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ORGANIZATION**

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**UNITED STATES – CONTINUED EXISTENCE AND APPLICATION OF ZEROING
METHODOLOGY**

AB-2008-11

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<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
<i>Brazil – Aircraft</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, 1221
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/AB/R, adopted 14 November 2008
<i>Canada – Dairy (Article 21.5 – New Zealand and US)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, 6829
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473)
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<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008
<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 – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965

Short Title	Full case title and citation
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
<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>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791
<i>EEC – Cotton Yarn</i>	GATT Panel Report, <i>European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil</i> , ADP/137, adopted 30 October 1995, BISD 42S/17
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
<i>India – Additional Import Duties</i>	Appellate Body Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/AB/R, adopted 17 November 2008
<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 – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<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 – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<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, DSR 2005:XXII, 10853
<i>Mexico – Corn Syrup</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345

Short Title	Full case title and citation
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<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>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
<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 – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008
<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, DSR 2004:I, 3
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS345/AB/R, adopted 1 August 2008
<i>US – FSC (Article 21.5 – EC II)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, 4721
<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, DSR 2004:VII, 3257
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
<i>US – Shrimp (Ecuador)</i>	Panel Report, <i>United States – Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R, adopted on 20 February 2007
<i>US – Shrimp (Thailand) / US – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008

Short Title	Full case title and citation
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
<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, DSR 2004:V, 1875
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, 1937
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/RW, adopted 1 September 2006, as reversed by Appellate Body Report WT/DS264/AB/RW
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 30 April 2008
<i>US – Stainless Steel (Mexico)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, adopted 30 April 2008, as modified by the Appellate Body Report WT/DS344/AB/R
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<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, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R and Corr.1, adopted 9 May 2006
<i>US – Zeroing (EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007
<i>US – Zeroing (Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
<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 1947	<i>General Agreement on Tariffs and Trade 1947</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
Panel Report	Panel Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/R
panel request	Request for the Establishment of a Panel by the European Communities, WT/DS350/6, attached to the Panel Report as Annex F-1
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
Tariff Act	United States Tariff Act of 1930, Public Law No. 1202-1527, 46 Stat. 741, codified in <i>United States Code</i> , Title 19, Chapter 4, as amended
<i>Tokyo Round Anti-Dumping Code</i>	<i>Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade</i> , BISD 26S/171, entered into force 1 January 1980
T-T	transaction-to-transaction
USDOC	United States Department of Commerce
USDOC December 2006 Notice	"Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification", <i>United States Federal Register</i> , Vol. 71, No. 248 (27 December 2006) 77722-77725 (Panel Exhibit EC-90)
USITC	United States International Trade Commission
<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
W-T	weighted average-to-transaction
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>
W-W	Weighted average-to-weighted average

WORLD TRADE ORGANIZATION
APPELLATE BODY

**United States – Continued Existence and
Application of Zeroing Methodology**

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

Brazil, *Third Participant*
China, *Third Participant*
Egypt, *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*
Thailand, *Third Participant*

AB-2008-11

Present:

Zhang, Presiding Member
Baptista, Member
Unterhalter, 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 – Continued Existence and Application of Zeroing Methodology* (the "Panel Report").¹ The Panel was established to consider a complaint by the European Communities concerning the continued application by the United States of anti-dumping duties resulting from anti-dumping duty orders enumerated in 18 cases², as calculated or maintained in place pursuant to the most recent proceedings³ at a level in excess of the margin of dumping that, in the European Communities' view, would have resulted from the correct application of the relevant provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and*

¹WT/DS350/R, 1 October 2008.

²Panel Report, para. 2.1. In the annex to its Request for the Establishment of a Panel, WT/DS350/6, the European Communities identified 18 anti-dumping orders for which, it alleges, duties were set and/or maintained on the basis of the zeroing methodology applied by the United States Department of Commerce (the "USDOC"). The European Communities identified these 18 cases by reference to the country and the product involved (enumerated as Cases I to XVIII), as well as 52 specific anti-dumping proceedings (original investigations, periodic reviews, and sunset reviews) that pertain to these 18 cases (Nos. 1 to 52). (See Panel Report, para. 7.48) For ease of reference, we will use the same numbering system in this Report to facilitate identification of the 18 cases and the various proceedings at issue, as listed in the panel request attached to the Panel Report as Annex F-1, pp. F-6 to F-15. The relevant exhibits relating to these 18 cases are Panel Exhibits EC-26, EC-28 to EC-31, and EC-33 through EC-79.

³On page 3 of its panel request, the European Communities specified that its claim related to duties as "calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding". (WT/DS350/6, Panel Report, Annex F-1, p. F-4)

Trade 1994 (the "*Anti-Dumping Agreement*"). The European Communities also challenged the specific instances of application of the zeroing methodology in four original anti-dumping investigations, 37 periodic reviews, and 11 sunset reviews pertaining to the same 18 cases.⁴

2. Before the Panel, the European Communities claimed that:

- (a) the United States had acted inconsistently with Articles VI:1 and VI:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), Articles 2.4, 2.4.2, 9.3, 11.1, and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), because it continues to apply duties that were calculated using the zeroing methodology in the 18 anti-dumping measures listed in the annex to the European Communities' request for the establishment of a panel⁵;
- (b) the United States had acted inconsistently with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* when applying "model zeroing"⁶ in the four original investigations at issue in this dispute⁷;

⁴Panel Report, para. 2.1.

⁵European Communities' first written submission to the Panel, Panel Report, Annex A-1, p. A-59, para. 264; Panel Report, para. 3.1.

⁶Before the Panel, the European Communities used the term "model zeroing" to describe a methodology whereby an investigating authority compares the weighted average normal value and the weighted average export price for each model of the product under investigation and treats as zero the results of model-specific comparisons where the weighted average export price exceeds the weighted average normal value, when aggregating comparison results in order to calculate a margin of dumping for the product under investigation. (See Panel Report, para. 7.7; and European Communities' first written submission to the Panel, Panel Report, Annex A-1, p. A-9, paras. 10 and 11)

⁷European Communities' first written submission to the Panel, Panel Report, Annex A-1, p. A-59, para. 264; Panel Report, para. 3.1(b). The four original investigations are identified at paragraph 7.103 of the Panel Report, and the relevant exhibits relating to these investigations are Panel Exhibits EC-26, EC-28, EC-29, and EC-30.

- (c) the United States had acted inconsistently with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.4, 2.4.2, 9.3, and 11.2 of the *Anti-Dumping Agreement* when applying "simple zeroing"⁸ in the 37 periodic reviews⁹ at issue in this dispute¹⁰; and
- (d) the United States had acted inconsistently with Articles 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *Anti-Dumping Agreement* in the 11 sunset reviews¹¹ at issue in this dispute¹² when relying on margins of dumping calculated in prior investigations using the zeroing methodology.¹³

3. The European Communities also requested the Panel to suggest, pursuant to Article 19 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that the United States cease to use the zeroing methodology when calculating dumping margins in any anti-dumping proceeding in connection with the 18 cases identified in the annex to the European Communities' panel request.¹⁴

⁸Before the Panel, the European Communities used the term "simple zeroing" to describe a methodology whereby an investigating authority compares the prices of individual export transactions against monthly weighted average normal values and treats as zero the results of comparisons where the export price exceeds the monthly weighted average normal value when aggregating comparison results. (See Panel Report, paras. 7.7 and 7.160; and European Communities' first written submission to the Panel, Panel Report, Annex A-1, p. A-12, paras. 25 and 26)

⁹We use the term "periodic review" to describe the periodic review of the amount of anti-dumping duty as required by Section 751(a) of the United States Tariff Act of 1930 (Public Law No. 1202-1527, 46 Stat. 741, codified in *United States Code*, Title 19, Chapter 4, as amended) (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. 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 measures. (See also European Communities' first written submission to the Panel, Panel Report, Annex A-1, pp. A-10 and A-11, paras. 15-19)

¹⁰European Communities' first written submission to the Panel, Panel Report, Annex A-1, p. A-59, para. 264; Panel Report, para. 3.1(c). The 37 periodic reviews are identified at paragraph 7.145 of the Panel Report, and the relevant exhibits relating to these periodic reviews are Panel Exhibits EC-31 and EC-33 through EC-68.

¹¹We use the term "sunset review" to describe the review of an anti-dumping duty order five years after its publication, as required by Section 751(c) of the Tariff Act. That provision requires the USDOC to conduct a review to determine whether revocation of the anti-dumping duty order would likely lead to continuation or recurrence of dumping and of material injury five years after the date of publication of an anti-dumping duty order. (See also European Communities' first written submission to the Panel, Panel Report, Annex A-1, p. A-13, paras. 30 and 31)

¹²The 11 sunset reviews are identified at paragraph 7.190 of the Panel Report, and the relevant exhibits relating to these sunset reviews are Panel Exhibits EC-69 through EC-79.

¹³European Communities' first written submission to the Panel, Panel Report, Annex A-1, p. A-59, para. 264; Panel Report, para. 3.1(d).

¹⁴Panel Report, para. 3.2.

4. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 1 October 2008, the Panel found that:

- (a) the 14 anti-dumping proceedings identified in the European Communities' panel request, but not in its request for consultations, were within the Panel's terms of reference¹⁵;
- (b) the European Communities' claims in connection with the continued application of the 18 anti-dumping duties were not within the Panel's terms of reference¹⁶;
- (c) the European Communities' claims regarding the four preliminary determinations identified in its panel request were not within the Panel's terms of reference¹⁷;
- (d) the United States had acted inconsistently with its obligations under Article 2.4.2 of the *Anti-Dumping Agreement* by using model zeroing in the four original investigations challenged by the European Communities in this dispute¹⁸;
- (e) the United States had acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by applying simple zeroing in 29 periodic reviews challenged by the European Communities in this dispute¹⁹; and
- (f) the United States had acted inconsistently with its obligations under Article 11.3 of the *Anti-Dumping Agreement* by using, in eight sunset reviews challenged by the European Communities in this dispute, dumping margins obtained through the use of model zeroing in prior investigations.²⁰

5. The Panel recommended that the Dispute Settlement Body (the "DSB") request the United States to bring its measures found to be inconsistent with the GATT 1994 and the *Anti-Dumping*

¹⁵Panel Report, paras. 7.28 and 8.1(a).

¹⁶Panel Report, paras. 7.61 and 8.1(b).

¹⁷Panel Report, paras. 7.77 and 8.1(c).

¹⁸Panel Report, paras. 7.111 and 8.1(d).

¹⁹Panel Report, paras. 7.183 and 8.1(e). One of the 37 periodic reviews challenged by the European Communities was a preliminary determination that the Panel found not to be within its terms of reference, and the Panel found that the European Communities had not shown that simple zeroing was used in the other seven periodic reviews. (*Ibid.*, para. 7.158)

²⁰Panel Report, paras. 7.202 and 8.1(f). The Panel noted that three of the 11 sunset reviews challenged by the European Communities concerned preliminary determinations that the Panel found not to be within its terms of reference. (*Ibid.*, para. 7.191)

Agreement into conformity with its WTO obligations²¹, but declined to make a suggestion as to how the DSB recommendations and rulings could be implemented by the United States.²²

6. On 6 November 2008, the European Communities notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal²³ pursuant to Rule 20 of the *Working Procedures for Appellate Review*²⁴ (the "*Working Procedures*"). On 13 November 2008, the European Communities filed an appellant's submission.²⁵ On 18 November 2008, the United States notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal²⁶ pursuant to Rule 23(1) and (2) of the *Working Procedures*. On 21 November 2008, the United States filed an other appellant's submission.²⁷ On 1 December 2008, the European Communities and the United States each filed an appellee's submission.²⁸ On the same day, Brazil, Japan, and Korea each filed a third participant's submission²⁹, and China, India, Mexico, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand each notified its intention to appear at the oral hearing as a third participant.³⁰ On 2 December 2008, Egypt notified its intention to attend the oral hearing as a third participant.³¹

7. The European Communities and the United States requested, by letters dated 14 and 17 November 2008, respectively, that the Appellate Body Division hearing this appeal authorize public observation of the oral hearing.³² The European Communities and the United States submitted that public observation of the oral hearing was not precluded by the DSU, the *Working Procedures*, or the *Rules of Conduct for the Understanding on Rules and Procedures Governing the*

²¹Panel Report, para. 8.3.

²²Panel Report, para. 8.7. The Panel applied judicial economy with regard to the European Communities' claims under: Article 2.4 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 regarding the use of model zeroing in the four original investigations at issue; Articles 2.1, 2.4, 2.4.2, and 11.2 of the *Anti-Dumping Agreement* regarding the use of simple zeroing in 29 periodic reviews; and Articles 2.1, 2.4, 2.4.2, and 11.1 of the *Agreement* regarding the use of margins obtained in prior proceedings through the zeroing methodology in eight sunset reviews at issue. (Panel Report, para. 8.2)

²³WT/DS350/11 (attached as Annex I to this Report).

²⁴WT/AB/WP/5, 4 January 2005.

²⁵Pursuant to Rule 21 of the *Working Procedures*.

²⁶WT/DS350/12 (attached as Annex II to this Report).

²⁷Pursuant to Rule 23(3) of the *Working Procedures*.

²⁸Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

²⁹Pursuant to Rule 24(1) of the *Working Procedures*.

³⁰Pursuant to Rule 24(2) of the *Working Procedures*.

³¹Pursuant to Rule 24(4) of the *Working Procedures*.

³²Similar requests were made in the appeals in *US – Continued Suspension* and *Canada – Continued Suspension* and *EC – Bananas III (Article 21.5 – Ecuador II)* and *EC – Bananas III (Article 21.5 – US)*.

Settlement of Disputes.³³ The participants proposed public observation by means of a simultaneous closed-circuit television broadcast to a separate room, with the transmission being interrupted when any third participant wishing to maintain the confidentiality of its statements took the floor.

8. On 18 November 2008, the Division invited the third participants to comment in writing on the participants' requests to open the hearing to public observation. The Division asked the third participants to provide their views on, in particular, the permissibility of opening the hearing for public observation under the DSU and the *Working Procedures*, and, if they so wished, the specific logistical arrangements proposed by the participants. Comments were received from all of the third participants on 24 November 2008. Japan, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu expressed their support for the requests of the participants. Korea did not object to the opening of the oral hearing to the public in these proceedings, but requested the Appellate Body to treat its written and oral statements as confidential. Brazil, China, Egypt, India, Mexico, and Thailand expressed the view that the provisions of the DSU do not allow public observation of oral hearings at the appellate stage. According to these third participants, the oral hearing forms part of the proceedings of the Appellate Body and is, therefore, subject to the requirement of Article 17.10 of the DSU that "[t]he proceedings of the Appellate Body shall be confidential".

9. On 28 November 2008, the Division issued a Procedural Ruling in which it authorized the public observation of the oral hearing for the participants and the third participants who so requested, and adopted additional procedures for that purpose in accordance with Rule 16(1) of the *Working Procedures*.³⁴ Oral statements and responses to questions by third participants wishing to maintain the confidentiality of their submissions were not subject to public observation.

10. The oral hearing in this appeal was held on 11 and 12 December 2008. The participants and the third participants were given the opportunity to present oral arguments and respond to questions posed by the Division hearing the appeal.³⁵

³³The *Rules of Conduct*, as adopted by the DSB on 3 December 1996 (see WT/DSB/RC/1), are incorporated into the *Working Procedures* as Annex II thereto (see WT/DSB/RC/2, WT/AB/WP/W/2).

³⁴The Procedural Ruling is attached as Annex III to this Report.

³⁵Public observation took place via simultaneous closed-circuit television broadcast to a separate room. Pursuant to the additional procedures adopted by the Division, China, Egypt, India, Korea, Mexico, and Thailand each requested that its oral statements and responses to questions remain confidential and not be subject to public observation. Brazil agreed to public observation of its participation in the oral hearing without prejudice to its position on the permissibility of public observation of the oral hearing before the Appellate Body.

II. Arguments of the Participants and the Third Participants

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

1. The Panel's Terms of Reference – Continued Application of 18 Anti-Dumping Duties

11. The European Communities claims that the Panel erred in finding that the European Communities failed to identify in its request for the establishment of a panel, as required by Article 6.2 of the DSU, the specific measures at issue with respect to the application and continued application of 18 anti-dumping duties. The European Communities requests the Appellate Body to modify or reverse the Panel's finding and complete the analysis by finding that the panel request did identify the specific measures at issue, and that "each of the 18 measures is inconsistent with Articles VI:1 and VI:2 of the *GATT 1994*, Articles 2.4, 2.4.2, 9.3, 11.1 and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*."³⁶

12. Before elaborating on its specific grounds of appeal, the European Communities clarifies the "correct legal analysis"³⁷ of Articles 3.3 and 6.2 of the DSU. The European Communities observes that Articles 3.3 and 6.2 relate to different matters. The European Communities distinguishes between whether "something brought before a panel by a complaining Member constitutes a 'measure' within the meaning of Article 3.3 of the *DSU*" and whether "a panel request satisfies the requirement in Article 6.2 of the *DSU* that it 'identify the specific measures at issue'".³⁸ According to the European Communities, the former is a substantive issue, while the latter is a procedural one. The European Communities maintains that the United States made no reference to Article 3.3 in its request for a preliminary ruling by the Panel, and did not assert that the European Communities "had not demonstrated the *existence* or *precise content* of the measures at issue".³⁹

13. The European Communities further submits that the United States' request for a preliminary ruling was based on the assumption that the European Communities' panel request referred to measures "*that might or might not be adopted in the future*, and therefore referred to an '*indeterminate*' number of measures".⁴⁰ The European Communities maintains that it was not referring to the "type of 'measure' falling within the same category as the 52 measures (*i.e.*, the 18 measures [were] not just a simple aggregation of the 52 measures)", but that it was

³⁶European Communities' appellant's submission, para. 75.

³⁷European Communities' appellant's submission, para. 17.

³⁸European Communities' appellant's submission, para. 18. (original emphasis)

³⁹European Communities' appellant's submission, para. 21. (original emphasis)

⁴⁰European Communities' appellant's submission, para. 23 (original emphasis) (referring to United States' first written submission to the Panel, Panel Report, Annex A-2, pp. A-88 and A-89, paras. 66-71).

referring to "the *duty* as the measure".⁴¹ The European Communities further submits that it had demonstrated the existence and precise content of what were measures within the meaning of Article 3.3 of the DSU, and that the existence and precise content of the 18 duties was not in dispute between the parties.⁴²

14. In the European Communities' view, the Appellate Body has found that "*any act or omission* attributable to a WTO Member can be a measure of that Member for the purposes of dispute settlement proceedings, including acts setting forth rules or norms that are intended to have *general and prospective* application."⁴³ The European Communities further endorses the Appellate Body's view that the term "measure" encompasses "the *entire body* of generally applicable rules, norms and standards adopted by Members"⁴⁴ and that there is no basis for finding that *only certain types of measure* can be challenged in dispute settlement proceedings. The European Communities adds that the Appellate Body has also affirmed that, as long as the complaining Member adduces evidence to demonstrate the existence and precise content of a measure, the fact that it is not expressed in writing is not determinative.⁴⁵

15. The European Communities argues that the legal issue it raises on appeal concerns the manner in which the complaining Member is entitled to frame its claims, and particularly the terms in which it is entitled to refer to the measures at issue. The European Communities explains that, with respect to its claims before the Panel concerning the 52 measures, it had referred to each final order and the result of each periodic review or sunset review as a separate "measure" within the meaning of Article 3.3 of the DSU. In a separate set of claims, it had referred to each of the 18 anti-dumping duties as a "measure" within the meaning of Article 3.3 of the DSU. The European Communities acknowledges that there is some overlap between the two sets of claims, but states that the claims with respect to the 18 anti-dumping duties were "more extensive and of more value to the European Communities"⁴⁶ than the claims concerning the 52 measures.

16. The European Communities further explains that its approach of challenging the 18 duties as "measures" allows it "to apprehend the *root* of the WTO inconsistency as it relates to a particular anti-dumping duty".⁴⁷ For the European Communities, once there is a finding that a particular anti-

⁴¹European Communities' appellant's submission, para. 24. (original emphasis)

⁴²European Communities' appellant's submission, para. 25.

⁴³European Communities' appellant's submission, para. 27 (original emphasis; footnote omitted) (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81 and 82).

⁴⁴European Communities' appellant's submission, para. 27 (original emphasis) (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87).

⁴⁵European Communities' appellant's submission, para. 28 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 198).

⁴⁶European Communities' appellant's submission, para. 31. (footnote omitted)

⁴⁷European Communities' appellant's submission, para. 33. (original emphasis)

dumping duty is WTO-inconsistent, it may take "the entirely reasonable view that as long as the particular anti-dumping duty based on zeroing remains in place the United States will not have complied."⁴⁸ The European Communities argues that the United States' interpretation—that there are a series of different measures, each with a distinctive temporal scope—means that, even if the European Communities obtains a finding of inconsistency against a measure, "such finding is *worthless*".⁴⁹ This is so because, when the European Communities initiates compliance proceedings, the United States asserts that the "original" measure has "expired", and that, if the European Communities wishes to challenge the new measure, it "must start all over again" with a new panel.⁵⁰

17. According to the European Communities, the Panel suggests that a complaining Member is "actually *precluded, from the outset, and as a matter of principle*, from referring to the duty as the measure"⁵¹ and that this contradicts the text of the DSU, the GATT 1994, and the *Anti-Dumping Agreement*. In the European Communities' view, this line of reasoning is erroneous, because it "focuses only on that part of the measure that might change (as a function of the updated data-set) with each administrative review, namely the rate of duty (or the cash deposit rate)."⁵² Rather, the European Communities' complaint is directed at the unchanging part of the measure, "namely the zeroing methodology as used in the final order and programmed to continue to be used until such time as the United States eliminates zeroing from the particular anti-dumping duty under consideration."⁵³

18. The European Communities submits that relevant provisions of the GATT 1994 and the *Anti-Dumping Agreement* provide contextual support for the proposition that the term "measure" in Article 3.3 of the DSU includes an anti-dumping duty. Given that Article 17.4 of the *Anti-Dumping Agreement* refers expressly to "anti-dumping duties", and the Appellate Body has referred to anti-dumping duties when describing the three types of permissible responses to dumping under Article 17.4, "[i]t necessarily follows that the outcomes of the various types of review (newcomer, changed circumstances, sunset and assessment proceedings) fall within the ambit of Article 17.4 by virtue of the fact that they amend the underlying measure."⁵⁴ In such cases, there is one single measure (the duty) manifested in a series of documents that may be adopted over time. The European Communities asserts that, "[a]s long as there is an aspect of the measure that does not change (in this case, the zeroing methodology), then that aspect of the measure can be addressed in its own right, in such a way that any findings will have prospective value, until such time as the measure is

⁴⁸European Communities' appellant's submission, para. 33.

⁴⁹European Communities' appellant's submission, para. 34. (original emphasis)

⁵⁰European Communities' appellant's submission, para. 34.

⁵¹European Communities' appellant's submission, para. 35. (original emphasis)

⁵²European Communities' appellant's submission, para. 36.

⁵³European Communities' appellant's submission, para. 36.

⁵⁴European Communities' appellant's submission, para. 38 (referring to Appellate Body Report, *Guatemala – Cement I*, para. 79).

corrected."⁵⁵ In addition, the European Communities refers to Articles II, VI, and XXIII of the GATT 1994 and Articles 7.2, 8.6, 9.1-9.3, 11.1-11.3, 12.2.2, 15, and 18.3.2 of the *Anti-Dumping Agreement* and the general object and purpose of the covered agreements in support of its assertion that Article 3.3 of the DSU "allows Members to challenge duties as a measure".⁵⁶

19. The European Communities considers that all prior panels and the Appellate Body dealing with zeroing have found that the zeroing methodology is a "measure" within the meaning of Article 3.3 of the DSU, and that its precise content has been demonstrated. As the present case addresses precisely the same thing but is more specifically limited to particular anti-dumping duties on particular products exported from the European Communities to the United States, the European Communities fails to understand how additional criteria (specifying particular products, particular country of export, particular duties), which in effect narrow the scope of the measure, could have the effect of taking the measure outside the scope of Article 3.3 of the DSU.

20. The European Communities asserts that, given that the existence of the zeroing methodology has been repeatedly demonstrated, the Panel's finding that the European Communities had not demonstrated the existence of each of the 18 measures was unfounded. The European Communities maintains that the existence of a specific anti-dumping duty on a specific product exported from the European Communities to the United States "not only was never contested by the United States, but could never be seriously contested by the United States, given the fact that it is a simple matter of public record".⁵⁷

21. The European Communities rejects the view of the Panel that the European Communities was referring to an "indeterminate number of measures"⁵⁸ and was seeking a remedy as regards "'future measures' that 'do not exist as of the date of the panel's establishment'".⁵⁹ The European Communities argues that its approach sufficiently distinguishes between the 18 measures and the 52 measures, and that nothing precludes a WTO Member from bringing dispute settlement proceedings against measures that overlap. Further, in the European Communities' view, it is clear that the Panel could exercise judicial economy with respect to the 52 measures if the Panel made findings regarding the 18 measures. The European Communities contends that it did not "equate" the 18 measures with the "zeroing methodology" measure; rather, it explained to the Panel that "the relevant part of the

⁵⁵European Communities' appellant's submission, para. 38.

⁵⁶European Communities' appellant's submission, para. 41.

⁵⁷European Communities' appellant's submission, para. 48.

⁵⁸European Communities' appellant's submission, para. 43 (referring to Panel Report, para. 7.42).

⁵⁹European Communities' appellant's submission, para. 44 (quoting Panel Report, para. 7.59).

'*precise content*' of the 18 measures (that is, the zeroing methodology) was the same as the precise content of the zeroing methodology measure."⁶⁰

22. The European Communities explains what it considers to be the correct legal analysis under Article 6.2 of the DSU. Once it is accepted that an anti-dumping duty is a measure, "it is immediately apparent that it would have been *impossible* for the [European Communities'] Panel Request to be *any more specific*, identifying as it did the document originating each of the 18 measures (in each case, the final order), that is, the specific duties applying to the specific products exported from the European Communities to the United States."⁶¹ According to the European Communities, the Panel should have found that the United States had not raised the issue of whether or not the 18 measures constituted measures within the meaning of Article 3.3 of the DSU. In any event, the European Communities had made out a "*prima facie* case on the existence and precise content of the 18 measures"⁶², which the United States did not address or rebut. Referring to the objective of Article 6.2 to protect a defendant's due process rights, the European Communities argues that there was no basis for the United States to assert that it did not understand the allegations being made against it, and contends that the United States was thus "*unilaterally reformulating* the case and requesting a preliminary ruling with respect to that re-formulated case".⁶³

23. In addition, the European Communities submits that the Panel erred by confounding its analysis of Articles 3.3 and 6.2 of the DSU when it "erroneously equate[d] the substantive question of the *demonstration* of the existence and precise content of a measure with the procedural requirement that a panel request *identify* the specific measure at issue."⁶⁴ The issue of specificity under Article 6.2 is not, as the Panel asserted, a "burden of proof" issue, because a complainant "does not have to discharge its burden of proof, nor make a *prima facie* case, in its panel request".⁶⁵ Rather, "[t]he procedural issue under Article 6.2 of the *DSU* is not 'how' the measures have been identified in the panel request, but simply whether or not the [European Communities'] Panel Request *identifies* the specific measure at issue".⁶⁶ The European Communities adds that the Panel engaged in a "covert substantive analysis"⁶⁷ in which the "Article 3.3 of the *DSU* issue [*was*] decisive of its analysis of the Article 6.2 of the *DSU* issue".⁶⁸ The European Communities then faults the Panel for finding that the

⁶⁰European Communities' appellant's submission, para. 47 (original emphasis) (referring to European Communities' response to Panel Question 1 following the first meeting).

⁶¹European Communities' appellant's submission, para. 50. (original emphasis)

⁶²European Communities' appellant's submission, para. 51.

⁶³European Communities' appellant's submission, para. 52. (original emphasis)

⁶⁴European Communities' appellant's submission, para. 54 (original emphasis) (referring to Panel Report, para. 7.41).

⁶⁵European Communities' appellant's submission, para. 55 (referring to Panel Report, para. 7.41).

⁶⁶European Communities' appellant's submission, para. 57. (original emphasis)

⁶⁷European Communities' appellant's submission, para. 58.

⁶⁸European Communities' appellant's submission, para. 57. (original emphasis)

description of the 18 measures was "ambiguous" because the panel request did not "sufficiently distinguish" between the 52 measures and the 18 measures.⁶⁹ According to the European Communities, this is "irrelevant to the question of whether or not the panel request *identifie[d]* the specific measures at issue".⁷⁰

24. The European Communities also argues that the Panel's analysis was inconsistent with: Articles 7.1 and 12.1 of the DSU, and the Working Procedures for panels in Appendix 3 thereto; the "rule" that the complaining Member has the burden of raising an issue under Article 3.3 of the DSU; and the "rule" that panels must not make the case for the defending Member.⁷¹ Additionally, the European Communities contends that the Panel Report is inconsistent with Article 7.2 of the DSU insofar as the Panel did not address relevant provisions of the GATT 1994 and the *Anti-Dumping Agreement* that were cited by the European Communities in this dispute.

25. The European Communities posits that a complaining Member may make the necessary factual assertions and adduce the necessary evidence, and that this may be sufficient—and was certainly sufficient in this case—to constitute a *prima facie* case. The European Communities also contends that defending Members cannot "claim at a late stage of the proceedings ... that the complaining Member has not made a *prima facie* case because it has not provided *argument* regarding Article 3.3 of the *DSU*"; nor was the Panel permitted to "autonomously raise" the Article 3.3 issue and "make a case for the defending Member".⁷² It is for the defending Member to "*at least raise that issue in a timely manner*"⁷³ so that the complaining Member may make further factual assertions or adduce additional evidence.

26. The European Communities further submits that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the facts when concluding that the 18 anti-dumping duties in question did not exist or that their precise content had not been demonstrated. The European Communities maintains that the Panel erroneously relied on the "as such" or "as applied" distinction, and erred in finding that the European Communities equated the 18 measures with the zeroing methodology. The European Communities considers these Panel findings were based on a "deliberate refusal"⁷⁴ to make an objective assessment of the facts, and not on a misunderstanding on the part of the Panel.

⁶⁹European Communities' appellant's submission, para. 58 (quoting Panel Report, para. 7.49).

⁷⁰European Communities' appellant's submission, para. 58. (original emphasis)

⁷¹European Communities' appellant's submission, para. 62.

⁷²European Communities' appellant's submission, para. 64. (original emphasis)

⁷³European Communities' appellant's submission, para. 64. (original emphasis)

⁷⁴European Communities' appellant's submission, para. 72.

27. Finally, the European Communities contends that the Panel Report is inconsistent with Article 12.7 of the DSU because "the Panel did not set out the basic rationale behind its findings and recommendations."⁷⁵ The European Communities claims that the Panel offered no explanation supporting its conclusions that an anti-dumping duty constitutes a measure within the meaning of Article 3.3 of the DSU, or that the European Communities' panel request did not identify the specific measures at issue as required by Article 6.2 of the DSU.

28. On this basis, the European Communities requests the Appellate Body to modify or reverse the Panel's findings.⁷⁶ In addition, the European Communities requests the Appellate Body to complete the analysis and find that the European Communities' panel request did identify the specific measures at issue as required by Article 6.2 of the DSU. To the extent the Appellate Body reaches the issue, it should find that the European Communities had demonstrated the existence and precise content of the measures within the meaning of Article 3.3 of the DSU. The European Communities further requests the Appellate Body to complete the analysis and find that, "because of the use of zeroing, each of the 18 measures is inconsistent with Articles VI:1 and VI:2 of the *GATT 1994*, Articles 2.4, 2.4.2, 9.3, 11.1 and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*."⁷⁷

2. The Panel's Terms of Reference – Four Preliminary Determinations

29. The European Communities submits that the Panel erred when it excluded four preliminary determinations from its terms of reference. The European Communities observes that the Panel rejected the claims "on the *assumption* that the European Communities had argued that the four preliminary determinations were 'provisional measures'"⁷⁸ within the meaning of Article 17.4 of the *Anti-Dumping Agreement*. The European Communities emphasizes that it was not challenging the four preliminary determinations as "provisional measures" but, rather, "the *continued application of zeroing* in connection with the [18] *definitive anti-dumping duties*"⁷⁹ identified in its panel request. Accordingly, the European Communities argues that its claim concerning the continued application of 18 specific anti-dumping duties "effectively caught any subsequent 'measure' (that is, the type of measure falling into the category of the 52 measures) adopted by the United States, including

⁷⁵European Communities' appellant's submission, para. 73.

⁷⁶European Communities' appellant's submission, para. 74 (referring to Panel Report, paras. 7.40-7.67—in particular, 7.56, final sentence, and 7.61—and 8.1(b)).

⁷⁷European Communities' appellant's submission, para. 75. The European Communities also outlines its objection to the designation of the document circulated by the United States as WT/DS344/11. The European Communities requests the Appellate Body to confirm that such documents do not fall into the same category as other WT/DS documents relating to the same dispute or, alternatively, to consider how such documents should be designated. (See European Communities' appellant's submission, paras. 77-80)

⁷⁸European Communities' appellant's submission, para. 85. (original emphasis)

⁷⁹European Communities' appellant's submission, para. 87. (original emphasis)

preliminary determinations setting out the duty levels (wrongly *calculated* by applying zeroing) and insofar as those duties are still *in place*."⁸⁰ Therefore, any act or decision taken by the United States with respect to the duties in place, even if it was not final, was covered by the Panel's terms of reference.

30. The European Communities submits that Article 17.4 allows Members to challenge preliminary determinations that are part of the matter as identified in the dispute.⁸¹ The European Communities refers to the Appellate Body's observation that, "once one of the three types of measure[s] listed in Article 17.4 has been *identified* in the request for establishment of a panel, a Member may challenge the consistency of any action taken by an investigating authority in the course of an anti-dumping investigation."⁸² The European Communities maintains that it "precisely identified the *definitive anti-dumping duties*" as well as "the *claims* as to why those definitive duties were WTO-inconsistent".⁸³

31. On this basis, the European Communities requests the Appellate Body to reverse the Panel's finding that the four preliminary determinations were outside its terms of reference. Instead, the Appellate Body should complete the analysis and conclude that the four preliminary determinations fall under the scope of these proceedings and are inconsistent with those provisions of the GATT 1994 and the *Anti-Dumping Agreement* cited by the European Communities in the Panel proceedings.⁸⁴

3. Article 11 of the DSU – Seven Periodic Reviews

32. The European Communities claims that the Panel made factual and legal errors in violation of Article 11 of the DSU when it concluded that the European Communities had not shown that "simple zeroing" was used in respect of seven of the 37 challenged periodic reviews.⁸⁵ The European Communities requests the Appellate Body to "modify" the finding made by the Panel and conclude

⁸⁰European Communities' appellant's submission, para. 87. (original emphasis)

⁸¹See European Communities' appellant's submission, paras. 89 and 90 (referring to Appellate Body Report, *Guatemala – Cement I*, para. 79; and Panel Report, *Mexico – Corn Syrup*, paras. 7.52 and 7.53).

⁸²European Communities' appellant's submission, para. 91 (original emphasis) (referring to Appellate Body Report, *US – 1916 Act*, paras. 73 and 74 and footnote 39 thereto).

⁸³European Communities' appellant's submission, para. 92. (original emphasis)

⁸⁴The European Communities further maintains that, if the Appellate Body accepts the claim with respect to the 18 anti-dumping duties, the Appellate Body could declare the Panel's findings regarding the four preliminary determinations "moot and of no legal effect". (European Communities' appellant's submission, para. 95 (emphasis omitted))

⁸⁵The seven periodic reviews at issue are: *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3) (Panel Exhibit EC-35); *Stainless Steel Bar from France* (Case V – No. 20) (Panel Exhibit EC-47); *Stainless Steel Bar from France* (Case V – No. 21) (Panel Exhibit EC-48); *Stainless Steel Bar from Germany* (Case IX – No. 33) (Panel Exhibit EC-57); *Stainless Steel Bar from Germany* (Case IX – No. 34) (Panel Exhibit EC-58); *Stainless Steel Bar from Italy* (Case XI – No. 39) (Panel Exhibit EC-62); and *Certain Pasta from Italy* (Case XIII – No. 43) (Panel Exhibit EC-65). See also Panel Report, para. 7.145.

that the European Communities showed that zeroing was used in the seven periodic reviews. The European Communities further requests the Appellate Body to complete the analysis and extend the finding of breach of Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* to all 37 periodic reviews at issue in this dispute.

33. The European Communities asserts that the Panel failed to carry out an objective assessment of the facts as required by Article 11 of the DSU when it concluded that the European Communities had not made out a *prima facie* case that the simple zeroing methodology "was part of the measure and indeed was actually used in the seven administrative reviews concerned".⁸⁶ The European Communities maintains that there was sufficient evidence in the record and that there was no other relevant documentation that it could have produced.

34. The European Communities submits that Article 17.6 of the DSU does not preclude the Appellate Body from considering the legal question of whether a panel complied with its obligations under Article 11. Although a panel's examination and weighing of evidence generally falls within the scope of its discretion as the trier of facts, the Appellate Body may review a panel's exercise of that discretion to ensure that the panel rendered an objective assessment of the matter before it and did not exceed the bounds of its discretion in its appreciation of the evidence. The European Communities posits that, when a panel exceeds its discretion "by misunderstanding, disregarding, ignoring, distorting, refusing to consider or misrepresenting the evidence, such an *egregious error* can be subject to review by the Appellate Body *as a matter of law* under the panel's obligations pursuant to Article 11 of the *DSU*."⁸⁷ Likewise, the failure of a panel to draw certain inferences from the facts in the record is also subject to Appellate Body review "*as a matter of law* since it implies that a panel improperly exercised its discretion under Article 11 of the *DSU*".⁸⁸

35. The European Communities claims that the Panel committed an "egregious error"⁸⁹ in concluding that the European Communities had not shown that the zeroing methodology was actually used in the seven periodic reviews at issue. Rather, having examined the evidence in the record, the Panel should have concluded that zeroing was used in those periodic reviews.

36. The European Communities provides a description of the evidence submitted to the Panel that, in its view, showed that the United States Department of Commerce (the "USDOC") had used simple zeroing in the challenged periodic reviews. This evidence consisted of the USDOC's final

⁸⁶European Communities' appellant's submission, para. 100.

⁸⁷European Communities' appellant's submission, para. 110 (original emphasis) (referring to Appellate Body Report, *US – Wheat Gluten*, paras. 173, 185, and 195; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 176 and 179; and Appellate Body Report, *Japan – DRAMs (Korea)*, para. 139).

⁸⁸European Communities' appellant's submission, para. 110. (original emphasis)

⁸⁹European Communities' appellant's submission, para. 111.

results of the periodic reviews at issue, the USDOC's Standard Margin Program, certain computer Program Logs, and lists of transactions and tables containing the dumping calculations with and without zeroing in those reviews.⁹⁰

37. In addition to these "specific documents showing concrete details of each administrative review", the European Communities points to other evidence in the record "from which it can be inferred that the United States actually used zeroing in those reviews".⁹¹ The European Communities claims that this evidence consists of: a Notice published in the *United States Federal Register* on 27 December 2006⁹² (the "USDOC December 2006 Notice") indicating that there would be no policy change to the practice of zeroing in periodic reviews; the Issues and Decision Memoranda in the 37 periodic reviews at issue containing the USDOC's repeated statements regarding its continued practice of using simple zeroing in periodic reviews⁹³; and the significant amount of WTO litigation against the use of zeroing by the United States.⁹⁴ The European Communities submits that it "also brought to the Panel's attention the fact that the United States remained silent as to whether it had used zeroing in the administrative reviews at issue and did not provide any evidence showing the contrary."⁹⁵

38. The European Communities explains the specific evidence it submitted with respect to each of the seven periodic reviews. Regarding *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3), the European Communities disagrees with the Panel's conclusion that the evidence did not "necessarily show"⁹⁶ that simple zeroing was used. The European Communities notes that it had explained that both the USDOC's Standard Margin Program and the Program Log disclosed by the USDOC to the parties contained the zeroing line and that "[t]his alone indicates that the zeroing methodology was part of the measure".⁹⁷ The European Communities points to the additional evidence it produced to support its case, and alleges that the Panel ignored the fact that "the application of the USDOC's Standard [Margin] Program[] containing the zeroing line (*i.e.*, WHERE EMARGIN GT 0) shows that only a limited number of transactions (*i.e.*, referred to as 'observations' in the programme log) were taken into account for the purpose of the dumping calculation (*i.e.*, those

⁹⁰See European Communities' appellant's submission, paras. 113-123.

⁹¹European Communities' appellant's submission, para. 124.

⁹²European Communities' appellant's submission, para. 125 (referring to "Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification", *United States Federal Register*, Vol. 71, No. 248 (27 December 2006), 77722-77725 (Panel Exhibit EC-90)). See also *ibid.*, paras. 167-169.

⁹³European Communities' appellant's submission, para. 126 (referring to Panel Exhibits EC-32 through EC-68). See also *ibid.*, paras. 170-172.

⁹⁴European Communities' appellant's submission, para. 127. See also *ibid.*, paras. 173 and 174.

⁹⁵European Communities' appellant's submission, para. 128. See also *ibid.*, paras. 175-177.

⁹⁶European Communities' appellant's submission, para. 133 (quoting Panel Report, para. 7.151).

⁹⁷European Communities' appellant's submission, para. 133 (referring to the summary provided in Panel Exhibit EC-35).

where the EMARGIN was greater than zero)".⁹⁸ The European Communities also alleges that the Panel ignored the relevant tables containing calculations showing that zeroing was being used, as well as the fact that, when the Program Log is considered together with the tables, "the evidence overwhelmingly corroborates the fact that the zeroing methodology was part of the measure and indeed was actually used."⁹⁹ The European Communities concludes that "the specific documents contained in the record 'necessarily show' that simple zeroing was 'actually used'", and that the Panel's assertion that certain of the documents were not issued by the USDOC at the time of the review is "both *incorrect* and *irrelevant*".¹⁰⁰

39. The European Communities presents similar arguments regarding the question whether zeroing was used in four additional periodic reviews.¹⁰¹ The European Communities explains that, with respect to each of these four reviews, the evidence it submitted—namely, printouts of certain computer programs used by the USDOC, as well as calculation tables prepared on the basis of data supplied by the USDOC—demonstrates that zeroing was used. Because the Panel "ignored" the evidence in the record, it "committed an egregious error" in concluding that the European Communities failed to demonstrate that the zeroing methodology was used by the USDOC in each of these four reviews.¹⁰²

40. Regarding the periodic reviews in *Stainless Steel Bar from France* (Case V – Nos. 20 and 21), the European Communities asserts that the Panel's description of the evidence was incomplete, and that the Panel ignored other evidence in the record "from which it could be inferred that the USDOC actually used zeroing in this administrative review".¹⁰³ The European Communities then refers to prior zeroing decisions against the United States, statements of the USDOC regarding the practice of zeroing, and the United States' silence in this dispute regarding the practice of zeroing, and concludes that, based on "the *totality of the facts* in the record ... the Panel should have concluded that the zeroing methodology was part of the measure and was actually used".¹⁰⁴

41. The European Communities submits, as a separate claim, that the Panel failed to apply a reasonable burden of proof because it "required the European Communities to provide evidence 'necessarily showing' ... that zeroing was 'actually used' in the seven administrative reviews at

⁹⁸European Communities' appellant's submission, para. 134.

⁹⁹European Communities' appellant's submission, para. 136.

¹⁰⁰European Communities' appellant's submission, para. 137. (original emphasis)

¹⁰¹These four additional periodic reviews are: *Stainless Steel Bar from Germany* (Case IX – No. 33); *Stainless Steel Bar from Germany* (Case IX – No. 34); *Stainless Steel Bar from Italy* (Case XI – No. 39); and *Certain Pasta from Italy* (Case XIII – No. 43).

¹⁰²See European Communities' appellant's submission, paras. 149, 144, 155, and 162, respectively.

¹⁰³European Communities' appellant's submission, paras. 165 (footnote omitted) and 181.

