup>
2. The Panel's finding that "zeroing methodology" constituted a "measure" because it is a norm is erroneous, as is its subsequent finding that this "measure" breaches Article 2.4.2 of the AD Agreement.<sup>3</sup>

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<sup>1</sup>The Panel's conclusion and the articulation of the reasons therefore are set forth in Panel Report, paragraphs 7.91-7.106 and 8.1(c).

<sup>2</sup>The standard used by the Panel is set forth largely in Panel Report, paragraphs 7.98-7.100.

<sup>3</sup>The Panel's finding is set forth largely in Panel Report, paragraphs 7.101-7.104.

3. The Panel failed to apply a correct analysis in finding that a measure allegedly taken by the United States – the so-called "zeroing methodology" – is "as such" inconsistent with Article 2.4.2 of the AD Agreement, and, in any event, failed to make an objective assessment under Article 11 of the DSU.<sup>4</sup>

4. The Panel relieved the European Communities of its burden of proving the existence of a measure that is inconsistent with Article 2.4.2 of the AD Agreement.<sup>5</sup>

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<sup>4</sup>The Panel's "as such" analysis appears to be set forth in Panel Report, paragraphs 7.104-7.105.

<sup>5</sup>This error is reflected in the Panel's overall analysis set forth in Panel Report, paragraphs 7.91-7.106.