¹⁰⁴European Communities' appellant's submission, paras. 178 (original emphasis) and 181.

issue".¹⁰⁵ The European Communities considers that it has "made a *prima facie* case that the zeroing methodology was part of the measure", and that it at least "provided sufficient evidence for the Panel to establish the *presumption* that the USDOC applied zeroing in the administrative reviews at issue".¹⁰⁶ As a result, the Panel should have shifted the burden of proof so that the United States could rebut such a presumption. The European Communities maintains that, "if a Member provides sufficient evidence that a *fact* has occurred, then a panel should conclude from that evidence that there is [a] *presumption* that 'what is claimed is true, the burden then shift[ing] to the other party'."¹⁰⁷

42. The European Communities maintains that, when a dispute essentially refers to the same measure (that is, a periodic review carried out by the USDOC) where the same provisions have been applied (that is, the United States laws and regulations dealing with periodic reviews), the application of the same burden of proof criteria and requirements to establish the same presumption by panels and the Appellate Body should be expected. The European Communities also notes instances in which panels and the Appellate Body were able to reach findings regarding the application of simple zeroing.¹⁰⁸ The European Communities maintains that, in those cases, the panels and the Appellate Body found that the complaining Member had made out a *prima facie* case, establishing a presumption that the zeroing methodology was part of the measure, and that the USDOC had used zeroing in the periodic reviews concerned in those disputes, based on similar documents to the ones provided by the European Communities in the present case. The European Communities contends that "the *same presumption* should be concluded, *at least*, from the *same type and amount of evidence*", and that panels cannot increase the burden of proof "in cases where previous panels and the Appellate Body have decided that a particular set of facts (or inferences) is enough to make a *presumption* that what is claimed is true."¹⁰⁹

43. The European Communities argues that, where a complaining Member cannot show a particular fact because it is impossible to provide further evidence of that particular fact, such evidence should suffice to raise a presumption that the Member has proven the fact it claims to be true. The European Communities maintains that, in requiring proof in each case that not all

¹⁰⁵European Communities' appellant's submission, para. 185 (referring to Panel Report, paras. 7.151-7.158).

¹⁰⁶European Communities' appellant's submission, para. 186. (original emphasis)

¹⁰⁷European Communities' appellant's submission, para. 188 (original emphasis) (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335).

¹⁰⁸European Communities' appellant's submission, paras. 191-193 (referring to Panel Report, *US – Zeroing (EC)*, para. 7.144; Appellate Body Report, *US – Zeroing (EC)*, para. 135; Panel Report, *US – Stainless Steel (Mexico)*, para. 7.149; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 139; Panel Report, *US – Zeroing (Japan)*, paras 4.250 and 7.226; Appellate Body Report, *US – Zeroing (Japan)*, para. 175; Panel Report, *US – Shrimp (Ecuador)*, para. 7.29; and Panel Report, *US – Softwood Lumber V*, footnote 341 to para. 7.186).

¹⁰⁹European Communities' appellant's submission, para. 195. (original emphasis)

transactions were "dumped", the Panel disregarded the fact that the European Communities could not provide more evidence, because the United States did not produce any other additional documents showing that zeroing was used in a particular periodic review. The European Communities recalls that, as it explained to the Panel, the USDOC does not produce a complete transaction-by-transaction calculation of the dumping margins from which the application of zeroing can be ascertained. Thus, the documents provided to the Panel in this case were sufficient to establish the presumption that the zeroing methodology was part of the measure and that the USDOC used zeroing in the seven periodic reviews at issue. The European Communities clarifies that it is not arguing that the United States should have provided evidence that zeroing was not used because the United States had access to the complete record of each periodic review. Rather, the European Communities maintains that it was impossible (rather than more difficult) for the European Communities to produce the additional documents the Panel sought. Consequently, the European Communities requests the Appellate Body to find that the Panel applied an unreasonable standard of burden of proof, and to conclude that the European Communities supplied sufficient evidence to raise a presumption that the zeroing methodology was used in the seven periodic reviews at issue.

44. Furthermore, the European Communities submits that the Panel erred in its interpretation of Article 13 of the DSU when it concluded that the European Communities did not ask the Panel to seek information from the United States regarding detailed margin calculations for the seven periodic reviews, and that the request of the European Communities "[did] not suffice as a request to the Panel to seek specific factual information from the USDOC pursuant to its authority under Article 13".¹¹⁰ The European Communities submits that the language it used in articulating its request was precise and contained the specific factual information that the Panel could, if it considered it necessary, request of the United States. Furthermore, in the view of the European Communities, nothing in the DSU (or more specifically in Article 13) requires a Member to identify expressly under which mechanism a panel should seek further information from the parties. The European Communities submits that it was up to the Panel to channel such a request through the most appropriate means. Consequently, the fact that the European Communities did not expressly refer to Article 13 in its request was not sufficient for the Panel to disregard that request. The European Communities accordingly requests the Appellate Body to find, pursuant to Articles 17.6 and 17.13 of the DSU, that the Panel erred in concluding that the European Communities' statement did not amount to a request under Article 13 of the DSU.

45. Additionally, the European Communities questions the legal interpretation developed by the

¹¹⁰European Communities' appellant's submission, para. 203 (quoting Panel Report, footnote 20 to para. 6.20).

Panel in concluding that "it would be *inappropriate* for a panel to exercise its authority to seek information based on its own judgement as to what information is necessary for a party to prove its case, as opposed to seeking information in order to elucidate its understanding of the facts and issues in the dispute before it."¹¹¹ In the European Communities' view, it is appropriate for a panel to seek information "in cases like the present one where the information 'necessarily showing' that a particular fact 'actually' is true ... is *only* in the possession of the respondent Member."¹¹² In support of its position, the European Communities notes that the Appellate Body has clarified that a panel's right to seek information pursuant to Article 13 is discretionary, and a panel's authority to ask questions is not conditional upon the making out of a *prima facie* case by the other party.¹¹³ Consequently, the European Communities requests the Appellate Body to find that it would have been "appropriate"¹¹⁴ for the Panel to seek further information corroborating the fact that the zeroing methodology was used in the seven periodic reviews at issue.

4. Article 19.1 of the DSU

46. The European Communities submits that the Panel erred when it disregarded the European Communities' request for two suggestions pursuant to Article 19.1 of the DSU concerning steps necessary for the United States to bring its measures into conformity with its obligations under the covered agreements. First, the European Communities had asked the Panel to suggest "that the United States cease using zeroing when calculating dumping margins in any anti-dumping proceeding with respect to the 18 measures".¹¹⁵ The European Communities maintains that this suggestion would be appropriate to help promote the resolution of the dispute, because it would provide guidance to the United States as to what it must do in order to comply. Secondly, the European Communities had also requested the Panel to suggest "that the United States should take all necessary steps of a general or particular nature to ensure that any further specific action against dumping by the United States in relation to the same products from the European Communities as referenced in the present dispute be WTO consistent".¹¹⁶ In the European Communities' view, this suggestion would reduce the need for "protracted and unnecessary discussions"¹¹⁷ regarding the scope of a compliance panel proceeding. The European Communities argues that, while there is a presumption of good faith compliance with DSB recommendations and rulings, suggestions would assist in the achievement of the objective of a

¹¹¹European Communities' appellant's submission, para. 207 (original emphasis) (quoting Panel Report, footnote 20 to para. 6.20).

¹¹²European Communities' appellant's submission, para. 208. (original emphasis)

¹¹³European Communities' appellant's submission, para. 209 (referring to Appellate Body Report, *EC – Bed Linen*, para. 166; Appellate Body Report, *EC – Sardines*, para. 302; and Appellate Body Report, *Canada – Aircraft*, paras. 185 and 192).

¹¹⁴European Communities' appellant's submission, para. 211. (emphasis omitted)

¹¹⁵European Communities' appellant's submission, para. 215.

¹¹⁶European Communities' appellant's submission, para. 216.

¹¹⁷European Communities' appellant's submission, para. 216.

prompt and satisfactory settlement of the dispute, and would help clarify the interpretations made by the panel and the Appellate Body.¹¹⁸ Thus, the European Communities requests the Appellate Body to make suggestions pursuant to Article 19.1, and invites the Appellate Body to take into account those already made by the European Communities.

5. Conditional Appeals

47. The European Communities makes two conditional appeals. First, the European Communities recalls the Appellate Body's statements in *US – Stainless Steel (Mexico)* and the conclusions it made in paragraphs 160 to 162 of that report. Should the Appellate Body construe the Panel Report in this dispute "as inconsistent with these prior statements by the Appellate Body"¹¹⁹, then the European Communities appeals those findings "for all the reasons set out by the Appellate Body in its report in *US – Stainless Steel (Mexico)*".¹²⁰

48. Secondly, if the United States appeals the Panel's findings regarding what the Panel referred to as "the role of jurisprudence", and if the Appellate Body modifies or reverses those findings in whole or in part, then the European Communities appeals "what might be construed as substantive findings or the exercise of false judicial economy in the Panel Report on the substantive issue of zeroing in administrative reviews".¹²¹ The European Communities further refers to its reasoning before the Panel and requests the Appellate Body to complete the analysis on the basis of that reasoning.

B. *Arguments of the United States – Appellee*

1. The Panel's Terms of Reference – Continued Application of 18 Anti-Dumping Duties

49. The United States requests the Appellate Body to reject the European Communities' appeal and affirm the Panel's preliminary ruling that the continued application of 18 anti-dumping duties were outside its terms of reference. Recalling that Article 6.2 of the DSU states that a panel request must identify the specific measure at issue, the United States argues that the European Communities' panel request was "unclear in numerous respects".¹²² The United States notes that, in particular, at the time of the European Communities' first written submission, it was uncertain what the European Communities meant by the "most recent"¹²³ anti-dumping proceeding. The United States considered

¹¹⁸See European Communities' appellant's submission, paras. 219-221.

¹¹⁹European Communities' appellant's submission, para. 229. (footnote omitted)

¹²⁰European Communities' appellant's submission, para. 229.

¹²¹European Communities' appellant's submission, para. 230. (footnote omitted)

¹²²United States' appellee's submission, para. 58.

¹²³United States' appellee's submission, para. 59.

that the reference in the panel request to the application or continued application of anti-dumping duties in 18 cases "included an indefinite number of measures resulting from current, past, and future antidumping determinations" and that these "alleged 18 'duties' were therefore not specifically identified, as required by Article 6.2 of the DSU".¹²⁴

50. The United States alleges that the European Communities admitted the "broad, indeterminate nature" of the 18 duties when, in response to the United States' request for a preliminary ruling, the European Communities noted that its panel request pertained to all "subsequent measures" adopted by the United States with respect to the 18 duties, and to any "subsequent modification" of the measures concerning the level of duty.¹²⁵ The United States noted before the Panel that, under the DSU, such subsequent measures, proceedings, and modifications "could not be subject to dispute settlement"¹²⁶ since they were not in existence at the time of the Panel's establishment. According to the United States, the European Communities was "improperly trying to include the application or continued application of duties resulting from determinations that have not yet been made"; the United States, however, "could not determine when these determinations were or will be made, what calculations they did or will include, what duty rates they have established or will establish, and what individual companies they did or will cover".¹²⁷

51. The United States submits that the European Communities' concept of "duty as a measure" is "some type of free-standing measure that had a life of its own beyond the 52 particular determinations identified in its panel request".¹²⁸ In the view of the United States, the characterization of the measure ignores that, "for any given importation, the antidumping duty imposed or assessed depends on a particular administrative determination"¹²⁹, and that the continued existence of an anti-dumping duty order depends on a sunset review. Consequently, the United States submits that the panel request could not fulfil the requirements of Article 6.2 unless it identified the specific determination related to the particular anti-dumping duty. Because these measures could not have existed at the time of its request for consultations, or at the time of the establishment of the Panel, they cannot be within its terms of reference. The United States claims that, by requesting a preliminary ruling, it was not trying to "unilaterally reformulat[e]"¹³⁰ the case of the European Communities, but rather understood that "the application or continued application of antidumping duties had to result from an underlying

¹²⁴United States' appellee's submission, para. 59. (footnote omitted)

¹²⁵United States' appellee's submission, para. 60 (referring to European Communities' response to United States' preliminary objections, paras. 47 and 48).

¹²⁶United States' appellee's submission, para. 61.

¹²⁷United States' appellee's submission, para. 61. (footnote omitted)

¹²⁸United States' appellee's submission, para. 62. (footnote omitted)

¹²⁹United States' appellee's submission, para. 62.

¹³⁰United States' appellee's submission, para. 64 (emphasis omitted) (quoting European Communities' appellant's submission, para. 52).

antidumping determination".¹³¹ By not identifying the determination giving rise to the particular duty in the 18 cases, the European Communities "failed to identify the *specific* measure at issue".¹³²

52. The United States maintains that it "has not accepted"¹³³ that anti-dumping duties related to the 18 cases will be applied in all future instances, nor that zeroing will be used in the determinations potentially giving rise to such duties. As the United States explains, it is "entirely possible"¹³⁴ that subsequent determinations will yield a zero or *de minimis* duty, that future sunset reviews could lead to revocation of an anti-dumping order, or that a particular period will result in no negative margins that would require zeroing. For the United States, it was unfounded for the European Communities to state that a "part of the measure ... does not change over time, namely the zeroing methodology as used in the final order and programmed to continue to be used until such time as the United States eliminates zeroing from the particular anti-dumping duty under consideration."¹³⁵ The United States also submits that the European Communities' approach would have a detrimental effect on the dispute settlement system because it disregards the rights of other Members who may rely on the description of the measures identified in the panel request when deciding whether to participate as third parties.

53. The United States argues that the Panel's analysis of the lack of specificity in the European Communities' panel request was not flawed. Regarding the European Communities' argument that it "would have been *impossible* for the [European Communities'] Panel Request to be *any more specific*"¹³⁶, the United States contends that it would have been impossible to be more specific given that the measures were not yet in existence. In any event, the fact that the European Communities could not have been more specific does not mean that the panel request identified the specific measures at issue in accordance with Article 6.2 of the DSU.

54. The United States also argues that the Panel properly considered jurisdictional issues arising from the United States' request for a preliminary ruling. The United States submits that, although it raised its objection as a preliminary matter, this does not mean that it has the burden of proof, because the complaining party has a duty to comply with Article 6.2.¹³⁷ The United States responds next to the European Communities' arguments that the United States had the burden of raising an issue under Article 3.3 of the DSU, and that the Panel must not make the case for the defending Member. First,

¹³¹United States' appellee's submission, para. 65.

¹³²United States' appellee's submission, para. 65. (original emphasis)

¹³³United States' appellee's submission, para. 67.

¹³⁴United States' appellee's submission, para. 67.

¹³⁵United States' appellee's submission, para. 67 (quoting European Communities' appellant's submission, para. 36).

¹³⁶United States' appellee's submission, para. 71 (quoting European Communities' appellant's submission para. 50 (original emphasis)).

¹³⁷United States' appellee's submission, para. 75 (referring to Appellate Body Report, *EC – Bananas III*, para. 144).

the United States alleges that the European Communities "ignores the actual rules governing the Panel's authority to address issues pertaining to its terms of reference, as well as the rules related to the burden of proof in this dispute".¹³⁸ The United States argues that, even if it had not raised the preliminary objection, the Panel was entitled to examine the issue of its own accord.¹³⁹ The United States submits that the issue of whether a specific measure is identified in a complaining Member's panel request goes to the "root" of a panel's jurisdiction and that the Panel "was not required to wait for the United States to raise the issue".¹⁴⁰

55. The United States also disagrees with the European Communities' characterization of the rules concerning burden of proof in WTO dispute settlement. The United States endorses the Panel's observation that the European Communities was under an obligation to make a *prima facie* case and provide proof thereof, and also refers to a panel's obligations under Article 11 of the DSU. According to the United States, the European Communities faults the Panel "for making the very inquiry that it was required to make as part of its objective assessment of the matter".¹⁴¹ Further, the United States maintains that the European Communities did not articulate how the Panel's findings violate Article 12.1 of the DSU, or the Working Procedures for panels in Appendix 3 thereto.¹⁴²

56. The United States submits that the Panel properly examined the alleged measures and issues and found that they fell outside its terms of reference under Article 6.2. The United States argues that, because Article 3.3 of the DSU does not define a measure, or relate to the identification of a measure in a panel request or in a panel's terms of reference, it fails to see how Article 3.3 provides a basis for the European Communities' appeal. According to the United States, the Panel "properly understood that an inquiry under Article 6.2 is related to the issue of whether the thing being challenged is classifiable as a 'measure', as that term is used in Article 6.2 and throughout the DSU."¹⁴³ In the United States' view, "if something is not even a 'measure', then it is not, and cannot be, 'specifically identified' for the purposes of DSU Article 6.2".¹⁴⁴ Thus, there is no dichotomy between a so-called "substantive" issue under Article 3.3 of the DSU and a so-called "procedural" issue under Article 6.2 of the DSU. The issue as to what a Member may include in a panel request "is an issue presented by the text of Article 6.2 of the DSU and thus properly considered by the Panel".¹⁴⁵ The United States considers that the European Communities' position is "disingenuous" because the European

¹³⁸United States' appellee's submission, para. 76.

¹³⁹United States' appellee's submission, para. 77 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36).

¹⁴⁰United States' appellee's submission, para. 77.

¹⁴¹United States' appellee's submission, para. 81. (footnote omitted)

¹⁴²United States' appellee's submission, para. 82.

¹⁴³United States' appellee's submission, para. 86. (footnote omitted)

¹⁴⁴United States' appellee's submission, para. 86.

¹⁴⁵United States' appellee's submission, para. 87.

Communities "itself asked the Panel to consider the issue of whether the application or continued application of antidumping duties in 18 'cases' were measures when ruling on the [United States'] preliminary objection under Article 6.2 of the DSU."¹⁴⁶

57. The United States agrees with the Panel's conclusion that the duties challenged by the European Communities were "in isolation from any proceeding in which such duties have been calculated, allegedly through zeroing", and that it therefore "did not consider this [description] to represent a measure in and of itself".¹⁴⁷ The United States also expresses support for the Panel's observation that "the application or continued application of antidumping duties in the 18 'cases' could not exist as a 'measure' separate and apart from the underlying determinations which would give rise to each instance of such application or continued application."¹⁴⁸ As the United States asserts, divorcing the underlying determination from the application or continued application of anti-dumping duties is exactly what the European Communities intended by merely referring to application or continued application "in a general and detached way".¹⁴⁹ The United States can see why the Panel was "at a loss to understand how the 18 'duties' could contain the same precise content as the so-called zeroing methodology which had been challenged 'as such' in other disputes, when the [European Communities] stated that it was not challenging that methodology 'as such' in this dispute."¹⁵⁰

58. Finally, the United States argues that the European Communities' reliance on the need for the prompt and effective settlement of the dispute, and the need to ensure proper compliance by the United States in the light of prior disputes, is "unfounded".¹⁵¹ In any event, these arguments do not justify a departure from the requirements of the DSU related to the identification of specific measures by the complaining party. The United States agrees with the Panel that events in other disputes do not have a bearing on the Panel's analysis of the compliance of the European Communities' panel request with Article 6.2 of the DSU.

59. With regard to the European Communities' claim that the Panel Report is inconsistent with Article 7.2 of the DSU, the United States submits that the European Communities "fundamentally misinterprets"¹⁵² that provision. The United States notes that the Appellate Body has recognized that "a panel is not ... required to examine *all* legal claims made before it" but may "exercise judicial

¹⁴⁶United States' appellee's submission, para. 88.

¹⁴⁷United States' appellee's submission, para. 90 (quoting Panel Report, para. 7.56).

¹⁴⁸United States' appellee's submission, para. 93.

¹⁴⁹United States' appellee's submission, para. 93.

¹⁵⁰United States' appellee's submission, para. 95.

¹⁵¹United States' appellee's submission, para. 96.

¹⁵²United States' appellee's submission, para. 100.

economy".¹⁵³ Thus, the Panel was not required to address explicitly each and every argument made by the European Communities. Moreover, Article 7.2 applies to a panel's discharge of the matters within its terms of reference. Thus, where a measure is not within a panel's terms of reference, Article 7.2 "does not operate to expand the terms of reference and require a panel to discuss provisions of the covered agreements with respect to such measures".¹⁵⁴ In addition, the United States submits that, in connection with its claim under Article 11 of the DSU, the European Communities failed "to argue how the Panel allegedly failed to undertake an objective assessment"¹⁵⁵ of the United States' preliminary objection.

60. The United States further asserts that the European Communities' claim under Article 12.7 is unfounded and should be rejected. The United States maintains that the Panel provided a detailed legal and factual analysis of the United States' preliminary objection and "laid out the rationale behind its findings".¹⁵⁶ Moreover, the United States asserts that the European Communities "devoted considerable space" in its appellant's submission "to criticizing the very rationale and analysis that the [European Communities] now says does not exist".¹⁵⁷

61. On this basis, the United States requests the Appellate Body to uphold the Panel's conclusions that the 18 duties were not within its terms of reference, and to reject the European Communities' request to complete the analysis. If the Panel's conclusions are reversed, the United States asks the Appellate Body to exercise judicial economy and not complete the analysis. Should the Appellate Body decide to complete the analysis, the United States asks the Appellate Body to find that the application or continued application of the 18 anti-dumping duties is not inconsistent with the *Anti-Dumping Agreement*, the GATT 1994, and the *WTO Agreement*.¹⁵⁸

2. The Panel's Terms of Reference – Four Preliminary Determinations

62. The United States asks the Appellate Body to reject the European Communities' appeal of the Panel's finding that the three preliminary sunset review determinations and one periodic review were outside the Panel's terms of reference. The United States submits that none of these proceedings constituted "final action" within the meaning of Article 17.4 of the *Anti-Dumping Agreement*. According to the United States, at the time of the panel request, it had not yet made a decision to levy

¹⁵³United States' appellee's submission, para. 101 (quoting Appellate Body Report, *Canada – Autos*, para. 114 (original emphasis)).

¹⁵⁴United States' appellee's submission, para. 102. (footnote omitted)

¹⁵⁵United States' appellee's submission, para. 103.

¹⁵⁶United States' appellee's submission, para. 105.

¹⁵⁷United States' appellee's submission, para. 105. (footnote omitted)

¹⁵⁸The United States also argues that the Appellate Body should reject the European Communities' appeal concerning the designation of certain United States communications as a "WT/DS" document. (United States' appellee's submission, para. 108)

definitive duties, and it was "entirely possible"¹⁵⁹ that no definitive anti-dumping duties would be levied, or would continue to be levied. The United States also maintains that the Panel "properly concluded" that the European Communities' challenge did not fit within the exception to the finality requirement in Article 17.4 reserved for "provisional measures".¹⁶⁰

63. The United States contends that the matter before the Panel involved duties "*calculated or maintained in place* pursuant to the most recent [anti-dumping proceedings]".¹⁶¹ The United States submits that the European Communities cannot avoid the finality requirement of Article 17.4 by relying on the notion that the preliminary measures were "subsequent measures"¹⁶² that were part of the European Communities' panel request. The United States maintains that this argument ignores the plain text of Article 17.4, which requires that the investigating authority has taken final action by the time of the panel request. Therefore, neither ongoing periodic reviews (which "do[] not affect the cash deposit rate or the assessment rate"), nor ongoing sunset reviews (which "only result in the continuation of an order, and the imposition of duties ... once a final determination has been made"), can be classified as final action to levy definitive anti-dumping duties.¹⁶³ The United States also rejects reliance by the European Communities on Appellate Body rulings that, it asserts, do not address the issue of whether a preliminary determination can be challenged in WTO dispute settlement.¹⁶⁴ Finally, with regard to the argument that the four preliminary determinations were within the Panel's terms of reference, and the request of the European Communities that the Panel consider the "special circumstances"¹⁶⁵ of this dispute, the United States maintains that the Panel properly found that both of these arguments lack a legal basis in the *Anti-Dumping Agreement*, and could not justify a departure from the finality requirement of Article 17.4.

64. On this basis, the United States asks the Appellate Body to reject the European Communities' appeal and affirm the Panel's finding that the four preliminary determinations in the European Communities' panel request were outside the Panel's terms of reference.

3. Article 11 of the DSU – Seven Periodic Reviews

65. The United States asserts that the European Communities failed to meet its burden of

¹⁵⁹United States' appellee's submission, para. 112.

¹⁶⁰United States' appellee's submission, para. 113.

¹⁶¹United States' appellee's submission, para. 114 (quoting European Communities' appellant's submission, para. 87 (original emphasis)).

¹⁶²United States' appellee's submission, para. 115.

¹⁶³United States' appellee's submission, para. 116.

¹⁶⁴United States' appellee's submission, paras. 117-119 (referring to Appellate Body Report, *Guatemala – Cement I*, para. 79; and Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 7.44 and 7.45).

¹⁶⁵United States' appellee's submission, para. 121 (quoting Panel Report, para. 7.76).

demonstrating that zeroing was employed in the seven periodic reviews at issue, and that the Panel "properly excluded those reviews from its terms of reference".¹⁶⁶ The United States recalls that it had explained to the Panel that it was able to confirm the accuracy of only the USDOC-generated documents, and that, apart from published *Federal Register* Notices and Issues and Decision Memoranda, "the origin of the remaining documents ... was unclear."¹⁶⁷ The United States notes that it further explained to the Panel that it could not confirm the accuracy of documents, program logs, printouts, or margins produced by the European Communities' legal advisors, which the European Communities claims are the result of the USDOC's Standard Margin Program without the application of the zeroing methodology. The United States submits that at no point during the Panel proceedings did the European Communities "identify whether its submitted documentation was [USDOC]-generated, or otherwise inform the Panel as to its source".¹⁶⁸

66. The United States submits that the Panel's factual determinations in this case as to whether zeroing was employed in the challenged periodic reviews, as distinguished from legal interpretations or legal conclusions by a panel, are, in principle, not subject to review by the Appellate Body. The United States refers to the Appellate Body's statement that it will interfere with a panel's factual finding only if it is satisfied that the panel has exceeded the bounds of its discretion as the trier of facts, and that it will not interfere lightly with the exercise of that discretion.¹⁶⁹ In the view of the United States, the assertions by the European Communities that the Panel "ignored", "misinterpreted", or "misunderstood" the totality of the evidence before it "is based solely on the [European Communities'] disagreement with the Panel's conclusion as to the submitted evidence".¹⁷⁰ This, the United States contends, is not an appropriate or correct standard of review by the Appellate Body. The United States asserts that the Panel fully discharged its duty under Article 11 by considering the full range of evidence that was put before it as to these seven reviews. The United States adds that the reasoning set forth by the Panel "reveals that its conclusion was based on its full and careful consideration of all the evidence before it".¹⁷¹

67. The United States submits that the European Communities' evidence and argument "*never* established that the submitted documents were generated by [the USDOC]".¹⁷² As a result, the United States contends that the factual component of its claim that the USDOC had employed the zeroing

¹⁶⁶United States' appellee's submission, para. 123 (referring to Panel Report, paras. 7.151-7.158).

¹⁶⁷United States' appellee's submission, para. 125 (referring to United States' response to Panel Question 7(b) following the second meeting, paras. 6 and 7).

¹⁶⁸United States' appellee's submission, para. 127.

¹⁶⁹United States' appellee's submission, para. 138 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 151).

¹⁷⁰United States' appellee's submission, para. 138.

¹⁷¹United States' appellee's submission, para. 139 (referring to Panel Report, paras. 6.7-6.20 and 7.145-7.158).

¹⁷²United States' appellee's submission, para. 140. (original emphasis)

methodology was never established for the seven periodic reviews. The United States argues that the burden rested with the European Communities, as the complaining party, to prove all components of its "as applied" claims. The United States further submits that, "[a]t a minimum, the [European Communities] was required to supply the Panel with documentation showing that 'zeroing' was in fact employed by [the USDOC] in the administrative reviews challenged."¹⁷³ The European Communities, however, made "no attempt"¹⁷⁴, despite several questions from the Panel concerning the evidence, to authenticate the documentation. Accordingly, the Panel "properly and correctly concluded"¹⁷⁵ that it could not be established that the European Communities' evidence was generated by the USDOC.

68. The United States argues that the European Communities is trying to establish the origin of its documentation for the first time on appeal, and that, because such explanations were never before the Panel, the European Communities' arguments relating to the Panel's breach of Article 11 in this respect must fail. As the United States contends, "[n]ewly formed explanations of evidence and much belated attempts to authenticate its evidence before the Appellate Body have no place in the context of review by the Appellate Body given the prescribed limits of Article 17.6 of the DSU."¹⁷⁶ In addition, the United States argues that the European Communities is placing the Appellate Body in the "untenable position"¹⁷⁷ of weighing evidence never before considered by the Panel, something the Appellate Body has declined to entertain in prior instances.

69. The United States argues that, in any event, the European Communities' new attempt at authenticating evidence also fails to establish that the evidence was generated by the USDOC, and thus does not demonstrate that zeroing was used in these seven periodic reviews. The United States claims that the European Communities' assertions regarding the use of an alleged "standard computer program", which requires negative margins to be treated as zero, must fail since the USDOC "does not have a 'standard program' that it applies in all cases, nor does it have a program that 'mandates' the zeroing of negative margins in all cases."¹⁷⁸ Instead, as it purportedly explained to the Panel at the interim review stage, the United States submits that "the computer program that performs the calculations starts as a basic template, and the template is then tailored to a particular exporter/producer for *every* case in which an antidumping calculation is performed."¹⁷⁹ The United States further submits that, because the European Communities did not provide the Panel with evidence demonstrating the contents of the alleged "Standard Margin Program", nor evidence

¹⁷³United States' appellee's submission, para. 141.

¹⁷⁴United States' appellee's submission, para. 143. (original emphasis)

¹⁷⁵United States' appellee's submission, para. 143.

¹⁷⁶United States' appellee's submission, para. 145.

¹⁷⁷United States' appellee's submission, para. 145 (referring to Appellate Body Report, *Canada – Aircraft*, para. 211).

¹⁷⁸United States' appellee's submission, para. 146.

¹⁷⁹United States' appellee's submission, para. 146. (original emphasis; footnote omitted)

demonstrating that such a program could not be altered in particular cases, the European Communities cannot point to a "Standard Margin Program" to support its argument that zeroing was applied in any particular periodic review. Moreover, the United States asserts that the European Communities did not authenticate the Standard Margin Programs or the Program Logs as USDOC-generated documents. The United States also contends that no review-specific documentation was submitted in support of the European Communities' challenges to the two periodic reviews in *Stainless Steel Bar from France* (Case V – Nos. 20 and 21).

70. The United States also submits that, contrary to the European Communities' claim, the Panel applied the correct standard of the burden of proof. The United States argues that the European Communities cannot summarily discharge its burden by "simply claiming that such information is available from the defending Member, while making only cursory efforts on its own behalf to establish the basis for its complaint".¹⁸⁰ Moreover, the United States submits that there is nothing in the Panel Report to suggest that it required a particular type of document, such as the full transaction listing generated by the USDOC. Rather, in the United States' view, "the Panel desired *any* document generated by [the USDOC]"¹⁸¹ that demonstrated the use of zeroing. The United States also contests the European Communities' argument that it was "impossible" to have obtained documents generated by the USDOC with respect to the challenged reviews, arguing that the European Communities never indicated that it had "attempted, but was unable, to obtain the requisite documentation from [the USDOC's] records office".¹⁸²

71. The United States also disagrees with the European Communities' claim that the Panel erred in its interpretation of Article 13 of the DSU. The United States argues that the Panel was under no obligation to seek further information pursuant to Article 13 of the DSU, and that the European Communities' claim appears to be no more than an improper attempt to shift its rightful burden back to the Panel. Recalling prior Appellate Body jurisprudence concerning Article 13 of the DSU, the United States submits that the Panel's right to seek information is discretionary and that the Panel's "comprehension of the evidence was not lacking, such that it needed to request further clarification"¹⁸³, and, moreover, the Panel did not find the United States to have withheld requested information. The United States further argues that the Panel had no reason to treat the European Communities' "blanket suggestion"¹⁸⁴ that the documentation at issue should be obtained from the United States as a formal request to seek information pursuant to Article 13. Finally, recalling the

¹⁸⁰United States' appellee's submission, para. 151.

¹⁸¹United States' appellee's submission, para. 152. (original emphasis)

¹⁸²United States' appellee's submission, para. 152.

¹⁸³United States' appellee's submission, para. 156. See also *ibid.*, para. 155 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 166 and 167).

¹⁸⁴United States' appellee's submission, para. 157.

Appellate Body's statement that a violation of the requirement in Article 11 of the DSU to make an objective assessment "cannot result from the *due* exercise of the discretion permitted by another provision of the DSU"¹⁸⁵, the United States submits that the European Communities' allegations of a violation pursuant to Article 13 cannot support a claim of violation of Article 11.

4. Article 19.1 of the DSU

72. The United States submits that it is "entirely within a panel's discretion to make a suggestion" pursuant to Article 19.1 of the DSU, and that panels "should not, and do not" exercise their authority to make such suggestions lightly.¹⁸⁶ The United States further argues that the Panel was not required to give a reason as to why it chose to reject the European Communities' request to make a suggestion for implementation. The United States also submits that there is no textual basis for reliance on Article 19.2 to address the European Communities' purported concerns regarding compliance. As the United States maintains, Article 19.1 "says nothing about making suggestions to deal with potential future disputes concerning the scope of compliance proceedings under Article 21.5 of the DSU".¹⁸⁷ The United States further argues that the Panel was "charged with resolving the dispute within its terms of reference, and had no duty, obligation, or responsibility of predicting whether or what compliance issues would arise under Article 21.5, and crafting suggestions to address such hypothetical scenarios".¹⁸⁸

73. In addition, the United States submits that the European Communities' suggestion also goes beyond the limits of the second sentence of Article 19.1 because it appears to address future "specific action against dumping"¹⁸⁹, even though such future actions may bear no relationship to any specific recommendations in the present dispute. Further, even if the proposed suggestion is read more narrowly, "it appears that the [European Communities] was trying to have the Panel treat any and all subsequent determinations related to the 18 duties as falling within the scope of the panel proceeding"¹⁹⁰ which were not in existence at the time of the Panel's establishment. Accordingly, the United States contends, such measures fell outside the Panel's terms of reference and the Panel could therefore not make any suggestions concerning them. For these reasons, the United States asks the Appellate Body to reject the appeal of the European Communities regarding the Panel's refusal to make a suggestion.

¹⁸⁵United States' appellee's submission, para. 158 (emphasis added) (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 166, in turn quoting Appellate Body Report, *EC – Sardines*, para. 302).

¹⁸⁶United States' appellee's submission, para. 160.

¹⁸⁷United States' appellee's submission, para. 163.

¹⁸⁸United States' appellee's submission, para. 163.

¹⁸⁹United States' appellee's submission, para. 164 (quoting European Communities' closing statement at the second meeting).

¹⁹⁰United States' appellee's submission, para. 164.

5. Conditional Appeals

74. In the United States' view, the European Communities' conditional appeal regarding the relevance of prior Appellate Body findings, including those in *US – Stainless Steel (Mexico)*, should be rejected. First, the United States argues that the European Communities fails to identify an erroneous finding of law or legal interpretation and, instead, seeks "to shift the burden to the Appellate Body to develop the argumentation and explanation in the first instance of whether there is a legal error".¹⁹¹ Secondly, the United States submits that, because the only conceivable basis for a claim of error would seem to be under Article 11 of the DSU, and the European Communities asserts no such error, the European Communities' claim should be rejected on this basis as well.

75. The United States argues that the European Communities is essentially asking the Appellate Body to assess the consistency of the Panel Report with the Appellate Body's dicta in *US – Stainless Steel (Mexico)*. The United States maintains, however, that the Panel was bound by neither the findings, nor the dicta, of the Appellate Body in a prior, unrelated dispute. Moreover, the United States contends that the Ministerial Conference and the General Council have the exclusive authority to adopt binding interpretations of the covered agreements under Article IX:2 of the *WTO Agreement*. In the view of the United States, treating prior reports as binding outside the scope of the original dispute would add to the obligations of the United States and other Members, inconsistent with Articles 3.2 and 19.1 of the DSU. Consequently, the European Communities cannot treat Appellate Body statements from a prior report as authoritative and then ask the Appellate Body under Article 17.6 of the DSU to assess whether the Panel acted consistently with that report.

76. The United States submits that the European Communities' second conditional appeal regarding the Panel's exercise of judicial economy should be rejected as it "does not explain why the Panel's exercise of judicial economy was false, or legally erroneous".¹⁹² As a result, the European Communities "has failed to provide a basis for the Appellate Body to rule on that claim on appeal".¹⁹³ Furthermore, the United States submits that, because the Panel made no legal interpretations other than in relation to Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, if the Appellate Body reverses the Panel's findings, it should not complete the analysis by making "legal interpretations for the first time as to issues the Panel never reached".¹⁹⁴ Finally, the United States submits that it has fully demonstrated in its written submissions and at the Panel's substantive meetings with the parties that the provisions of the WTO agreements invoked by the European Communities do not require "offsets" for negative margins in periodic reviews. Accordingly, if the

¹⁹¹United States' appellee's submission, para. 167.

¹⁹²United States' appellee's submission, para. 172.

¹⁹³United States' appellee's submission, para. 172.

¹⁹⁴United States' appellee's submission, para. 172.

Appellate Body decides to complete the analysis, the United States requests the Appellate Body to reject the European Communities' claims regarding the challenged periodic reviews, and to find instead that the United States did not act inconsistently with the relevant provisions of the GATT 1994 and the *Anti-Dumping Agreement*.

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

1. The Panel's Terms of Reference – 14 Additional Measures

77. The United States requests the Appellate Body to reverse the Panel's finding that the 14 periodic and sunset reviews¹⁹⁵ that were identified in the European Communities' panel request, but not in its request for consultations, were within the Panel's terms of reference. In support of its request, the United States submits that Articles 4 and 6 of the DSU, together with Articles 17.3, 17.4, and 17.5 of the *Anti-Dumping Agreement*, set forth the "fundamental jurisdictional requirement"¹⁹⁶ for a complainant to request consultations on a matter before referring the matter to the DSB for the establishment of a panel. The United States contends that "under the special and additional rules contained in the [*Anti-Dumping Agreement*] as well as under the DSU, a measure that is outside the request for consultations cannot be included in a panel request or in a panel's terms of reference."¹⁹⁷

78. In the view of the United States, the Panel "misconstrued"¹⁹⁸ the meaning of, and the relationship between, the relevant provisions of the DSU concerning requests for consultations and panel requests, and thereby "incorrectly rejected the [United States'] preliminary objection on the grounds that the panel request referred to the 'same dispute' or 'same subject matter' as the consultation request".¹⁹⁹ For the United States, the "critical question" under the DSU is whether the additional measures included in the panel request are "in essence the *same measures*" as those identified in the request for consultations.²⁰⁰ The United States purports to find support for its position in the Appellate Body's finding in *US – Certain EC Products*, where the Appellate Body clarified that "the scope of measures subject to establishment of a panel is defined by the consultations request, and that a separate and 'legally distinct' measure may not be added in the panel request."²⁰¹

79. The United States contends that the European Communities' request for consultations identified separate anti-dumping measures that are "legally distinct" under United States law, and that

¹⁹⁵See *infra*, footnote 497.

¹⁹⁶United States' other appellant's submission, para. 29.

¹⁹⁷United States' other appellant's submission, para. 28.

¹⁹⁸United States' other appellant's submission, para. 30.

¹⁹⁹United States' other appellant's submission, para. 33 (referring to Panel Report, paras. 7.23 and 7.28).

²⁰⁰United States' other appellant's submission, para. 33. (original emphasis)

²⁰¹United States' other appellant's submission, para. 34 (referring to Appellate Body Report, *US – Certain EC Products*, paras. 59, 60 and 82).

the European Communities subsequently added 14 "legally distinct" anti-dumping measures to its panel request.²⁰² The 14 additional measures, even if they pertained to the same subject merchandise as the measures listed in the request for consultations, resulted from different proceedings. Given that the measures "each involved different time frames and different calculations using different information and data"²⁰³, they were "substantively and procedurally"²⁰⁴ different from the measures in the consultations request. The United States argues that the Panel wrongly found that the 14 measures were within its terms of reference based on "striking similarities"²⁰⁵ between those measures and other measures that had been identified in the European Communities' request for consultations. The United States further argues that the Panel's reliance on the Appellate Body's finding in *Brazil – Aircraft* is misplaced because, in that case, "the Appellate Body recognized that the consultations and panel request contained essentially the same measures, unlike the situation here."²⁰⁶

80. The United States also notes that the Panel found that the European Communities' challenge to the continued application of the 18 anti-dumping duties at issue did not meet the specificity requirement of Article 6.2 of the DSU, and these alleged 18 measures were therefore outside the Panel's terms of reference. Should the Appellate Body reverse the Panel's finding on specificity, the United States requests the Appellate Body to find that the alleged 18 measures were "outside the Panel's terms of reference on the grounds that they were identified in the [European Communities'] panel request, but not in its consultations request".²⁰⁷

2. Simple Zeroing as Applied in 29 Periodic Reviews

81. The United States requests the Appellate Body to reverse the Panel's finding that zeroing, as applied by the USDOC in 29 periodic reviews, is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*.

82. The United States argues that the Panel misapplied the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*. According to the United States, the Panel viewed the *Anti-Dumping Agreement* "as admitting of more than one permissible interpretation" and that the use of zeroing in periodic reviews rests "on one of those interpretations".²⁰⁸ On this basis, the Panel should have found that the application of simple zeroing in the 29 reviews was permissible under the

²⁰²United States' other appellant's submission, para. 35.

²⁰³United States' other appellant's submission, para. 35.

²⁰⁴United States' other appellant's submission, para. 37.

²⁰⁵United States' other appellant's submission, para. 36 (referring to Panel Report, para. 7.27).

²⁰⁶United States' other appellant's submission, para. 38 (referring to Appellate Body Report, *Brazil – Aircraft*, paras. 127-129 and 132).

²⁰⁷United States' other appellant's submission, footnote 6 to para. 26.

²⁰⁸United States' other appellant's submission, para. 51.

Anti-Dumping Agreement. The United States suggests that the Panel's departure from the requirements of Article 17.6(ii) appears to rely on Articles 3.2 and 3.3 of the DSU. However, Article 1.2 of the DSU specifies that the provisions of the DSU are "'subject to' the special or additional rules listed in Appendix 2 to the DSU"²⁰⁹, which includes Article 17.6(ii) of the *Anti-Dumping Agreement*. The United States adds that Article 17.6(ii) was negotiated as a recognition that some provisions of the *Anti-Dumping Agreement* would be susceptible to multiple permissible interpretations. According to the United States, "the Panel erred by setting aside that carefully negotiated standard of review"²¹⁰, and instead finding that the United States acted inconsistently with its obligations under the *Anti-Dumping Agreement*.

83. Turning to Article 2.1 of the Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, the United States argues that these provisions "do not define 'dumping' and 'margins of dumping' so as to require that export transactions be examined at an aggregate level".²¹¹ Instead, the definition of dumping in these provisions "describes the real-world commercial conduct by which a product is imported into a country, i.e., transaction by transaction"²¹², whereas the European Communities wrongly considers that those terms apply to the product under investigation "as a whole".²¹³ The United States argues that the European Communities' interpretation relies on the term "product" as being synonymous with "the concept that dumping may only be determined on an exporter-specific basis".²¹⁴ However, the United States maintains that the term "product" as used throughout the *Anti-Dumping Agreement* and the GATT 1994 "can have either a collective meaning or an individual meaning".²¹⁵ The United States argues, for example, that Article 2.6 of the *Anti-Dumping Agreement* uses the term "product" in a collective sense; by contrast, Article VII:3 of the GATT 1994—which refers to "[t]he value for customs purposes of any imported product"—uses the term "in the individual sense of the object of a particular transaction".²¹⁶ The United States contends that the ordinary meaning of the terms "product" and "products" do not compel a reading of those terms as excluding individual transactions.

84. The United States further submits that there is no reason why a Member may not "establish the 'margin of dumping' on the basis of the total amount by which transaction-specific export prices

²⁰⁹United States' other appellant's submission, para. 52.

²¹⁰United States' other appellant's submission, para. 53.

²¹¹United States' other appellant's submission, para. 60 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 140).

²¹²United States' other appellant's submission, para. 60 (referring to Panel Report, *US – Zeroing (EC)*, para. 7.285).

²¹³United States' other appellant's submission, para. 62 (referring to European Communities' first written submission to the Panel, Panel Report, Annex A-1, p. A-45, para. 194).

²¹⁴United States' other appellant's submission, para. 62.

²¹⁵United States' other appellant's submission, para. 63.

²¹⁶United States' other appellant's submission, para. 63.

are less than the transaction-specific normal values".²¹⁷ According to the United States, the term "margin of dumping", as used elsewhere in the GATT 1994 and the *Anti-Dumping Agreement*, "does not refer exclusively to the aggregated results of comparisons for the 'product as a whole'".²¹⁸ For example, "[a]s used in the Note Ad Article VI:1, which provides for an importer-specific price comparison, the term 'margin of dumping' cannot relate to aggregated results of all comparisons for the 'product as a whole' because an exporter or foreign producer may make export transactions using multiple importers."²¹⁹

85. The United States disagrees with the Appellate Body's finding that a "determination of dumping with respect to an exporter is properly made not at the level of individual export transactions, but on the basis of the totality of an exporter's transactions of the subject merchandise over the period of investigation."²²⁰ The United States argues that this reasoning does not provide any textual references that direct the calculation of a margin of dumping to be done only "at the level of multiple transactions"²²¹, or that would preclude the calculation of a margin of dumping on a transaction-specific level. The United States contends that the Appellate Body failed to take into account the possibility that the definitions of "dumping" and "margin of dumping" could incorporate the same level of "flexibility of meaning"²²² as that of the term "product", which has both a collective and transaction-specific meaning. Additionally, because the Appellate Body's decision seems to imply that there is no "temporal limit to the extent of the obligation to continue aggregating comparison results ... [a]ny attempt to set an end date to the obligated aggregation would appear to arbitrarily subdivide the 'product as a whole' such that subsequent non-dumped transactions may be 'zeroed' due to the fact they would be precluded from offsetting current antidumping duty liability."²²³

86. The United States also refers to a Group of Experts that was convened in 1960 to consider numerous issues with respect to the application of Article VI of the *General Agreement on Tariffs and Trade 1947* (the "GATT 1947"). In its report²²⁴ (the "1960 Group of Experts Report"), the Group of Experts concluded that the "ideal method" for applying anti-dumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product

²¹⁷United States' other appellant's submission, para. 67 (referring to Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.28).

²¹⁸United States' other appellant's submission, para. 68.

²¹⁹United States' other appellant's submission, para. 68.

²²⁰United States' other appellant's submission, para. 71 (quoting Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98).

²²¹United States' other appellant's submission, para. 72.

²²²United States' other appellant's submission, para. 73.

²²³United States' other appellant's submission, para. 74.

²²⁴GATT Second Report of the Group of Experts, *Anti-Dumping and Countervailing Duties*, GATT Document L/1141, adopted 27 May 1960, BISD 9S/194.

concerned".²²⁵ The United States maintains, therefore, that the concept of dumping has historically been understood to be applicable at the level of individual transactions.²²⁶ According to the United States, the Appellate Body has previously misapprehended the relevance of the 1960 Group of Experts Report for the purposes of interpreting Article VI of the GATT 1947.²²⁷ In particular, the United States argues that the Appellate Body has failed to "explain why the fact that a particular system for determining injury is administratively impracticable leads to the conclusion that Members, when negotiating the Tokyo Round [Anti-Dumping] Code or the Uruguay Round [*Anti-Dumping Agreement*], necessarily agreed to a completely different concept of calculating a margin of dumping".²²⁸ The United States further points out that the Uruguay Round negotiators discussed the issue of whether zeroing should be restricted in the light of two GATT panels' decisions that had found "[t]he methodology of not offsetting dumping based on comparisons where the export price was greater than normal value"²²⁹ to be consistent with the *Tokyo Round Anti-Dumping Code*.²³⁰ According to the United States, it can be inferred, from the fact that the text of Article VI of the GATT 1947 was unaltered after the negotiations, that the drafters "intended no change in meaning".²³¹

87. The United States further submits that the use of the term "margin of dumping" in Article 9.3 of the *Anti-Dumping Agreement* is consistent with a transaction-specific meaning. In the view of the United States, the Panel "properly recognized"²³² that the United States' position rested on a permissible interpretation of Article 9.3. The United States contends that the European Communities' claim of inconsistency with Article 9.3 necessarily depends upon whether the European Communities' preferred interpretation of "margin of dumping", which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the *Anti-Dumping Agreement*. However, there is no textual basis for this proposition in the text of Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*. The United States also observes that previous

²²⁵United States' other appellant's submission, para. 76 (referring to 1960 Group of Experts Report, para. 7).

²²⁶United States' other appellant's submission, para. 76 (referring to Panel Report, *US – Zeroing (Japan)*, para. 7.107).

²²⁷United States' other appellant's submission, para. 78 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96, in turn referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 114).

²²⁸United States' other appellant's submission, para. 78.

²²⁹United States' other appellant's submission, para. 79 (referring to GATT Panel Report, *EC – Audio Cassettes*, ADP/136, 28 April 1995, unadopted, para. 360; and GATT Panel Report, *EEC – Cotton Yarn*, ADP/137, adopted 30 October 1995, BISD 42S/17, para. 502).

²³⁰*Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, BISD 26S/171, entered into force 1 January 1980.

²³¹United States' other appellant's submission, para. 79. (footnote omitted)

²³²United States' other appellant's submission, para. 80.

panels have found that a transaction-specific meaning of the term "margin of dumping" is consistent with Article 9.3 of the *Anti-Dumping Agreement*.²³³

88. Moreover, the United States asserts that the prospective normal value assessment system referred to in Article 9.4(ii) of the *Anti-Dumping Agreement* confirms that the term "margin of dumping" may have a transaction-specific meaning. According to the United States, if "individual export transactions at prices less than normal value can attract liability for payment of antidumping duties ... there is no reason why liability for payment of antidumping duties may not be similarly assessed"²³⁴ in the United States. The United States rejects an interpretation of Article 9 as requiring offsets between importers in a retrospective assessment system while capping the importer's liability based on individual transactions in a prospective system. The United States further argues that accepting the interpretation that a Member must aggregate the results of all comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value system, to take into account all of the exporters' transactions. For the United States, this would, in effect, render prospective normal value systems retrospective.

89. The United States submits that a prohibition of zeroing in periodic reviews "would favor importers with high margins *vis-à-vis* importers with low margins".²³⁵ According to the United States, if "the amount of the antidumping duty must be reduced to account for the amount by which some other transaction was sold at above normal value"²³⁶, the anti-dumping duty would be insufficient to prevent dumping from having further injurious effect. For the United States, under such an interpretation of Article 9.3 of the *Anti-Dumping Agreement*, anti-dumping duties "would be prevented from fulfilling their intended purpose under Article VI:2 of the GATT 1994, because importers that contribute the most to injurious dumping would be favored over other importers (and domestic competitors) that price fairly."²³⁷ This is so, the United States maintains, because "if a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the export price is less than normal value to the greatest extent will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports."²³⁸

²³³United States' other appellant's submission, paras. 83-86 (referring to Panel Report, *US – Zeroing (EC)*, paras. 7.201, 7.204-7.207, and 7.220-7.223; and Panel Report, *US – Zeroing (Japan)*, paras. 7.196, 7.198 and 7.199).

²³⁴United States' other appellant's submission, para. 89 (referring to Panel Report, *US – Zeroing (Japan)*, para. 7.208).

²³⁵United States' other appellant's submission, para. 92 (quoting Panel Report, para. 7.164).

²³⁶United States' other appellant's submission, para. 93.

²³⁷United States' other appellant's submission, para. 95 (referring to Panel Report, *US – Stainless Steel (Mexico)*, para. 7.146).

²³⁸United States' other appellant's submission, para. 95.

90. The United States contends that any general prohibition of zeroing that applies beyond the context of weighted average-to-weighted average ("W-W") comparisons in original investigations would render the remaining text of Article 2.4.2 redundant. In particular, it would reduce the second sentence of Article 2.4.2 to "inutility" because the targeted dumping methodology would "yield the same result as [a W-W] comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons".²³⁹ The United States finds support for its position in the findings in prior panel reports addressing zeroing.²⁴⁰

91. The United States takes issue with the Appellate Body's finding that "mathematical equivalence" occurs only in "certain situations" and is a "non-tested hypothesis".²⁴¹ First, the United States argues that all of the situations under which it has been argued that mathematical equivalence would not occur have been addressed by panels and found to be inconsistent with the *Anti-Dumping Agreement*.²⁴² Secondly, the United States argues that "mathematical equivalence is not a 'non-tested hypothesis'"²⁴³ because, according to the United States, the complaining party in this case actively uses this methodology. The United States also rejects the Appellate Body's conclusion that the second sentence of Article 2.4.2 is an "exception" and therefore "cannot determine the interpretation of methodologies contained in the first sentence of Article 2.4.2".²⁴⁴ According to the United States, this reading of Article 2.4.2 would be contrary to the principle of effective treaty interpretation. The United States also questions the Appellate Body's conclusion "that it may be permissible to apply the targeted dumping methodology to a subset of export transactions."²⁴⁵ The United States argues that nothing in the language of Article 2.4.2 provides for selecting a subset of transactions when conducting a targeted dumping analysis. The United States submits that the word "pattern" in the second sentence of Article 2.4.2 "incorporates export prices that differ significantly" and does not suggest "that one part of the identified pattern may be treated in one way (i.e., used in [weighted] average-to-transaction ["W-T"] comparisons) while another part of the identified pattern may be treated differently (i.e., ignored or used in [W-W] comparisons)."²⁴⁶ Further, selecting a subset of

²³⁹United States' other appellant's submission, para. 101. (footnote omitted)

²⁴⁰United States' other appellant's submission, para. 102 (referring to Panel Report, *US – Zeroing (EC)*, para. 7.266; Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.52; Panel Report, *US – Zeroing (Japan)*, para. 7.127; and Panel Report, *US – Stainless Steel (Mexico)*, paras. 7.130-7.133).

²⁴¹United States' other appellant's submission, para. 103 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 133; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97).

²⁴²United States' other appellant's submission, para. 103 (referring to Panel Report, *US – Zeroing (Japan)*, paras. 7.127-7.137; Panel Report, *US – Zeroing (EC)*, para. 7.266; and Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 5.33-5.52).

²⁴³United States' other appellant's submission, para. 103.

²⁴⁴United States' other appellant's submission, para. 104.

²⁴⁵United States' other appellant's submission, para. 105 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 135).

²⁴⁶United States' other appellant's submission, para. 107.

export transactions would, in the United States' view, be contrary to the Appellate Body's conclusion that "all"²⁴⁷ export transactions should be considered when performing W-W and W-T comparisons. According to the United States, "if the Appellate Body's statements are understood to mean that the use of [W-T] comparisons with a subset of the export transactions is to be done in conjunction with the use of the [W-W] comparison for the remaining export transactions", then "such comparisons will be mathematically equivalent to the results obtained through the use of [W-W] comparisons."²⁴⁸

92. Finally, the United States submits that the European Communities, "when addressing this issue before domestic tribunals, agrees with the United States and the panel reports cited above, that a general prohibition of zeroing applied equally to both assessment proceedings and original investigations, would render the [W-T] comparison *inutile*."²⁴⁹

3. Article 11 of the DSU – Eight Sunset Reviews

93. The United States claims that the Panel failed to comply with its duties under Article 11 of the DSU by finding that the United States acted inconsistently with its obligations under Article 11.3 of the *Anti-Dumping Agreement* in eight of the sunset reviews at issue in this dispute.²⁵⁰ In particular, the United States argues that "the Panel's finding that model zeroing was used in the [original] investigations underlying the eight sunset reviews 'lack[s] a basis in the evidence contained in the panel record'."²⁵¹ In support of its claim, the United States points out that it is the complaining Member that bears the burden of making a *prima facie* case. In order to succeed with its claim in this case, the European Communities was required to provide evidence from the underlying original investigations in which the dumping margins at issue were calculated in order to show that model zeroing was employed in those calculations. However, according to the United States, the European Communities failed to provide this evidence, and the "sole basis" for the Panel's decision with respect to the eight sunset review determinations was "language from a *Federal Register* notice in which [the USDOC] announced that it would no longer use model zeroing in [W-W] comparisons in [original] investigations."²⁵² The United States underscores that such a general statement "does not provide

²⁴⁷United States' other appellant's submission, para. 108.

²⁴⁸United States' other appellant's submission, para. 109. (footnote omitted).

²⁴⁹United States' other appellant's submission, para. 112 (original emphasis) (referring to Case T-274/02, *Ritek Corp. v. Council of the European Union*, 24 October 2006 (Panel Exhibit US-3), para. 94; and to Panel Report, *supra*, footnote 242). See also Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 49.

²⁵⁰United States' other appellant's submission, para. 115 (referring to Panel Report, paras. 7.192-7.202 and 8.1(f)).

²⁵¹United States' other appellant's submission, para. 121 (emphasis omitted) (quoting Appellate Body Report, *US – Carbon Steel*, para. 142).

²⁵²United States' other appellant's submission, para. 119 (referring to Panel Report, paras. 6.9 and 7.200).

evidence as to whether zeroing was in fact employed in [calculating] the specific margins relied upon in each of the challenged sunset reviews".²⁵³

D. *Arguments of the European Communities – Appellee*

1. The Panel's Terms of Reference – 14 Additional Measures

94. The European Communities requests the Appellate Body to dismiss the United States' claim that the 14 additional measures that were not identified in the European Communities' consultations request fell outside the Panel's terms of reference. The European Communities also considers that the Appellate Body should reject the United States' request for a finding that the 18 duties were outside the Panel's terms of reference on the grounds that they were not identified in the European Communities' consultations request.

95. With respect to the 14 additional measures, the European Communities argues that Articles 4 and 6 of the DSU do not require that the measures that were the subject of consultations and the measures identified in the request for the establishment of a panel "be identical, as long as they involve essentially the *same matter*".²⁵⁴ The European Communities finds support for this proposition in Article 4 of the DSU and Article 17 of the *Anti-Dumping Agreement*, which "refer to the 'dispute' and the 'matter', rather than to 'specific measures'"²⁵⁵, as well as in Articles 3.3 through 3.7 of the DSU.

96. The European Communities also agrees with the Panel that the Appellate Body's reasoning in *US – Certain EC Products* is inapplicable to the present case since the facts of the cases are different. According to the European Communities, unlike the additional measure identified for the first time in the panel request in *US – Certain EC Products*, the 14 additional measures identified in the panel request in the present case are not legally distinct as compared to the measures identified in the European Communities' request for consultations. In particular, the European Communities points out that the 14 additional measures in the present case relate to the same products from the same countries as those identified in the request for consultations. Moreover, the same government agency issued the measures; the legal claims made by the European Communities were identical to those made in the request for consultations; and the 14 measures have a direct relationship to the measures mentioned in the annexes to the request for consultations since they imply extensions, modifications, or implementation of the anti-dumping duties upon which the parties consulted. The European

²⁵³United States' other appellant's submission, para. 119.

²⁵⁴European Communities' appellee's submission, para. 11 (original emphasis) (referring to Appellate Body Report, *Brazil – Aircraft*, para. 132; Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 119; and Appellate Body Report, *US – Upland Cotton*, para. 285).

²⁵⁵European Communities' appellee's submission, para. 12. (footnote omitted)

Communities further argues that the Appellate Body's reasoning in *Brazil – Aircraft*—that "the additional measures included in the panel request did not change the *essence* of the subsidy scheme challenged by Canada in its consultations request"—applies to the present case since the 14 additional measures "refer to the same *matter* raised during consultations, *i.e.*, the use of zeroing when calculating the dumping margins in the specific anti-dumping proceedings with respect to the same products originating from the specific countries listed therein."²⁵⁶

97. The European Communities also considers that the Appellate Body should reject the United States' request for a finding that 18 anti-dumping duties were outside the Panel's terms of reference on the grounds that they were not identified in the European Communities' request for consultations. In the European Communities' view, there is "a certain analogy" between the measures challenged in the present case and a subsidy programme at issue in *Brazil – Aircraft* because, "[l]ike the measure referenced in the present dispute, a subsidy programme is distinct from both legislation implementing the *SCM Agreement*, and from instances of the application of such programme."²⁵⁷

98. Moreover, the European Communities argues that the United States did not include in its Notice of Other Appeal the claim that the 18 duties were outside the Panel's terms of reference. Therefore, pursuant to Rule 20(2)(d) of the *Working Procedures*, the Appellate Body should reject the United States' claim. In the event that the Appellate Body decides to examine the United States' appeal on this point, the European Communities argues that there is "no need for identity between the specific measures that were the subject of the request for consultations and those which are the subject of the Panel request as long as they involve essentially the same *matter* (in this case, the use of zeroing in specific anti-dumping measures)."²⁵⁸ The European Communities further argues that, because the reference to the zeroing methodology in its consultations request "was simply narrowed" in its panel request to the methodology "as embedded in the 18 measures"²⁵⁹, the scope of the consultations was in fact wider than the scope of the panel request.

2. Simple Zeroing as Applied in 29 Periodic Reviews

99. The European Communities requests the Appellate Body to reject the United States' appeal that the Panel erred in concluding that zeroing as applied by the USDOC in 29 periodic reviews is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*.

²⁵⁶European Communities' appellee's submission, para. 15 (original emphasis) (referring to Appellate Body Report, *Brazil – Aircraft*, para. 130).

²⁵⁷European Communities' appellee's submission, para. 15.

²⁵⁸European Communities' appellee's submission, para. 17. (original emphasis)

²⁵⁹European Communities' appellee's submission, para. 17.

100. The European Communities contends that the United States' interpretation cannot be "permissible" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement* "[i]f all of the interpretative elements in the *Vienna Convention* support the position of the European Communities, and disprove the position of the United States".²⁶⁰ According to the European Communities, past panel and Appellate Body reports have confirmed the correct legal interpretation of the GATT 1994 and the *Anti-Dumping Agreement*.

101. The European Communities submits that it is clear from Articles VI:1 and VI:2 of the GATT 1994 and various provisions of the *Anti-Dumping Agreement* that: (a) "dumping" and "margin of dumping" are exporter-specific concepts; "dumping" is also product-related, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped; (b) "dumping" and "margin of dumping" have the same meaning throughout the *Anti-Dumping Agreement*; (c) an individual margin of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied in respect of an exporter shall not exceed its margin of dumping; and (d) the purpose of an anti-dumping duty is to counteract "injurious dumping" and not "dumping" *per se*.²⁶¹ In the view of the European Communities, the notion that "dumping" and "margin of dumping" can exist at the level of an individual transaction is contrary to "the requirement to make the determination on the basis of all an exporter's transactions over a period of time, and cannot be reconciled with a proper interpretation and application of several provisions of the *Anti-Dumping Agreement*."²⁶²

102. The European Communities argues that the term zeroing describes only part of the problem, that is, the downward adjustment of the relatively high-priced export transactions. For the European Communities, the heart of the matter is the selection of the relatively low-priced export transactions *per se*, as a sub-category, as the only or preponderant basis for the dumping margin calculation.

103. Based on its examination of the overall design and architecture of Article 2.4.2, the European Communities concludes that "there are only three sub-categories of clustered low priced export transactions that it is permissible to respond to: those clustered by purchaser, region or time."²⁶³ Therefore, it is clear from the term "all" in the first sentence of Article 2.4.2, and the definition of "dumping" in Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 "read together with the absence in the targeted dumping provisions of any reference to a sub-category by model", that it is neither permissible, nor fair, "to pick up low priced export transactions clustered by

²⁶⁰European Communities' appellee's submission, para. 43. (original emphasis)

²⁶¹European Communities' appellee's submission, para. 20 (original emphasis) (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 83-96).

²⁶²European Communities' appellee's submission, para. 21. See also *ibid.*, para. 44.

²⁶³European Communities' appellee's submission, para. 31. (emphasis and footnote omitted)

model".²⁶⁴ Nor is it possible, according to the European Communities, to select low-priced export transactions *per se* as a sub-category.

104. The European Communities asserts that the United States wrongly assumes that Article 2.4.2 does not apply to the re-calculation of dumping margins in assessment proceedings. According to the European Communities, such an interpretation would negate the compromise enshrined in Article 2.4.2, because "the results of the first retrospective assessment proceeding are applied with effect from the date on which duties were first imposed".²⁶⁵

105. The European Communities believes that the ordinary meaning of the term "investigation" is simply a systematic examination or careful study of a particular subject. Thus, the European Communities argues that there are five types of proceedings (original, newcomer, changed circumstances, sunset, and periodic reviews) because they all involve an investigation into something, and that the United States is wrong to assert that there is only one type of proceeding with five phases. Further, the European Communities disagrees with the proposition that the term "existence" is unique to original investigations, arguing that "this term simply relates to any dumping margin calculation."²⁶⁶

106. The European Communities then submits that all the arguments advanced by the United States have been repeatedly considered and rejected by the Appellate Body. The European Communities argues that the interpretation advanced by the United States is not a permissible one. If, however, the Appellate Body decides to overturn the finding of the Panel, then the European Communities refers to its conditional appeal wherein it asks the Appellate Body to reverse that part of the Panel Report which agrees with the United States with respect to the use of simple zeroing in periodic reviews. The European Communities urges the Appellate Body to consider the present matter in the light of findings in *US – Stainless Steel (Mexico)* on the question of precedent. In the European Communities' view, the Appellate Body can reverse its previous decision only for new and cogent reasons, which do not exist in this case. Further, the European Communities disagrees with the proposition that Article 17.6(ii) of the *Anti-Dumping Agreement* "override[s]" or "replace[s]" the provisions of the DSU. Instead, for the European Communities, Article 17.6 supplements the provisions of the DSU.²⁶⁷ The European Communities adds that the Panel in this case followed previous Appellate Body findings and thus complied with its obligations under Article 11 of the DSU.

²⁶⁴European Communities' appellee's submission, para. 32. (emphasis omitted)

²⁶⁵European Communities' appellee's submission, para. 34.

²⁶⁶European Communities' appellee's submission, para. 41. (footnote omitted)

²⁶⁷European Communities' appellee's submission, paras. 64 and 65 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 62).

In the European Communities' view, "it is for the Appellate Body to change its own mind; not for a panel to do it on the Appellate Body's behalf."²⁶⁸

107. The European Communities also asserts that is not necessary to consider preparatory work or other historical materials. In any event, the European Communities argues that there is a "strong indication of consensus that the interests of both sides in the asymmetry and zeroing debate was accommodated in the targeted dumping provisions that eventually became the second sentence of Article 2.4.2."²⁶⁹ The European Communities further argues that the United States' arguments relating to the 1960 Group of Experts Report have already been carefully considered and rejected by the Appellate Body in previous cases.

108. The European Communities submits that past cases have rejected the United States' assertion that a prohibition on zeroing would favour "prospective" systems at the expense of "retrospective" systems.²⁷⁰ According to the European Communities, the retrospective and prospective systems are "very nearly the same".²⁷¹ Both systems impose duties on a prospective basis, and provide for review or refund on a retrospective basis. For the European Communities, the "key difference"²⁷² is that under the retrospective system anyone can request a review, whereas in a prospective system only importers can request a review. Finally, the European Communities disagrees with the proposition that the amounts collected under the variable duty system, which the United States likens to amounts collected based on a transaction-to-transaction ("T-T") assessment and zeroing, are final. The European Communities argues in this regard that the variable duty referenced in Article 9.4(ii) is subject always to the review and refund procedures provided for in Articles 9.3.1 or 9.3.2.

109. Moreover, the European Communities argues that the Appellate Body has repeatedly rejected the proposition "that a prohibition on zeroing will favour importers selling at lower prices over importers selling at higher prices".²⁷³ First, the European Communities argues that, "if the relatively low and high priced transactions are distributed more or less equally amongst importers, no such issue arises."²⁷⁴ Secondly, if the relatively low-priced transactions are clustered with one importer, then the investigating authority could use the targeted dumping methodology. Thirdly, "it is a matter of simple accounting to collect the appropriate and equitable amounts from different importers, whilst respecting the ceiling provided for in Article 9.3 of the *Anti-Dumping Agreement* to the effect that the

²⁶⁸European Communities' appellee's submission, para. 66.

²⁶⁹European Communities' appellee's submission, para. 26.

²⁷⁰European Communities' appellee's submission, para. 46 (referring to United States' other appellant's submission, heading III.B.2.d; and Panel Report, para. 7.166).

²⁷¹European Communities' appellee's submission, para. 47.

²⁷²European Communities' appellee's submission, para. 47.

²⁷³European Communities' appellee's submission, para. 52.

²⁷⁴European Communities' appellee's submission, para. 53.

amount of [duty] must not exceed the *exporter's* dumping margin."²⁷⁵ Fourthly, the European Communities contends that it is incorrect to say that "an 'offset' is provided for the so-called non-dumped transactions; it is rather a question of properly calculating a margin of dumping for each *exporter* by taking all transactions fully into account, regardless of whether they are above or below normal value."²⁷⁶

110. Finally, the European Communities points out that the argument that "a general prohibition on zeroing would render the targeted dumping provisions redundant"²⁷⁷ has been carefully considered and rejected in past cases. The European Communities adds that the mathematical equivalence argument "depends upon a specific set of assumptions, which may not hold true".²⁷⁸ In any event, an "exception cannot determine the interpretation of the normal rule: something that is unfair absent targeted dumping might be a fair response to targeted dumping."²⁷⁹ Moreover, the European Communities argues that "permitting zeroing under the first sentence of Article 2.4.2 would enable investigating authorities to select as the only or preponderant basis for calculating a margin of dumping relatively low priced export transactions *per se* ... thus rendering the third method redundant."²⁸⁰

3. Article 11 of the DSU – Eight Sunset Reviews

111. The European Communities argues that the Panel did not fail to make an objective assessment, as required by Article 11 of the DSU, when finding that the European Communities had made out a *prima facie* case that, in eight sunset reviews, the margins in the underlying original investigations were obtained through model zeroing. The European Communities submits that the Panel was entitled to draw inferences from the facts available in the record. According to the European Communities, "the *fact* that there was a concrete policy change so declared by the United States to depart from its practice of using model zeroing in original investigations together with the *fact* that the underlying original investigations concerned took place before that policy change, imply that the European Communities made out a *prima facie* case that what was claimed ... was true."²⁸¹ The European Communities contends that the United States' investigating authority had all the evidence necessary to rebut the *prima facie* case made by the European Communities, and could have agreed that model zeroing had not actually been used in the underlying investigations. Finally, the European Communities argues that the United States failed to meet its burden of proof because it has

²⁷⁵European Communities' appellee's submission, para. 55. (original emphasis)

²⁷⁶European Communities' appellee's submission, para. 23. (original emphasis) See also *ibid.*, para. 56.

²⁷⁷European Communities' appellee's submission, para. 58. (footnote omitted)

²⁷⁸European Communities' appellee's submission, para. 58.

²⁷⁹European Communities' appellee's submission, para. 58.

²⁸⁰European Communities' appellee's submission, para. 58.

²⁸¹European Communities' appellee's submission, para. 76. (original emphasis; footnote omitted)

failed to show that the margins of dumping in the underlying original investigations were not based on model zeroing.

E. *Arguments of the Third Participants*

1. Brazil

112. Brazil submits that the Appellate Body should affirm the Panel's finding that the 14 additional measures included in the European Communities' panel request, but not in its request for consultations, were properly within the Panel's terms of reference. According to Brazil, the United States' view that Articles 4 and 6 of the DSU require strict identity between the measures listed in the consultations request and the panel request creates "an endless cycle"²⁸² of litigation aimed at resolving the same dispute (that is, the application of the zeroing methodology in successive anti-dumping proceedings that involve the same United States anti-dumping order) regarding the same products from the same countries. Brazil argues that Articles 4 and 6 of the DSU are properly interpreted as conferring jurisdiction "over all measures manifesting the same basic 'problem'".²⁸³ Brazil submits that the Appellate Body and previous panels, when determining the scope of a panel's jurisdiction, have focused on a "*substantive connection*", such that, "[a]s long as the various measures are *substantively the same with respect to the disputed issue*, even those measures not formally identified in the consultations and/or panel requests are properly within the scope of the dispute."²⁸⁴ Brazil contends that, in accordance with Articles 3.4 and 3.7 of the DSU, this approach aims at achieving a "satisfactory settlement of the matter" and secures a "positive solution" to the substance of the dispute.

113. Brazil finds further support for the Panel's finding in the Appellate Body's consideration of the jurisdiction of Article 21.5 compliance panels. Brazil contends that the Appellate Body has called upon Article 21.5 panels to "apply a 'nexus-based test' to determine whether contested measures share sufficiently close 'relationships' with indisputably covered measures, to enable their inclusion within the compliance panel's jurisdiction."²⁸⁵ Brazil contends that, despite the United States' assertions that the two sets of measures are "legally distinct", USDOC regulations support the position that the measures are formally linked because "all periodic and sunset reviews that occur under a single order are mere '*segments*' of a single '*proceeding*' that continues until revocation."²⁸⁶ In Brazil's

²⁸²Brazil's third participant's submission, para. 14.

²⁸³Brazil's third participant's submission, para. 15.

²⁸⁴Brazil's third participant's submission, para. 21. (original emphasis)

²⁸⁵Brazil's third participant's submission, para. 23 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 79).

²⁸⁶Brazil's third participant's submission, para. 26 (original emphasis) (referring to *United States Code of Federal Regulations*, Title 19, Chapter 3, Section 351.102 (Definitions)).

consideration, it is crucial that the original 38 measures and the additional 14 measures "all concern the application of the *same zeroing methodology* to the *same products* from the *same countries*, under the *same anti-dumping orders*, and they provide *succeeding bases for the continued application and imposition* of anti-dumping duties under that order."²⁸⁷

114. Brazil asserts that the Panel correctly held that the United States acted inconsistently with the provisions of the *Anti-Dumping Agreement* and the GATT 1994 by applying simple zeroing in periodic reviews. Brazil contends that the United States' position that "dumping" and "margin of dumping" may be established for individual export transactions is not supported by a proper interpretative analysis. In Brazil's view, the United States' position that the term "dumping" can refer to "anything from one transaction to all transactions ... seeks to replace a uniform multilateral definition with an empty vessel that each Member's authority can unilaterally fill as it wishes, with the meaning possibly changing from one proceeding to another."²⁸⁸ Brazil also disagrees with the support the United States draws from the fact that Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* both use the word "price" in the singular. According to Brazil, "[t]he immediate context in Article 2.1 shows that the two singular prices mentioned—home market price (or normal value) and export price—are collective prices for the 'product' as a whole."²⁸⁹ Brazil also maintains that the term "like product" is used in the *Anti-Dumping Agreement* in the collective sense, and that the three methodologies in Article 2.4.2, each of which requires a comparison with "export prices" in multiple transactions, show that the single price is obtained by aggregating prices of multiple export transactions.

115. Brazil argues that the United States' view that dumping can be determined for an individual export transaction cannot be reconciled with the context provided by Articles 5.8, 6.10, 8.1, 9.1, 9.3, and 9.5 of the *Anti-Dumping Agreement*. According to Brazil, Article 6.10 requires a single margin of dumping to be determined with respect to each exporter. As a consequence, the decision to terminate or pursue an investigation under Article 5.8 is based on a single dumping determination made for all transactions relating to the product; for the purpose of injury determination under Article 3, all entries of the product are treated as dumped; and remedial action to counter injurious dumping under Articles 8 and 9 is "fixed by reference to a single margin of dumping, and that remedy applies to *all* future imports of the 'product'."²⁹⁰ Brazil submits that defining "dumping" in relation to the product as a whole "ensures parallelism between the scope of a dumping determination and the scope of the regulatory consequences the determination entails."²⁹¹ In addition, Brazil recalls, Article 2.1 sets forth

²⁸⁷Brazil's third participant's submission, para. 31. (original emphasis)

²⁸⁸Brazil's third participant's submission, para. 44.

²⁸⁹Brazil's third participant's submission, para. 47.

²⁹⁰Brazil's third participant's submission, para. 57. (original emphasis)

²⁹¹Brazil's third participant's submission, para. 58.

the definition of "dumping" that applies to the entire Agreement. Allowing the meaning to change from one type of proceeding to another "would lead to arbitrary and unpredictable results: for a given set of export transactions, at identical prices, for an identical product and exporter, there could be 'dumping' in one type of anti-dumping proceeding but not in another."²⁹²

116. Brazil challenges certain of the United States' contextual arguments. Brazil argues that, although the word "product" is used in Articles VI:1 and VII:3 of the GATT 1994, this does not mean that the word carries the same meaning in each of those provisions. According to Brazil, the different contexts for these provisions shows that the word has different meanings with respect to each provision. Brazil also rejects the United States' argument that paragraph 1 of *Ad Article VI* of the GATT 1994 "provides for importer specific comparisons".²⁹³ Brazil argues that paragraph 1 of *Ad Article VI*, like Article 2.3 of the *Anti-Dumping Agreement*, "simply permits an authority to use the importer's resale price to an independent buyer as the starting-point for its determination of export price, in circumstances where the importer is related to the exporter."²⁹⁴ Brazil also rejects arguments of the United States regarding Article 2.2 of the *Anti-Dumping Agreement*, noting that, "whether or not normal value is constructed for some or all models under Article 2.2, the results of the intermediate comparisons must all be aggregated to determine 'dumping' on a product-wide basis to meet the definition of Article 2.1."²⁹⁵ Regarding the application of Article 9.4(ii) to a prospective normal value system under the *Anti-Dumping Agreement*, Brazil argues that reliance on a specific definition of "dumping" is misplaced because this argument "conflates"²⁹⁶ two distinct concepts: the "amount of anti-dumping duty" under Article 9.4 and the "margin of dumping" determined under Article 2. According to Brazil, "the amount of duties imposed on importers with respect to individual imports of a product is *not* a 'margin of dumping' determined for that entry."²⁹⁷ Brazil disagrees with the United States that, in a review under Article 9.3.2, it is not possible to determine an exporter's margin, because the importer has to make the request for the review, and the importer does not possess all the information regarding the exporter. For Brazil, this argument overlooks examples of similar situations in the *Anti-Dumping Agreement*, such as Articles 5, 11.2, and 11.3, in which, "like Article 9.3.2, the party making a duly substantiated request is *not* the exporter, yet a determination is made regarding the exporter."²⁹⁸ Finally, Brazil disagrees with the proposition that a general prohibition of zeroing would render the second sentence of Article 2.4.2 *inutile*. In Brazil's view, this

²⁹²Brazil's third participant's submission, para. 62.

²⁹³Brazil's third participant's submission, para. 70 (referring to United States' other appellant's submission, para. 68).

²⁹⁴Brazil's third participant's submission, para. 71.

²⁹⁵Brazil's third participant's submission, para. 72.

²⁹⁶Brazil's third participant's submission, para. 73.

²⁹⁷Brazil's third participant's submission, para. 74. (original emphasis)

²⁹⁸Brazil's third participant's submission, para. 78. (original emphasis)

dispute does not concern zeroing under Article 2.4.2, but "whether zeroing is permitted in a [W-T] comparison in a periodic review under Article 9.3".²⁹⁹ Accordingly, in the circumstances of this dispute, "any exceptional right that sentence *might* afford for zeroing is simply irrelevant to the periodic reviews at issue."³⁰⁰

117. Brazil takes issue with the United States' argument that defining "dumping" in relation to the product as a whole leads to "perverse incentives and absurd results".³⁰¹ For Brazil, this argument is based on the proposition that "'dumping' *should* be defined on a transaction-specific basis to allow the importing Member to *maximize* the amount of duties collected, without the 'dumping' found in one transaction being offset by the prices of other transactions."³⁰² Brazil argues that this policy position is not reflected in the text of the treaty, and believes that Members agreed to a single "dumping" determination for each exporter because this approach "strikes an appropriate balance between the interests of an importing Member in protecting its domestic industries against the unfair pricing of a 'product', and those of exporting Members in enjoying the market access concessions it secured in the Uruguay Round."³⁰³

118. Brazil agrees with the Panel that the European Communities made out a *prima facie* case regarding the application of zeroing in the eight sunset reviews, and submits that there is no "valid basis"³⁰⁴ for the United States to challenge the Panel's factual findings. Brazil notes that, in so concluding, the Panel relied on the USDOC December 2006 Notice that announced the decision to no longer apply zeroing to W-W comparisons in original investigations, together with the United States' silence in the face of this evidence. Brazil contends that, if a party offers "affirmative evidence" with respect to a matter, a panel is entitled to attach "evidentiary significance" to the silence of the opposing party.³⁰⁵ Thus, "[i]n light of the evidence the European Communities had produced, the Panel was entitled to interpret the United States' silence"³⁰⁶ as evidence to be taken into account.

119. Brazil supports the claim of the European Communities that the Panel did not conduct an objective assessment of the facts and law with respect to the seven periodic reviews at issue. Brazil argues that the Panel failed to conduct an objective assessment of the facts as required under Article 11 of the DSU because it "disregarded and otherwise failed to address the highly relevant

²⁹⁹Brazil's third participant's submission, para. 81.

³⁰⁰Brazil's third participant's submission, para. 84. (original emphasis)

³⁰¹Brazil's third participant's submission, para. 89 (referring to United States' other appellant's submission, heading III.B.2.c).

³⁰²Brazil's third participant's submission, para. 90. (original emphasis)

³⁰³Brazil's third participant's submission, para. 91.

³⁰⁴Brazil's third participant's submission, para. 94.

³⁰⁵Brazil's third participant's submission, para. 98.

³⁰⁶Brazil's third participant's submission, para. 99.

evidence of factual findings in recently adopted panel and Appellate Body reports".³⁰⁷ According to Brazil, these adopted reports contain findings that establish that the USDOC has always used zeroing procedures in periodic reviews during the period covered by the investigations of the seven periodic reviews at issue. Moreover, Brazil maintains that factual findings in adopted panel and Appellate Body reports create "legitimate expectations concerning the existence and application of particular measures", particularly where "an adopted report may include findings regarding the *existence* and the *nature* of an *identical* measure of the *same* defending party during the *same* time period at issue in a later dispute."³⁰⁸ Brazil finds support for its position in WTO jurisprudence regarding Article 21.5 compliance proceedings. According to Brazil, "the notion that later disputes involving measures subject to factual findings in adopted reports form part of a 'continuum of events' of which the panel in the later dispute must take account, and failing some relevant change, from which it may not depart, should not be limited to compliance disputes under Article 21.5."³⁰⁹ In this case, the Panel was dealing with a "consistent continuum" of findings regarding zeroing in periodic reviews, and if the Panel wished to depart from factual findings in adopted reports, it should have provided a "reasoned and adequate explanation setting out a relevant change of circumstances".³¹⁰ Brazil also contends that it would have been appropriate for the Panel *sua sponte* to have taken notice of the relevant findings of fact in prior adopted reports.

120. Brazil argues that the Panel also breached Article 11 of the DSU by failing to seek information from the United States as to whether it had applied simple zeroing in the seven periodic reviews. Brazil asserts that the Panel "refused" to request of the United States "detailed data and other information about its margin calculations" despite its relevance, the European Communities' contingent request, the Panel's own conclusion that such information was relevant to its final determination, and the "undoubted fact" that only the United States had access to this information.³¹¹ Brazil rejects as "legally incorrect"³¹² the Panel's view that, "unless and until a complaining party has made its *prima facie* case during the course of the proceedings, there is no obligation by a defending party to provide *any* information, even if such information would be highly relevant to the claims or defenses at issue in the dispute."³¹³ According to Brazil, "[a]n objective examination of the facts presupposes that the 'facts' examined are as complete as possible in view of the evidence *available*—whether because it has been submitted by a party, or because it is of significance to the panel's inquiry

³⁰⁷Brazil's third participant's submission, para. 107.

³⁰⁸Brazil's third participant's submission, para. 116. (original emphasis)

³⁰⁹Brazil's third participant's submission, para. 121.

³¹⁰Brazil's third participant's submission, para. 122.

³¹¹Brazil's third participant's submission, para. 125.

³¹²Brazil's third participant's submission, para. 131.

³¹³Brazil's third participant's submission, para. 130 (original emphasis) (referring to Panel Report, para. 6.20).

but not in the public domain. Assessment of the facts without the benefit of the best available information runs the risk of non-objectivity, or decisions made on the basis of an incomplete record."³¹⁴ Further, Brazil argues that parties to a WTO dispute are bound by a "duty to cooperate and to produce information ... regardless of which party bore the ultimate burden of proof to establish a *prima facie* case."³¹⁵

121. Brazil contends that Article 13.1 of the DSU does not require a panel to wait for a request by one party in order to request information from the other party. In addition, a panel does not "make the case" for one party by seeking information from the other because "every request by a panel under Article 13.1 necessarily relates to some element of a claim or defense."³¹⁶ Thus, Brazil submits that the failure of the Panel to seek information from the United States to examine the authenticity and accuracy of the European Communities' documentation for each periodic review in question constitutes a failure by the Panel to conduct an objective assessment of the facts. In addition, the Panel's failure to agree to the European Communities' request to seek information resulted in the Panel assessing facts that were "significantly incomplete."³¹⁷ While Brazil "appreciates" the Appellate Body's reluctance to second-guess a panel's exercise of discretion "regarding the quantum or completeness of evidence in the record", Brazil adds that "[t]here are limits to a [p]anel's discretion *not* to act and *not* to collect sufficient facts to ensure that its decision is based on the best information available."³¹⁸

122. Finally, Brazil argues that the Panel failed to conduct an objective assessment of the facts because it "did not properly evaluate and explain the absence of any denial by the United States that it had applied the zeroing procedures in the seven periodic reviews".³¹⁹ Brazil disagrees with the Panel's conclusion that the United States should not be expected "to rebut a factual assertion unsupported by relevant evidence from the party making the assertion".³²⁰ Despite the rationale provide by the Panel, Brazil questions why the United States did not "simply refute the [European Communities'] allegations with a documented assertion that it did *not* apply the zeroing procedures in the seven periodic reviews".³²¹ Brazil contends that, unlike previous panels, the Panel in the present case failed to ask the United States if it could provide any example in which the USDOC had not applied zeroing

³¹⁴Brazil's third participant's submission, para. 134. (original emphasis)

³¹⁵Brazil's third participant's submission, para. 136 (referring to Appellate Body Report, *India – Additional Import Duties*, para. 213 and footnote 409 thereto).

³¹⁶Brazil's third participant's submission, para. 139.

³¹⁷Brazil's third participant's submission, para. 145.

³¹⁸Brazil's third participant's submission, para. 146. (original emphasis)

³¹⁹Brazil's third participant's submission, para. 147.

³²⁰Brazil's third participant's submission, para. 147 (quoting Panel Report, para. 6.20).

³²¹Brazil's third participant's submission, para. 147. (original emphasis)

procedures in a periodic review. Brazil further points out that the United States never denied using zeroing in the seven periodic reviews at issue.

2. China

123. Pursuant to Rule 24(2) of the *Working Procedures*, China chose not to submit a third participant's submission, but notified its intention to appear at the oral hearing.

3. Egypt

124. Pursuant to Rule 24(2) of the *Working Procedures*, Egypt chose not to submit a third participant's submission, but notified its intention to appear at the oral hearing.

4. India

125. Pursuant to Rule 24(2) of the *Working Procedures*, India chose not to submit a third participant's submission, but notified its intention to appear at the oral hearing. At the oral hearing, India expressed views relating to the European Communities' claim regarding the continued application of 18 anti-dumping duties, the interpretation of the *Anti-Dumping Agreement* in respect of four preliminary determinations, and the alleged inconsistency of the use of the zeroing methodology in original investigations and periodic reviews.

5. Japan

126. Japan submits that the Panel erred in finding that the European Communities failed to identify the specific measures at issue in connection with its claims regarding the continued application of the 18 anti-dumping duties, and that such claims did not fall within the Panel's terms of reference. Japan submits that the measure challenged by the European Communities was "specific enough"³²² under Article 6.2 of the DSU, because the scope of the measure at issue is limited to the anti-dumping orders in specific cases. Japan also agrees with the European Communities that the complaining Member does not have to discharge its burden of proof or make out a *prima facie* case in its panel request. Japan further submits that, because the application of specific anti-dumping duties is an act attributable to the United States, these measures can be subject to dispute settlement proceedings so long as they are identified pursuant to Article 6.2 of the DSU.

127. Japan argues that a panel should decide whether measures should be identified under Article 6.2 based on the "language o[f] the panel request and its related documents".³²³ Japan also

³²²Japan's third participant's submission, para. 15.

³²³Japan's third participant's submission, para. 22.

submits that the due process requirement of Article 6.2, as well as the "specific circumstances in the specific dispute"³²⁴, should be taken into account when deciding whether the measure is properly identified in the panel request. Specific circumstances in this dispute include the previous zeroing disputes brought before WTO panels and the Appellate Body that, according to Japan, demonstrate that the United States continues to use the zeroing methodology. Japan further points to the USDOC December 2006 Notice demonstrating that the zeroing methodology underlying the measures at issue "continues to exist".³²⁵

128. Japan submits that the Panel erred when it concluded that the European Communities' claims regarding the four preliminary determinations at issue were outside the Panel's terms of reference. Japan argues that the Panel's reasoning was premised on the understanding that these were "provisional measures" under Article 17.4, and thus subject to the conditions under Articles 7.1 and 17.4 of the *Anti-Dumping Agreement*. Japan agrees with the European Communities that the preliminary determinations are not necessarily "provisional measures", and that Article 17.4 is not necessarily limited to a "final action", an "acceptance of a price undertaking", or a "provisional measure" under Article 17.4.³²⁶ Japan contends that it was therefore reasonable for the European Communities to argue that any act or decision taken by the United States, even if not final, was covered by the Panel's terms of reference.

129. Japan asserts that the Panel was correct to find that the 14 periodic and sunset reviews that were identified in the European Communities' panel request, but not in the request for consultations, were within the Panel's terms of reference. Japan argues that, because these 14 determinations were "part of the same 'dispute' with respect to which consultations were requested"³²⁷, they fell within the Panel's jurisdiction.

130. Japan submits that the Panel erred in its finding that the European Communities failed to demonstrate that simple zeroing was used by the USDOC in the seven periodic reviews at issue. Japan further maintains that the Panel failed to carry out an objective assessment of the facts as required by Article 11 of the DSU. In particular, Japan submits that the Panel committed an "egregious error"³²⁸ when assessing the evidence before it because it failed to give consideration to the totality of the evidence. Japan argues that the Panel should have considered the Appellate Body's findings in *US – Zeroing (Japan)*—that simple zeroing in periodic reviews is "as such" inconsistent

³²⁴Japan's third participant's submission, para. 29.

³²⁵Japan's third participant's submission, para. 31.

³²⁶Japan's third participant's submission, para. 39.

³²⁷Japan's third participant's submission, para. 49.

³²⁸Japan's third participant's submission, para. 61.

with the *Anti-Dumping Agreement*—and that the United States "openly stated its reluctance to abandon simple zeroing in administrative reviews".³²⁹

131. Japan takes issue with the burden of proof that the Panel imposed on the European Communities. Japan argues that, if the United States did not rebut the facts claimed by the European Communities, there was no need for the Panel "to deny the facts claimed because of the incompleteness of the evidence introduced to prove the facts".³³⁰ Compared to other zeroing disputes, Japan argues, the European Communities was subject to a "higher demand regarding the evidence".³³¹ Japan submits the Appellate Body should "consider the balance with respect to the standard of proof among the disputes which are dealing with the same issue".³³² Japan also contends that the Panel erred when it disregarded the European Communities' request for the Panel to ask for further information pursuant to Article 13.1 of the DSU. Japan argues that the Panel should have requested a copy of the detailed calculations from the United States, and that, by not doing so, it placed "an unbalanced burden to collect information [on] the other party".³³³

132. Japan reiterates that simple zeroing in periodic reviews is inconsistent with the requirements of Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*. Japan explains that it expects the Appellate Body to maintain consistency in its findings regarding simple zeroing in periodic reviews "lest it should diminish the rights and obligations of the Members".³³⁴

133. Finally, Japan supports the Panel's finding that the United States acted inconsistently with its obligations under Article 11.3 of the *Anti-Dumping Agreement* by using, in eight sunset reviews, dumping margins obtained through model zeroing in prior investigations. Because the United States did not submit evidence to rebut the *prima facie* showing of the European Communities reflected in the USDOC December 2006 Notice, it was "reasonable"³³⁵ for the Panel to have arrived at the conclusion it reached.

6. Korea

134. Regarding the European Communities' challenge to the continued application of 18 anti-dumping duties, Korea argues that the Panel failed to recognize the difference between Article 3.3 and Article 6.2 of the DSU. Korea submits that these 18 duties are "measures" within the

³²⁹Japan's third participant's submission, para. 63 (referring to USDOC December 2006 Notice, *supra*, footnote 92).

³³⁰Japan's third participant's submission, para. 66.

³³¹Japan's third participant's submission, para. 67.

³³²Japan's third participant's submission, para. 68.

³³³Japan's third participant's submission, para. 70.

³³⁴Japan's third participant's submission, para. 80.

³³⁵Japan's third participant's submission, para. 88.

meaning of Article 3.3 of the DSU "as long as and to the extent"³³⁶ the Panel found that the underlying zeroing methodology constitutes a measure under that provision. Korea adds that these 18 duties not only contain the same "precise content", but they are also "more specific and narrower" in their scope than the zeroing methodology, which itself constitutes a measure under Article 3.3.³³⁷ Further, Korea argues that previous Appellate Body decisions stand for the proposition "that a panel must look at the panel request in its entirety and collectively."³³⁸ Korea submits that a panel should "respect the discretion given to a complaining party as to how to formulate its own claims as long as it identifies a discernible measure in its Panel Request".³³⁹

135. Korea submits that it is now settled that, with the exception of "some unclear situations" regarding targeted dumping, the zeroing methodology in all respects violates relevant provisions of the *Anti-Dumping Agreement*, and that zeroing must be prohibited in all anti-dumping proceedings.³⁴⁰ In Korea's view, the European Communities' claim is simply confirmation of settled jurisprudence in a particular context and that, after all the previous litigation regarding zeroing, it is "disingenuous"³⁴¹ for a Member to argue that it is unclear what the European Communities is claiming.

136. Korea also submits that the decision by the European Communities to "group" the 18 duties was "apparently caused by the continued attempt by the United States to avoid the good faith implementation of the rulings and recommendations of the DSB in the previous zeroing disputes".³⁴² Consequently, Korea does not see why a Member should be precluded from presenting a new claim, in the way the European Communities does, "to address its existing concern arising from the absence or lack of implementation of another Member with respect to previous disputes".³⁴³ In Korea's view, the Panel's finding has "effectively authorized the United States to continue to ignore previous rulings and recommendations of the DSB" and does not settle the dispute in a prompt manner, "which could be inconsistent with Article 3.3 of the DSU".³⁴⁴ Korea thus submits that the Panel ignored the "proper context" of the panel request and "improperly confined its terms of reference to reach an erroneous conclusion" concerning the European Communities' fulfilment of its obligation under Article 6.2 of the DSU.³⁴⁵

³³⁶Korea's third participant's submission, para. 14.

³³⁷Korea's third participant's submission, para. 14.

³³⁸Korea's third participant's submission, para. 16 (referring to Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, paras. 66-68; and Appellate Body Report, *US – Carbon Steel*, para. 127).

³³⁹Korea's third participant's submission, para. 17.

³⁴⁰Korea's third participant's submission, para. 18.

³⁴¹Korea's third participant's submission, para. 18.

³⁴²Korea's third participant's submission, para. 19.

³⁴³Korea's third participant's submission, para. 19.

³⁴⁴Korea's third participant's submission, para. 20.

³⁴⁵Korea's third participant's submission, para. 21.

137. Finally, Korea submits that the Panel erred in finding that the European Communities failed to make out a *prima facie* case regarding the use of simple zeroing in the seven periodic reviews at issue because it "failed to observe what is obvious on the record".³⁴⁶ Korea maintains that there was a "great deal of evidence"³⁴⁷ other than the Issues and Decision Memoranda showing that simple zeroing was used in the seven periodic reviews, and notes that the United States does not assert that zeroing was not used in these reviews. Korea submits that the Panel's conclusion, based on the mere absence of an explicit reference to zeroing in the Issues and Decision Memoranda alone, is "clearly erroneous and misplaced"³⁴⁸ and constitutes a violation of Article 11.

138. For the foregoing reasons, Korea submits the Appellate Body should "modify or reverse the legal findings and conclusions of the Panel and complete the necessary analysis".³⁴⁹ Korea also submits that the Appellate Body should ensure that the relevant provisions of the *Anti-Dumping Agreement* and the DSU "are construed in their proper context and in accordance with the applicable Appellate Body precedents".³⁵⁰

7. Mexico

139. Pursuant to Rule 24(2) of the *Working Procedures*, Mexico chose not to submit a third participant's submission, but notified its intention to appear at the oral hearing. At the oral hearing, Mexico expressed views relating to the consequences that follow the decision of a respondent not to submit evidence in response to assertions of a complainant, and concerning the relationship between different determinations in an anti-dumping proceeding.

8. Norway

140. Pursuant to Rule 24(2) of the *Working Procedures*, Norway chose not to submit a third participant's submission, but notified its intention to appear at the oral hearing. At the oral hearing, Norway argued that it follows from the Appellate Body's findings in prior disputes involving zeroing that the use of simple zeroing in periodic reviews is inconsistent with WTO law. Norway also disagreed with the United States' analysis of Article 17.6(ii) of the *Anti-Dumping Agreement*. For Norway, a panel must first apply customary rules of interpretation of public international law to the language of the contested provisions. The purpose of this exercise is to assist the treaty interpreter in arriving at one single interpretation, except in the rarest of cases. The second sentence would apply only as a last resort to settle an interpretative question in favour of the investigating authority.

³⁴⁶Korea's third participant's submission, para. 24.

³⁴⁷Korea's third participant's submission, para. 23.

³⁴⁸Korea's third participant's submission, para. 24.

³⁴⁹Korea's third participant's submission, para. 26.

³⁵⁰Korea's third participant's submission, para. 27.

According to Norway, the Appellate Body has repeatedly confirmed that the relevant Articles of the GATT 1994 and the *Anti-Dumping Agreement* do not admit of another interpretation in respect of zeroing.

9. Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

141. Pursuant to Rule 24(2) of the *Working Procedures*, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu chose not to submit a third participant's submission, but notified its intention to appear at the oral hearing. At the oral hearing, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu argued that Article 6.2 of the DSU serves two purposes: to define the scope of the dispute and, thus, the jurisdiction of the panel; and to guarantee the due process rights of the parties to the dispute. In the view of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, the European Communities' panel request was sufficiently specific for the Panel to decide what measures would fall within its jurisdiction, and specific enough for the defendant to understand what measures it would be required to defend.

10. Thailand

142. Pursuant to Rule 24(2) of the *Working Procedures*, Thailand chose not to submit a third participant's submission, but notified its intention to appear at the oral hearing. At the oral hearing, Thailand expressed views relating to the WTO-inconsistency of the use of the zeroing methodology, the role of prior rulings of the Appellate Body, and the interpretation of the *Anti-Dumping Agreement* in respect of the four preliminary measures at issue.

III. Issues Raised in This Appeal

143. Regarding the Panel's terms of reference, the following issues are raised on appeal by the European Communities:

- (a) Whether the Panel erred in finding that the European Communities' claims regarding the continued application of 18 anti-dumping duties did not fall within the Panel's terms of reference and, more specifically:
 - (i) whether the Panel erred in finding that the European Communities failed to identify the specific measure at issue with regard to these claims, as required by Article 6.2 of the DSU; and
 - (ii) whether the Panel acted inconsistently with Articles 7.1, 7.2, 11 and 12.7 of the DSU in reaching its finding.

- (b) If the Appellate Body reverses the Panel's finding that the European Communities failed to comply with the requirements of Article 6.2 of the DSU, then whether the Appellate Body should complete the analysis and find that:
- (i) the continued application of the 18 anti-dumping duties fell within the Panel's terms of reference; and
 - (ii) the continued application of the 18 anti-dumping duties is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1 and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.
- (c) Whether the Panel erred in finding that the European Communities' claims concerning four preliminary measures were outside the Panel's terms of reference.
- (d) If the Appellate Body reverses the Panel's finding that the European Communities' claims concerning the four preliminary measures were outside the Panel's terms of reference, then whether the Appellate Body should complete the analysis and find that:
- (i) the four preliminary determinations are within the scope of these proceedings;
 - (ii) the preliminary result of the periodic review is inconsistent with Articles 2.1, 2.4, 2.4.2, 9.3, and 11.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994; and
 - (iii) the preliminary results of the sunset reviews are inconsistent with Articles 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *Anti-Dumping Agreement*.

144. Regarding the Panel's terms of reference, the following issue is raised on appeal by the United States:

- Whether the Panel erred in finding that 14 periodic review and sunset review determinations that were identified in the European Communities' panel request, but not in the European Communities' consultations request, were within the Panel's terms of reference; and
- Whether the continued application of the 18 duties were not included in the consultations request and, consequently, fell outside the Panel's terms of reference.

145. Regarding zeroing in periodic reviews, the following issue is raised on appeal by the United States:

- Whether the Panel erred in finding that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by using simple zeroing in 29 periodic reviews.

146. Regarding zeroing in periodic reviews, the following issues are raised on appeal by the European Communities:

- (a) Whether the Panel acted inconsistently with its duties under Article 11 of the DSU in finding that the European Communities had failed to demonstrate that the United States Department of Commerce (the "USDOC") used simple zeroing in seven of the periodic reviews at issue; and
- (b) If the Appellate Body reverses the Panel's finding that the European Communities had not shown that simple zeroing was used in seven periodic reviews, then whether the Appellate Body should complete the analysis and conclude that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in respect of these reviews.

147. Regarding zeroing in sunset reviews, the following issue is raised on appeal by the United States:

- Whether the Panel acted inconsistently with its duties under Article 11 of the DSU in finding that the United States failed to comply with its obligations under Article 11.3 of the *Anti-Dumping Agreement* in the eight sunset review determinations at issue in this dispute.

148. Regarding the Panel's recommendations, the following issue is raised on appeal by the European Communities:

- Whether the Panel erred in rejecting the European Communities' request for a suggestion pursuant to Article 19.1 of the DSU.

IV. The Panel's Terms of Reference

149. We begin with the participants' appeals relating to the Panel's terms of reference. First, we review the Panel's finding that the European Communities failed to identify the specific measures at issue, as required by Article 6.2 of the DSU, in relation to its claims regarding the "continued

application of the 18 anti-dumping duties"³⁵¹ by the United States. Next, we examine whether the Panel erred in finding that the European Communities' claims regarding four preliminary determinations did not fall within the Panel's terms of reference. Furthermore, we address the issue of whether the Panel erred in finding that the European Communities' claims concerning 14 periodic and sunset review proceedings were within the Panel's terms of reference despite the fact that these proceedings were not identified in the European Communities' consultations request.³⁵² Finally, we review the United States' conditional request³⁵³ that the Appellate Body find that the continued application of the 18 anti-dumping duties fell outside the Panel's terms of reference on the grounds that they were not identified in the European Communities' consultations request.

A. *The Continued Application of the 18 Anti-Dumping Duties*

150. The European Communities alleges that the Panel erred in concluding that the claims concerning the continued application of the 18 anti-dumping duties fell outside the Panel's terms of reference because the European Communities' panel request did not identify the specific measures at issue in relation to these claims, as required by Article 6.2 of the DSU. The European Communities requests the Appellate Body to reverse the Panel's conclusions and to complete the analysis by finding that the continued application of the 18 anti-dumping duties is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1, and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.³⁵⁴

1. The Panel's Findings

151. The United States requested the Panel to make a preliminary ruling that, in relation to the European Communities' claims regarding the "continued application of, or the application of"³⁵⁵ 18 anti-dumping duties, the panel request failed to identify the specific measures at issue, "[i]nsofar as" the alleged measure is "deemed indeterminate".³⁵⁶ At the outset, the Panel noted the European Communities' explanation that it was not pursuing a claim against zeroing "as such" and found that

³⁵¹Panel Report, para. 7.61. The European Communities' panel request refers to, *inter alia*, the "continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request". (WT/DS350/6, Panel Report, Annex F-1, p. F-4) For ease of reference, the Panel referred to "the continued application of the 18 duties" to describe the subject of the European Communities' challenge. (See, for example, Panel Report, footnote 4 to para. 2.1. See also *ibid.*, paras. 7.49-7.61) In this Report, we use the term "the continued application of the 18 anti-dumping duties" in the same manner.

³⁵²Panel Report, para. 7.28.

³⁵³The United States makes this request in the event that the Appellate Body reverses the Panel's finding that the European Communities' panel request does not identify the specific measures at issue, as required under Article 6.2 of the DSU. (United States' other appellant's submission, footnote 6 to para. 26)

³⁵⁴European Communities' appellant's submission, paras. 74 and 75.

³⁵⁵WT/DS350/6, Panel Report, Annex F-1, p. F-4.

³⁵⁶United States' first written submission to the Panel, Panel Report, Annex A-2, p. A-83, para. 45.

the European Communities' claims "are to be considered as challenging particular instances of application of the zeroing methodology".³⁵⁷ For the Panel, the description in the panel request was "ambiguous, particularly because the panel request [did] not sufficiently distinguish between the continued application of the 18 duties and the use of zeroing in the 52 specific proceedings"³⁵⁸ that were also listed in the annex to the panel request. The Panel reasoned that, "if the European Communities wishes to raise claims in connection with the continued application of the 18 duties at issue, it has to, in the first place, identify that measure independently from other measures with regard to which it raises other claims."³⁵⁹

152. The Panel further considered that the European Communities did not "demonstrate the existence and the precise content of the purported measure" and that "the continued application of the 18 duties", in isolation from any proceeding in which such duties had been calculated, did not "represent a measure in and of itself".³⁶⁰ The Panel added that the remedy sought by the European Communities would "affect the determinations that the USDOC might make in anti-dumping proceedings that may be conducted in the future".³⁶¹ The Panel reasoned that "[t]here may be exceptional cases where panels may consider to make findings on measures not identified in the complaining party's panel request".³⁶² For that to happen, however, the new measure would "have to constitute 'a measure' within the meaning of Article 6.2 of the DSU" and would "have to come into existence during the panel proceedings".³⁶³

153. Based on this analysis, the Panel concluded that the European Communities had "failed to identify the specific measure at issue in connection with its claims regarding the continued application of the 18 anti-dumping duties".³⁶⁴ As a consequence, the Panel concluded that such claims did not fall within its terms of reference.³⁶⁵

2. Claims and Arguments on Appeal

154. The European Communities submits that the Panel erroneously interpreted Article 6.2 of the DSU in finding that the European Communities failed to identify in its panel request the specific

³⁵⁷Panel Report, para. 7.42.

³⁵⁸Panel Report, para. 7.49.

³⁵⁹Panel Report, para. 7.58.

³⁶⁰Panel Report, para. 7.56.

³⁶¹Panel Report, para. 7.59.

³⁶²Panel Report, para. 7.59.

³⁶³Panel Report, para. 7.59.

³⁶⁴Panel Report, para. 7.61.

³⁶⁵Panel Report, para. 7.61. In so finding, the Panel rejected the European Communities' assertion that, in order to prevail in its preliminary objection, the United States was required to demonstrate that the alleged flaw in the European Communities' panel request had prejudiced the United States' due process rights in these proceedings. (*Ibid.*, para. 7.62)

measures at issue with respect to the continued application of the 18 anti-dumping duties.³⁶⁶ The European Communities maintains that "it would have been *impossible*" for its panel request "to be *any more specific*, identifying as it did the document originating each of the 18 measures (in each case, the final order), that is, the specific duties applying to the specific products exported from the European Communities to the United States."³⁶⁷ The European Communities argues that the Panel confused the "procedural legal analysis" under Article 6.2 of the DSU with the "substantive legal analysis" under Article 3.3 of the DSU.³⁶⁸ As a consequence, the Panel erroneously addressed the issue of what is "a measure for purposes of WTO dispute settlement"³⁶⁹ and whether the European Communities had demonstrated the "existence and precise content of such measure".³⁷⁰ According to the European Communities, both questions concern substantive issues that should be analyzed properly under Article 3.3 of the DSU, which had not been raised by the United States. Consequently, the European Communities maintains, the Panel acted inconsistently with Articles 7.1 and 12.1 of the DSU by making findings on matters that were not raised by the United States. The European Communities adds that, in any event, a correct analysis under Article 3.3 shows that the European Communities demonstrated the existence and precise content of the measure in relation to the continued application of the 18 anti-dumping duties.³⁷¹ The European Communities also alleges the following errors: (i) the Panel acted inconsistently with Article 7.2 of the DSU by failing to address the relevant provisions of the covered agreements cited by the European Communities; (ii) the Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU; and (iii) the Panel failed to set out the basic rationale behind its findings, inconsistently with Article 12.7 of the DSU.³⁷²

155. On this basis, the European Communities requests the Appellate Body to "modify or reverse"³⁷³ the Panel's findings that, in relation to the continued application of the 18 anti-dumping duties, the European Communities' panel request failed to identify the specific measures at issue, as required by Article 6.2 of the DSU. The European Communities also requests the Appellate Body to find that the European Communities identified the specific measures at issue. The European Communities additionally requests the Appellate Body to complete the analysis by ruling that, because of the use of zeroing, each of the 18 measures is inconsistent with Articles VI:1 and VI:2 of

³⁶⁶European Communities' appellant's submission, paras. 66-68.

³⁶⁷European Communities' appellant's submission, para. 50. (original emphasis)

³⁶⁸European Communities' appellant's submission, paras. 2 and 15. See also *ibid.*, paras. 54-61.

³⁶⁹European Communities' appellant's submission, para. 56 (quoting Panel Report, para. 7.46).

³⁷⁰European Communities' appellant's submission, para. 59 (emphasis omitted) (quoting Panel Report, para. 7.50).

³⁷¹European Communities' appellant's submission, paras. 27-49.

³⁷²European Communities' appellant's submission, paras. 69-73.

³⁷³European Communities' appellant's submission, para. 74.

the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1, and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.³⁷⁴

156. By contrast, the United States contends that the Panel correctly found that the European Communities' panel request failed to identify the specific measures at issue. For the United States, the panel request did not fulfil the requirement under Article 6.2 because it did not identify the specific determination leading to a particular anti-dumping duty, and merely referred to the application of the duty in a general and detached way.³⁷⁵ In the United States' view, the Panel did not confound the legal analyses under Articles 6.2 and 3.3 of the DSU. Rather, the Panel properly understood that an inquiry under Article 6.2 is related to the issue of whether "the thing being challenged is classifiable as a 'measure', as that term is used in Article 6.2 and throughout the DSU."³⁷⁶ The United States adds that the Panel's analysis as to the existence and precise content of the 18 duties is not flawed, because the Panel correctly found that the European Communities' challenge with respect to these duties "seemed directed at free-floating, indefinite 'measures', disconnected from any specific determinations giving rise to a duty rate".³⁷⁷ The United States further argues that, by claiming that the Panel improperly addressed issues not raised by the United States, the European Communities "faults the Panel for making the very inquiry that it was required to make as part of its objective assessment of the matter"³⁷⁸, that is, whether the European Communities made a *prima facie* case with respect to the alleged measures. Finally, the United States maintains that the European Communities' allegations that the Panel acted inconsistently with Articles 7.2, 11, and 12.7 of the DSU lack merit and should be rejected.³⁷⁹

157. On this basis, the United States requests the Appellate Body to reject the European Communities' claim that the Panel erred in finding that the panel request did not identify the specific measures at issue with respect to the European Communities' challenge of the continued application of the 18 anti-dumping duties. The United States further requests the Appellate Body to reject the European Communities' request to complete the analysis and, if the Appellate Body decides to complete the analysis, to find that the continued application of the 18 anti-dumping duties is not inconsistent with the covered agreements.³⁸⁰

³⁷⁴European Communities' appellant's submission, para. 75.

³⁷⁵United States' appellee's submission, para. 72.

³⁷⁶United States' appellee's submission, para. 86. (footnote omitted)

³⁷⁷United States' appellee's submission, para. 92.

³⁷⁸United States' appellee's submission, para. 81 (referring to European Communities' appellant's submission, paras. 64 and 65).

³⁷⁹United States' appellee's submission, para. 99.

³⁸⁰United States' appellee's submission, para. 106.

158. In considering the participants' arguments on appeal, we examine, first, the issue of whether the European Communities' panel request identifies the specific measures at issue, as required by Article 6.2 of the DSU.

3. The Specificity of the Panel Request

159. Article 6.2 of the DSU provides, in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

160. There are two main requirements under Article 6.2 of the DSU, namely, the identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint.³⁸¹ Together, these elements comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.³⁸² These requirements are intended to ensure that the complainant "present[s] the problem clearly" in the panel request. This appeal concerns the first of the two requirements under Article 6.2, namely, the identification of the specific measures at issue.³⁸³

161. The Appellate Body has observed previously that the requirements in Article 6.2 serve two distinct purposes.³⁸⁴ First, as a panel's terms of reference are established by the claims raised in panel requests, the conditions of Article 6.2 serve to define the jurisdiction of a panel. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response. To ensure that such purposes are fulfilled, a panel must examine the request for the establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".³⁸⁵ Such compliance must be

³⁸¹The Appellate Body has stated that:

When parsed into its constituent parts, Article 6.2 may be seen to impose the following requirements. The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

(Appellate Body Report, *Korea – Dairy*, para. 120)

³⁸²See, for example, Appellate Body Report, *Guatemala – Cement I*, para. 72.

³⁸³The Panel noted that there was "no disagreement between the parties regarding the inclusion in the [European Communities'] panel request of a brief summary of the legal basis of the complaint". (Panel Report, para. 7.40)

³⁸⁴See, for example, Appellate Body Report, *US – Carbon Steel*, para. 126; and Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167, at 186. See also Appellate Body Report, *EC – Chicken Cuts*, para. 155; and Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

³⁸⁵Appellate Body Report, *EC – Bananas III*, para. 142.

"demonstrated on the face" of the panel request³⁸⁶, read "as a whole".³⁸⁷ With these principles in mind, we turn to review the Panel's examination of the European Communities' panel request.

162. The chapeau of the panel request states that "[t]he European Communities hereby requests that a panel be established by DSB action ... with regard to an 'as such' measure or measures providing for the practice or methodologies for calculating dumping margins involving the use of zeroing, and the application of zeroing in certain specified anti-dumping measures maintained by the United States". Subsequently, in section 1 of the panel request, the European Communities claims that "[s]ince the WTO inconsistency of this practice or methodology is already established (notably in [*US – Stainless Steel (Mexico)*]) the European Communities does not ask the Panel to rule on the WTO inconsistency of this practice."³⁸⁸

163. With respect to the measures at issue, the European Communities' panel request reads as follows:

The measures at issue and the legal basis of the complaint include, but are not limited to, the following:

The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure).

In addition to these measures, the administrative reviews, or, as the case may be, original proceedings or changed circumstances or sunset review proceedings listed in the Annex (numbered 1 to 52) with the specific anti-dumping orders and are also considered by the [European Communities] to be measures subject to the current request for establishment of the panel in addition to the anti-dumping orders.

This includes the determinations in relation to all companies and includes any assessment instructions, whether automatic or otherwise, issued at any time pursuant to any of the measures listed in the Annex. The anti-dumping duties maintained (in whatever form) pursuant to these orders, and the administrative reviews, or, as

³⁸⁶Appellate Body Report, *US – Carbon Steel*, para. 127.

³⁸⁷Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 169 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

³⁸⁸WT/DS350/6, Panel Report, Annex F-1, p. F-3. At the oral hearing, the European Communities confirmed that it is not challenging the inconsistency of the zeroing methodology, as such, with the covered agreements.

the case may be, original proceedings and changed circumstances or sunset review proceedings listed in the Annex are inconsistent with [Articles 1, 2.1, 2.4, 2.4.2, 5.8, 9.1, 9.3, 9.5, 11, 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*.]³⁸⁹ (footnote omitted)

164. The European Communities thus challenges two distinct sets of "measures". First, the European Communities challenges the continued application of the duties resulting from the 18 anti-dumping duty orders listed in the annex to its panel request, as calculated or maintained in the most recent proceeding pertaining to such duties. Secondly, the European Communities challenges the use of the zeroing methodology in 52 specific anti-dumping proceedings (four original investigations, 37 periodic reviews, and 11 sunset reviews) that pertain to the duties resulting from these 18 anti-dumping duty orders.

165. It is with respect to the first set of measures that the issue of specificity under Article 6.2 arises in this appeal. The panel request makes explicit reference to the definitive anti-dumping duties resulting from 18 anti-dumping duty orders, each imposed on a specific product exported to the United States from a specific country. The orders imposing these definitive duties are also listed in the annex to the European Communities' panel request. For each of these 18 anti-dumping duty orders, a citation is provided. The panel request further indicates that the European Communities is challenging the "continued application of, or the application of" these anti-dumping duties "as calculated or maintained in place pursuant to the most recent administrative review or ... original proceeding or changed circumstances or sunset review proceeding".³⁹⁰ The European Communities further alleges in its panel request that the duties maintained pursuant to such "most recent" reviews are calculated at levels "in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement".³⁹¹ Read in its context, it is clear that this sentence refers to the continued application of anti-dumping duties calculated with the use of the zeroing methodology. More specifically, the European Communities maintains in section 1 of its panel request that the USDOC "systematically" uses the zeroing methodology in all types of reviews pertaining to anti-dumping duties and relies on margins calculated with the zeroing methodology in sunset reviews. The European Communities further submits in its panel request that it "has identified in the annex to this request a number of anti-dumping orders where duties are set and/or maintained on the basis of the above-mentioned zeroing practice or methodology with the result that duties are

³⁸⁹WT/DS350/6, Panel Report, Annex F-1, p. F-4.

³⁹⁰WT/DS350/6, Panel Report, Annex F-1, p. F-4.

³⁹¹WT/DS350/6, Panel Report, Annex F-1, p. F-4.

paid by importers ... in excess of the dumping margin which would have been calculated using a WTO consistent methodology".³⁹²

166. Thus, the panel request links the following three elements in seeking to identify the measures at issue: (i) duties resulting from the anti-dumping duty orders in the 18 cases listed in the annex; (ii) the most recent periodic or sunset review proceedings pertaining to these duties; and (iii) the use of the zeroing methodology in calculating the level of these duties in such proceedings. Taken together, the United States could reasonably have been expected to understand that the European Communities was challenging the use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which the anti-dumping duties are maintained.

167. The Panel found that the panel request does not meet the specificity requirement under Article 6.2 because the European Communities failed to "demonstrate the existence and the precise content of the purported measure" and that "the continued application of the 18 duties" does not "represent a measure in and of itself".³⁹³ The Panel reasoned that, "in order to successfully raise claims against a measure, the complaining Member must in the first place demonstrate the existence and the precise content of such measure, consistently with the requirements of Article 6.2 of the DSU."³⁹⁴ In support of the Panel's findings, the United States maintains that the Panel "properly understood that an inquiry under Article 6.2 is related to the issue of whether the thing being challenged is classifiable as a 'measure', as that term is used in Article 6.2 and throughout the DSU."³⁹⁵

168. As noted above, the specificity requirement under Article 6.2 is intended to ensure the sufficiency of a panel request in "present[ing] the problem clearly". The identification of the measure, together with a brief summary of the legal basis of the complaint, serves to demarcate the scope of a panel's jurisdiction and allows parties to engage in the subsequent panel proceedings. Thus, the specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request. The Panel, however, appeared to attribute a more substantive meaning to the specificity requirement, whereby the existence and precise content of a measure must be demonstrated for a panel request to fulfil this requirement.

169. Yet, the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures. For the latter, a complainant would be

³⁹²WT/DS350/6, Panel Report, Annex F-1, p. F-4.

³⁹³Panel Report, para. 7.56.

³⁹⁴Panel Report, para. 7.50.

³⁹⁵United States' appellee's submission, para. 86. (footnote omitted)

expected to present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten norms.³⁹⁶ Moreover, although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue. Thus, an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement. Such consideration may have to be explored by a panel and the parties during the panel proceedings, but is not prerequisite for the establishment of a panel. To impose such prerequisite would be inconsistent with the function of a panel request in commencing panel proceedings and setting the jurisdictional boundaries of such proceedings. Therefore, we reject the proposition that an examination of the specificity requirement under Article 6.2 of the DSU must involve a substantive inquiry as to the existence and precise content of the measure.

170. Furthermore, in the Panel's view, the European Communities' panel request did "not sufficiently distinguish between the continued application of the 18 duties and the use of zeroing in the 52 specific proceedings at issue."³⁹⁷ The Panel reasoned that, "if the European Communities wishes to raise claims in connection with the continued application of the 18 duties at issue, it has to, in the first place, identify that measure independently from other measures with regard to which it raises other claims."³⁹⁸ We have some sympathy for the view that the panel request could have been formulated with greater precision and clarity. Nonetheless, so long as each measure is discernable in the panel request, the complaining party is not required to identify in its panel request each challenged measure independently from other measures in order to comply with the specificity requirement in Article 6.2 of the DSU.

171. For the Panel, "another flaw" in the European Communities' arguments was that "the remedy sought by the European Communities will affect the determinations that the USDOC might make in anti-dumping proceedings that may be conducted in the future."³⁹⁹ The Panel reasoned that "Article 6.2 of the DSU, in principle, does not allow a panel to make findings regarding measures that do not exist as of the date of the panel's establishment" unless they "come into existence during the panel proceedings".⁴⁰⁰ The Panel appeared to consider that, because the remedy sought by the European Communities was prospective in nature, the "measures" with respect to which such remedy was sought could not be regarded as specifically identified in the panel request. In our view, the

³⁹⁶See Appellate Body Report, *US – Zeroing (EC)*, para. 198.

³⁹⁷Panel Report, para. 7.49.

³⁹⁸Panel Report, para. 7.58.

³⁹⁹Panel Report, para. 7.59.

⁴⁰⁰Panel Report, para. 7.59.

remedy sought by the complainant may provide further confirmation as to the measure that is the subject of the complaint. As discussed, we are of the view that it can be discerned from the panel request, read as a whole, that the measures at issue consist of an ongoing conduct, that is, the use of the zeroing methodology in successive proceedings in each of the 18 cases whereby anti-dumping duties are maintained. The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future. Moreover, it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments.

172. In the light of the above, we reverse the Panel's finding that the European Communities failed to comply with Article 6.2 of the DSU, and find, instead, that the panel request identifies the specific measures at issue with regard to the European Communities' claims concerning the continued application of the 18 anti-dumping duties calculated with the use of the zeroing methodology.

173. The European Communities further argues that, by confounding the legal issues under Articles 6.2 and 3.3 in its analysis regarding the specificity of the panel request, the Panel made findings on matters that were not raised by the United States, in violation of Articles 7.1 and 12.1 of the DSU.⁴⁰¹ Furthermore, the European Communities alleges that the Panel acted inconsistently with Articles 7.2, 11, and 12.7 of the DSU in finding that the European Communities' claims relating to the continued application of the 18 anti-dumping duties did not fall within the Panel's terms of reference.⁴⁰²

174. Having reversed the Panel's finding that the European Communities' panel request failed to comply with the requirements of Article 6.2 of the DSU, we do not consider it necessary to make additional findings on these claims by the European Communities.

4. Whether the Measures Identified by the European Communities are Susceptible to Challenge in WTO Dispute Settlement

175. The European Communities requests the Appellate Body, in the event it reverses the Panel's finding under Article 6.2, to complete the analysis and find that the European Communities demonstrated the existence and precise content of the measures at issue. The European Communities submits that, in this dispute, it "has referred to as 'measures' within the meaning of Article 3.3 of the DSU each of the 18 anti-dumping duties calculated using zeroing on a specific product".⁴⁰³ According

⁴⁰¹European Communities' appellant's submission, paras. 62-65.

⁴⁰²European Communities' appellant's submission, paras. 69-73.

⁴⁰³European Communities' appellant's submission, para. 31. (emphasis omitted)

to the European Communities, each of the 18 measures is "manifested in a series of documents that may be adopted over time, beginning with the final order and continuing with the outcomes of the various subsequent proceedings."⁴⁰⁴

176. We begin our consideration of this issue by examining the concept of "measure" as it appears in the DSU. The DSU, in Article 3.3, provides that the WTO dispute settlement system exists to address "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". In previous cases, the Appellate Body has addressed, in the context of the *Anti-Dumping Agreement*, the scope of "measures" that may be the subject of WTO dispute settlement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body observed 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. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.⁴⁰⁵ (footnotes omitted)

177. Articles 17.3 and 17.4 of the *Anti-Dumping Agreement* are also relevant to the question of the types of measures that can be submitted to dispute settlement under the *Anti-Dumping Agreement*. Closely resembling Article 3.3 of the DSU, Article 17.3 provides that, "[i]f any Member considers that any benefit accruing to it, directly or indirectly, under [the *Anti-Dumping Agreement*] is being nullified or impaired ... 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."⁴⁰⁶ Article 17.4 of the *Anti-Dumping Agreement* further specifies that a Member may refer a matter to the DSB if it considers that the consultations have failed to achieve a mutually agreed solution "and if final action has been taken by the administering authorities of the importing Member to", *inter alia*, "levy definitive anti-dumping duties".

178. As noted by the Panel, measures examined by WTO panels and the Appellate Body include "not only measures consisting of acts that apply to particular situations, but also those consisting of acts setting forth rules or norms that have general and prospective application."⁴⁰⁷ The Panel further stated that "[c]laims taking issue with measures of general and prospective application are generally called 'as such' claims, whereas those targeting acts that apply to specific situations are called

⁴⁰⁴European Communities' appellant's submission, para. 38.

⁴⁰⁵Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

⁴⁰⁶We address provisional measures within the meaning of Article 17.4 of the *Anti-Dumping Agreement* below in paragraph 205 ff.

⁴⁰⁷Panel Report, para. 7.45 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 80 to para. 82).

'as applied' claims."⁴⁰⁸ The Panel cautioned that "the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement".⁴⁰⁹ In subsequent analyses, however, the Panel attributed some significance to this distinction when rejecting the European Communities' explanation as to the precise content of the measures at issue. More specifically, the Panel found that the European Communities "equates the continued application of the 18 duties at issue with the zeroing methodology 'as such'".⁴¹⁰ In the Panel's view, because the European Communities stated that it was not challenging the zeroing methodology "as such" in this dispute, its explanation regarding the precise content of the measures was "internally inconsistent".⁴¹¹ The European Communities takes issue with this reasoning, contending that it did not equate the measures at issue with the zeroing methodology "as such".⁴¹² Rather, as it "careful[ly]"⁴¹³ explained to the Panel, it was "seeking review of each of the 18 anti-dumping duties insofar as part of each duty is the zeroing methodology as it relates to that specific product and country."⁴¹⁴

179. We share the Panel's view that the distinction between "as such" and "as applied" claims does not govern the definition of a measure for purposes of WTO dispute settlement. This distinction has been developed in the jurisprudence as an analytical tool to facilitate the understanding of the nature of a measure at issue. This heuristic device, however useful, does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement. In order to be susceptible to challenge, a measure need not fit squarely within one of these two categories, that is, either as a rule or norm of general and prospective application, or as an individual instance of the application of a rule or norm.

180. In this dispute, the measures at issue consist of the use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which the anti-dumping duties are maintained.

⁴⁰⁸Panel Report, para. 7.45.

⁴⁰⁹Panel Report, para. 7.46.

⁴¹⁰Panel Report, para. 7.55. In this paragraph, the Panel referred to the European Communities' explanation that:

[i]n *US – Zeroing (EC)* and in *US – Zeroing (Japan)*, the Appellate Body has accepted that both the [European Communities] and Japan have described the "precise content" in the context of the methodology itself. It necessarily follows that what the [European Communities] has described in each of the 18 measures—which is the same—also meets the "precise content" requirement.

(*Ibid.* (emphasis omitted) (quoting European Communities' response to Panel Question No. 1(a) following the first meeting))

⁴¹¹Panel Report, para. 7.55.

⁴¹²European Communities' appellant's submission, para. 47.

⁴¹³European Communities' appellant's submission, para. 47.

⁴¹⁴European Communities' responses to questioning at the oral hearing. See also European Communities' appellant's submission, para. 38.

The European Communities' claim regarding these measures is not an "as such" claim⁴¹⁵, in that its scope is narrower than a challenge to the zeroing methodology as a rule or norm of general and prospective application with regard to all imports into the United States from all countries.⁴¹⁶ At the same time, the measures at issue are broader than specific instances in which the zeroing methodology was applied, such as a periodic review or sunset review determination. In other words, the measures at issue consist of the use of the zeroing methodology in a string of connected and sequential determinations, in each of the 18 cases, by which the duties are maintained. As the European Communities explains, its complaint is directed at "the zeroing methodology as used in the final order and programmed to continue to be used until such time as the United States eliminates zeroing from the particular anti-dumping duty under consideration."⁴¹⁷

181. Thus, the measures at issue consist of neither the zeroing methodology as a rule or norm of general and prospective application, nor discrete applications of the zeroing methodology in particular determinations; rather, they are the use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which duties are maintained over a period of time. We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement. The successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order.⁴¹⁸ The use of the zeroing methodology in a string of these stages is the allegedly unchanged component of each of the 18 measures at issue.⁴¹⁹ It is with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation.

⁴¹⁵As noted earlier, the European Communities claims that "[s]ince the WTO inconsistency of this practice or methodology is already established (notably in [*US – Stainless Steel (Mexico)*]) the European Communities does not ask the Panel to rule on the WTO inconsistency of this practice." (WT/DS350/6, Panel Report, Annex F-1, p. F-3)

⁴¹⁶We note that, as of February 2007, the USDOC has ceased to apply zeroing in weighted average-to-weighted average ("W-W") comparisons in original investigations. (Panel Report, para. 7.198)

⁴¹⁷European Communities' appellant's submission, para. 36. See also European Communities' first written submission to the Panel, Panel Report, Annex A-1, p. A-30, para. 118.

⁴¹⁸More specifically, the USDOC issues an anti-dumping duty order at the conclusion of an original anti-dumping investigation if the USDOC finds that dumping existed during the period of investigation, and the USITC finds that domestic industry was materially injured, or threatened with material injury, by reason of dumped imports. Generally, this order imposes an estimated anti-dumping duty deposit rate for each exporter individually examined. Subsequently, if a request for a periodic review is made, the USDOC will determine the final amount of anti-dumping duties owed on sales made by the foreign exporter during the previous period. In addition, the USDOC will calculate a going-forward cash deposit rate that will apply to all future entries of the subject merchandise from that exporter. In a sunset review of an order, the authorities determine whether revocation of the anti-dumping duty order would likely lead to continuation or recurrence of dumping and injury. As we understand it, an affirmative sunset review determination, while providing a distinct legal basis for the continued imposition of the relevant anti-dumping duties, nonetheless derives from the same underlying anti-dumping order under which duties have been imposed over the preceding five years. In this respect, we further note that, under Article 11.3 of the *Anti-Dumping Agreement*, the termination of the anti-dumping duty at the end of five years is the "rule" and its continuation beyond that period is the "exception".

⁴¹⁹See European Communities' appellant's submission, para. 36.

At the oral hearing, the European Communities confirmed that it is not seeking the revocation of the 18 anti-dumping orders but, rather, the cessation of the use of the zeroing methodology by which the duties are calculated and maintained in these 18 cases.⁴²⁰ In our view, the European Communities, in seeking an effective resolution of its dispute with the United States, is entitled to frame the subject of its challenge in such a way as to bring the ongoing conduct, regarding the use of the zeroing methodology in these 18 cases, under the scrutiny of WTO dispute settlement.

182. The European Communities takes issue with the Panel's finding that "the continued application of 18 duties" was "in isolation from any proceeding in which such duties have been calculated".⁴²¹ The European Communities submits that it "carefully explained the genesis of each of the 18 measures"⁴²² and that the existence of these duties on specific products from the European Communities could not "be seriously contested by the United States".⁴²³ In response, the United States maintains that, in making the above finding, the Panel correctly "grasped" that the European Communities' challenge regarding the continued application of the 18 anti-dumping duties "seemed directed at free-floating, indefinite 'measures,' disconnected from any specific determinations giving rise to a duty rate".⁴²⁴

183. As we see it, the European Communities is not challenging duties "in isolation" from any proceeding. Rather, as indicated in its panel request, the European Communities is challenging the anti-dumping duties resulting from 18 specific anti-dumping duty orders "as calculated or maintained in place", with the use of the zeroing methodology, in the "most recent" proceeding in the 18 cases. As explained above, we consider that the measures at issue consist of the continued use of the zeroing methodology in successive proceedings by which duties in each of the 18 cases are maintained. Thus, we disagree with the proposition that the European Communities' challenge concerns "free-floating"⁴²⁵ duties in isolation from the underlying determinations giving rise to them.

184. The continued use of the zeroing methodology in a string of determinations can be illustrated by the following example. With respect to one of the 18 cases listed in the panel request—*Ball Bearings and Parts Thereof from Italy* (Case II – Nos. 5-9)—the Panel found that simple zeroing was used in the four periodic reviews (Nos. 5-8)⁴²⁶ conducted for the four consecutive years

⁴²⁰European Communities' responses to questioning at the oral hearing.

⁴²¹European Communities' appellant's submission, para. 49 (referring to Panel Report, para. 7.56).

⁴²²European Communities' appellant's submission, para. 49.

⁴²³European Communities' appellant's submission, para. 48.

⁴²⁴United States' appellee's submission, para. 92.

⁴²⁵United States' appellee's submission, para. 92.

⁴²⁶Panel Exhibits EC-31, EC-36, EC-37, and EC-38.

between 1 May 2001 and 30 April 2005.⁴²⁷ The Panel further found that, in the sunset review pertaining to this order (of which the likelihood-of-dumping determination was issued on 5 October 2005), the USDOC relied on the margin from the original investigation, which was calculated with the zeroing methodology.⁴²⁸ The Panel record further indicates that the sunset review (No. 9)⁴²⁹ resulted in continuation of the original anti-dumping duty order. Thus, the Panel's factual findings show that the USDOC used the zeroing methodology in all of the above periodic reviews. Moreover, the USDOC relied on margins calculated with zeroing in the sunset review that led to the continuation of the anti-dumping duty order. This string of determinations demonstrates the continued use of the zeroing methodology in successive proceedings, whereby duties resulting from the anti-dumping duty order on *Ball Bearings and Parts Thereof from Italy* are maintained.⁴³⁰ In the following subsection, we discuss whether there are sufficient factual findings and undisputed facts in the record that establish the existence of the measures at issue in respect of each of the 18 cases.

185. In the light of the above, we find that the continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 anti-dumping duty orders are maintained, constitute "measures" that can be challenged in WTO dispute settlement.

5. Whether the Appellate Body May Complete the Analysis

186. This brings us to the question of whether we can complete the analysis, as requested by the European Communities, and rule that the continued application of the zeroing methodology in successive proceedings, by which the duties in the 18 cases are maintained, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1, and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.⁴³¹

187. In previous disputes, the Appellate Body has completed the analysis with a view to facilitating the prompt settlement of the dispute.⁴³² However, the Appellate Body has held that it can

⁴²⁷Panel Report, para. 7.145. The United States did not contest that simple zeroing was used in these proceedings. (*Ibid.*)

⁴²⁸Panel Report, paras. 7.190 and 7.200. This finding is upheld on appeal. See *supra*, section VIII.

⁴²⁹Panel Exhibit EC-71.

⁴³⁰See also the graph provided by the European Communities in its first written submission to the Panel regarding duties on *Ball Bearings and Parts Thereof from Italy* (Case II). (Panel Report, Annex A-1, p. A-30)

⁴³¹European Communities' appellant's submission, para. 75.

⁴³²See, for example, Appellate Body Report, *Australia – Salmon*, paras. 117-118; Appellate Body Report, *US – Wheat Gluten*, paras. 80-92; and Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

do so only if the factual findings of the panel and the undisputed facts in the panel record provides it with a sufficient basis for its own analysis.⁴³³

188. In this dispute, the Panel made no findings on the above claims of the European Communities, having excluded such claims from its terms of reference pursuant to Article 6.2 of the DSU. Nonetheless, according to the European Communities, there is a sufficient factual basis in the record to allow for the completion of the analysis. The European Communities contends that the 52 proceedings pertaining to the 18 cases listed in the annex to the panel request serve as evidence for its claims against the continued application of the zeroing methodology, whereby the duties are maintained.⁴³⁴

189. We have found that the measures at issue subject to the European Communities' claims are the continued use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which the duties are maintained. This, however, does not establish whether the use of the zeroing methodology, as an ongoing conduct, exists with respect to duties resulting from each of the 18 anti-dumping duty orders subject to the European Communities' claims. In order to complete the analysis in this respect, we must ascertain whether the factual findings made by the Panel and undisputed facts in the record show that the zeroing methodology has been used repeatedly in successive proceedings, in each of the 18 cases, by which the duties are maintained.

190. As an initial matter, we note the European Communities' reference to adopted panel and Appellate Body reports in which the existence of the United States' zeroing methodology, as an unwritten norm of general and prospective application, was found to exist in the context of both original investigations and periodic reviews.⁴³⁵ Factual findings made in prior disputes do not determine facts in another dispute. Evidence adduced in one proceeding, and admissions made in respect of the same factual question about the operation of an aspect of municipal law, may be submitted as evidence in another proceeding. The finders of fact are of course obliged to make their own determination afresh and on the basis of all the evidence before them. But if the critical evidence is the same and the factual question about the operation of domestic law is the same, it is likely that the finder of facts would reach similar findings in the two proceedings. Nonetheless, the factual

⁴³³See Appellate Body Report, *Australia – Salmon*, paras. 209, 241 and 255; Appellate Body Report, *Korea – Dairy*, paras. 91 and 102; Appellate Body Report, *Canada – Autos*, paras. 133 and 144; and Appellate Body Report, *Korea – Various Measures on Beef*, para. 128.

⁴³⁴European Communities' responses to questioning at the oral hearing.

⁴³⁵These include the Appellate Body Reports in *EC – Bed Linen*, *US – Softwood Lumber V*, *US – Softwood Lumber V (Article 21.5 – Canada)*, *US – Zeroing (EC)*, and *US – Zeroing (Japan)*. (European Communities' appellant's submission, para. 99 (referring to European Communities' first written submission to the Panel, Panel Report, Annex A-1, pp. A-26 and A-27, paras. 101-106)) We note that, as of February 2007, the USDOC has ceased to apply zeroing in W-W comparisons in original investigations. (Panel Report, para. 7.198)

findings adopted by the DSB in prior cases regarding the existence of the zeroing methodology, as a rule or norm, are not binding in another dispute. In themselves, they do not establish that zeroing was used in all the successive proceedings in each of the 18 cases listed in the European Communities' panel request.

191. With this in mind, we turn to examine relevant factual findings made by the Panel. As noted in the previous subsection, in *Ball Bearings and Parts Thereof from Italy* (Case II), the Panel made findings confirming the use of zeroing in the string of determinations pertaining to the same anti-dumping duty order. More specifically, the Panel found that simple zeroing was used in the four periodic reviews (Nos. 5-8) and that, in the sunset review determination resulting in the continuation of the duty order (No. 9), the USDOC relied on the margin from the original investigation, which was calculated with the zeroing methodology.⁴³⁶ The Panel made the same findings regarding the four periodic reviews and the sunset review with respect to each of the following⁴³⁷: *Ball Bearings and Parts Thereof from Germany* (Case III – Nos. 10-14)⁴³⁸; *Ball Bearings and Parts Thereof from France* (Case IV – Nos. 15-19)⁴³⁹; and *Stainless Steel Sheet and Strip in Coils from Germany* (Case VI – Nos. 22-26).⁴⁴⁰ The Panel's factual findings regarding the use of zeroing in these periodic reviews are not subject to appeal, and its factual findings regarding the sunset reviews are upheld on appeal.⁴⁴¹ The Panel record further indicates that the sunset reviews in all four cases resulted in continuation of the original anti-dumping duty orders.⁴⁴² Thus, in each of the above four cases, the Panel's findings indicate that the zeroing methodology was repeatedly used in a string of determinations, made sequentially in periodic reviews and sunset reviews over an extended period of time. The density of factual findings in these cases, regarding the continued use of the zeroing methodology in a string of successive proceedings pertaining to the same anti-dumping duty order, provides a sufficient basis for us to conclude that the zeroing methodology would likely continue to be applied in successive proceedings whereby the duties in these four cases are maintained.

192. The United States contends that the European Communities "cannot say with any certainty that the United States will use so-called zeroing in each and every future determination giving rise to

⁴³⁶Panel Report, paras. 7.145, 7.190 and 7.200.

⁴³⁷Panel Report, paras. 7.145, 7.190 and 7.200.

⁴³⁸Panel Exhibits EC-39 to EC-42 and EC-72.

⁴³⁹Panel Exhibits EC-43 to EC-46 and EC-73.

⁴⁴⁰Panel Exhibits EC-49 to EC-52 and EC-74.

⁴⁴¹See *infra*, section VIII.

⁴⁴²The continuation orders in these four cases are: *Ball Bearings and Parts Thereof from Italy* (Case II – No. 9) (Panel Exhibit EC-71, Appendix I); *Ball Bearings and Parts Thereof from Germany* (Case III – No. 14) (Panel Exhibit EC-72, Appendix II); *Ball Bearings and Parts Thereof from France* (Case IV – No. 19) (Panel Exhibit EC-73, Appendix II); and *Stainless Steel Sheet and Strip in Coils from Germany* (Case VI – No. 26) (Panel Exhibit EC-74, Appendix II).

the application or continued application of duties in the 18 'cases'".⁴⁴³ Specifically, the United States maintains that "[i]t is not even certain that in some periods there will be sales above normal value, so there would not even be the possibility of applying so-called zeroing."⁴⁴⁴ According to this argument, in a particular case where all export prices happen to be below the normal value, zeroing would not be applied. However, the use of zeroing is relevant only when there are transactions with export prices above normal value, whereby the negative comparison results between the export prices and the normal value would be treated as zero. Thus, even if zeroing may not manifest itself as a result of the particular factual circumstances of a case in which all export prices are below the normal value, this does not negate the fact that the repeated action by the USDOC in a string of determinations relating to these four cases confirms the use of the zeroing methodology as an ongoing conduct.

193. In contrast, the existing factual findings of the Panel and undisputed facts in the Panel record in relation to 6 of the 18 cases concern only one proceeding in each case whereby duties were applied with the use of zeroing. More specifically, the Panel found that the zeroing methodology was used in the original investigations in four cases.⁴⁴⁵ No other determinations in those cases were in the Panel record. In one other case, the Panel found that, in the sunset review, the USDOC relied on the original margin calculated with zeroing.⁴⁴⁶ However, no other determination concerning successive stages in this case was in the Panel record. In yet another case, the only specific evidence submitted by the European Communities concerns one periodic review.⁴⁴⁷ In this case, the Panel found that there was insufficient evidence showing that simple zeroing was used.⁴⁴⁸ In our view, the Panel's factual findings and undisputed facts concerning these six cases do not appear sufficient for us to complete the analysis and determine the existence of the ongoing use of the zeroing methodology in a string of determinations emanating from successive proceedings, in each of these cases, by which duties are maintained.

194. With respect to the remaining eight cases, the Panel's factual findings are only partial with respect to the use of the zeroing methodology in successive proceedings by which the duties are maintained. More specifically, in three cases, the Panel found that, in each case, simple zeroing was used in two periodic reviews and that margins calculated with zeroing were relied upon by the

⁴⁴³United States' appellee's submission, para. 67.

⁴⁴⁴United States' appellee's submission, para. 67.

⁴⁴⁵Panel Report, para. 7.104. These four cases are: *Purified Carboxymethylcellulose from Sweden* (Case XV) (Panel Exhibit EC-28); *Purified Carboxymethylcellulose from the Netherlands* (Case XVI) (Panel Exhibit EC-26); *Purified Carboxymethylcellulose from Finland* (Case XVII) (Panel Exhibit EC-29); and *Chlorinated Isocyanurates from Spain* (Case XVIII) (Panel Exhibit EC-30).

⁴⁴⁶Panel Report, paras. 7.190, and 7.200. This is *Brass Sheet and Strip from Germany* (Case XIV – No. 48) (Panel Exhibit EC-79). This finding is upheld on appeal. See *infra*, section VIII.

⁴⁴⁷*Stainless Steel Bar from Italy* (Case XI – No. 39) (Panel Exhibit EC-62).

⁴⁴⁸Panel Report, para. 7.156. The European Communities appeals this finding. See *infra*, section VI.

USDOC in the sunset review⁴⁴⁹; however, no evidence regarding any other proceedings was submitted to the Panel. In two of the remaining five cases, the Panel's findings⁴⁵⁰ confirm the use of zeroing in two periodic reviews of one case and in three periodic reviews of the other case.⁴⁵¹ However, for both cases, the Panel found a lack of evidence showing that zeroing was used in one periodic review listed in the panel request.⁴⁵² Moreover, for both cases, the sunset review determination was excluded from the Panel's terms of reference, hence no substantive findings were made.⁴⁵³ As for two of the remaining cases, the only evidence in the record concerns two periodic reviews in each case. In this respect, the Panel found that none of the evidence in these two cases established that simple zeroing was used in the periodic reviews.⁴⁵⁴ Thus, unlike the situation described in paragraph 191 above, the Panel made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained. Given the absence of the Panel's factual findings and the fragmented nature of the evidence, we are unable to complete the analysis on whether the use of the zeroing methodology exists as an ongoing conduct in successive proceedings by which the duties are maintained in these cases.

195. We recognize the important limitation on our ability to complete the analysis. We have accordingly adopted, for the purpose of this dispute, a cautious approach. Thus, only where the Panel has made clear findings of fact concerning the use of the zeroing methodology, without interruption, in different types of proceedings over an extended period of time, have we considered these findings sufficient for us to complete the analysis and to make findings regarding the continued application of zeroing in these cases.⁴⁵⁵ By contrast, we have not completed the analysis where the factual findings are absent in respect of the use of the zeroing methodology in each of the successive proceedings whereby the duties are maintained, or where there are insufficient factual findings to indicate that zeroing has been repeatedly applied.⁴⁵⁶ In such circumstances, an examination of the facts, as well as

⁴⁴⁹Panel Report, paras. 7.145, 7.190 and 7.200. The Panel's findings regarding the sunset reviews are upheld on appeal. See *infra*, section VIII. These three cases are: *Stainless Steel Plate in Coils from Belgium* (Case VII) (Panel Exhibits EC-53, EC-54, and EC-75); *Ball Bearings and Parts Thereof from the United Kingdom* (Case VIII) (Panel Exhibits EC-55, EC-56, and EC-76); and *Stainless Steel Sheet and Strip Coils from Italy* (Case XII) (Panel Exhibits EC-63, EC-64, and EC-69).

⁴⁵⁰Panel Report, para. 7.145.

⁴⁵¹The two cases are, respectively: *Steel Concrete Reinforcing Bars from Latvia* (Case I) (Panel Exhibits EC-33 to EC-35 and EC-70); and *Certain Pasta from Italy* (Case XIII) (Panel Exhibits EC-65 to EC-68 and EC-78).

⁴⁵²Panel Report, paras. 7.151 and 7.157. The European Communities appeals these findings. See *infra*, section VI.

⁴⁵³Panel Report, paras. 7.70-7.77. On appeal, we reverse the Panel's finding regarding the terms of reference, but do not complete the analysis concerning the consistency of these sunset reviews with the covered agreements. See *infra*, section IV.B.

⁴⁵⁴Panel Report, paras. 7.152-7.155. The European Communities appeals these findings. See *infra*, section VI. These two cases are: *Stainless Steel Bar from France* (Case V) (Panel Exhibits EC-47 and EC-48); and *Stainless Steel Bar from Germany* (Case IX) (Panel Exhibits EC-57 and EC-58).

⁴⁵⁵See *supra*, para. 191.

⁴⁵⁶See *supra*, paras. 193 and 194.

a determination as to what conclusions may be drawn from the remaining evidence in the record, would be more appropriately conducted by a panel, with the assistance of the parties.

196. Finally, for the one remaining case⁴⁵⁷, the Panel found that simple zeroing was used in two of the periodic reviews. Nonetheless, the Panel made no findings on one periodic review and the sunset review in that case, having excluded them from its terms of reference.⁴⁵⁸ As the Panel also noted, this anti-dumping duty was revoked during the course of the Panel proceedings.⁴⁵⁹ Given that the duty in this case has already been terminated, we do not consider it appropriate to make any finding in this respect.

197. In sum, we find that relevant factual findings by the Panel and undisputed facts in the record establish that, with respect to the anti-dumping duties in four of the cases listed in the panel request, the zeroing methodology has been used in successive periodic reviews and in the sunset review, in each of these cases, whereby these duties are maintained.

198. We recall that the European Communities requests us to find that the continued application of the zeroing methodology in the 18 cases, as identified in its panel request, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1, and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.⁴⁶⁰ In section V of this Report, we find that the zeroing methodology, as applied in periodic reviews, is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*. In addition, the Panel, referring to relevant jurisprudence of the Appellate Body, concluded that, to the extent an administering authority relies on dumping margins calculated with zeroing in its likelihood determination in sunset reviews, the resulting sunset review determination is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.⁴⁶¹ On this basis, the Panel found that the United States acted inconsistently with its obligations under Article 11.3 of the Agreement by relying, in eight sunset reviews at issue, on margins obtained through model zeroing in prior investigations. In section VIII of this Report, we uphold this finding of the Panel.

199. In the light of the above, we conclude that the application and continued application of anti-

⁴⁵⁷*Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case X) (Panel Exhibits EC-59 to EC-61 and EC-77).

⁴⁵⁸Panel Report, paras. 7.70-7.77. On appeal, we reverse the Panel's finding regarding the terms of reference, but do not complete the analysis concerning the consistency of the sunset review with the covered agreements. See *infra*, section IV.B.

⁴⁵⁹Panel Report, footnote 152 to para. 7.191. The revocation order, is published in *United States Federal Register*, Vol. 72, No. 123 (27 June 2007) 35220 (Panel Exhibit EC-77, Appendix II).

⁴⁶⁰European Communities' appellant's submission, para. 75.

⁴⁶¹Panel Report, paras. 7.195 and 7.196 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 185).

dumping duties is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 to the extent that the duties are maintained at a level calculated through the use of the zeroing methodology in the periodic reviews in the following four cases: *Ball Bearings and Parts Thereof from Italy* (Case II), *Ball Bearings and Parts Thereof from Germany* (Case III); *Ball Bearings and Parts Thereof from France* (Case IV); and *Stainless Steel Sheet and Strip in Coils from Germany* (Case VI). In addition, we conclude that the application and continued application of anti-dumping duties in these four cases is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* to the extent that reliance is placed upon a margin of dumping calculated through the use of the zeroing methodology in the sunset review determinations. Having reached these findings, we do not consider it necessary to make additional findings under Articles 2.4, 2.4.2, and 11.1 of the *Anti-Dumping Agreement*, Article VI:1 of the GATT 1994, and Article XVI:4 of the *WTO Agreement* for purposes of resolving this dispute.

B. *Preliminary Determinations in Four Specific Anti-Dumping Proceedings*

200. In this section, we examine the European Communities' appeal against the Panel's finding that the European Communities' claims regarding four preliminary determinations were outside the scope of the Panel's terms of reference.⁴⁶²

201. Before the Panel, the United States argued that four of the measures identified in the European Communities' panel request were "preliminary results of periodic or sunset reviews" made by the USDOC.⁴⁶³ The United States observed that Article 17.4 of the *Anti-Dumping Agreement* "allows the initiation of dispute settlement proceedings with regard to provisional measures if certain criteria are met"⁴⁶⁴, but asserted that the European Communities had not shown that those criteria were met in this case. The United States therefore requested that the Panel find that these four preliminary determinations did not fall within its terms of reference.

202. As an initial matter, the Panel noted that it was factually uncontested that "four of the 52 measures identified in the [European Communities'] panel request were preliminary determinations."⁴⁶⁵ The Panel observed that, pursuant to Article 17.4 of the *Anti-Dumping Agreement*, "a Member may challenge definitive measures imposed by other Members", although "exceptionally a provisional anti-dumping measure may be challenged if it has a significant impact and if the complaining Member shows that the provisional measure was taken inconsistently with the

⁴⁶²Panel Report, para. 7.77.

⁴⁶³Panel Report, para. 7.68.

⁴⁶⁴Panel Report, para. 7.68.

⁴⁶⁵Panel Report, para. 7.70.

provisions of Article 7.1".⁴⁶⁶ Noting that Article 7.1 lays down three conditions for the imposition of a provisional anti-dumping measure, the Panel stated that the European Communities' claim regarding the four preliminary measures "may be accepted only if the European Communities proves that the conditions set out under Article 7.1 ... have not been met with regard to such measures."⁴⁶⁷ The Panel further noted that the European Communities had not raised a claim under Article 7.1 of the *Anti-Dumping Agreement*. Therefore, the Panel concluded that the European Communities' claims regarding the four preliminary determinations were not within the Panel's terms of reference.⁴⁶⁸

203. On appeal, the European Communities maintains that the Panel rejected the European Communities' claims on the "assumption" that the European Communities had argued that the four preliminary determinations were "provisional measures".⁴⁶⁹ The European Communities argues that, as it explained to the Panel and the Panel admitted⁴⁷⁰, it was not challenging the four preliminary determinations as "provisional measures" within the meaning of Articles 7.1 and 17.4 of the *Anti-Dumping Agreement*. Rather, it was challenging "the continued application of zeroing in connection with the definitive anti-dumping duties identified in [its] Panel Request (i.e., the 18 measures)."⁴⁷¹ Thus, these 18 measures "effectively caught any subsequent 'measure'" falling into the category of the 52 specific proceedings, including these four preliminary determinations.⁴⁷² According to the European Communities, these four preliminary determinations "are contrary to the covered agreements because the United States carried out its dumping calculations based on zeroing (in the administrative review concerned) or relied on dumping margins calculated in prior investigations using the zeroing methodology (in the case of the sunset reviews)".⁴⁷³ On this basis, the European Communities requests the Appellate Body to reverse the Panel's finding and to complete the analysis by finding that: (i) the four preliminary determinations are within the scope of this dispute; (ii) the preliminary result of the periodic review is inconsistent with Articles 2.1, 2.4, 2.4.2, 9.3, and 11.2 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the *WTO Agreement*; and (iii) the preliminary results of the sunset reviews are inconsistent with

⁴⁶⁶Panel Report, para. 7.73.

⁴⁶⁷Panel Report, para. 7.73.

⁴⁶⁸Panel Report, para. 7.77.

⁴⁶⁹European Communities' appellant's submission, para. 85.

⁴⁷⁰European Communities' appellant's submission, para. 86 (referring to Panel Report, para. 7.75).

⁴⁷¹European Communities' appellant's submission, para. 87. (emphasis omitted)

⁴⁷²European Communities' appellant's submission, para. 87.

⁴⁷³European Communities' appellant's submission, para. 92.

Articles 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.⁴⁷⁴

204. The United States submits that the Panel properly excluded the four preliminary determinations from its terms of reference.⁴⁷⁵ The United States submits that, pursuant to Article 17.4 of the *Anti-Dumping Agreement*, a matter may only be referred to a panel if "final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties."⁴⁷⁶ Yet, the four preliminary determinations challenged by the European Communities were not "final action" because, at the time of the panel request, the United States had not yet made a decision to levy definitive duties.⁴⁷⁷ The United States further contends that the only exception to Article 17.4 of the *Anti-Dumping Agreement* is that a provisional measure may be challenged if the conditions set out in Article 7.1 are met. Thus, the United States asserts, the Panel properly understood that the only way a non-final action could be challenged under the *Anti-Dumping Agreement* would be if it were a provisional measure, and properly concluded that the European Communities' challenge against these four preliminary determinations did not fulfil the conditions set forth in Article 7.1.⁴⁷⁸ Furthermore, the United States notes the European Communities' argument that its challenge against the continued application of the 18 duties includes "any subsequent 'measure'"⁴⁷⁹, such as the preliminary determinations. The United States maintains that this argument ignores the plain text of Article 17.4, because "[n]either on-going administrative reviews, nor on-going sunset reviews, can be classified as final action to levy definitive anti-dumping duties."⁴⁸⁰

205. Article 17.4 of the *Anti-Dumping Agreement* provides:

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

⁴⁷⁴European Communities' appellant's submission, paras. 6 and 94; Panel Report, para. 3.1(c) and (d). The European Communities adds that, if the Appellate Body reverses the Panel's finding that the continued application of the 18 duties were outside its terms of reference and completes the analysis, as requested by the European Communities, then the Appellate Body could deal with its appeal concerning the four preliminary determinations by "declaring the Panel's findings *moot and of no legal effect*". (European Communities' appellant's submission, para. 95 (original emphasis))

⁴⁷⁵United States' appellee's submission, para. 111.

⁴⁷⁶United States' appellee's submission, para. 112 (quoting Article 17.4 of the *Anti-Dumping Agreement*).

⁴⁷⁷United States' appellee's submission, para. 112.

⁴⁷⁸United States' appellee's submission, para. 113.

⁴⁷⁹United States' appellee's submission, para. 114 (quoting European Communities' appellant's submission, para. 87).

⁴⁸⁰United States' appellee's submission, para. 116.

consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB. (emphasis added)

206. Article 17.4 of the *Anti-Dumping Agreement* stipulates, therefore, that a Member may refer the matter to the DSB if two conditions are met: (i) consultations "have failed to achieve a mutually agreed solution"; and (ii) *final action* has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings. In addition, under the second sentence of Article 17.4, a Member may request the establishment of a panel in the case of a *provisional measure* if: (i) that measure has a "significant impact"; and (ii) the Member that requested consultations considers that the measure was taken contrary to the provisions of Article 7.1.⁴⁸¹

207. Before the Panel, the European Communities expressly stated that it was "not challenging provisional measures within the meaning of Article 17.4 of the *Anti-Dumping Agreement*."⁴⁸² The Panel, however, excluded these four measures from its terms of reference for the reason that the European Communities "does not raise any claims under Article 7.1 [of the *Anti-Dumping Agreement*] in these proceedings" and had not "prove[d] that the conditions set out under Article 7.1 ... have not been met" with regard to provisional measures.⁴⁸³ We note, however, that in this dispute, the European Communities was not challenging provisional measures within the meaning of Article 7.1 of the *Anti-Dumping Agreement*. Instead, the European Communities listed among the 52 specific proceedings three preliminary results in sunset reviews and one preliminary result in a periodic review.⁴⁸⁴ These reviews were conducted by the USDOC, subsequent to the imposition of duties pursuant to the original anti-dumping investigations, to assess the duty liabilities and cash deposit rates (in the case of periodic review), and to determine whether a duty should be revoked or continued (in the case of sunset reviews). In contrast, a provisional measure, within the meaning of Article 7 of the *Anti-Dumping Agreement*, is an interim measure taken by an investigating authority in the context of an original investigation to prevent further injury to the domestic industry, pending the final outcome of the original investigation. Therefore, we fail to see the Panel's rationale in excluding

⁴⁸¹ Article 7.1 of the *Anti-Dumping Agreement* provides:

Provisional measures may be applied only if:

- (i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;
- (ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and
- (iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

⁴⁸² Panel Report, para. 7.75.

⁴⁸³ Panel Report, para. 7.73.

⁴⁸⁴ Panel Report, para. 7.70.

these measures from its terms of reference on the grounds that the European Communities did not bring any claims under Article 7.1 concerning the conditions for imposing provisional measures. As a result, the Panel's finding that the four preliminary determinations were outside its terms of reference, which was made on the basis of the European Communities' failure to bring claims under Article 7.1, cannot stand.

208. This brings us to the question of whether we can complete the analysis as requested by the European Communities, by finding that the four preliminary determinations identified in its panel request were within the panel's terms of reference and were inconsistent with "the provisions of the GATT 1994 and the *Anti-Dumping Agreement* cited in the Panel proceedings".⁴⁸⁵

209. We note that two of the four determinations challenged by the European Communities are "preliminary results" issued by the USDOC in, respectively, the periodic review (for the period between 1 November 2004 and 31 October 2005) (No. 35) and the sunset review (No. 38) concerning the anti-dumping duty on *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case X), with the final outcome pending in each proceeding.⁴⁸⁶ In the "Preliminary Results of the Sunset Review of Antidumping Duty Order in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*", for example, the USDOC stated that it "*preliminarily* determines that revocation of the antidumping duty order on [the reviewed product] is likely to lead to continuation or recurrence of dumping" at specified margins.⁴⁸⁷ In addition, the USDOC invited interested parties to submit comments on the preliminary results within certain deadlines, and explained that it would issue the final results subsequent to the deadlines. Moreover, we note that the evidence submitted by the European Communities shows that the anti-dumping duty on *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* was revoked shortly after the establishment of the Panel, because the USDOC, in the final results of the sunset review, could not determine that revocation of the duty would likely lead to continuation or recurrence of dumping.⁴⁸⁸

210. Under these circumstances, we consider the European Communities' challenge in relation to these two preliminary results to be premature. Specifically, given that these preliminary results could be modified by the final results, we fail to see how the European Communities could establish that

⁴⁸⁵European Communities' appellant's submission, para. 94. The provisions cited in the Panel proceedings include Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1, 11.2, and 11.3 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*. (Panel Report, para. 3)

⁴⁸⁶Panel Report, para. 7.70.

⁴⁸⁷*United States Federal Register*, Vol. 72, No. 32 (16 February 2007) 7604 (Panel Exhibit EC-77, Appendix I), at 7605. (emphasis added)

⁴⁸⁸"*Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*; Final Results and Revocation Order", *United States Federal Register*, Vol. 72, No. 123 (27 June 2007) 35220 (Case X) (Panel Exhibit EC-77, Appendix II).

final anti-dumping duty were assessed in excess of the margin of dumping or that the USDOC would have relied on the margin calculated with zeroing in deciding to continue the duty.

211. With respect to the remaining two determinations, the documents referred to by the European Communities are final likelihood-of-dumping determinations issued by the USDOC in the sunset reviews in *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 4)⁴⁸⁹ and in *Certain Pasta from Italy* (Case XIII – No. 47).⁴⁹⁰ With respect to the former, the European Communities submitted the Issues and Decision Memorandum accompanying the final results, which indicates that the USDOC relied on the margin calculated in the original investigation for its likelihood determination.⁴⁹¹ The original investigation in that case was conducted prior to the date on which the USDOC announced that it would no longer apply model zeroing in original investigations.⁴⁹² Nonetheless, we note that both sunset review proceedings were still pending before the USITC at the time the Panel was established. Thus, the USITC had not yet determined, for either case, whether expiry of the anti-dumping duty order would be likely to lead to the continuation or recurrence of injury.⁴⁹³ Under these circumstances, we do not consider that completion of the analysis as to whether these measures are inconsistent with the covered agreements would be appropriate.

212. On this basis, we decline the European Communities' request for completion of the analysis and for a finding that the four preliminary determinations are inconsistent with "the provisions of the GATT 1994 and the *Anti-Dumping Agreement* cited in the Panel proceedings".⁴⁹⁴

C. *Certain Measures Allegedly Not Included in the Request for Consultations*

213. We turn now to consider the United States' allegation that the Panel erred in finding that 14 periodic and sunset reviews identified in the European Communities' panel request were within the Panel's terms of reference even though they were not listed in the European Communities' request for consultations.⁴⁹⁵ We also consider the United States' request for a finding that the

⁴⁸⁹Panel Exhibit EC-70, Appendix I.

⁴⁹⁰Panel Exhibit EC-78, Appendix I.

⁴⁹¹"Issues and Decision Memorandum for the Sunset Review of the Anti-Dumping Duty Order on Steel Concrete Reinforcing Bars from Latvia; Final Result" (Panel Exhibit EC-70, Appendix II), p. 6.

⁴⁹²See USDOC December 2006 Notice, *supra*, footnote 92.

⁴⁹³United States' appellee's submission, footnote 111.

⁴⁹⁴European Communities' appellant's submission, para. 94. The provisions cited in the Panel proceedings include Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1, 11.2, and 11.3 of the *Anti-Dumping Agreement*. (Panel Report, para. 3.1(c) and (d))

⁴⁹⁵For ease of reference, we refer to these periodic reviews and sunset reviews jointly as the "14 additional measures".

continued application of the 18 anti-dumping duties were outside the Panel's terms of reference because they were not included in the European Communities' consultations request.⁴⁹⁶

1. The Panel's Findings

214. Before the Panel, the United States requested a preliminary ruling that the following measures were outside the Panel's terms of reference because they were not identified in the request for consultations: (i) 14 of the 52 anti-dumping proceedings listed in the annex to the panel request; and (ii) the continued application of the 18 anti-dumping duties.⁴⁹⁷

215. The Panel noted that Article 6.2 of the DSU "requires that a panel request mention whether consultations were held, but it does not stipulate that the scope of the consultations request limits the scope of the claims that may subsequently be raised before a panel."⁴⁹⁸ The Panel further noted that, pursuant to Article 4.7 of the DSU and Article 17.4 of the *Anti-Dumping Agreement*, "as long as the consultations request and the panel request concern the same matter, or dispute, claims raised in connection with measures identified in the ... panel request would fall within a panel's terms of reference even if those precise measures were not identified in the consultations request."⁴⁹⁹ The Panel found that the 52 anti-dumping measures, including the 14 additional measures not identified in the consultations request, all concerned "different determinations pertaining to the same products originating in the same countries".⁵⁰⁰ Moreover, they entailed the alleged use of the same

⁴⁹⁶United States' other appellant's submission, footnote 6 to para. 26.

⁴⁹⁷Panel Report, para. 7.16. The 14 additional measures consist of 10 sunset review determinations and four periodic review determinations, listed in the panel request, attached as Annex F-1 to the Panel Report, as set out below.

Seven sunset review determinations: *Ball Bearings and Parts Thereof from Italy* (Case II – No. 9) (Panel Exhibit EC-71); *Ball Bearings and Parts Thereof from Germany* (Case III – No. 14) (Panel Exhibit EC-72); *Ball Bearings and Parts Thereof from France* (Case IV – No. 19) (Panel Exhibit EC-73); *Stainless Steel Sheet and Strip in Coils from Germany* (Case VI – No. 26) (Panel Exhibit EC-74); *Stainless Steel Plate in Coils From Belgium* (Case VII – No. 29) (Panel Exhibit EC-75); *Ball Bearings and Parts Thereof from the United Kingdom* (Case VIII – No. 32) (Panel Exhibit EC-76); and *Stainless Steel Sheet and Strip in Coils from Italy* (Case XII – No. 42) (Panel Exhibit EC-69).

Three sunset reviews (on-going at the time of the panel request): *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 4) (the USITC had not yet determined injury at the time of the panel request) (Panel Exhibit EC-70); *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case X – No. 38 (preliminary results)) (Panel Exhibit EC-77); and *Certain Pasta from Italy* (Case XIII – No. 47) (the USITC had not yet determined injury at the time of the panel request) (Panel Exhibit EC-78). See also United States' other appellant's submission, footnote 3 to para. 26.

Four final periodic review determinations: *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 1) (identified as preliminary results in the consultations request) (Panel Exhibit EC-33); *Stainless Steel Sheet and Strip in Coils from Germany* (Case VI – No. 22) (identified as preliminary results in the consultations request) (Panel Exhibit EC-49); *Certain Pasta from Italy* (Case XIII – No. 43) (Panel Exhibit EC-65); and *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case X – No. 35 (preliminary results)) (Panel Exhibit EC-59). See also United States' other appellant's submission, footnote 4 to para. 26.

⁴⁹⁸Panel Report, para. 7.22.

⁴⁹⁹Panel Report, para. 7.22.

⁵⁰⁰Panel Report, para. 7.25.

methodology, zeroing, which, in the Panel's words, was the "gist of the [European Communities'] claims" before the Panel.⁵⁰¹ For the Panel, this "substantive similarity" between the measures at issue and the fact that they concerned the same country and the same product "outweighed" the fact that they represent independent determinations under United States law.⁵⁰² On this basis, the Panel found that the European Communities' consultations request and panel request referred to the "same subject matter" and the "same dispute" and therefore rejected the United States' claim that 14 of the 52 anti-dumping determinations were outside the Panel's terms of reference because they were not included in the European Communities' consultations request.⁵⁰³

216. With respect to the continued application of the 18 anti-dumping duties, the Panel referred to its finding that these measures fell outside its terms of reference because their identification in the panel request failed to meet the specificity requirement in Article 6.2 of the DSU. On this basis, the Panel declined to address the United States' assertion that these measures fell outside the Panel's terms of reference on the grounds that they were not identified in the European Communities' consultations request.⁵⁰⁴

2. Claims and Arguments on Appeal

217. On appeal, the United States argues that the Panel "fundamentally misconstrued"⁵⁰⁵ the requirements of the DSU regarding panels' terms of reference in reaching its findings. According to the United States, Articles 4 and 6 of the DSU, along with Articles 17.3, 17.4, and 17.5 of the *Anti-Dumping Agreement*, "set forth a fundamental jurisdictional requirement for a complaining Member to request consultations on a matter before that matter may be referred to the DSB for the establishment of a panel."⁵⁰⁶ The United States argues that the Panel incorrectly rejected the United States' preliminary objection on the grounds that the panel request referred to the "same dispute" or "same subject matter" as the consultations request.⁵⁰⁷ In the United States' view, these 14 additional measures were "legally distinct measures"⁵⁰⁸ from those included in the consultations request because they "resulted from completely different proceedings" involving "different time frames and different calculations using different information and data".⁵⁰⁹ The United States further argued that the Panel

⁵⁰¹Panel Report, para. 7.25.

⁵⁰²Panel Report, para. 7.25.

⁵⁰³Panel Report, para. 7.28.

⁵⁰⁴Panel Report, para. 7.29.

⁵⁰⁵United States' other appellant's submission, para. 26.

⁵⁰⁶United States' other appellant's submission, para. 29.

⁵⁰⁷United States' other appellant's submission, para. 33 (referring to Panel Report, paras. 7.23, 7.27 and 7.28).

⁵⁰⁸United States' other appellant's submission, para. 33.

⁵⁰⁹United States' other appellant's submission, para. 35.

identified certain "supposed commonalities"⁵¹⁰ between the measures listed in the consultations request and the 14 additional measures not listed therein on the basis of the erroneous reasoning that the European Communities' legal claims regarding these measures were the same. For the United States, just because a complaining party may wish to raise the same legal claim with respect to two measures does not mean that those measures are not legally distinct.⁵¹¹ In addition, the United States requests that the Appellate Body find that the continued application of the 18 anti-dumping duties were also outside the Panel's terms of reference because they were not identified in the European Communities' consultations request.⁵¹² The United States makes this request on the condition that the Appellate Body reverses the Panel's finding that these 18 measures were not specifically identified in the European Communities' panel request, as required by Article 6.2 of the DSU.⁵¹³

218. The European Communities requests the Appellate Body to dismiss the United States' claim that the Panel erred in finding that the 14 additional measures identified in the panel request but not included in the European Communities' consultations request were within the Panel's terms of reference.⁵¹⁴ According to the European Communities, the measures that were the subject of consultations need not be identical with those identified in the panel request, "as long as they involve essentially the *same matter*".⁵¹⁵ The European Communities agrees with the Panel that the Appellate Body's reasoning in *US – Certain EC Products* is inapplicable to the present case because⁵¹⁶, unlike the additional measure identified for the first time in the panel request in *US – Certain EC Products*, the 14 additional measures identified in the panel request in the present case are not "*legally distinct measure[s]*" from those identified in the consultations request.⁵¹⁷

219. The European Communities further request the Appellate Body to reject the United States' request for a finding that the continued application of the 18 anti-dumping duties were outside the Panel's terms of reference. The European Communities contends that, because the United States did

⁵¹⁰United States' other appellant's submission, para. 36.

⁵¹¹United States' other appellant's submission, para. 36.

⁵¹²United States' other appellant's submission, footnote 6 to para. 26. In this regard, the United States referred to its arguments made before the Panel, which were similar to those submitted by the United States on appeal in relation to the 14 additional measures. (United States' first written submission to the Panel, Panel Report, Annex A-2, pp. A-87 and A-88, paras. 61-65; United States' second written submission to the Panel, Panel Report, Annex C-2, p. C-63, paras. 11 and 13)

⁵¹³United States' other appellant's submission, footnote 6 to para. 26.

⁵¹⁴European Communities' appellee's submission, para. 11.

⁵¹⁵European Communities' appellee's submission, para. 11.

⁵¹⁶European Communities' appellee's submission, para. 14 (referring to Panel Report, para. 7.26).

⁵¹⁷European Communities' appellee's submission, para. 14. (original emphasis) The European Communities argues that the 14 additional measures in the present case relate to the same products from the same countries as those mentioned in its consultations request, the same government agency issued the measures, and the legal claims made by the European Communities were identical to those made in the request for consultations, and have a direct relationship to the measures mentioned in the annexes of the European Communities request for consultations. (*Ibid.*)

not make such a request in its Notice of Other Appeal, the Appellate Body should reject this request.⁵¹⁸ In any event, the European Communities argues, the European Communities' consultations request "did refer to the zeroing methodology, and this was simply narrowed in the Panel Request to refer to the zeroing methodology as embedded in the 18 measures."⁵¹⁹

3. Whether the 14 Additional Measures Fell within the Panel's Terms of Reference

220. In considering the United States' arguments on appeal, we begin with the text of the relevant provisions of the DSU. Article 4 of the DSU provides, in relevant part, that:

Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

...

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

221. Article 6.2 of the DSU provides, in relevant part:

The request for establishment of the panel ... shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

222. The Appellate Body has found that Articles 4 and 6 of the DSU "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."⁵²⁰ Moreover, the Appellate Body has held that "consultations provide the parties an opportunity to define and delimit the scope of the dispute between them".⁵²¹ At the same time, the Appellate Body has also explained that Articles 4 and 6 do not "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."⁵²² Rather, "[a]s long as the complaining party does not expand the scope of the dispute," the Appellate Body has said it would "hesitate to impose too rigid a standard for the 'precise and exact identity'

⁵¹⁸European Communities' appellee's submission, para. 16.

⁵¹⁹European Communities' appellee's submission, para. 17.

⁵²⁰Appellate Body Report, *Brazil – Aircraft*, para. 131.

⁵²¹Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

⁵²²Appellate Body, *Brazil – Aircraft*, para. 132. (original emphasis)

between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request."⁵²³

223. In the present case, there is no dispute between the parties that 14 anti-dumping duty review determinations (including 10 sunset reviews and 4 periodic reviews) were not specifically identified by name or case number in the European Communities' consultations request.⁵²⁴ The United States emphasizes this fact and argues that these measures were therefore not within the Panel's terms of reference pursuant to Articles 4 and 6 of the DSU and the parallel provisions (that is, Articles 17.3, 17.4, and 17.5) of the *Anti-Dumping Agreement*.⁵²⁵

224. Yet, as noted above, Articles 4 and 6 do not require an "exact identity"⁵²⁶ between the scope of the consultations request and the panel request. Thus, the fact that the 14 additional measures were added to the panel request, in itself, does not necessarily mean that they fell outside the Panel's terms of reference. As previously explained by the Appellate Body, the relevant question, in determining whether, in this case, the 14 additional measures fell within the Panel's terms of reference, is whether the "scope of the dispute" was expanded as a result of their addition.⁵²⁷ Therefore, we turn to review the European Communities' consultations request and panel request in order to determine whether the scope of the dispute has been broadened as a result of the inclusion of the 14 additional measures in the panel request.

225. The European Communities requested consultations regarding the "United States regulations, zeroing methodology, practice, administrative procedures and measures for determining the dumping margin in reviews mentioned under point 1(a)"⁵²⁸ of the consultations request. Point 1(a) in turn refers to "all types of review", including annual periodic reviews, new shipper reviews, and changed circumstances reviews, in which the United States "systematically uses" the zeroing methodology.⁵²⁹ In addition, the European Communities also requested consultations regarding the following matters:

(b) The specific anti-dumping administrative reviews listed in Annex I to the present request, and any assessment instructions issued pursuant to them in which the United States applied the regulations, zeroing methodology, practice, administrative procedures and measures described under point 1(a) above. As a consequence, the European Communities consider that *the outcome of the administrative reviews* as detailed in Annex I is inconsistent with Articles 1, 2.1 2.4, 2.4.2, 9.1, 9.3, 11.2 and 18.4 of the

⁵²³ Appellate Body Report, *US – Upland Cotton*, para. 293.

⁵²⁴ Panel Report, para. 7.17.

⁵²⁵ United States' other appellant's submission, paras. 27-29.

⁵²⁶ Appellate Body, *Brazil – Aircraft*, para. 132. (emphasis omitted)

⁵²⁷ Appellate Body Report, *US – Upland Cotton*, para. 293.

⁵²⁸ WT/DS350/1, p. 3.

⁵²⁹ WT/DS350/1, p. 1.

AD Agreement, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization for the reasons set out above under point (a).

(c) The specific dumping determination in the original investigations listed in Annex III to the present request, and any automatic assessment instructions issued pursuant to them, in which the United States applied the zeroing methodology described under point 1(b) above. As a consequence, the European Communities consider that *the imposition of definitive duties* in the original investigations detailed in Annex III is inconsistent with [Articles 1, 2.1, 2.4, 2.4.2, 5.8, 9.1, and 9.3 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*].

(d) The specific sunset review determination in the case listed in Annex II to the present request. The United States relied in its determination on dumping margins that were calculated in the original investigation and in administrative reviews using the methodology described under point 1(a) above. As a consequence, the European Communities consider that *the continuation of the anti-dumping [duty]* in this case is inconsistent with [Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.3, 11.1, 11.3, 18.3, 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*].⁵³⁰ (emphasis added)

226. The consultations request thus makes clear that, in addition to the zeroing methodology, the European Communities challenges the "*outcome* of the administrative reviews", the "*imposition of definitive duties*", and "*the continuation of the anti-dumping [duty]*" resulting from the proceedings listed in the annexes. Under United States anti-dumping laws and practice, the outcome of an administrative review (referred to as a "*periodic review*" in this Report⁵³¹) involves the collection of duties pursuant to an assessment of an importer's actual duty liabilities for the review period, as well as the imposition of an updated cash deposit rate on that importer for future entries.⁵³² In other words, the measures referred to in the European Communities' consultations request include the duties imposed, or continued to be applied, as a result of the specific anti-dumping proceedings listed in the annexes. The consultations request further indicates that the European Communities considers that these duties are inconsistent with the covered agreements because the zeroing methodology was used in their assessment in periodic reviews and in their calculation in original determinations, and because the United States relied upon margins calculated on the basis of the zeroing methodology in the sunset reviews. Therefore, the measures subject to the European Communities' challenge encompass the anti-dumping duties resulting from the proceedings identified in the consultations request, in which the zeroing methodology was allegedly used.

⁵³⁰WT/DS350/1, pp. 3-5.

⁵³¹See *supra*, footnote 9.

⁵³²United States' other appellant's submission, para. 57.

227. With respect to the specific anti-dumping proceedings, the European Communities requested consultations regarding, *inter alia*, 33 periodic reviews and one sunset review in which the zeroing methodology was allegedly applied. In the panel request, the European Communities challenges the application of the zeroing methodology in 52 specific anti-dumping proceedings. Among them, four periodic reviews and 10 sunset reviews were not expressly listed in the consultations request.

228. We recall that the Appellate Body has cautioned against a standard that is too "rigid" in terms of requiring the "precise and exact identity" between the scope of the request for consultations and the panel request, as long as the complaining party does not "expand the scope of the dispute".⁵³³ Here, the 14 additional measures identified in the panel request pertain to the same anti-dumping duties that are included in the consultations request. Among the 14 additional measures are the sunset review proceedings concerning the continuation of 10 anti-dumping duties, in relation to which the successive periodic reviews are identified in the consultations request.⁵³⁴ The remaining four additional measures are more recent periodic reviews to the ones listed in the consultations request, including two final results issued subsequent to the preliminary results that were listed in the consultations request.⁵³⁵ The proceedings listed in the consultations request and the panel request are therefore successive stages subsequent to the issuance of the same anti-dumping duty orders. More specifically, as regards the periodic reviews, the subsequent measures assessed actual duty liabilities and updated cash deposit rates that were imposed on the same products from the same countries as those listed in the consultations request. With respect to the sunset reviews, the subsequent measures related to the continued application of duties on the same products from the same countries as those listed in the consultations request. Moreover, in both its consultations request and panel request, the European Communities made clear that it was challenging the specific administrative review and sunset review proceedings because of the use of the zeroing methodology. Specifically, both the consultations request and the panel request allege that the USDOC "systematically"⁵³⁶ applies the zeroing methodology in all types of review proceedings, which, the European Communities contends, is a methodology found to be inconsistent with the covered agreements.⁵³⁷ In sum, these 14 additional measures relate to the same duties identified in the consultations request, and the legal basis of the claims raised is the same.

229. The United States contends that the 14 additional measures are "legally distinct" from those listed in the consultations request and therefore could not properly fall within the Panel's terms of reference. As support, the United States refers to the Appellate Body's finding in *US – Certain EC*

⁵³³Appellate Body Report, *US – Upland Cotton*, para. 293.

⁵³⁴WT/DS350/1, pp. 6-8. United States' other appellant's submission, footnote 3 to para. 26.

⁵³⁵WT/DS350/1, pp. 6-8. United States' other appellant's submission, footnote 4 to para. 26.

⁵³⁶WT/DS350/1, point 1(a), p. 1; WT/DS350/6, Panel Report, Annex F-1, p. F-2.

⁵³⁷WT/DS350/1, point 1(b), p. 2; WT/DS350/6, Panel Report, Annex F-1, p. F-3.

Products that, although a measure was listed in the panel request, it nevertheless fell outside the panel's terms of reference because it was "legally distinct" from the measure included in the consultations request.⁵³⁸

230. We note that, in reaching its finding in *US – Certain EC Products*, the Appellate Body took into account several particular factors arising in that dispute. For example, the Appellate Body noted that the contents of these two measures were different: while one provided for increased bonding requirements, the other provided for the imposition of 100 per cent customs duties. It also noted that these two measures were taken by two separate agencies pursuant to two distinctly separate legal authorities. Furthermore, the earlier measure was not a prerequisite for the imposition of the later measure, and there was no perceptible correlation between the amount of bonding requirements and the customs duties.⁵³⁹ In other words, the two measures in that dispute were entirely different and, as a consequence, the matters covered by the consultations request and the panel request were distinct from one another.

231. The situation is rather different in this dispute. As noted, the 14 additional measures and those explicitly listed in the consultations request relate to the same duties on the same products from the same countries imposed pursuant to the same authorities (that is, the relevant anti-dumping rules and regulations of the United States). In relation to each of the duties, the proceedings identified in both the consultations request and the panel request derive from the same underlying legal basis, that is, the anti-dumping duty orders issued pursuant to the original investigations in which dumping, material injury, and the causal link between the two were determined. The United States argued that the periodic reviews were conducted by the USDOC alone and the sunset reviews required decisions by both the USDOC and the USITC. Yet, the fact that one or two agencies were involved does not change the fact that each of the duties subject to both types of reviews derived from the same anti-dumping duty order. As the Appellate Body explained in *US – Certain EC Products*, "[i]t is perfectly possible for more than one governmental agency to be involved in taking a single measure."⁵⁴⁰ Thus, we consider that the United States' reliance on the Appellate Body's findings in *US – Certain EC Products* is misplaced.

232. The United States further asserts that, in rejecting the relevance of *US – Certain EC Products*, the Panel erroneously applied a "striking similarities" test with respect to the 14 additional measures and those included in the consultations request.⁵⁴¹ We agree that similarities between the measures,

⁵³⁸United States' other appellant's submission, para. 34 (referring to Appellate Body Report, *US – Certain EC Products*, para. 82).

⁵³⁹Appellate Body Report, *US – Certain EC Products*, paras. 74-77.

⁵⁴⁰Appellate Body Report, *US – Certain EC Products*, para. 75.

⁵⁴¹United States' other appellant's submission, para. 36 (referring to Panel Report, para. 7.27).

alone, does not lead to the conclusion that the 14 additional measures necessarily fell within the Panel's terms of reference. However, we do not consider that the Panel made such a finding. Rather, the Panel was distinguishing the current dispute from that in *US – Certain EC Products*, in which the measure listed in the panel request and that mentioned in the consultations request were different.⁵⁴²

233. Moreover, the Panel's analysis did not stop at recognizing the similarities of the measures. Rather, the Panel went on to find that, "[m]ore importantly, the legal nature of the European Communities' claims regarding the additional 14 measures does not in any way differ from that of the 38 measures identified in the ... consultations request."⁵⁴³ Hence, the Panel found, "it is clear that the European Communities' consultations request and its panel request refer to the same subject matter, the same dispute."⁵⁴⁴ The United States contends that the Panel's approach confused two aspects of the "matter", namely, claims and measures. The United States submits that, "[j]ust because a complaining party may wish to raise the same legal claim with respect to two measures does not mean that those measures are not legally distinct."⁵⁴⁵ We disagree. In our view, the Panel properly examined both components of the matter before it in order to determine whether the scope of the dispute had changed.

234. In addition, the United States contends that the Panel's reliance on relevant findings by the panel and the Appellate Body in *Brazil – Aircraft* was "misplaced"⁵⁴⁶ because in that dispute "the consultations and panel request contained essentially the same measures, unlike the situation here."⁵⁴⁷

235. In *Brazil – Aircraft*, the measures at issue were the Brazilian export subsidies for regional aircraft under "PROEX".⁵⁴⁸ The panel and the Appellate Body found that consultations were held on these subsidies, and that the regulatory instruments that came into effect subsequent to the consultations "involve essentially the same practice, [that is,] the payment of export subsidies under PROEX."⁵⁴⁹ Therefore, the consultations request and the panel request "relate to what is fundamentally the same 'dispute'"⁵⁵⁰ and, as a result, the regulatory instruments that came into effect after the consultations were properly before the panel.⁵⁵¹ In the present dispute, the periodic reviews

⁵⁴²Panel Report, paras. 7.26 and 7.27.

⁵⁴³Panel Report, para. 7.28.

⁵⁴⁴Panel Report, para. 7.28.

⁵⁴⁵United States' other appellant's submission, para. 36.

⁵⁴⁶United States' other appellant's submission, para. 38 (referring to Panel Report, para. 7.23).

⁵⁴⁷United States' other appellant's submission, para. 38.

⁵⁴⁸Appellate Body Report, *Brazil – Aircraft*, para. 132.

⁵⁴⁹Panel Report, *Brazil – Aircraft*, para. 7.11. See also Appellate Body Report, *Brazil – Aircraft*, para. 132.

⁵⁵⁰Panel Report, *Brazil – Aircraft*, para. 7.11.

⁵⁵¹Appellate Body Report, *Brazil – Aircraft*, para. 133. See also Panel Report, *Brazil – Aircraft*, para. 7.11.

listed in the consultations request also involve essentially the same practice as the successive periodic reviews identified in the panel request, that is, the assessment of duty liabilities and cash deposit rates. Moreover, the European Communities' claims against the periodic and sunset reviews listed, respectively, in the consultations request and the panel request relate to essentially the same dispute, that is, the application of the zeroing methodology in the imposition or continuation of specific anti-dumping duties. Thus, in our view, the Panel properly relied on the relevant findings in *Brazil – Aircraft* to confirm its finding that a precise identity is not required between the specific measures identified in the consultations request and those identified in the panel request, provided that the complainant does not expand the scope of the dispute.⁵⁵²

236. In the light of the above, we uphold the Panel's finding that the 14 additional measures were within the Panel's terms of reference.⁵⁵³

4. Whether the Continued Application of the 18 Anti-Dumping Duties was Included in the Request for Consultations

237. Should the Appellate Body reverse the Panel's finding that the European Communities failed to identify in the panel request the specific measures at issue with regard to its claims concerning the continued application of the 18 anti-dumping duties, the United States requests the Appellate Body to find "the alleged 18 measures" to be outside the Panel's terms of reference because they were not identified in the consultations request.⁵⁵⁴

238. In section IV.A.3 of this Report, we reversed the Panel's finding that the European Communities failed to identify the specific measures at issue in relation to its claims concerning the continued application of the 18 duties. The condition upon which the United States' request rests is therefore fulfilled, and we turn to examine the issue of whether the continued application of the 18 anti-dumping duties fell outside the Panel's terms of reference because they were not identified in the consultations request.

239. As noted above, the European Communities' consultations request makes clear that, in

⁵⁵²Panel Report, para. 7.23 (referring to Panel Report, *Brazil – Aircraft*, para. 7.10; and Appellate Body Report, *Brazil – Aircraft*, para. 132). Furthermore, as noted by Brazil in this case, "in assessing the scope of a panel's jurisdiction, panels and the Appellate Body have focused on the *substantive connection* ... between a group of measures" and on the issue of whether these measures are substantively the same with respect to the disputed issue. (Brazil's third participant's submission, para. 21) Brazil refers to, for example, the Appellate Body's finding in *Chile – Price Band System* that an amendment to a measure subsequent to the panel's establishment did not change the essence of the original measure, and therefore the amended measure was within the panel's jurisdiction. (*Ibid.*, para. 18 (referring to Appellate Body Report, *Chile – Price Band System*, para. 139))

⁵⁵³Panel Report, para. 7.28.

⁵⁵⁴United States' other appellant's submission, footnote 6 to para. 26.

addition to the zeroing methodology, the European Communities challenges the "*outcome* of the administrative reviews", the "imposition of definitive *duties*", and "the continuation of the anti-dumping [*duty*]" resulting from the proceedings listed in the annexes. In other words, the measures subject to the European Communities' consultations request include the duties imposed, or continued to be applied, as a result of the specific anti-dumping proceedings listed in the annex to the consultations request. The consultations request further indicates that the European Communities considers that these duties are inconsistent with the covered agreements because the zeroing methodology was used in their assessment in periodic reviews and in their calculation in original determinations, and because the United States relied upon margins calculated previously on the basis of the zeroing methodology in the sunset review. Therefore, the measures subject to the European Communities' challenge encompass the anti-dumping duties resulting from the proceedings identified in the consultations request, in which the zeroing methodology was allegedly used.

240. A comparison between the consultations request and the panel request shows that the 38 proceedings listed in the consultations request pertain to all of the 18 cases identified in the panel request. More specifically, in its panel request, the European Communities indicated that it challenges the continued application of 18 anti-dumping duties, each identified in the annex to the panel request by reference to the original anti-dumping order, together with the product and country to which the duty applies. In addition, the European Communities challenges 52 specific proceedings pertaining to these 18 cases. Among these 52 proceedings, 38 are listed in the consultations request, which pertain to all of the 18 cases. Thus, the 18 anti-dumping duties challenged by the European Communities are the same duties as those resulting from the proceedings listed in the consultations request. Although, in the consultations request, the exact term "18 duties" or "18 cases" was not used, these duties are nonetheless manifested in the specific proceedings listed therein that resulted in the imposition, collection, or assessment of duties. Moreover, in its panel request, the European Communities indicates that it challenges the continued application of the 18 duties because of the use of the zeroing methodology in calculating or assessing the rates of these duties. Therefore, in our view, with respect to these 18 duties, the consultations request and the panel request concern the same matter, that is, the inconsistency with the GATT 1994 and the *Anti-Dumping Agreement* of the 18 anti-dumping duties due to the use of the zeroing methodology in the determination of the dumping margins or the cash deposit rates.

241. On this basis, we dismiss the United States' request and conclude that the continued application of the anti-dumping duties in each of the 18 cases was identified in the European Communities' consultations request.⁵⁵⁵

V. Simple Zeroing as Applied in Periodic Reviews

242. We turn next to examine the United States' other appeal of the Panel's finding that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by using simple zeroing in 29 periodic reviews.

243. In what follows, we summarize briefly the findings of the Panel and the arguments of the participants before turning to the issue before us in this case.

A. *The Panel's Findings*

244. The Panel found that zeroing, as applied by the USDOC in 29 periodic reviews, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.⁵⁵⁶

245. In its analysis, the Panel first considered the issue of "whether dumping may be determined on the basis of an individual export transaction or whether it requires an aggregation of all export transactions made within the period of review."⁵⁵⁷ The Panel said it was "inclined to agree" with the proposition that "it is a permissible interpretation of the [*Anti-Dumping Agreement*] that dumping may be determined for individual export transactions"⁵⁵⁸, but also added that panel reports agreeing with that proposition have been consistently reversed by the Appellate Body. In this regard, the Panel noted the Appellate Body's explanation that, "if it were permissible to determine a separate margin of dumping for each individual transaction, several margins of dumping would exist for each exporter and for the product under consideration."⁵⁵⁹ The Panel added that the Appellate Body has found that

⁵⁵⁵In any event, we note that the United States did not make this request in its Notice of Other Appeal, but only included this request subsequently in a footnote in its other appellant's submission.

⁵⁵⁶Before the Panel, the European Communities argued that the United States applied simple zeroing in the 37 periodic reviews listed in the annex to the European Communities' panel request. (See Panel Report, para. 7.145) The Panel found that the European Communities had failed to establish that simple zeroing was used in seven periodic reviews. (See *ibid.*, para. 7.158) In addition, the Panel found that the preliminary results of one periodic review were not within its terms of reference. (See *ibid.*, para. 7.77) Thus, the Panel's findings regarding the use of simple zeroing in periodic reviews applied only to 29 of the 37 reviews challenged by the European Communities.

⁵⁵⁷Panel Report, para. 7.162.

⁵⁵⁸Panel Report, para. 7.162.

⁵⁵⁹Panel Report, para. 7.162 (quoting Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 99).

this cannot be reconciled with the interpretation and application of several provisions of the *Anti-Dumping Agreement*, including a determination of injury under Article 3.⁵⁶⁰

246. Secondly, the Panel examined the issue of "whether dumping is necessarily an exporter-specific concept or whether it may also be determined for individual importers."⁵⁶¹ The Panel said that it "tend[ed] toward the view that dumping is not necessarily and exclusively an exporter-specific concept".⁵⁶² However, referring to the Appellate Body's reasoning that "certain elements of the definitional provisions contained in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 compel the notion that dumping reflects the exporter's behaviour"⁵⁶³, the Panel observed that the Appellate Body had reversed the findings of prior panels that had considered the determination of importer-specific margins permissible. The Panel further noted that the Appellate Body "found contextual support for its interpretation in other provisions of the Agreement, including Articles 2.3, 5.2(ii), 6.1.1, 6.7, 5.8, 6.10, 9.5, 8.1, 8.2, 8.5 and 9.4(i) and (ii)."⁵⁶⁴ In addition, the Appellate Body "restated the overarching requirement of Article 9.3 that the level of anti-dumping duty cannot exceed the margin of dumping as established under Article 2 of the Agreement [and] reasoned that dumping can only be determined for the exporter and in connection with the product under consideration as a whole, and considered that this definition of 'dumping' applies throughout the Agreement."⁵⁶⁵

247. Thirdly, the Panel stated that it shared the United States' concern that "prohibiting simple zeroing in periodic reviews would favour importers with high margins *vis-à-vis* importers with low margins."⁵⁶⁶ However, in this regard, the Panel recalled the Appellate Body's explanation "that the prohibition of simple zeroing in periodic reviews does not preclude Members from carrying out an importer-specific inquiry in determining liability for the collection of anti-dumping duties, as long as the duty collected does not exceed the exporter-specific margin of dumping established for the product under consideration as a whole."⁵⁶⁷

⁵⁶⁰Panel Report, para. 7.162 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 99).

⁵⁶¹Panel Report, para. 7.163.

⁵⁶²Panel Report, para. 7.163.

⁵⁶³Panel Report, para. 7.163 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 83-96).

⁵⁶⁴Panel Report, para. 7.163 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 83-96).

⁵⁶⁵Panel Report, para. 7.163.

⁵⁶⁶Panel Report, para. 7.164.

⁵⁶⁷Panel Report, para. 7.164 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 113).

248. Fourthly, while expressing the view that an opinion presented in the 1960 Second Report by the Group of Experts on Anti-Dumping and Countervailing Duties⁵⁶⁸ (the "1960 Group of Experts Report") "supports the conclusion that dumping could be determined for individual importers"⁵⁶⁹, the Panel recalled that the Appellate Body "rejected this argument, finding that interpretation of the Agreement in this regard does not necessitate an analysis of supplementary means of interpretation provided for under Article 32 of the Vienna Convention."⁵⁷⁰ The Appellate Body further reasoned that the 1960 Group of Experts Report "does not clarify whether simple zeroing in periodic reviews is allowed under the Anti-Dumping Agreement because it only reflects the views of some of the negotiating parties well before the Anti-Dumping Agreement came into force."⁵⁷¹

249. Fifthly, the Panel said it "tend[ed] to agree" with the proposition that recognition in the *Anti-Dumping Agreement* of a prospective normal value system "reinforces the argument that dumping may be determined on the basis of individual export transactions".⁵⁷² The Panel noted, however, that the Appellate Body "highlighted the fact that the duty collected at the time of importation under a prospective normal value system does not represent the margin of dumping within the meaning of Article 9.3 and noted that such duty is subject to review under Article 9.3.2."⁵⁷³

250. Finally, the Panel said it "tend[ed] to agree" with the United States and the panel in *US – Stainless Steel (Mexico)* that, if the *Anti-Dumping Agreement* was read to prohibit zeroing generally, then Article 2.4.2 would yield the same mathematical result as the first methodology, rendering the second sentence of Article 2.4.2 *inutile*.⁵⁷⁴ However, the Appellate Body dismissed this concern, explaining that, "if the determination of weighted average normal values was based on *different time periods*, dumping margin calculations under these two methodologies would yield different mathematical results."⁵⁷⁵ The Appellate Body also reiterated its view that "[b]eing an exception, the comparison methodology in the second sentence of Article 2.4.2 (weighted average-to-transaction) alone cannot determine the interpretation of the two methodologies provided in the first sentence."⁵⁷⁶

⁵⁶⁸GATT Second Report of the Group of Experts, Anti-Dumping and Countervailing Duties, GATT Document L/1141, adopted 27 May 1960, BISD 9S/194.

⁵⁶⁹Panel Report, para. 7.165.

⁵⁷⁰Panel Report, para. 7.165 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 128-132).

⁵⁷¹Panel Report, para. 7.165 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 128-132).

⁵⁷²Panel Report, para. 7.166.

⁵⁷³Panel Report, para. 7.166 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 120).

⁵⁷⁴Panel Report, para. 7.167 (referring to Panel Report, *US – Stainless Steel (Mexico)*, paras. 7.130-7.133).

⁵⁷⁵Panel Report, para. 7.167 (quoting Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 126 (original emphasis)).

⁵⁷⁶Panel Report, para. 7.167 (quoting Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127).

251. Although it had "generally found the reasoning of earlier panels on these issues to be persuasive"⁵⁷⁷, the Panel noted that it was "faced with a situation where the Appellate Body reports, adopted by the DSB, have consistently reversed the findings in the mentioned panel reports that simple zeroing in periodic reviews is not WTO-inconsistent."⁵⁷⁸ Thus, "before setting out any definitive findings", the Panel turned to consider what it referred to as "an important systemic question".⁵⁷⁹

252. Referring to the "consistent line of reasoning underlying the Appellate Body's conclusion regarding simple zeroing in periodic reviews"⁵⁸⁰, the Panel turned to consider the role of prior jurisprudence. The Panel noted the Appellate Body's finding that, although "Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties"⁵⁸¹, they are nevertheless "often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes".⁵⁸² The Panel recalled the Appellate Body's statements in *US – Stainless Steel (Mexico)* that "the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system" and that ensuring "security and predictability" in the dispute settlement system "requires the development of a consistent body of case law and applying it to the same legal questions, absent cogent reasons".⁵⁸³

253. With regard to the hierarchical structure between panels and the Appellate Body, the Panel observed the Appellate Body's finding that any panel report that fails to follow the case law developed through adopted panel and Appellate Body reports would undermine the important function of jurisprudence to develop a consistent body of case law.⁵⁸⁴ The Panel also noted the Appellate Body's view that "the legal interpretation contained in adopted Appellate Body reports has implications that go beyond the specifics of the relevant dispute" and has to be taken into consideration in interpreting the rights and obligations of WTO Members.⁵⁸⁵

254. The Panel then observed that its duty to make an "objective assessment" under Article 11 of the DSU did not exist "in a vacuum", but was to be read in the context of Article 3.2 of the DSU,

⁵⁷⁷Panel Report, para. 7.169. (footnote omitted)

⁵⁷⁸Panel Report, para. 7.169.

⁵⁷⁹Panel Report, para. 7.169.

⁵⁸⁰Panel Report, para. 7.170.

⁵⁸¹Panel Report, para. 7.173 (quoting Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 158).

⁵⁸²Panel Report, para. 7.173 (quoting Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160).

⁵⁸³Panel Report, paras. 7.174 and 7.175 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160).

⁵⁸⁴Panel Report, para. 7.175 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161).

⁵⁸⁵Panel Report, para. 7.176 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161).

which "establishes that the WTO dispute settlement system is intended to provide security and predictability to the multilateral trading system".⁵⁸⁶ The Panel agreed that such security and predictability may "be furthered by the development of consistent jurisprudence and applying it to the same legal questions, absent cogent reasons to do otherwise".⁵⁸⁷ However, while concluding that "it is obviously incumbent upon any panel to consider prior adopted Appellate Body reports, as well as adopted panel reports, and adopted GATT panel reports, in undertaking the objective assessment required by Article 11"⁵⁸⁸, the Panel said it did not believe that "the development of binding jurisprudence is a contemplated element to enable the dispute settlement system to provide security and predictability to the multilateral trading system."⁵⁸⁹

255. The Panel reasoned as follows:

Clearly, it is important for a panel to have cogent reasons for any decision it reaches, regardless of whether or not there are any relevant adopted reports, and whether or not the panel follows such reports. ... In our view, however, a panel cannot simply follow the adopted report of another panel, or of the Appellate Body, without careful consideration of the facts and arguments made by the parties in the dispute before it. To do so would be to abdicate its responsibilities under Article 11. By the same token, however, neither should a panel make a finding different from that in an adopted earlier panel or Appellate Body report on similar facts and arguments without careful consideration and explanation of why a different result is warranted, and assuring itself that its finding does not undermine the goals of the system.⁵⁹⁰ (emphasis omitted)

256. Consequently, while the Panel said it "share[d] a number of concerns" expressed by the panel in *US – Stainless Steel (Mexico)*, the Panel recognized that the Appellate Body had reversed the findings of that panel and that the Appellate Body report had "gained legal effect through adoption by the DSB."⁵⁹¹ The Panel also noted that "this continues a series of consistent recommendations made by the DSB over the past several years following reports that addressed the same issues based largely on the same arguments."⁵⁹²

257. The Panel further observed that:

In addition to the goal of providing security and predictability to the multilateral trading system, ... Article 3.3 of the DSU provides that "[t]he prompt settlement of situations in which a Member considers

⁵⁸⁶Panel Report, para. 7.179.

⁵⁸⁷Panel Report, para. 7.179.

⁵⁸⁸Panel Report, para. 7.179.

⁵⁸⁹Panel Report, para. 7.179.

⁵⁹⁰Panel Report, para. 7.180.

⁵⁹¹Panel Report, para. 7.181.

⁵⁹²Panel Report, para. 7.181.

that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Given the consistent adopted jurisprudence on the legal issues that are before us with respect to simple zeroing in periodic reviews, we consider that providing prompt resolution to this dispute in this manner will best serve the multiple goals of the DSU, and, on balance, is furthered by following the Appellate Body's adopted findings in this case.⁵⁹³

258. Based on this analysis, the Panel concluded that the United States had acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by applying simple zeroing in 29 periodic reviews. Having reached this conclusion, the Panel declined to rule on the European Communities' claims under Articles 2.1, 2.4, 2.4.2, and 11.2 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994.⁵⁹⁴

B. *Arguments of the Participants and the Third Participants*

259. On appeal, the United States argues that the use of simple zeroing in periodic reviews rests on a permissible interpretation of the *Anti-Dumping Agreement*. According to the United States, the Panel in this dispute reached the same conclusion. Nevertheless, the Panel ultimately found that the United States had acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying simple zeroing in 29 periodic reviews. The United States contends that this finding was based on an improper application of the standard of review set out under Article 17.6(ii) of the *Anti-Dumping Agreement* and should be reversed.

260. The United States further argues that Article 2.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994 "do not define 'dumping' and 'margins of dumping' so as to require that export transactions be examined at an aggregate level".⁵⁹⁵ Instead, the definition of dumping in these provisions "describes the real-world commercial conduct by which a product is imported into a country, i.e., transaction by transaction".⁵⁹⁶ Thus, there is no reason why a Member may not "establish the 'margin of dumping' on the basis of the total amount by which the transaction-specific export prices are less than the transaction-specific normal values".⁵⁹⁷

⁵⁹³Panel Report, para. 7.182.

⁵⁹⁴Panel Report, para. 7.183.

⁵⁹⁵United States' other appellant's submission, para. 60 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 140).

⁵⁹⁶United States' other appellant's submission, para. 60 (referring to Panel Report, *US – Zeroing (EC)*, para. 7.285).

⁵⁹⁷United States' other appellant's submission, para. 67 (quoting Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.28).

261. The United States adds that "the term 'margin of dumping', as used elsewhere in the GATT 1994 and the [*Anti-Dumping Agreement*], does not refer exclusively to the aggregated results of comparisons for the 'product as a whole'."⁵⁹⁸ The United States disagrees with the Appellate Body's finding that a "determination of dumping with respect to an exporter is properly made not at the level of individual export transactions, but on the basis of the totality of an exporter's transactions of the subject merchandise over the period of investigation."⁵⁹⁹ For the United States, there is nothing in the *Anti-Dumping Agreement* that directs the calculation of a margin of dumping to be done only "at the level of multiple transactions", nor any text that would preclude the calculation of a margin of dumping on a transaction-specific level.⁶⁰⁰

262. By contrast, the European Communities argues that it is clear from Articles VI:1 and VI:2 of the GATT 1994 and various provisions in the *Anti-Dumping Agreement* that "dumping" and "margin of dumping" are "exporter-specific concepts", and that dumping "is also product-related, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped".⁶⁰¹ In the European Communities' view, the notion that dumping and a margin of dumping can exist at the level of an individual transaction runs counter to the basic disciplines of the *Anti-Dumping Agreement*, including the requirement that the determination of dumping be made on the basis of all of an exporter's transactions over a period of time.⁶⁰² The European Communities argues, therefore, that the interpretation put forth by the United States is not a permissible one.⁶⁰³ If, however, the Appellate Body decides to overturn the finding of the Panel, then the European Communities refers to its conditional appeal wherein it asks the Appellate Body to reverse "that part of the Panel Report that agrees with the United States".⁶⁰⁴ The European Communities urges the Appellate Body to consider the present matter in the light of findings in *US – Stainless Steel (Mexico)* on the question of precedent, because the present case cannot be distinguished on facts.⁶⁰⁵ In the European Communities' view, the Appellate Body can reverse its previous decision only for new and cogent reasons, which do not exist in this case. Further, the European Communities disagrees with the United States' proposition that Article 17.6(ii) of the *Anti-Dumping Agreement* "override[s]" or "replace[s]" the provisions of the DSU; rather, the European Communities agrees with the Appellate

⁵⁹⁸United States' other appellant's submission, para. 68.

⁵⁹⁹United States' other appellant's submission, para. 71 (quoting Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98).

⁶⁰⁰United States' other appellant's submission, para. 72.

⁶⁰¹European Communities' appellee's submission, para. 20.

⁶⁰²European Communities' appellee's submission, para. 21 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 97-99).

⁶⁰³European Communities' appellee's submission, para. 61.

⁶⁰⁴European Communities' appellee's submission, para. 62.

⁶⁰⁵European Communities' appellee's submission, para. 63.

Body that Article 17.6 "supplements" the provisions of the DSU.⁶⁰⁶ The European Communities adds that the Panel followed the Appellate Body Report in *US – Stainless Steel (Mexico)* and thus complied with its obligations under Article 11 of the DSU in this case.

263. Brazil, India, Japan, Korea, Norway, and Thailand generally agree with the European Communities. Brazil and Japan further submit that the Appellate Body should uphold the Panel's finding that zeroing, as applied by the USDOC in the 29 periodic reviews at issue in this appeal, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.⁶⁰⁷ In essence, they argue that these provisions establish a requirement that "dumping" and "margins of dumping" be established by reference to the product under consideration and to individual exporters, and not in relation to specific models or subsets of low-priced transactions. Brazil and Japan also argue that there must be consistent treatment of dumping and margins of dumping for all purposes and stages of anti-dumping proceedings because these terms have the same meaning throughout the *Anti-Dumping Agreement*.

C. *Simple Zeroing in Periodic Reviews*

264. We begin our analysis by examining whether the Panel misapplied the standard of review set out under Article 17.6(ii) of the *Anti-Dumping Agreement*. Next, we consider the United States' arguments insofar as they relate to the interpretation and operation of the terms "dumping" and "margin of dumping" as they appear in the *Anti-Dumping Agreement* and Article VI of the GATT 1994. In particular, we evaluate whether "dumping" and "margin of dumping" are exporter- or importer-related concepts and whether they can be found to exist at the transaction- or importer-specific levels for the purpose of Article 9.3 of the *Anti-Dumping Agreement*.

1. Article 17.6 of the *Anti-Dumping Agreement*

265. On appeal, the United States argues that the Panel misapplied the standard of review set out under Article 17.6(ii) of the *Anti-Dumping Agreement*. According to the United States, the Panel viewed the *Anti-Dumping Agreement* "as admitting of more than one permissible interpretation" and considered that the use of zeroing in periodic reviews rests "on one of those interpretations".⁶⁰⁸ On this basis, the United States argues that the Panel should have found that the application of simple

⁶⁰⁶European Communities' appellee's submission, paras. 64 and 65 (referring to United States' other appellant's submission, para. 52; and Appellate Body Report, *US – Hot-Rolled Steel*, para. 62).

⁶⁰⁷Brazil's third participant's submission, paras. 39-93; India's statement at the oral hearing; Japan's third participant's submission, para. 82; Korea's third participant's submission, para. 4; Norway's statement at the oral hearing; Thailand's statement at the oral hearing.

⁶⁰⁸United States' other appellant's submission, para. 51. See Panel Report, paras. 7.162-7.169, and footnote 131 to para. 7.169. See also para. 9.4 of the separate opinion.

zeroing in the 29 periodic reviews at issue was permissible under the *Anti-Dumping Agreement*.⁶⁰⁹ The United States suggests that the Panel's departure from Article 17.6(ii) appears to rely on Articles 3.2 and 3.3 of the DSU, but notes that Article 1.2 specifies that the provisions of the DSU are "subject to" the special or additional rules listed in Appendix 2 to the DSU⁶¹⁰, which includes Article 17.6(ii) of the *Anti-Dumping Agreement*. The United States adds that Article 17.6(ii) was negotiated "as a recognition that some provisions of the [*Anti-Dumping Agreement*] would be susceptible to multiple permissible interpretations".⁶¹¹ As we see it, the United States' appeal in this regard is predicated on the existence of two permissible interpretations.⁶¹²

266. The European Communities contends that the United States' interpretation cannot be "permissible" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement* "[i]f all of the interpretative elements in the *Vienna Convention* support the position of the European Communities, and disprove the position of the United States."⁶¹³ According to the European Communities, 15 past Appellate Body and panel reports have confirmed the correct legal interpretations of the GATT 1994 and the *Anti-Dumping Agreement* with respect to this matter.⁶¹⁴ Further, the European Communities disagrees with the United States' proposition that Article 17.6(ii) of the *Anti-Dumping Agreement* "overrides" or "replaces" the provisions of the DSU; rather, the European Communities agrees with the Appellate Body that Article 17.6 "supplements" the provisions of the DSU.⁶¹⁵ The European Communities adds that the Panel followed previous Appellate Body findings and thus complied with its obligations under Article 11 of the DSU in this case. In the European Communities' view, "it is for the Appellate Body to change its own mind; not for a panel to do it on the Appellate Body's behalf."⁶¹⁶

267. Article 17.6(ii) consists of two sentences. The first sentence clarifies that panels are charged with the obligation to interpret the provisions of the *Anti-Dumping Agreement* "in accordance with customary rules of interpretation of public international law". The same language is found in

⁶⁰⁹United States' other appellant's submission, para. 51.

⁶¹⁰United States' other appellant's submission, para. 52.

⁶¹¹United States' other appellant's submission, para. 53.

⁶¹²At the oral hearing, the United States was repeatedly asked, in the light of its reliance on Article 17.6(ii) of the *Anti-Dumping Agreement*, whether it accepted that there were at least two permissible interpretations of the *Anti-Dumping Agreement* and the GATT 1994 in respect of zeroing: that of the United States and that of the European Communities. Ultimately, the United States accepted that the Panel had found that there were two permissible interpretations and supported the Panel in this regard. It would follow that the United States accepts, at least for the purposes of this appeal, that there are indeed, two permissible interpretations that fall within the scope of the second sentence of Article 17.6(ii): that of the United States and that of the European Communities.

⁶¹³European Communities' appellee's submission, para. 43. (original emphasis)

⁶¹⁴European Communities' appellee's submission, para. 19.

⁶¹⁵European Communities' appellee's submission, paras. 64 and 65 (referring to United States' other appellant's submission, para. 52; and Appellate Body Report, *US – Hot-Rolled Steel*, para. 62).

⁶¹⁶European Communities' appellee's submission, para. 66.

Article 3.2 of the DSU.⁶¹⁷ Panels examining claims under the *Anti-Dumping Agreement* are therefore required to apply the customary rules of treaty interpretation codified in Articles 31 and 32 of the *Vienna Convention*. Article 31(1) of the *Vienna Convention* provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁶¹⁸ Article 32 further stipulates that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of [A]rticle 31 or to determine the meaning". The latter applies when interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable. The customary rules of treaty interpretation apply to any treaty, in any field of public international law, and not just to the WTO agreements. As the Appellate Body has said, they "impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned."⁶¹⁹

268. The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one meaning or shade of meaning, but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it. Nor do multiple meanings of a word or term automatically constitute "permissible" interpretations within the meaning of Article 17.6(ii). Instead, a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis. At the same time, it should be kept in mind that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.

269. The second sentence of Article 17.6(ii) imposes an obligation on panels that is not found elsewhere in the covered agreements. It stipulates that:

⁶¹⁷Clearly, the first sentence of Article 17.6(ii) involves no "conflict" with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*.

⁶¹⁸Articles 31(2) of the *Vienna Convention* defines what constitutes "context" for the purpose of interpretation and Article 31(3) provides for elements that an interpreter has to take into account together with the context.

⁶¹⁹Appellate Body Report, *US – Hot-Rolled Steel*, para. 60. The parties to a particular treaty might agree upon rules of interpretation for that treaty which differ from the rules of interpretation in Articles 31 and 32 of the *Vienna Convention*. (*Ibid.*, footnote 40) But this is not the case here.

Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

270. The Appellate Body has reasoned that the second sentence of Article 17.6(ii) presupposes "that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be 'permissible interpretations'."⁶²⁰ Where that is the case, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations." As the Appellate Body has said, "[i]t follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*."⁶²¹

271. The second sentence of Article 17.6(ii) must therefore be read and applied in the light of the first sentence. We wish to make a number of general observations about the second sentence. First, Article 17.6(ii) contemplates a sequential analysis. The first step requires a panel to apply the customary rules of interpretation to the treaty to see what is yielded by a conscientious application of such rules including those codified in the *Vienna Convention*. Only *after* engaging this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies. The structure and logic of Article 17.6(ii) therefore do not permit a panel to determine first whether an interpretation is permissible under the second sentence and then to seek validation of that permissibility by recourse to the first sentence.

272. Secondly, the proper interpretation of the second sentence of Article 17.6(ii) must itself be consistent with the rules and principles set out in the *Vienna Convention*. This means that it cannot be interpreted in a way that would render it redundant, or that derogates from the customary rules of interpretation of public international law. However, the second sentence allows for the possibility that the application of the rules of the *Vienna Convention* may give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible and must be given effect by holding the measure to be in conformity with the covered agreement. The function of the second sentence is thus

⁶²⁰ Appellate Body Report, *US – Hot-Rolled Steel*, para. 59. (original emphasis)

⁶²¹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 60 (original emphasis) (referring to Appellate Body Report, *EC – Bed Linen*, footnote 36 to paras. 63-65; and Appellate Body Report, *Thailand – H-Beams*, footnote 36 to para. 127).

to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail.

273. We further note that the rules and principles of the *Vienna Convention* cannot contemplate interpretations with mutually contradictory results. Instead, the enterprise of interpretation is intended to ascertain the proper meaning of a provision; one that fits harmoniously with the terms, context, and object and purpose of the treaty.⁶²² The purpose of such an exercise is therefore to narrow the range of interpretations, not to generate conflicting, competing interpretations. Interpretative tools cannot be applied selectively or in isolation from one another. It would be a subversion of the interpretative disciplines of the *Vienna Convention* if application of those disciplines yielded contradiction instead of coherence and harmony among, and effect to, all relevant treaty provisions. Moreover, a permissible interpretation for purposes of the second sentence of Article 17.6(ii) is not the result of an inquiry that asks whether a provision of domestic law is "necessarily excluded" by the application of the *Vienna Convention*. Such an approach subverts the hierarchy between the treaty and municipal law. It is the proper interpretation of a covered agreement that is the enterprise with which Article 17.6(ii) is engaged, not whether the treaty can be interpreted consistently with a particular Member's municipal law or with municipal laws of Members as they existed at the time of the conclusion of the relevant treaty.

274. In the present case, the United States argues that the Panel viewed the *Anti-Dumping Agreement* "as admitting of more than one permissible interpretation" and considered that the use of zeroing in periodic reviews rests "on one of those interpretations".⁶²³ By contrast, the European Communities and Brazil emphasize that, whilst the Panel may have made an intermediate statement to the effect that the United States' interpretation was permissible, this was not the Panel's ultimate finding.⁶²⁴

275. We are not required in this case to determine whether the Panel considered the use of zeroing in periodic reviews to rest on a permissible interpretation of the relevant provisions of the covered agreements because, now that the matter is before us on appeal, we must decide whether the Panel erred in finding that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. In so doing, we must determine whether the second sentence of Article 17.6(ii) is of application. It is to this issue that we now turn.

⁶²²Recourse to supplementary means may also be had under Article 32 of the *Vienna Convention*.

⁶²³United States' other appellant's submission, para. 51. See Panel Report, paras. 7.162-7.169 and footnote 131 to para. 7.169. See also *ibid.*, para. 9.4, of the separate opinion.

⁶²⁴European Communities' responses to questioning at the oral hearing; Brazil's responses to questioning at the oral hearing.

2. The Concept of "Dumping" and "Margins of Dumping" in the *Anti-Dumping Agreement*

276. The *Anti-Dumping Agreement* establishes disciplines relating to the use of anti-dumping measures; it also aims to ensure Members' ability to counter injurious dumping in accordance with such disciplines.

277. As the United States points out, this dispute "is ultimately about the definitions of 'dumping' and 'margin of dumping'."⁶²⁵ In particular, the disagreement between the participants flows from their respective interpretations of the terms "dumping" and "margin of dumping" in Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, and whether these terms apply at the level of the product under consideration or at the level of an individual export transaction.

278. As we understand it, the United States' position that simple zeroing is permitted in periodic reviews under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT is premised on the argument that "dumping" and "margin of dumping" can be found to exist at the level of individual transactions and for individual importers when assessing the anti-dumping duty liability for each importer. Moreover, the United States argues that "the definition of these terms, used in a wide variety of contexts throughout the provisions of GATT 1994 and the [*Anti-Dumping Agreement*], incorporate a flexibility of meaning that permits these terms to be understood based on the context in which they are used."⁶²⁶

279. First, we recall that "dumping" is defined in Article VI:1 of the GATT 1994 as occurring when a "product" of one country is introduced into the commerce of another country at less than the normal value of that product.⁶²⁷ Consistent with this definition, Article VI:1 states that dumping is to be "condemned" if it causes, or threatens to cause, material injury to the domestic industry producing a like product. In turn, Article VI:2 lays down 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."

280. This definition of "dumping" is carried over into the *Anti-Dumping Agreement* by Article 2.1, which states that a product is to be considered as being "dumped" if the "export price" of "the product" "exported" from one country to another is less than the comparable price for the "like

⁶²⁵United States' other appellant's submission, para. 59.

⁶²⁶United States' other appellant's submission, para. 73. The United States further argues that the Appellate Body's findings in *US – Stainless Steel (Mexico)* "resulted from imposing an inflexibly rigid definition upon the terms 'dumping' and 'margin of dumping' that ignored the ordinary meaning of the word 'product,' which can have either a transaction-specific or collective meaning, or both, depending on the context." (*Ibid.*)

⁶²⁷See Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 83; Appellate Body Report, *US – Zeroing (Japan)*, para. 108; and Appellate Body Report, *US – Zeroing (EC)*, para. 125.

product" when destined for consumption in the "exporting" country. By virtue of the opening phrase of Article 2.1—"[f]or the purpose of this Agreement"—this definition of "dumping" applies throughout the *Anti-Dumping Agreement*.⁶²⁸ In the interpretation of the concept of "dumping", the discipline imposed by the opening phrase of Article 2.1 of the *Anti-Dumping Agreement* is important because it requires that the definitional content of "dumping" must be capable of application throughout the *Anti-Dumping Agreement* in a coherent fashion. This definition cannot be of variable content or application.

281. Turning to the concept of "margin of dumping", we note that Article VI:2 speaks of the difference between the normal value and the export price and establishes the link between "dumping" and "margin of dumping".⁶²⁹ Article VI:2 further clarifies that the "margin of dumping" is in respect of the dumped "product". In our view, there must be clarity as to the definition of "dumping" because it becomes a fundamental part of the basic concepts that underlie the *Anti-Dumping Agreement*, such as the "margin of dumping".

282. Mere scrutiny of the particular terms—such as "product" and "export price"—in Article 2.1 does not resolve the issue of whether the concept of dumping is concerned with individual transactions or whether it is necessarily an aggregative concept attributable to an exporter. However, as we have indicated above, the interpretative exercise that is mandated under the *Vienna Convention* is a holistic and integrated one that cannot result in interpretations that are mutually contradictory. We thus turn to examine the context found in various other provisions of the *Anti-Dumping Agreement* in order to better elucidate what the concept of "dumping" means.

283. One aspect to be considered is that a number of provisions in the *Anti-Dumping Agreement* require a determination of dumping by reference to an exporter and to a product under consideration. More specifically, Article 5.8 requires that an anti-dumping investigation be terminated if the investigating authority determines that the margin of dumping is *de minimis*, which is defined as less than two per cent, expressed as a percentage of the export price. A plain reading of Article 5.8 indicates that the term "margin of dumping" as used in that provision refers to a single margin. Moreover, the first sentence of Article 6.10 of the *Anti-Dumping Agreement* stipulates that authorities "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". Likewise, Article 9.5, dealing with new shipper reviews, requires the authorities to determine *an individual margin of dumping* for any exporter that

⁶²⁸See Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 84; and Appellate Body Report, *US – Zeroing (Japan)*, para. 109. See also Appellate Body Report, *US – Zeroing (EC)*, para. 125; and Appellate Body Report, *US – Softwood Lumber V*, para. 93.

⁶²⁹See Appellate Body Report, *US – Zeroing (EC)*, para. 125; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 85; and Appellate Body Report, *US – Zeroing (Japan)*, para. 110.

had not exported the product during the period of investigation. These provisions suggest that a single margin of dumping is to be established for each individual exporter or producer investigated as they do not refer to multiple margins occurring at the level of individual transactions.⁶³⁰

284. We further note that the *Anti-Dumping Agreement* deals with "injurious dumping", and the very purpose of an anti-dumping duty is to counteract the material injury caused, or threatened to be caused, by "dumped imports" to the domestic industry producing a "like product".⁶³¹ Under the *Anti-Dumping Agreement*, the concepts of "dumping", "injury", and "margin of dumping" are interlinked and should be considered and interpreted in a coherent and consistent manner for all parts of the *Anti-Dumping Agreement*.⁶³²

285. We fail to see a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as "dumped", for purposes of determining the existence and magnitude of dumping in the original investigation, and as "non-dumped", for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review. If, as a consequence of zeroing, the results of certain comparisons are disregarded only for purposes of assessing final liability for payment of anti-dumping duties in a periodic review, a mismatch is created between the product considered "dumped" in the original investigation and the product for which anti-dumping duties are collected. This is not consonant with the need for consistent treatment of a

⁶³⁰See Appellate Body Report, *US – Zeroing (EC)*, para. 128; and Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 89. We recall that, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body found that the use of zeroing in calculating the margins of dumping under the T-T comparison methodology in the original investigation at issue in that dispute was inconsistent with the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*. (Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 146) Moreover, in *US – Zeroing (Japan)*, the Appellate Body found that zeroing in periodic reviews is, as such, inconsistent with Article 2.4 of the *Anti-Dumping Agreement*. (Appellate Body Report, *US – Zeroing (Japan)*, para. 169)

⁶³¹Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98. Thus, Article 3.1 of the *Anti-Dumping Agreement* stipulates that a determination of injury shall be based on an objective examination of both the volume of the *dumped* imports and the effect of the *dumped* imports on prices in the domestic market for like products, and of the consequent impact of the *dumped* imports on domestic producers of such like products. Furthermore, Article 3.5 lays down that "[t]he authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to dumped imports."

⁶³²Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94. See also Appellate Body Report, *US – Zeroing (Japan)*, para. 114.

product at the various stages of anti-dumping duty proceedings.⁶³³

286. Article 9.3.1 of the *Anti-Dumping Agreement* is subject to the overarching requirement in Article 9.3 that the amount of anti-dumping duty "shall not exceed the margin of dumping as established under Article 2" of that Agreement. Based on an examination of the context of Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, the Appellate Body has found that the term "margin of dumping", as used in those provisions, relates to the "exporter" of the "product" under consideration. Furthermore, the Appellate Body has clarified that the definitions of "dumping" and "margin of dumping" apply in the same manner throughout the *Anti-Dumping Agreement* and do not vary under the various provisions of the Agreement.⁶³⁴ Thus, under Article VI:2 and Article 9.3, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter.⁶³⁵ The Appellate Body has seen no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the *Anti-Dumping Agreement* for disregarding the results of comparisons where the export price exceeds the normal value. As the Appellate Body has said, "other provisions of the *Anti-Dumping Agreement* are explicit regarding the permissibility of disregarding certain matters."⁶³⁶

287. For all these reasons, we are unable to agree with the United States' view that "dumping" may be determined at the level of individual transactions, and that multiple comparison results are "margins of dumping" in themselves. Rather, as the Appellate Body held in *US – Stainless Steel (Mexico)*, "[a] proper determination as to whether an exporter is dumping or not can only be made on

⁶³³See Appellate Body Report, *US – Zeroing (Japan)*, para. 128; and Appellate Body Report, *US – Softwood Lumber V*, para. 99. The Appellate Body has previously found that, "while investigating authorities may define the scope of a product for an anti-dumping investigation, that definition applies throughout the investigation." (Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 106) Moreover, the Appellate Body has explained that "'[d]umping', within the meaning of the *Anti-Dumping Agreement*, can 'be found to exist only for the product under investigation as a whole', by fully taking into account all the transactions pertaining to that product." (*Ibid.*, referring to Appellate Body Report, *US – Softwood Lumber V*, para. 93; Appellate Body Report, *US – Zeroing (Japan)*, para. 115; and Appellate Body Report, *US – Zeroing (EC)*, para. 127))

⁶³⁴See Appellate Body Report, *US – Zeroing (Japan)*, para. 114; and Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 95 and 96.

⁶³⁵Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 102.

⁶³⁶Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 103; see also Appellate Body Report, *US – Softwood Lumber V*, para. 100. For example, Article 9.4 of the *Anti-Dumping Agreement* expressly directs investigating authorities to disregard "any zero and *de minimis* margins" under certain circumstances when calculating the weighted average margin of dumping to be applied to exporters that have not been individually investigated. Similarly, Article 2.2.1, which deals with the calculation of normal value, sets forth the only circumstances under which sales of the like product in the exporting country can be disregarded.

the basis of an examination of the exporter's pricing behaviour as reflected in all of its transactions over a period of time."⁶³⁷

3. Periodic Reviews and Importer-Specific Duty Assessment

288. The United States expresses concern regarding the implications for importer-specific duty assessment in periodic reviews that flow from the Appellate Body's interpretation of Article 9.3 of the *Anti-Dumping Agreement* in previous disputes.

289. The United States argues that, "if a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the export price is less than normal value to the greatest extent will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports."⁶³⁸

290. As the Appellate Body has previously noted, various provisions of the *Anti-Dumping Agreement*, including Articles 5.8, 6.10, 9.5, and 8.1, make clear that "dumping" and "margins of dumping" relate to the pricing behaviour of the relevant "exporter or foreign producer".⁶³⁹ Thus, to the extent that anti-dumping measures are intended to create incentives for a change in pricing behaviour as the United States argues, the party to be "encouraged" is the exporter or producer, rather than the importer. This is "not altered by the fact that the export price may be the result of negotiation between the importer and the exporter."⁶⁴⁰

291. The Appellate Body has not suggested that individual importers must be assessed anti-dumping duties at the identical rate as that of all other importers and it has not held that "an importer's anti-dumping margin must be averaged out".⁶⁴¹ Instead, the Appellate Body has recognized that, under Article 9.3, "anti-dumping duty liability can be assessed in relation to a specific importer on the basis of its transactions from the relevant exporter."⁶⁴² Furthermore, the Appellate Body has reasoned

⁶³⁷ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98.

⁶³⁸ United States' other appellant's submission, para. 95.

⁶³⁹ Article 6.10 of the *Anti-Dumping Agreement* requires, "as a rule", that investigating authorities determine a "margin of dumping for each known exporter or producer concerned of the product under investigation." (emphasis added) (See also Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 94) Similarly, Article 8.1 of the *Anti-Dumping Agreement* speaks of "voluntary undertaking from any exporter to revise its prices or to cease exports to the area in question at dumped prices." (emphasis added) (See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 208 and 217) 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 individual margins of dumping for exporters or foreign producers.

⁶⁴⁰ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 95. (footnote omitted)

⁶⁴¹ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 112.

⁶⁴² Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 112.

that the possibility that aggregation of multiple comparisons results in a periodic review would yield a negative value for a particular importer "would not mean that the authorities would be required ... to compensate an importer for the amount of that negative value (that is, when export prices exceed normal value)."⁶⁴³

4. Prospective Normal Value Systems

292. We turn next to examine the United States' arguments relating to the calculation of the liability for payment of anti-dumping duties on the basis of a so-called "prospective normal value"⁶⁴⁴ referred to in Article 9.4(ii) of the *Anti-Dumping Agreement*.

293. The United States argues that Article 9.4(ii) of the *Anti-Dumping Agreement* lends support to the proposition that "dumping" may be interpreted in relation to individual export transactions. For the United States, it would be "absurd to interpret Article 9 as requiring offsets between importers in a retrospective assessment system while capping the importer's liability based on individual transactions in a prospective system."⁶⁴⁵ The United States further argues that accepting the interpretation that a Member must aggregate the results of all comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value system, in order to take into account all of the exporters' transactions. For the United States, this would, in effect, render prospective normal value systems retrospective.

294. In addressing similar arguments by the United States in previous appeals, the Appellate Body has emphasized that the anti-dumping duty collected at the time of importation, "under a prospective normal value system, does not represent the 'margin of dumping' under Article 9.3, which, as the Appellate Body has found, is the margin of dumping for an exporter for all of its sales of the subject merchandise into the country concerned."⁶⁴⁶ This is not changed by the fact that, in such a system, the *liability* for payment of anti-dumping duties may be *final* at the time of importation. Rather, Article 9.3.2 contemplates that the amount of duties collected on a prospective basis is subject to review pursuant to Article 9.3 of the *Anti-Dumping Agreement*, which provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."⁶⁴⁷

⁶⁴³ Appellate Body Report, *US – Zeroing (EC)*, footnote 234 to para. 131; Appellate Body Report, *US – Zeroing (Japan)*, para. 155.

⁶⁴⁴ In a prospective normal value system, duties are assessed on the basis of the difference between a "prospective normal value" and the prices of individual export transactions.

⁶⁴⁵ United States' other appellant's submission, para. 89 (referring to Panel Report, *US – Stainless Steel (Mexico)*, para. 7.133).

⁶⁴⁶ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 120.

⁶⁴⁷ Emphasis added.

295. Thus, Article 9.4(ii) does not mean that the basic disciplines governing the calculation of margins of dumping, contained in Article VI of the GATT 1994 and Article 2 of the *Anti-Dumping Agreement*, no longer apply. The collection of anti-dumping duties on the basis of a *prospective* normal value is only an intermediate stage of collection, since it is subject to final assessment and "a prompt refund, upon request", under Article 9.3.2. There is nothing in Article 9.4 that exempts prospective normal value systems from the obligations under Article 9.3, including with respect to refund procedures in respect of duties assessed on a prospective basis.⁶⁴⁸

5. The "Mathematical Equivalence" Argument

296. The United States argues, as it has in previous appeals, that a prohibition of zeroing that applies beyond the context of average-to-average comparisons in investigations would be inconsistent with the principle of effective treaty interpretation, because it would render redundant the second sentence of Article 2.4.2 including the targeted dumping methodology.⁶⁴⁹ The United States also questions the Appellate Body's reasoning dismissing "the redundancy caused by mathematical equivalence by concluding that it may be permissible to apply the targeted dumping methodology to a subset of export transactions."⁶⁵⁰ According to the United States, nothing in the language of Article 2.4.2 provides for selecting a subset of transactions when conducting a targeted dumping analysis. Moreover, the United States argues that the use of a subset of export transactions when conducting a targeted dumping analysis would be contrary to the Appellate Body's conclusion that "all" export transactions should be considered when performing weighted average-to-weighted average ("W-W") and weighted average-to-transaction ("W-T") comparisons.⁶⁵¹

297. The W-T comparison methodology in the second sentence of Article 2.4.2 is an exception to the two comparison methodologies provided in the first sentence, which shall "normally" be used to establish the "margins of dumping".⁶⁵² As the Appellate Body has said, "[b]eing an exception, the

⁶⁴⁸It is true that in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of anti-dumping duties, regardless of whether prices of other export transactions exceed normal value. Similarly, under its retrospective system of duty collection, the United States is free to assess duty liability on a transaction-specific basis, but the total amount of anti-dumping duties that are levied must not exceed the exporters' or foreign producers' margins of dumping. (See Appellate Body Report, *US – Zeroing (Japan)*, paras. 161 and 162)

⁶⁴⁹United States' other appellant's submission, paras. 100-102.

⁶⁵⁰United States' other appellant's submission, para. 105 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 135).

⁶⁵¹United States' other appellant's submission, para. 108.

⁶⁵²The second sentence of Article 2.4.2 reads:

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

comparison methodology in the second sentence of Article 2.4.2 (weighted average-to-transaction) alone cannot determine the interpretation of the two methodologies provided in the first sentence, that is, transaction-to-transaction and weighted average-to-weighted average."⁶⁵³ Moreover, it could be argued, in reverse, that permitting zeroing under the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting "targeted dumping", thus rendering the third comparison methodology *inutile*.⁶⁵⁴

298. In any event, the fact that, under certain circumstances, the W-T comparison methodology could produce results that are equivalent to those obtained through the application of the W-W comparison methodology is insufficient to conclude that the second sentence of Article 2.4.2 is thereby rendered ineffective.⁶⁵⁵ Therefore, mathematical equivalence is inconclusive as to whether a transaction-specific or product-wide definition of dumping is required.

6. Historical Background

299. The United States argues that the concept of dumping has been historically understood to apply to individual transactions. In support of its contention, the United States points to various materials, including the 1960 Group of Experts Report. The Group of Experts concluded that the "'ideal method' for applying anti-dumping duties 'was to make a determination [...] of both dumping and material injury in respect of each single importation of the product concerned.'"⁶⁵⁶ According to the United States, the Appellate Body has previously misapprehended the relevance of the 1960 Group of Experts Report for purposes of interpreting Article VI of the GATT 1947. In particular, the United States argues that the Appellate Body has "failed to explain why the fact that a particular system for determining injury is administratively impracticable leads to the conclusion that Members, when negotiating the Tokyo Round [Anti-Dumping] Code or the Uruguay Round [*Anti-Dumping Agreement*] necessarily agreed to a completely different concept of calculating a margin of dumping, i.e., one that has no meaning in relation to individual transactions."⁶⁵⁷

⁶⁵³ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.

⁶⁵⁴ Appellate Body Report, *US – Zeroing (Japan)*, para. 133 (original emphasis) (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 100.

⁶⁵⁵ See Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

⁶⁵⁶ United States' other appellant's submission, para. 76 (quoting 1960 Group of Experts Report, para. 8). We note that the 1960 Group of Experts Report states that, although the ideal method to determine dumping and injury was in respect of each single importation of the product concerned, this "was clearly impracticable, particularly as regards injury". (1960 Group of Experts Report, para. 8) As the Appellate Body said, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the "fact that making a determination of dumping and injury for each importation was not considered practical could also be seen as implying that the Group of Experts did not, in fact, endorse transaction-specific determinations of dumping." (Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 119 and footnote 197 thereto)

⁶⁵⁷ United States' other appellant's submission, para. 78.

300. In *US – Stainless Steel (Mexico)*, the Appellate Body did not reason in the way the United States suggests. Rather, the Appellate Body said that the 1960 Group of Experts Report "did not resolve the issue of whether the negotiators of the *Anti-Dumping Agreement* intended to prohibit zeroing".⁶⁵⁸ The Appellate Body added that, "even if it were to assume that zeroing was permitted under Article VI of the GATT 1947, Article VI of the GATT 1994 has to be interpreted now in conjunction with the relevant provisions of the *Anti-Dumping Agreement*, such as Articles 2.1, 2.4, 2.4.2, and 9.3."⁶⁵⁹

301. The United States also refers to two GATT panel reports that dealt with the issue of zeroing⁶⁶⁰, and several proposals submitted during the Uruguay Round⁶⁶¹, which allegedly demonstrate that the negotiators were not able to agree on a general prohibition of zeroing.⁶⁶² The United States adds that the text of Article VI of the GATT 1947 was not modified during the Uruguay Round. According to the United States, it can be inferred, from the absence of a change in language "that the drafters intended no change in meaning."⁶⁶³

302. The historical materials referred to by the United States were examined by the Appellate Body in the appeals in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*. The Appellate Body observed in the latter case that:

[t]he Panel Reports in *EC – Audio Cassettes* (unadopted) and *EEC – Cotton Yarn* (adopted), referred to by the United States, examined the issue of zeroing under the provisions of the *Tokyo Round Anti-Dumping Code*. The relevance of these panel reports is diminished by the fact that the plurilateral *Tokyo Round Anti-Dumping Code* was legally separate from the GATT 1947 and has, in any event, been terminated. This Code was not incorporated into the WTO covered agreements and, furthermore, it contained provisions that were less detailed than those in the *Anti-Dumping Agreement*. ... Therefore, whatever the legal status of zeroing under the *Tokyo Round Anti-Dumping Code*, it is of little relevance for the interpretation of differently phrased or new provisions of the *Anti-Dumping Agreement*.⁶⁶⁴

303. The Appellate Body further noted that the negotiating proposals referred to by the United States reflected the positions of only some, but not all, of the negotiating parties. Thus, the Appellate

⁶⁵⁸ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 131.

⁶⁵⁹ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 131.

⁶⁶⁰ United States' other appellant's submission, para. 79 (referring to GATT Panel Report, *EC – Audio Cassettes*, ADP/136, 28 April 1995, unadopted; and GATT Panel Report, *EEC – Cotton Yarn*, adopted 30 October 1995, BISD 42S/17).

⁶⁶¹ See United States' other appellant's submission, footnote 87 to para. 79.

⁶⁶² United States' other appellant's submission, para. 79.

⁶⁶³ United States' other appellant's submission, para. 79.

⁶⁶⁴ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 132.

Body was not persuaded that the historical materials referred to by the United States provided guidance as to whether simple zeroing is permissible under Article 9.3 of the *Anti-Dumping Agreement*.⁶⁶⁵ Nor are we.

D. *Concurring Opinion*

304. One Member of the Division wishes to make the following statement in relation to section V.C.2.

305. Over a period of time, successive panels and the Appellate Body have engaged in a very considerable interpretative enterprise to determine whether the *Anti-Dumping Agreement* and Article VI of the GATT 1994 prohibit the use of zeroing. At the heart of the debate is a contestation as to the correct interpretation of the concept of dumping. The Appellate Body has interpreted dumping to be an exporter-specific concept, requiring that a determination be made for the product under consideration. By contrast, successive panels have found that dumping is permissibly determined at the level of individual export transactions. To resolve this difference, the text, context, and object and purpose have been carefully scrutinized, as well as supplementary means of treaty interpretation. Each interpretation has found support in different places. These interpretative exercises have not lacked for hermeneutic ingenuity, and each has generated its own puzzles: witness the question of mathematical equivalence and the consequential issue of textual redundancy.⁶⁶⁶

306. This debate at once demonstrates the robustness of the WTO's system of dispute settlement, but also its limits. The interpretation of the covered agreements requires scrupulous adherence to the disciplines of the customary rules of interpretation of public international law. Those disciplines are directed towards arriving at a coherent and harmonious interpretation to develop an answer to an interpretative problem and thereby provide certainty as to the rights and obligations of the parties. Variability, contradiction, and uncertainty stalk the interpretative enterprise, but they are the hallmarks of its failure, not its success. Just as the interpreter of a treaty strives for coherence, there is an inevitable recognition that a treaty bears the imprint of many hands. And what is left behind is a text, sometimes negotiated to a point where an agreement to regulate a matter could only be reached on the basis of constructive ambiguity, carrying both the hopes and fears of the parties. Interpretation is an endeavour to discern order, notwithstanding these infirmities, without adding to or diminishing the rights and obligations of the parties.

307. Article 2.1 of the *Anti-Dumping Agreement* illustrates this problem. Nothing could be more

⁶⁶⁵See Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 130.

⁶⁶⁶See *supra*, paras. 297 and 298.

important than the definition of the concept of "dumping". It is foundational and applies throughout the Agreement, as the clear wording of Article 2.1 makes plain. It cannot have variable or contradictory meanings, for that would infect the entire Agreement. Yet the definition is cast at a high level of generality. The definition makes no attribution of agency; it does not say who introduces a product into the commerce of another country. Article 2.1 might so easily have included the words "by an exporter", but it does not. So too, the definition might have referred to the product as a whole, and not simply a product. The definition is inchoate, and thus it must be interpreted.

308. The Appellate Body has found contextual support for its interpretation of "dumping" as a product-wide and exporter-specific concept by reference to other provisions in the *Anti-Dumping Agreement*. In particular, the Appellate Body has emphasized the significance of Articles 2.4, 2.4.2, 5.8, 6.10, 9.5, and 3.1 and concluded that the cumulative contextual force of these provisions is dispositive of the meaning attaching to the concept of "dumping", and excludes an interpretation of dumping that is transaction-specific.

309. There can be little doubt that the *Anti-Dumping Agreement* requires aggregation. In Article 6.10, an individual margin of dumping must be determined for each known exporter. Article 3.1 requires an assessment of the volume of dumped imports and their effect. Save for the most exceptional case where an importation consists only of a single transaction (for example, the importation of a large piece of capital equipment), this is an exercise that requires a determination by taking into account the entire volume of dumped imports. Under Article 5.8, a *de minimis* assessment could not be made with respect to an individual export transaction; and Article 9.5 requires a determination of individual margins of dumping for any exporters who have not exported the product during the period of investigation.

310. While aggregation is an unavoidable requirement of the *Anti-Dumping Agreement*, these provisions are not clear as to what it is that must be aggregated. Does aggregation require the aggregation of all comparison results, positive and negative, or does it suffice to aggregate only those comparison results that are positive, having considered all transactions and determined which are dumped and which are not. The Appellate Body has found that aggregation must give equal weight to all comparison results if the exercise is to be fair and arrive at a determination for the product as a whole; successive panels have found no such requirement, save where the first methodology in Article 2.4.2 refers in express terms to all comparable export transactions.

311. The interpretative endeavour has ranged far and wide. The Appellate Body has emphasized that dumping is an exporter-specific concept. Panels have pointed out that the liability for anti-dumping duties rests upon importers. The Appellate Body views its interpretation as one that respects

the differences in the prospective and retrospective systems of duty assessment; its critics think otherwise.

312. There is little point in further rehearsing the fine points of these interpretations. In my view, there is every reason to survey this debate with humility. There are arguments of substance made on both sides; but one issue is unavoidable. In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. The membership of the WTO is entitled to rely upon these outcomes. Whatever the difficulty of interpreting the meaning of "dumping", it cannot bear a meaning that is both exporter-specific and transaction-specific. We have sought to elucidate the notion of permissibility in the second sentence of Article 17(6)(ii). The range of meanings that may constitute a permissible interpretation does not encompass meanings of such wide variability, and even contradiction, so as to accommodate the two rival interpretations. One must prevail. The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come.

313. For these reasons, I concur in the decision reached by the Division in section E that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by using simple zeroing in periodic reviews.

E. *Conclusion on the European Communities' Claim under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994*

314. As noted above, Article 9.3.1 of the *Anti-Dumping Agreement* is subject to the overarching requirement in Article 9.3 that the amount of anti-dumping duty "shall not exceed the margin of dumping as established under Article 2" of that Agreement. Also as noted above, under Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter. We see no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the *Anti-Dumping Agreement* for disregarding the results of comparisons where the export price exceeds the normal value.

315. When applying "simple zeroing" in periodic reviews, the USDOC compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amounts by which the export prices exceed the monthly weighted average normal values, when

aggregating the results of the comparisons to calculate the going-forward cash deposit rate for the exporter and the duty assessment rate for the importer concerned. In this way, simple zeroing results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping, which, under Article 9.3 of the *Anti-Dumping Agreement*, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by an exporter.

316. In the light of the above, we uphold the Panel's finding that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying simple zeroing in 29 periodic reviews.

317. In our analysis, we have been mindful of the provisions of Article 17.6(ii) of the *Anti-Dumping Agreement*. The analysis offered above, applying the customary rules of interpretation of public international law, does not allow for conflicting interpretations. We have found, by the application of those rules, that zeroing is inconsistent with Article 9.3. A holding that zeroing is also consistent with Article 9.3 would be flatly contradictory. Such contradiction would be repugnant to the customary rules of treaty interpretation referred to in the first sentence of Article 17.6(ii). Consequently, it is not a permissible interpretation within the meaning of Article 17.6(ii), second sentence.

VI. The Seven Periodic Reviews

318. We now turn to consider the European Communities' claim that the Panel erred in finding that, with respect to seven of the periodic reviews challenged by the European Communities, the European Communities had not shown that the simple zeroing methodology was used.⁶⁶⁷

A. Proceedings Before the Panel and the Panel's Findings

319. The European Communities submitted, together with its first written submission to the Panel, a copy of the Issues and Decision Memorandum issued by the USDOC in connection with 30 of the 37 periodic reviews that the European Communities challenged. The United States agreed that these memoranda demonstrated that "simple zeroing" was used in the relevant 30 reviews.⁶⁶⁸ Asked

⁶⁶⁷Panel Report, para. 7.158. The seven periodic reviews at issue are: *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3) (Panel Exhibit EC-35); *Stainless Steel Bar from France* (Case V – No. 20) (Panel Exhibit EC-47); *Stainless Steel Bar from France* (Case V – No. 21) (Panel Exhibit EC-48); *Stainless Steel Bar from Germany* (Case IX – No. 33) (Panel Exhibit EC-57); *Stainless Steel Bar from Germany* (Case IX – No. 34) (Panel Exhibit EC-58); *Stainless Steel Bar from Italy* (Case XI – No. 39) (Panel Exhibit EC-62); and *Certain Pasta from Italy* (Case XIII – No. 43) (Panel Exhibit EC-65).

⁶⁶⁸Panel Report, para. 7.145. One of these 30 periodic reviews was a preliminary determination that the Panel had found not to be within its terms of reference. (Panel Report, para. 7.77) Accordingly, the Panel's ultimate finding regarding the use of zeroing applied only with respect to 29 of the periodic reviews challenged by the European Communities. (Panel Report, para. 8.1(e))

by the Panel why such memoranda had not been submitted for the remaining seven periodic reviews, the European Communities responded that, unlike the memoranda provided in connection with the other 30 periodic reviews, those pertaining to the seven reviews "did not discuss the use of zeroing methodologies in the margin calculation".⁶⁶⁹ The European Communities also submitted, together with its first written submission to the Panel, the *Federal Register* Notice for each review containing the USDOC's final periodic review results. Like the Issues and Decision Memorandum for each of these reviews, the *Federal Register* Notice does not mention whether zeroing was applied in arriving at the final results.⁶⁷⁰ In addition, the European Communities supplied documentation in connection with five of the seven periodic reviews at issue, consisting of printouts of the margin calculation program that the USDOC allegedly used in each review, and certain tables purportedly showing what the results of the margin calculations would be with and without the use of zeroing.⁶⁷¹

320. The Panel assessed the evidence submitted by the European Communities in separate paragraphs corresponding to each of the seven periodic reviews at issue.

321. As regards the periodic review in *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3), the Panel concluded that none of the documents submitted by the European Communities, other than the *Federal Register* Notice and the Issues and Decision Memorandum, "were issued by the USDOC during the review at issue".⁶⁷² The Panel also found that the "relevant parts of the programmes that were allegedly used in the review at issue contain certain computer commands which do not necessarily show that the simple zeroing methodology was used by the USDOC", and did not consider "that tables that allegedly contain results with and without zeroing necessarily show that simple zeroing was actually used in the periodic review at issue".⁶⁷³

322. With respect to the two reviews in *Stainless Steel Bar from Germany* (Case IX – Nos. 33 and 34), the Panel also concluded that certain documents submitted by the European Communities, other than the *Federal Register* Notice and the Issues and Decision Memorandum, "were not generated by the USDOC during the review at issue".⁶⁷⁴ For the periodic review covering the period from 1 March 2004 to 28 February 2005 (No. 33), the Panel found that it was not "readily discernable" from the margin calculation programs "that the simple zeroing methodology was used in this periodic review".⁶⁷⁵ For the periodic review covering the period from 2 August 2001

⁶⁶⁹European Communities' response to Panel Question 1(c) following the second meeting. See also Panel Report, para. 7.146.

⁶⁷⁰Panel Report, paras. 7.151-7.157.

⁶⁷¹Panel Report, paras. 7.151 and 7.154-7.157.

⁶⁷²Panel Report, para. 7.151.

⁶⁷³Panel Report, para. 7.151.

⁶⁷⁴Panel Report, paras. 7.154 and 7.155.

⁶⁷⁵Panel Report, para. 7.154.

to 28 February 2003 (No. 34), the Panel did not indicate whether the margin calculation program evidence was generated by the USDOC⁶⁷⁶, or whether it was able to determine from that evidence whether simple zeroing was used.

323. In the case of the two reviews in *Stainless Steel Bar from Italy* (Case XI – No. 39) and *Certain Pasta from Italy* (Case XIII – No. 43), the Panel concluded that the calculation tables submitted by the European Communities were "not produced by the USDOC".⁶⁷⁷ With respect to *Certain Pasta from Italy*, the Panel also found that it was not "readily discernable from such tables that simple zeroing was used".⁶⁷⁸ The Panel did not indicate for either of these reviews whether the margin calculation program evidence was generated by the USDOC⁶⁷⁹, or whether it was able to determine from that evidence whether simple zeroing was used.

324. As regards the two periodic reviews in *Stainless Steel Bar from France* (Case V – Nos. 20 and 21), the European Communities submitted evidence for each review consisting of the applicable *Federal Register* Notice and Issues and Decision Memorandum. The Panel found that neither of these documents demonstrated that simple zeroing was used in these reviews.⁶⁸⁰

325. During the interim review, the European Communities offered comments to the Panel pertaining to all seven periodic reviews, along with case-specific comments addressing the evidence it submitted in connection with five of the seven reviews (that is, those other than the two reviews involving *Stainless Steel Bar from France*).⁶⁸¹ The European Communities argued that a Notice published in the *Federal Register* in December 2006 (the "USDOC December 2006 Notice")⁶⁸² created a presumption that simple zeroing was used in the seven reviews at issue. In that Notice, the USDOC announced that it would no longer make W-W comparisons of export price and normal value in original investigations without providing offsets for non-dumped comparison results, but that it was not modifying any other comparison methodology, or any other segment of an anti-dumping proceeding.⁶⁸³ Because the periodic reviews at issue in this dispute were conducted prior to issuance of the Notice, the European Communities asserts, the Panel should have drawn the conclusion that simple zeroing was used in these reviews.⁶⁸⁴ Noting that the USDOC December 2006 Notice "makes

⁶⁷⁶Panel Report, para. 7.155 (finding only that the tables showing margin calculations with and without zeroing were not generated by the USDOC).

⁶⁷⁷Panel Report, paras. 7.156 and 7.157.

⁶⁷⁸Panel Report, para. 7.157.

⁶⁷⁹Panel Report, paras. 7.156 and 7.157 (finding only that the tables showing margin calculations with and without zeroing were not generated by the USDOC).

⁶⁸⁰Panel Report, paras. 7.152 and 7.153.

⁶⁸¹Panel Report, para. 6.5.

⁶⁸²See *supra*, footnote 92.

⁶⁸³Panel Report, para. 6.6.

⁶⁸⁴Panel Report, paras. 6.7 and 6.8.

no specific reference to periodic reviews and the methodologies that may be used in such reviews", the Panel found that the statement in the USDOC Notice was "too broad to support the [European Communities'] argument that the USDOC used simple zeroing in all periodic reviews carried out before the effective date of the policy change at issue".⁶⁸⁵

326. The European Communities also argued before the Panel that, given the various WTO rulings against the United States' use of the zeroing methodology, it should not be disputed that simple zeroing was used in the seven periodic reviews at issue.⁶⁸⁶ The Panel disagreed with the European Communities. The Panel considered that the existence of prior adverse rulings regarding the use of zeroing did not discharge the European Communities' burden of proving that simple zeroing was used in the periodic reviews at issue, and that "every dispute stands on its own merits" even if it concerns "the same measure that is at issue in these proceedings".⁶⁸⁷

327. The European Communities also pointed to the margin calculation programs and calculation tables that had been provided and argued that these documents, when read together, show that simple zeroing was used in each of the periodic reviews at issue.⁶⁸⁸ The United States maintained that, because the calculation tables were not generated by the USDOC, the United States could not confirm their accuracy, and they therefore do not show that zeroing was applied in the periodic reviews at issue.⁶⁸⁹ The United States also asserted that there is no such thing as a "standard computer programme" that requires zeroing in periodic reviews, and therefore called upon the Panel to reject the European Communities' arguments.⁶⁹⁰ After considering the comments of the European Communities, the Panel found no reason to change its conclusion "that the European Communities failed to show *prima facie* that the USDOC used simple zeroing in such reviews".⁶⁹¹

328. The Panel also addressed arguments of the European Communities that it had no further documentation available to it, and that it was therefore for the United States to rebut the *prima facie* case made out by the European Communities. Remarking that the European Communities must submit evidence of the underlying factual assertion that the United States used simple zeroing in the periodic reviews at issue, the Panel found that the European Communities had not done so.⁶⁹²

⁶⁸⁵Panel Report, para. 6.9.

⁶⁸⁶Panel Report, para. 6.11.

⁶⁸⁷Panel Report, para. 6.11.

⁶⁸⁸Panel Report, paras. 6.13-6.16.

⁶⁸⁹Panel Report, para. 6.17.

⁶⁹⁰Panel Report, para. 6.17.

⁶⁹¹Panel Report, para. 6.18.

⁶⁹²Panel Report, para. 6.20.

Accordingly, the Panel found that it "[could not] expect the United States to rebut a *prima facie* case that has not been made by the European Communities".⁶⁹³

329. Finally, the Panel addressed the contention of the European Communities that the United States was withholding relevant information, and that it was incumbent on the Panel to request such information of the United States. The Panel found that the European Communities had not made a request under Article 13 of the DSU that the Panel seek such information from the United States. The Panel made no representations as to whether such a request would have been granted, but stated that, in the absence of a request for information from the United States, the Panel saw "no reason why the United States should be expected to rebut a factual assertion unsupported by relevant evidence from the party making the assertion".⁶⁹⁴ The Panel also remarked that it considered it "inappropriate for a panel to exercise its authority to seek information based on its own judgement as to what information is necessary for a party to prove its case, as opposed to seeking information in order to elucidate its understanding of the facts and issues in the dispute before it."⁶⁹⁵

B. *Article 11 of the DSU*

330. The European Communities claims that the Panel committed certain factual and legal errors in concluding that the European Communities had not shown that simple zeroing was used in seven of the periodic reviews at issue.⁶⁹⁶ The European Communities principally contends that the Panel acted inconsistently with its obligations under Article 11 of the DSU "by misunderstanding, ignoring or misinterpreting" the evidence produced by the European Communities, and "by failing to draw the necessary inferences" from the evidence in the record.⁶⁹⁷ The European Communities maintains that it established a *prima facie* case and that the "*totality of facts* contained in the record"⁶⁹⁸ demonstrate that the United States applied simple zeroing to these seven periodic reviews.

331. Article 11 of the DSU requires a panel to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case". The Appellate Body has explained that panels enjoy a certain margin of discretion under Article 11 of the DSU in assessing the credibility and weight to be ascribed to a given piece of evidence⁶⁹⁹, and that it will "not interfere lightly"⁷⁰⁰ with

⁶⁹³Panel Report, para. 6.20.

⁶⁹⁴Panel Report, para. 6.20.

⁶⁹⁵Panel Report, footnote 20 to para. 6.20.

⁶⁹⁶European Communities' appellant's submission, para. 7.

⁶⁹⁷European Communities' appellant's submission, para. 182.

⁶⁹⁸European Communities' appellant's submission, para. 182. (original emphasis)

⁶⁹⁹Appellate Body Report, *EC – Hormones*, para. 132; and Appellate Body Report, *EC – Sardines*, para. 299.

⁷⁰⁰Appellate Body Report, *US – Carbon Steel*, para. 142 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 151).

that discretion. At the same time, the Appellate Body has stated that Article 11 requires panels "to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence."⁷⁰¹ In carrying out its mandate under Article 11, "a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof."⁷⁰² Article 11 requires a panel to consider evidence before it in its totality, which includes consideration of submitted evidence in relation to other evidence. A particular piece of evidence, even if not sufficient by itself to establish an asserted fact or claim, may contribute to establishing that fact or claim when considered in conjunction with other pieces of evidence. We also note, in relation to the question of the totality of the evidence and the burden of proof, the requirement that a complaining party establish a *prima facie* case in WTO dispute settlement. As the Appellate Body has explained, "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."⁷⁰³

332. We turn first to examine the Panel's approach to the evidence. For each of the seven periodic reviews at issue, the European Communities supplied the *Federal Register* Notice containing the USDOC's final periodic review results, and the Issues and Decision Memorandum issued by the USDOC and referred to in the *Federal Register* Notice. As the Panel notes, neither the *Federal Register* Notice, nor the referenced Issues and Decision Memorandum, mentions whether zeroing was applied in arriving at the final results.⁷⁰⁴ The European Communities does not argue on appeal that these documents mention the use of zeroing in periodic reviews. In connection with five of the periodic reviews at issue—that is, those other than the two reviews in *Stainless Steel Bar from France* (Case V – Nos. 20 and 21)—the European Communities also submitted two types of additional evidence specific to those reviews, consisting of printouts of the margin calculation program that the USDOC allegedly used in each review, and certain tables purportedly showing margin calculation results that reflect zeroing, and what those results would have been without the use of zeroing.

333. The European Communities also refers on appeal to facts in the record from which, it asserts, the Panel should have drawn inferences that simple zeroing was used. The European Communities points to "the extensive list of adopted DSB reports ruling against simple zeroing" in periodic reviews, and argues that those rulings established the use of simple zeroing as a rule or norm of

⁷⁰¹Appellate Body Report, *US – Carbon Steel*, para. 142. See also Appellate Body Report, *EC – Hormones*, para. 133.

⁷⁰²Appellate Body Report, *Korea – Dairy*, para. 137.

⁷⁰³Appellate Body Report, *EC – Hormones*, para. 104.

⁷⁰⁴Panel Report, paras. 7.151-7.157.

general and prospective application.⁷⁰⁵ The European Communities also refers to USDOC statements in the Issues and Decision Memoranda in other periodic reviews acknowledging the use of simple zeroing in periodic reviews, and the USDOC December 2006 Notice announcing that, apart from eliminating zeroing in W-W comparisons in original investigations, the USDOC was not modifying any other comparison methodologies for dumping determinations or any other segment of an anti-dumping proceeding. The European Communities asserts that the Panel should have drawn the conclusion from these statements that simple zeroing was used in the periodic reviews at issue in this dispute.⁷⁰⁶ Finally, the European Communities argues that "the *fact* that the United States *could* show that zeroing was not used in the specific administrative reviews ... but *did not do so* should have allowed the Panel to infer that zeroing was actually used."⁷⁰⁷

334. In its findings regarding the seven periodic reviews, the Panel evaluated individual pieces of case-specific evidence submitted by the European Communities. In connection with its consideration of the periodic review in *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3), for example, we note that the Panel referred in two instances to whether particular pieces of evidence "necessarily show" that simple zeroing was used. The Panel stated that certain computer commands in the margin calculation programs that were purportedly used in the review at issue "do not necessarily show that the simple zeroing methodology was used by the USDOC".⁷⁰⁸ The Panel also added that the calculation tables allegedly showing periodic review results with and without zeroing do not "necessarily show that simple zeroing was actually used in the periodic review at issue".⁷⁰⁹

335. The European Communities argues that the Panel applied an "unreasonable burden of proof in this case"⁷¹⁰ because it required "evidence 'necessarily showing' (i.e., without any trace of doubt) that zeroing was 'actually used' in the seven administrative reviews at issue".⁷¹¹ If evidence "necessarily showing" a particular fact were required, this would suggest that the evidence must in no circumstance permit of a conclusion *other than* the existence of that fact. We agree that such a standard is more stringent than the assessment of whether the evidence meets the required burden of

⁷⁰⁵European Communities' appellant's submission, para. 167. The European Communities observes that, with respect to the periodic reviews in *Stainless Steel Bar from France* (Case V – Nos. 20 and 21), the final periodic review results preceded the issuance of the panel and Appellate Body reports in *US – Zeroing (Japan)*. (European Communities' appellant's submission, paras. 169 and 181)

⁷⁰⁶European Communities' appellant's submission, paras. 171 and 174.

⁷⁰⁷European Communities' appellant's submission, footnote 211 to para. 177. (original emphasis)

⁷⁰⁸Panel Report, para. 7.151.

⁷⁰⁹Panel Report, para. 7.151.

⁷¹⁰European Communities' appellant's submission, para. 184.

⁷¹¹European Communities' appellant's submission, para. 197. The European Communities refers to this argument on appeal as a "separate claim". (*Ibid.*, para. 184) While we recognize a distinction between the standard of proof and the nature and scope of proof required to meet that standard, we consider the proper application of both to fall within a panel's duties under Article 11 of the DSU.

proof.⁷¹² We note, however, that the Panel may not have required that evidence "necessarily show" the existence of simple zeroing for the other periodic reviews; in those reviews, the Panel stated that it was not "readily discernable"⁷¹³ from particular documents that simple zeroing was used, or that certain evidence did not "demonstrate" or "show" that simple zeroing was used.⁷¹⁴

336. However, even if the Panel did not in all cases require that the European Communities provide evidence "necessarily showing" that simple zeroing was used, we remain concerned by the Panel's approach to the evidence, in which it assessed whether specific pieces of evidence, taken alone, proved the use of simple zeroing, without considering that evidence in relation to other factual evidence. As we noted above, a panel has a duty under Article 11 of the DSU to evaluate evidence in its totality, by which we mean the duty to weigh collectively all of the evidence and in relation to each other, even if no piece of evidence is by itself determinative of an asserted fact or claim. In the Panel's consideration of the periodic review in *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3), we note that the Panel made the following successive statements: (1) the final results published in the *Federal Register* "do not mention whether simple zeroing was used"; (2) the margin calculation programs "do not necessarily show that the simple zeroing methodology was used"; (3) the tables containing results with and without zeroing do not "necessarily show that simple zeroing was actually used"; and (4) the Issues and Decision Memorandum "does not mention whether simple zeroing was applied".⁷¹⁵ On the basis of these statements, the Panel concluded "that the European Communities has failed to demonstrate as a matter of fact that simple zeroing was used by the USDOC in this periodic review."⁷¹⁶ The Panel applied a similar approach to the other periodic reviews at issue, referring to individual pieces of evidence that do not "demonstrate" or "show" that simple zeroing was used, and then concluding that the European Communities had therefore failed to demonstrate that simple zeroing was used by the USDOC in that periodic review.⁷¹⁷

337. In our view, the Panel's reasoning reflects that it segregated and analyzed individual pieces of evidence in order to determine whether any of the pieces, by itself, proved the existence of simple zeroing. Even if the Panel were correct in assessing the value of individual pieces of evidence, and in

⁷¹²In *US – Wool Shirts and Blouses*, the Appellate Body explained that international tribunals "have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof", and that the burden of proof "rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence". (Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323, at 335)

⁷¹³Panel Report, para. 7.154 (concerning *Stainless Steel Bar from Germany* (Case IX – No. 33)); and Panel Report, para. 7.157 (concerning *Certain Pasta from Italy* (Case XIII – No. 43)).

⁷¹⁴Panel Report, paras. 7.152-7.153 (concerning *Stainless Steel Bar from France* (Case V – Nos. 20 and 21)); and Panel Report, paras. 7.155 and 7.156 (concerning *Stainless Steel Bar from Germany* (Case IX – No. 34) and *Stainless Steel Bar from Italy* (Case XI – No. 39)).

⁷¹⁵Panel Report, para. 7.151.

⁷¹⁶Panel Report, para. 7.151.

⁷¹⁷Panel Report, paras. 7.152-7.157.

concluding that no single piece of evidence demonstrated an asserted fact at issue, it was not proper for it to have foreclosed the possibility that the consideration of all of the evidence taken together might be sufficient proof of that fact. We note, in particular, the argument of the European Communities that, when the margin calculation programs are considered *together with* the tables showing detailed calculations, "the necessary conclusion is that the evidence overwhelmingly corroborates the fact that the zeroing methodology was part of the measure and indeed was actually used."⁷¹⁸ The Panel referenced this argument of the European Communities, but appears not to have engaged in a cumulative appreciation of the evidence. We therefore consider that the Panel disregarded the significance of the submitted evidence when it failed to give consideration to that evidence in its totality, including evidence that, in the Panel's view, did not by itself show that simple zeroing was applied in a particular periodic review.

338. We are also troubled that the Panel did not explain, with respect to all of the periodic reviews at issue, its rationale regarding the probative value of the margin calculation programs and/or calculation tables. We note, for instance, that for two of the periodic reviews at issue, the Panel referred to the margin calculation programs submitted by the European Communities, but did not explain whether they were probative as to the use of simple zeroing.⁷¹⁹ While we do not consider that a particular piece of evidence must by itself demonstrate an asserted fact or claim, we believe the Panel's omission is notable given that it treated the evidence with respect to each of the seven periodic reviews in separate paragraphs of its report, and placed such significance on this evidence in the other periodic reviews for which such evidence was submitted. In another of the periodic reviews, the Panel did not mention that the European Communities submitted a margin calculation program, nor did it explain its assessment of the program's probative value.⁷²⁰ We agree with the Panel that "[a]n essential part of a panel's task under Article 11 is to explain its objective assessment of the matter before it".⁷²¹ In the light of its view that this case-specific evidence was crucial in establishing the existence of simple zeroing in the seven periodic reviews, we consider that the Panel's explanation of this evidence in relation to some periodic reviews, but not others, further indicates that it disregarded the significance of the evidence in its totality and, in particular, that it failed to assess the probative value of individual pieces of evidence in relation to other evidence.

⁷¹⁸European Communities' appellant's submission, para. 136 (referring to *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3)). See also Panel Report, paras. 6.13-6.16.

⁷¹⁹Panel Report, para. 7.155 (concerning *Stainless Steel Bar from Germany* (Case IX – No. 34); and Panel Report, para. 7.156 (concerning *Stainless Steel Bar from Italy* (Case XI – No. 39)).

⁷²⁰Panel Report, para. 7.157 (concerning *Certain Pasta from Italy* (Case XIII – No. 43)). The Panel also did not explain its assessment of the probative value of the calculation tables in two of the other reviews. (Panel Report, para. 7.155 (concerning *Stainless Steel Bar from Germany* (Case IX – No. 34); and Panel Report, para. 7.156 (concerning *Stainless Steel Bar from Italy* (Case XI – No. 39)).

⁷²¹Panel Report, para. 7.180. (original underlining)

339. The European Communities also argues that the Panel erred by disregarding evidence that, the Panel asserted, was not "issued", "generated", or "produced" by the USDOC during the periodic review at issue. As the European Communities explains, following the USDOC's final determination in a periodic review, the USDOC discloses to interested parties in the proceeding the margin calculation programs in paper and/or electronic format.⁷²² These programs can be preserved by interested parties and may, at some later date, be reproduced or printed in the same format as originally received from the USDOC.⁷²³ The United States does not dispute this characterization, but takes the position that it could not confirm the content of margin calculation programs that indicated that they had been printed or otherwise produced by someone other than the USDOC after the final results were published.⁷²⁴ The United States therefore argues that, absent program logs originating from the USDOC, or other proof from USDOC-issued documents, "it is not apparent from the evidence submitted by the [European Communities] that zeroing was employed in the seven administrative review determinations in question".⁷²⁵ The European Communities responds that this is a restrictive view of what it means for documents to be generated by the USDOC, and that subsequent printouts of the margin calculation programs, originally supplied by the USDOC to interested parties in an anti-dumping proceeding, still reflect the margin calculations generated by the USDOC during the review.⁷²⁶

340. Even if printouts of margin calculation programs, or the calculation tables prepared by the European Communities, were not issued by the USDOC during the review at issue, we question the significance of this for a conclusion that the documents submitted are not probative as evidence of simple zeroing in periodic reviews. While it may have simplified the Panel's task if the evidence submitted by the European Communities had been confirmed as original USDOC documents, the absence of authentication does not negate the evidentiary significance of those documents. As we understand it, the USDOC provides margin calculation programs at the end of anti-dumping proceedings to interested parties in paper and/or electronic format, and it is from these programs that the original margin calculation program can be replicated, or the underlying data can be extracted to produce other documents such as the calculation tables submitted by the European Communities.⁷²⁷ As the European Communities maintains, "the printed paper version of the margin programme is

⁷²²European Communities' appellant's submission, paras. 114 and 119. The European Communities refers to Section III.B of Chapter 11 of the USDOC Antidumping Manual, which provides that "a full disclosure of all calculations, including the computer printouts and worksheets used, will be made". (Panel Exhibit EC-4.11, p. 25)

⁷²³European Communities' appellant's submission, paras. 117 and 137.

⁷²⁴United States' responses to questioning at the oral hearing. See also United States' comments to European Communities' response to Panel Question 1(a) following the second meeting; and United States' comments to the European Communities' interim review comments, para. 7.

⁷²⁵United States' appellee's submission, para. 141.

⁷²⁶European Communities' responses to questioning at the oral hearing.

⁷²⁷See *supra*, footnotes 722 and 723.

identical to the electronic version provided by [the] USDOC".⁷²⁸ We also note the argument of the European Communities that the United States does not allege that the printouts have been altered, or otherwise challenge that the content or underlying data of the documents was generated by the USDOC.⁷²⁹ Accordingly, the printouts of the margin calculation programs appear to have their origins in original USDOC documents, and we see no basis to conclude that such documentation differs in any material respect from the original program. Thus, while an authenticated USDOC document may have offered greater certainty as to its content, we do not agree that this renders a document that has not been authenticated not probative of the fact asserted, particularly if it is produced or replicated from documents or data supplied by the USDOC.

341. We agree with the United States that the issue of whether documents submitted by the European Communities were authenticated as USDOC-generated appears to have been "pivotal"⁷³⁰ to the Panel's finding regarding the seven periodic reviews. While the Panel does not explain the extent to which the probative value of submitted evidence was, in its view, undermined by its non-authentication, the fact of non-authentication was one of two factors, and at times the *only* factor, cited by the Panel for its conclusion that the European Communities had failed to demonstrate the use of simple zeroing in particular periodic reviews.⁷³¹ We therefore consider that the Panel, by insisting on authenticated USDOC documents to demonstrate or show the use of simple zeroing, also failed to make an objective assessment by allowing a challenge to the authenticity of evidence originating from the USDOC, but later reproduced by interested parties, to skew its consideration of the probative value of that evidence.

342. We now turn to address the European Communities' arguments that the Panel erred in its interpretation of Article 13 of the DSU when it concluded that the European Communities did not ask the Panel to seek detailed, transaction-specific margin calculations from the United States, and that the request the European Communities made in its written response to questions from the Panel "does not suffice as a request to the Panel to seek specific factual information from the USDOC pursuant to its authority under Article 13".⁷³² The European Communities requests the Appellate Body to find

⁷²⁸European Communities' appellant's submission, para. 117. (emphasis omitted)

⁷²⁹Participants' responses to questioning at the oral hearing. See also European Communities' appellant's submission, paras. 117, 119, 121 and 128.

⁷³⁰United States' appellee's submission, para. 140.

⁷³¹In the periodic reviews for *Stainless Steel Bar from Germany* (Case IX – No. 34) and *Stainless Steel Bar from Italy* (Case XI – No. 39), for instance, the Panel refers to the evidentiary value of the calculation tables submitted by the European Communities by noting only that they were not generated by the USDOC during the review at issue. (Panel Report, paras. 7.155 and 7.156) We noted above the other "factor", namely, that the Panel stated that certain evidence did not necessarily show, or that it was not readily discernable, that simple zeroing was used in a particular review. (See *supra*, footnotes 708, 709 and 713)

⁷³²European Communities' appellant's submission, para. 203 (quoting Panel Report, footnote 20 to para. 6.20).

that the Panel erred in its interpretation of Article 13, and to find that it would have been "appropriate" for the Panel, before finding against the European Communities, to seek further information corroborating the use of simple zeroing in the periodic reviews at issue.⁷³³

343. Article 13 of the DSU gives panels "the right to seek information and technical advice from any individual or body which it deems appropriate". The Appellate Body has explained that this is a discretionary authority that panels may exercise in seeking information "from any relevant source".⁷³⁴ The Appellate Body has also explained that, while panels have "broad authority to pose such questions to the parties as it deems relevant for purposes of considering the issues that are before it"⁷³⁵, such authority cannot be used "to make the case for a complaining party".⁷³⁶

344. The European Communities claims it explained to the Panel that the USDOC does not disclose a complete listing of all transactions and comparisons made in each periodic review. As a result, the European Communities posited to the Panel that, "should the Panel consider further corroboration appropriate, the Panel should request the United States to provide copies of the detailed margin calculations for each of the seven administrative reviews at issue."⁷³⁷ We do not consider that the Panel acted inconsistently with Article 13 of the DSU when it did not seek such information. As noted, a panel's authority to request information under Article 13 of the DSU is discretionary, and there is therefore no error that can be attributed to the Panel for its conduct in respect of that Article.

345. Article 11 of the DSU, however, regulates a panel's exercise of its discretion. The Appellate Body has noted the "comprehensive nature" of a panel's authority under Article 13, and has affirmed that this authority is "indispensably necessary" to enable a panel to discharge its duty imposed by Article 11.⁷³⁸ Moreover, the Appellate Body has underscored the importance of a panel's investigative function:

[A] panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the

⁷³³European Communities' appellant's submission, paras. 206 and 211.

⁷³⁴Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84.

⁷³⁵Appellate Body Report, *US – Zeroing (EC)*, para. 260.

⁷³⁶Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

⁷³⁷European Communities' appellant's submission, para. 201.

⁷³⁸Appellate Body Report, *Japan – Agricultural Products II*, para. 127 (quoting Appellate Body Report, *US – Shrimp*, paras. 104 and 106).

responding Member, as the case may be, has established a *prima facie* case or defence.⁷³⁹ (original emphasis)

346. In explaining why it did not request information from the United States, the Panel stated not only that the European Communities' request was not sufficiently specific, but that it would not have been appropriate for the Panel to have done so. As the Panel explained:

[W]e consider that it would be inappropriate for a panel to exercise its authority to seek information based on its own judgement as to what information is necessary for a party to prove its case, as opposed to seeking information in order to elucidate its understanding of the facts and issues in the dispute before it.⁷⁴⁰

347. As we have said, the Panel appears to have considered that a margin calculation program, or other document, only established the use of simple zeroing if it originated from the USDOC at the time of the review. Once the Panel set out that standard, however, we see no indication that it got to the heart of the matter concerning the probative value of evidence before it. For one thing, it is not enough for a panel to leave it to the parties to guess what proof it will require. Moreover, while a panel cannot make the case for a party, Article 11 requires a panel to test evidence with the parties, and to seek further information if necessary, in order to determine whether the evidence satisfies a party's burden of proof. As the Appellate Body has explained, "[a] panel may, in fact, need the information sought in order to evaluate evidence already before it"⁷⁴¹ so as to make an objective assessment of whether the complaining party has established a *prima facie* case, regardless of whether a party has requested it to seek such information. In our view, the Panel required evidence that was authenticated as USDOC documents, but then did not take the necessary steps to elicit from the parties information that might, in the words of the Panel, "elucidate its understanding of the facts and issues in the dispute before it". Because, however, the Panel erred in its articulation of the applicable standard as to the burden of proof, and failed to consider the submitted evidence in its totality, we cannot determine whether further inquiry by the Panel pursuant to its authority, including under Article 13, would have yielded greater clarity as to the evidence.⁷⁴²

C. Conclusion

348. In sum, we consider that the Panel erred in failing to examine the European Communities' evidence in its totality, and requiring, instead, that specific types of evidence, in and of themselves,

⁷³⁹Appellate Body Report, *Canada – Aircraft*, para. 192.

⁷⁴⁰Panel Report, footnote 20 to para. 6.20.

⁷⁴¹Appellate Body Report, *Canada – Aircraft*, para. 192.

⁷⁴²At a minimum, it would seem the Panel should have done more to engage the parties on the specific question of the extent to which the printouts of margin calculation programs and other documents—originating from the USDOC but later reproduced by interested parties—could be relied upon by the Panel in determining the use of simple zeroing.

are necessary in order to establish that simple zeroing was used by the USDOC in specific periodic reviews. Because of this error, the Panel could not properly reach a conclusion as to whether the European Communities had established a *prima facie* case. We therefore find that the Panel acted inconsistently with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it, including an objective assessment of the facts of this case, when it found that the European Communities had not shown that simple zeroing was used in the seven periodic reviews at issue. Consequently, we reverse this finding of the Panel.

D. *Completion of the Analysis*

349. Having reversed this finding, we turn to consider the European Communities' request that we complete the analysis and modify the finding "in order to conclude that the European Communities showed that zeroing was used".⁷⁴³ In previous disputes, the Appellate Body has emphasized that it can complete the analysis "only if the factual findings by the panel, or the undisputed facts in the panel record" provide a sufficient basis for the Appellate Body to do so.⁷⁴⁴ Where this has not been the case, the Appellate Body has declined to complete the analysis.⁷⁴⁵

350. For five of the periodic reviews—*Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3); *Stainless Steel Bar from Germany* (Case IX – No. 33); *Stainless Steel Bar from Germany* (Case IX – No. 34); *Stainless Steel Bar from Italy* (Case XI – No. 39); and *Certain Pasta from Italy* (Case XIII – No. 43)—the European Communities provided the Panel with the *Federal Register* Notice and the Issues and Decision Memorandum, along with documentation consisting of printouts of the margin calculation program that the USDOC allegedly used in each review, and certain tables purportedly showing margin calculations results that reflect zeroing, and what those results would have been without the use of zeroing.⁷⁴⁶ We also note the European Communities' argument that there are several facts in the record, including findings in other WTO disputes and statements by the United States in other proceedings, from which the Panel should have drawn inferences that the zeroing methodology was applied in these periodic reviews.

⁷⁴³European Communities' appellant's submission, para. 183.

⁷⁴⁴Appellate Body Report, *US – Hot-Rolled Steel*, para. 235. See Appellate Body Report, *EC – Hormones*, para. 222 ff; Appellate Body Report, *EC – Poultry*, para. 156 ff; Appellate Body Report, *Australia – Salmon*, paras. 117 ff and 193 ff; Appellate Body Report, *US – Shrimp*, para. 123 ff; Appellate Body Report, *Japan – Agricultural Products II*, para. 112 ff; and Appellate Body Report, *EC – Asbestos*, para. 133 ff.

⁷⁴⁵See Appellate Body Report, *Australia – Salmon*, paras. 209 ff, 241 ff and 255; Appellate Body Report, *Korea – Dairy*, paras. 91 ff and 102 ff; Appellate Body Report, *Canada – Autos*, paras. 133 ff and 144 ff; Appellate Body Report, *Korea – Various Measures on Beef*, para. 128 ff; Appellate Body Report, *EC – Asbestos*, para. 78 ff; and Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 98 ff.

⁷⁴⁶Panel Report, paras. 7.151 and 7.154-7.157.

351. With respect to the case-specific evidence for these reviews, we recall the United States' position that, unless it could be established that a particular document was generated by the USDOC, the United States could not confirm its content.⁷⁴⁷ As we noted, the United States does not argue that these documents were altered, and has not directly challenged the content of these documents or the data on which they were based.⁷⁴⁸ We also note that the margin calculation programs contain information, uncontested by the parties, that indicates that they represent the margin calculation programs used by the USDOC for the relevant periodic review.⁷⁴⁹ For the periodic review in *Stainless Steel Bar from Germany* (Case IX – No. 33), the United States submits that the evidence offered by the European Communities at Appendix II to Panel Exhibit EC-57 does not consist of a margin calculation program.⁷⁵⁰ The European Communities submitted two additional documents before the Panel that purportedly reflect margin calculation programs used in this review, and "refer to various macros forming part of the macro program included under Appendix II of [Panel] Exhibit EC-57 and which contains the zeroing code".⁷⁵¹ As we noted above, the European Communities also prepared and submitted calculation tables for each of these reviews which, it asserts, show margin calculation results that reflect the use of zeroing, and what those results would have been without the use of zeroing.

352. As we have also noted, the United States does not contest the underlying information of these documents other than to say that, because they appear to have been reproduced by interested parties after the periodic review at issue, the United States was not in a position to confirm them. The European Communities observes that the United States adduced no evidence or argument that it did not apply simple zeroing in these reviews⁷⁵², and we see no evidence in the Panel record to suggest that the United States *did not* apply simple zeroing in these reviews. When asked at the oral hearing,

⁷⁴⁷United States' responses to questioning at the oral hearing.

⁷⁴⁸See *supra*, footnote 729.

⁷⁴⁹During questioning at the oral hearing, it was noted that the documents advanced by the European Communities as margin calculation programs reflect the case number for the periodic review, the covered product, the name of the foreign exporter or producer, the name of the USDOC analyst identified in the *Federal Register* Notice, and the line of computer programming code that indicates that simple zeroing was applied. (Participants' responses to questioning at the oral hearing) The European Communities introduced an exhibit before the Panel that described various programming code designations that are used in margin calculation programs. (Panel Exhibit EC-5) The European Communities explained that use of the programming line "WHERE EMARGIN GT 0" reflects the application of the simple zeroing methodology in the challenged periodic reviews. (European Communities' first written submission to the Panel, Panel Report, Annex A-1, pp. A-12 and A-43, paras. 27-28 and 184-185) We see no indication that the significance of this line of programming code was contested between the parties in this dispute. (See United States' response to Panel Question 7(a) following the first meeting)

⁷⁵⁰United States' appellee's submission, para. 147 and footnote 204 thereto.

⁷⁵¹European Communities' response to Panel Question 1(c) following the second meeting. See also Panel Report, para. 7.154.

⁷⁵²European Communities' appellant's submission, paras. 128-129 and 175-177.

the United States was not in a position to confirm whether or not it applied simple zeroing in the periodic reviews at issue.⁷⁵³

353. We have carefully considered the Panel record in its totality regarding the seven periodic reviews. On the basis of the factual findings and uncontested facts in connection with five of these reviews—that is, *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3)⁷⁵⁴; *Stainless Steel Bar from Germany* (Case IX – No. 33)⁷⁵⁵; *Stainless Steel Bar from Germany* (Case IX – No. 34)⁷⁵⁶; *Stainless Steel Bar from Italy* (Case XI – No. 39)⁷⁵⁷; and *Certain Pasta from Italy* (Case XIII – No. 43)⁷⁵⁸—we find that the European Communities has shown that simple zeroing was used in these reviews and that the United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by applying simple zeroing in these reviews.

354. For the two periodic reviews concerning *Stainless Steel Bar from France* (Case V – Nos. 20 and 21)⁷⁵⁹, the European Communities submitted the *Federal Register* Notice and the Issues and Decision Memorandum relating to each case, but did not submit other case-specific evidence, consisting of either margin calculation programs or calculation tables, that would suggest that simple zeroing was used.⁷⁶⁰ The *Federal Register* Notice and the Issues and Decision Memorandum do not explicitly address the issue of zeroing.

355. In its appellant's submission, the European Communities argued that there are several facts in the record from which the Panel should have drawn inferences that the zeroing methodology was applied in these periodic reviews. As we noted, the European Communities pointed to prior adopted reports in which the Appellate Body made "as such" findings that the zeroing methodology existed as a rule or norm of general and prospective application with regard to periodic reviews.⁷⁶¹ The United States was found to be "incapable of providing a single case in which zeroing was not used".⁷⁶² The European Communities argues that, because the United States did not provide the panel and the

⁷⁵³United States' responses to questioning at the oral hearing.

⁷⁵⁴Panel Exhibit EC-35.

⁷⁵⁵Panel Exhibit EC-57.

⁷⁵⁶Panel Exhibit EC-58.

⁷⁵⁷Panel Exhibit EC-62.

⁷⁵⁸Panel Exhibit EC-65.

⁷⁵⁹Panel Exhibit EC-47; Panel Exhibit EC-48.

⁷⁶⁰Panel Report, paras. 7.152 and 7.153.

⁷⁶¹We observed above that factual findings in prior disputes are not binding in this dispute. See *supra*, para. 190.

⁷⁶²European Communities' appellant's submission, para. 169. The European Communities similarly argues that the Panel failed to draw inferences from the fact that the United States "remained silent as regards the use of zeroing in the administrative reviews at issue and never said that it did not use simple zeroing". (*Ibid.*, para. 175)

Appellate Body with evidence from the reviews at issue here that simple zeroing was not used, the Panel should have drawn the inference that simple zeroing was in fact used.⁷⁶³

356. We also noted above the European Communities' reference to statements by the United States that indicate the continued application of simple zeroing in periodic reviews. The European Communities refers, for instance, to the USDOC December 2006 Notice, announcing that the United States would no longer use W-W zeroing in original investigations.⁷⁶⁴ As the European Communities argues, in reversing its policy with respect to W-W comparisons in original investigations, the USDOC also stated that it was not modifying any other comparison methodologies for dumping determinations or any other segment of an anti-dumping proceeding. The European Communities maintains that the Panel should have drawn the conclusion that simple zeroing was used in such reviews.⁷⁶⁵ We also note the Panel's finding that the policy change reflected in the USDOC December 2006 Notice does not explicitly state that simple zeroing is used in periodic reviews.⁷⁶⁶

357. The fact that there is no direct evidence establishing the use of simple zeroing does not absolve a panel from examining submitted evidence in its totality. We, however, come to this question not as the original reviewer of that evidence, but against the standard of whether the factual findings and uncontested facts on the Panel record adequately support completion. On that basis, we decide not to complete the analysis to reach a finding that the United States applied simple zeroing in these two periodic reviews.⁷⁶⁷ We emphasize that the nature and scope of the evidence that might be reasonably expected by an adjudicator in order to establish a fact or claim in a particular case will depend on a range of factors, including the type of evidence that is made available by a Member's regulating authority. Because the design and operation of national regulatory systems will vary, we believe that, in a specific case, a panel may have a sufficient basis to reach an affirmative finding

⁷⁶³The European Communities observes, with respect to *Stainless Steel Bar from France* (Case V – Nos. 20 and 21), that the final periodic review results preceded the issuance of the panel and Appellate Body reports in *US – Zeroing (Japan)*. (European Communities' appellant's submission, paras. 169 and 181)

⁷⁶⁴The European Communities also argues that the Panel ignored the fact that, in 30 of the 37 periodic review challenged by the European Communities, the USDOC "made repeated statements supporting the use of simple zeroing in administrative reviews". (European Communities' appellant's submission, para. 173) The European Communities maintains that, through these statements issued after the conclusion of the seven periodic reviews at issue in this appeal, the United States "confirmed the existence of 'its current approach' and practice of using simple zeroing in administrative reviews". (*Ibid.*, para. 174)

⁷⁶⁵European Communities' appellant's submission, para. 171.

⁷⁶⁶Panel Report, para. 6.9. By contrast, in section VIII of this Report, we refer to the fact that the USDOC expressly stated in the USDOC December 2006 Notice that, prior to the Notice, model zeroing was consistently used in original investigations.

⁷⁶⁷We also note that the European Communities did not produce, for these two reviews, direct evidence to demonstrate the use of simple zeroing (for example, in the form of an Issues and Decision Memorandum that references zeroing and/or margin calculation programs and calculation tables), whereas it did so for all of the other periodic reviews at issue in this dispute.

regarding a particular fact or claim on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence.

VII. The European Communities' Conditional Appeals

358. The European Communities submits what it characterizes as two "conditional appeals". First, the European Communities argues that, if the Panel Report is construed as finding that a panel can invoke "cogent reasons" for departing from previous Appellate Body rulings on the same issue of legal interpretation, then the European Communities requests the Appellate Body to "modify or reverse" that finding by the Panel. Secondly, if the Appellate Body were to "modify or reverse" the Panel's finding that simple zeroing is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* as a result of an other appeal by the United States, then the European Communities requests that the Appellate Body complete the legal analysis and find that the United States acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, 9.3, and 11.2 of the *Anti-Dumping Agreement*, as well as Article XVI:4 of the *WTO Agreement* by applying simple zeroing in the periodic reviews at issue in this dispute.

359. The United States requests the Appellate Body to reject the European Communities' conditional appeal.⁷⁶⁸ The United States alleges, first, that the European Communities is "seeking to shift the burden to the Appellate Body to develop the argumentation and explanation"⁷⁶⁹ on behalf of the European Communities as to whether there is a legal error. The United States submits that, under the European Communities' rationale, "notices of appeal could simply read 'if there are any errors in the panel report, the Appellate Body should modify or reverse accordingly'."⁷⁷⁰ Secondly, the United States argues that "the only conceivable basis for a claim of error would seem to be under Article 11 of the DSU."⁷⁷¹ However, the European Communities "has not made such a claim in its notice of appeal, nor has it articulated such a claim in its appellant submission".⁷⁷²

360. The United States adds that the European Communities "is essentially asking the Appellate Body to assess the consistency of the Panel Report with the Appellate Body's dicta in *US – Stainless Steel (Mexico)*".⁷⁷³ However, for the United States, the Panel "was bound neither by the findings, nor the dicta in a prior, unrelated dispute".⁷⁷⁴ The United States further argues that "the Ministerial Conference and the General Council have the exclusive authority to adopt binding interpretations of

⁷⁶⁸United States' appellee's submission, para. 166.

⁷⁶⁹United States' appellee's submission, para. 167.

⁷⁷⁰United States' appellee's submission, para. 167.

⁷⁷¹United States' appellee's submission, para. 168.

⁷⁷²United States' appellee's submission, para. 168.

⁷⁷³United States' appellee's submission, para. 169.

⁷⁷⁴United States' appellee's submission, para. 169.

the covered agreements under Article IX:2 of the WTO Agreement."⁷⁷⁵ For the United States, treating prior reports as binding outside the scope of the original dispute would add to the obligations of WTO Members, inconsistently with Articles 3.2 and 19.1 of the DSU. On this basis, the United States submits that the European Communities "cannot treat the statements from a prior report as authoritative and then ask the Appellate Body under Article 17.6 of the DSU to assess whether the Panel acted consistently with them or not".⁷⁷⁶

361. We begin by examining the European Communities "conditional appeal" regarding the relevance of prior Appellate Body reports.

A. *The Relevance of Prior Appellate Body Reports*

362. Appellate Body reports adopted by the DSB are binding and must be unconditionally accepted by the parties to the particular dispute.⁷⁷⁷ The Appellate Body has also said that adopted panel and Appellate Body reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute.⁷⁷⁸ Following the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same.⁷⁷⁹ This is also in line with a key objective of the dispute settlement system to provide security and predictability to the multilateral trading system.⁷⁸⁰ The Appellate Body has further explained that adopted panel and Appellate Body reports become part and parcel of the *acquis* of the WTO dispute settlement system and that "ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."⁷⁸¹ Moreover, referring to the hierarchical structure contemplated in the DSU, the Appellate Body reasoned in *US – Stainless Steel (Mexico)* that the "creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that

⁷⁷⁵United States' appellee's submission, para. 169.

⁷⁷⁶United States' appellee's submission, para. 169.

⁷⁷⁷See Appellate Body Report, *US – Softwood Lumber V*, paras. 109-112; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97; and Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 12-15, DSR 1996:I, 97, at 106-108.

⁷⁷⁸Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14, DSR 1996:I, 97, at 108; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 109.

⁷⁷⁹See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188. We further recall that the Appellate Body has previously explained that "the mandate of an Article 21.5 panel includes the task of assessing whether the measures taken to comply with the rulings and recommendations adopted by the DSB in the original proceedings achieve compliance with those rulings" and therefore "panels established under that provision are bound to follow the legal interpretation contained in the original panel and Appellate Body reports that were adopted by the DSB." (Appellate Body Report, *US – Stainless Steel (Mexico)*, footnote 309 to para. 158)

⁷⁸⁰Article 3.2 of the DSU.

⁷⁸¹Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements."⁷⁸² The Appellate Body found that failure by the panel in that case to follow previously adopted Appellate Body reports addressing the same issues undermined the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.⁷⁸³ The Appellate Body added that:

Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.⁷⁸⁴

363. The European Communities underscores that it agrees with this reasoning of the Appellate Body in *US – Stainless Steel (Mexico)* "without reservation".⁷⁸⁵ The European Communities understands the Appellate Body to have found that a panel may invoke "cogent reasons" in order to depart from previous panel findings; but only the Appellate Body can invoke "cogent reasons" in order to depart from previous Appellate Body findings.⁷⁸⁶ The European Communities reasons that the Appellate Body refers in *US – Stainless Steel (Mexico)* to "an adjudicatory body" (in the singular), which the European Communities takes "to mean that the phrase refers to the situation in which it is the same body in both the previous case and the case to be decided".⁷⁸⁷ That is, "it refers to the situation in which a panel might be called upon to resolve the same legal issue that it has previously resolved; or the situation in which the Appellate Body might be called upon to resolve the same legal issue that it has already resolved."⁷⁸⁸ The European Communities understands the phrase to refer "to 'cogent reasons' as the basis for a change in view".⁷⁸⁹

⁷⁸² Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

⁷⁸³ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

⁷⁸⁴ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

⁷⁸⁵ European Communities' appellant's submission, para. 224 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 160-162).

⁷⁸⁶ Notification of an Appeal by the European Communities, WT/DS350/11 (attached as Annex I to this Report), p. 4.

⁷⁸⁷ European Communities' appellant's submission, para. 225 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160).

⁷⁸⁸ European Communities' appellant's submission, para. 225 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160).

⁷⁸⁹ European Communities' appellant's submission, para. 225 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160).

364. On appeal, the European Communities submits that "if the Panel Report is construed as finding that a panel can invoke 'cogent reasons' for departing from previous Appellate Body findings on the same issue of legal interpretation, then the European Communities requests the Appellate Body to modify or reverse those findings by the Panel."⁷⁹⁰ The European Communities further requests that the Appellate Body "complete the analysis".⁷⁹¹ These requests, however, are conditional. To reach the issues raised by the European Communities on appeal, we would first have to "construe" the Panel Report "as finding that a panel can invoke 'cogent reasons' for departing from previous Appellate Body findings on the same issue of legal interpretation."⁷⁹²

365. The Panel engaged in circuitous reasoning and it is not clear whether the Panel in fact found that it could invoke cogent reasons to depart from previous Appellate Body rulings on the same legal issue. The statement of the Panel that it "is important for a panel to have cogent reasons for any decision it reaches", regardless of "whether or not the panel follows such reports", is ambiguous.⁷⁹³ Ultimately, the Panel in this case did follow previous Appellate Body reports. In the light thereof, the Panel does appear to have acceded to the hierarchical structure contemplated in the DSU. Consequently, and since we have ruled on the merits of the United States' claims under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, there is no need for us to address this aspect of the European Communities' conditional appeal.

B. *The European Communities' Conditional Appeal regarding the Consistency of Simple Zeroing in Periodic Reviews*

366. We turn next to examine the European Communities' "conditional appeal" regarding the consistency of simple zeroing in periodic reviews.

367. The Panel found that the United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by applying simple zeroing in 29 periodic reviews. On appeal, the European Communities submits that if the Appellate Body "reverses or modifies those findings in whole or in part", then it appeals "what might be construed as

⁷⁹⁰Notification of an Appeal by the European Communities, WT/DS350/11 (attached as Annex I to this Report), p. 4. See also European Communities' appellant's submission, paras. 10 and 229. The European Communities refers, in particular, to Panel Report, para. 7.180, final sentence, and Panel Report, para. 7.182, final sentence. (European Communities' appellant's submission, footnote 246 to para. 229)

⁷⁹¹Notification of an Appeal by the European Communities, WT/DS350/11 (attached as Annex I to this Report), p. 4. See also European Communities' appellant's submission, paras. 10 and 229.

⁷⁹²Notification of an Appeal by the European Communities, WT/DS350/11 (attached as Annex I to this Report), p. 4.

⁷⁹³Panel Report, para. 7.180.

substantive findings" *or* the exercise of judicial economy by the Panel with respect to the "substantive issue of zeroing" in periodic reviews.⁷⁹⁴

368. We have upheld the Panel's finding that the United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by applying simple zeroing in 29 periodic reviews. Accordingly, we are not required to rule on this aspect of the European Communities' conditional appeal.

VIII. The Eight Sunset Reviews

369. We turn now to address the United States' claim that the Panel failed to undertake an objective assessment of the matter before it, as required by Article 11 of the DSU, in finding that the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* by allegedly using, in the eight sunset reviews at issue, dumping margins obtained through model zeroing in original investigations.⁷⁹⁵

370. Before the Panel, the European Communities challenged the use of zeroing in eight⁷⁹⁶ sunset reviews carried out by the USDOC, arguing that, as part of its sunset review determinations, the USDOC relied on dumping margins calculated through zeroing in original investigations or in the subsequent reviews.⁷⁹⁷ The Panel noted that, "[a]s the factual basis" for this claim⁷⁹⁸, the European Communities submitted copies of the Issues and Decision Memoranda, issued by the USDOC in the eight sunset reviews, which showed that the USDOC used dumping margins obtained in the underlying original investigations.

371. The Panel further noted that these underlying original investigations were carried out before the effective date of the USDOC's policy change published in the USDOC December 2006 Notice, in which the USDOC announced that it would "no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons".⁷⁹⁹ On this basis, the Panel found that "the European Communities ha[d] shown *prima facie* that the margins in the investigations at issue were obtained through model zeroing".⁸⁰⁰ Noting that the United States had not submitted

⁷⁹⁴European Communities' appellant's submission, para. 230.

⁷⁹⁵United States' other appellant's submission, paras. 114-121.

⁷⁹⁶The European Communities' challenge initially concerned 11 sunset reviews. (Panel Report, para. 7.184) The Panel noted that, with respect to three of the 11 sunset reviews, the European Communities' challenge concerned preliminary determinations. Recalling its finding that the preliminary determinations challenged by the European Communities were outside its terms of reference, the Panel stated that it would make findings only with regard to the remaining eight sunset reviews. (*Ibid.*, para. 7.191)

⁷⁹⁷Panel Report, para. 7.184.

⁷⁹⁸Panel Report, para. 7.198.

⁷⁹⁹Panel Report, para. 7.199 (quoting USDOC December 2006 Notice, *supra*, footnote 92).

⁸⁰⁰Panel Report, para. 7.200.

evidence to rebut the European Communities' assertion, the Panel considered that "the European Communities ha[d] demonstrated that in the eight sunset reviews at issue, the USDOC relied, either exclusively or along with margins obtained in prior periodic reviews, on margins obtained through model zeroing in prior investigations".⁸⁰¹ The Panel recalled the Appellate Body's findings in *US – Zeroing (Japan)* and found "convincing"⁸⁰² the Appellate Body's reasoning that, to the extent margins relied on in sunset review determinations are inconsistent with the covered agreements, the resulting sunset review determination is also rendered inconsistent with the covered agreements.⁸⁰³ Because model zeroing in original investigations is "inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*"⁸⁰⁴, the Panel concluded that the United States acted inconsistently with its obligations under Article 11.3 of the *Anti-Dumping Agreement* by relying, in the eight sunset reviews at issue, on margins obtained through model zeroing in prior investigations.⁸⁰⁵

372. The United States asserts that the Panel failed to make an objective assessment under Article 11 of the DSU in reaching the "erroneous conclusion" that the European Communities made out a *prima facie* case that the margins in the original investigations underlying the eight sunset reviews were obtained through model zeroing.⁸⁰⁶ The United States submits that, in order to establish that the United States breached Article 11.3 of the *Anti-Dumping Agreement*, the European Communities must "provide evidence from the investigations in which the dumping margins at issue were calculated showing that model zeroing was employed in calculating those *particular dumping margins*".⁸⁰⁷ The United States maintains that the "sole basis"⁸⁰⁸ for the Panel's finding was language from the USDOC December 2006 Notice, in which the USDOC announced that it would no longer use model zeroing in W-W comparisons in original investigations. Such a general statement, in the United States' view, does not provide evidence as to whether zeroing was in fact used in calculating the specific margins relied upon in each of the eight sunset reviews at issue. The United States adds that none of the other evidence submitted by the European Communities supported a finding that model zeroing was used to calculate margins in the original investigations underlying the eight sunset reviews. Therefore, the United States asserts that the Panel's finding that model zeroing was used in the investigations underlying the sunset reviews at issue "lack[s] a basis in the evidence contained in

⁸⁰¹Panel Report, para. 7.200.

⁸⁰²Panel Report, para. 7.196.

⁸⁰³Panel Report, paras. 7.195 and 7.196 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 185).

⁸⁰⁴Panel Report, para. 7.196.

⁸⁰⁵Panel Report, para. 7.202.

⁸⁰⁶United States' other appellant's submission, para. 115.

⁸⁰⁷United States' other appellant's submission, para. 118. (original emphasis)

⁸⁰⁸United States' other appellant's submission, para. 119.

the panel record".⁸⁰⁹ On this basis, the United States requests that the Appellate Body reverse the Panel's finding that it acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*.

373. The European Communities argues that the Panel was entitled to conclude from the evidence in the record that, "in the eight sunset reviews at issue, the USDOC relied, either exclusively or along with margins obtained in prior periodic reviews, on margins obtained through model zeroing in prior investigations".⁸¹⁰ In reaching this conclusion, the Panel properly drew inferences from the facts available in the record, including the fact that there was a concrete policy change declared by the USDOC to depart from its practice of using model zeroing in original investigations, and the fact that the original investigations underlying the sunset reviews at issue took place before this policy change.⁸¹¹ The European Communities further maintains that the United States did not submit any evidence to rebut the European Communities' assertion concerning the sunset reviews at issue, and that the Panel properly took this additional fact into account in drawing its final conclusion.⁸¹² Therefore, the European Communities requests the Appellate Body to reject the United States' claim and to find, instead, that the Panel "made an objective assessment of the facts when finding that the European Communities demonstrated that in the sunset reviews at issue, the USDOC relied ... on margins obtained through model zeroing in prior investigations."⁸¹³

374. We recall that, before the Panel, there was no disagreement between the parties that, in the eight sunset reviews at issue, the USDOC used margins obtained in the underlying original investigations.⁸¹⁴ Furthermore, the United States did not contest the Panel's reliance on the Appellate Body's finding, in *US – Zeroing (Japan)*, that to the extent that a sunset review determination is based on previous margins obtained through a methodology that is inconsistent with the covered agreements, the resulting sunset review determinations would also be inconsistent with the covered agreements.⁸¹⁵ Neither did the United States contest the Panel's finding that the model zeroing methodology in original investigations is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.⁸¹⁶

375. Thus, in order to make findings on the European Communities' claims relating to the eight sunset reviews, the remaining issue before the Panel was whether the dumping margins from the

⁸⁰⁹United States' other appellant's submission, para. 121 (quoting Appellate Body Report, *US – Carbon Steel*, para. 142).

⁸¹⁰European Communities' appellee's submission, para. 73 (quoting Panel Report, para. 7.200).

⁸¹¹European Communities' appellee's submission, paras. 75 and 76.

⁸¹²European Communities' appellee's submission, para. 78.

⁸¹³European Communities' appellee's submission, para. 79.

⁸¹⁴Panel Report, para. 7.198.

⁸¹⁵Panel Report, paras. 7.195 and 7.196.

⁸¹⁶Panel Report, para. 7.196. See also *ibid.*, para. 7.104.

original investigations underlying the eight sunset reviews, which the USDOC relied upon to make its likelihood determinations, were calculated on the basis of the model zeroing methodology. The Panel found that these margins were calculated using the model zeroing methodology on the basis of the following: (i) an announcement in the USDOC December 2006 Notice stating that the USDOC would no longer apply the model zeroing methodology in original investigations; and (ii) the fact that the original investigations underlying the eight sunset reviews were all completed before this announced change became effective on 22 February 2007.⁸¹⁷

376. According to the United States, "a general statement" in which the USDOC announced that it would no longer use model zeroing in original investigations "does not provide evidence as to whether zeroing was in fact employed in the specific margins relied upon in each of the challenged sunset reviews."⁸¹⁸ Therefore, in the United States' view, the Panel failed to conduct an objective assessment of the matter because its finding that the model zeroing methodology was used in the original investigations underlying the eight sunset reviews lacked a basis in the evidence contained in the Panel record.⁸¹⁹

377. The "general statement" to which the United States refers states that:

The Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.⁸²⁰

378. As the United States points out, this statement concerns what the USDOC would no longer do after 22 February 2007.⁸²¹ We recognize that, taken in isolation, this sentence might not have been conclusive of the issue of whether the USDOC in fact used model zeroing in all W-W comparisons in the original investigations conducted before that date.

379. Nonetheless, other evidence submitted by the European Communities to the Panel lends support to a finding that the model zeroing methodology was indeed used in the original investigations that were conducted before the USDOC's above announcement. Specifically, in the same document on which the Panel relies, the USDOC also made clear, in a separate paragraph, that it applied the model zeroing methodology in original investigations prior to this change in its methodology. This paragraph was specifically cited in the European Communities' response to the Panel's request to show that the zeroing methodology was used in the original investigations underlying the eight sunset reviews. More specifically, the European Communities replied that:

⁸¹⁷Panel Report, paras. 7.198-7.200.

⁸¹⁸United States' other appellant's submission, para. 119.

⁸¹⁹United States' other appellant's submission, para. 121.

⁸²⁰Panel Report, para. 7.199 (quoting USDOC December 2006 Notice, *supra*, footnote 92).

⁸²¹United States' other appellant's submission, para. 119.

It is undisputed that before 22 February 2007, the USDOC applied model zeroing in weighted average dumping margin calculations during the original investigation. As stated in the USDOC Notice dated 27 December 2006:

The [USDOC] is modifying its methodology in antidumping investigations with respect to the calculation of the weighted-average dumping margin. This final modification is necessary to implement the recommendations of the World Trade Organization Dispute Settlement Body. Under this final modification, the [USDOC] will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. (...)

Prior to this modification, when aggregating the results of the averaging groups in order to determine the weighted-average dumping margin, the [USDOC] did not permit the results of averaging groups for which the weighted-average export price or constructed export price exceeds the normal value to offset the results of averaging groups for which the weighted-average export price or constructed export price is less than the weighted-average normal value.⁸²² (emphasis added by the European Communities)

380. As background, we recall that "model zeroing" refers to the use of zeroing in investigations where the normal value and the export price are compared on a weighted average-to-weighted average basis.⁸²³ Thus, pursuant to the model zeroing methodology, where the weighted-average export price exceeds the weighted-average normal value, the results of the comparison will be regarded as zero, so as not to "offset" the comparison results in which the weighted-average export price is less than the weighted-average normal value. Therefore, by stating that it did not permit such "offsets" in original investigations conducted before the announced change, the USDOC made it clear, in its announcement that, prior to 22 February 2007, model zeroing was consistently used in original investigations.

381. This response of the European Communities was referenced by the Panel in a footnote to its Report, without reproducing the full text of the response.⁸²⁴ In addition, before the Panel, it was undisputed that the original investigations underlying the eight sunset reviews were completed before 22 February 2007. Moreover, the United States did not submit any evidence in rebuttal to show that the model zeroing methodology was not used in the original investigations at issue. In our view, therefore, the Panel had before it a sufficient evidentiary basis for its conclusion that the margins relied upon by the USDOC in these eight sunset reviews were calculated using the model zeroing methodology.

⁸²²European Communities' response to Panel Question 2(b) following the second meeting (quoting USDOC December 2006 Notice, *supra*, footnote 92).

⁸²³Panel Report, para. 2.2.

⁸²⁴Panel Report, footnote 161 to para. 7.198.

382. The Appellate Body has interpreted Article 11 of the DSU as requiring panels not to wilfully disregard or distort the evidence put before them, and not to make affirmative findings that lack a basis in the evidence.⁸²⁵ Provided that panels' actions remain within these limits, the Appellate Body has consistently held that it would not interfere lightly with the a panel's exercise of its discretion in the assessment of the facts.⁸²⁶ In this dispute, the United States alleges that the Panel acted inconsistently with Article 11 in finding that the model zeroing methodology was used in the investigations underlying the eight sunset reviews, arguing that this finding lacked a basis in the evidence contained in the Panel record. However, we have found that the Panel's finding was supported by the evidence before it. Therefore, we do not consider that the Panel committed legal error in reaching its finding that the model zeroing methodology was used in the investigations underlying the eight sunset reviews at issue.

383. On this basis, we dismiss the United States' claim that the Panel failed to conduct an objective assessment of the matter, as required by Article 11 of the DSU, in finding that the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* with regard to the eight sunset reviews and, consequently, uphold the Panel's finding.

IX. The European Communities' Request for a "Suggestion" under Article 19.1 of the DSU

384. We now consider the European Communities' arguments relating to its request for a suggestion under the second sentence of Article 19.1 of the DSU.

385. Before the Panel, the European Communities asked the Panel "to suggest that the steps the United States might take in the implementation of the DSB recommendations and rulings following this dispute should be WTO-consistent, particularly with regard to the issue of zeroing."⁸²⁷ The United States responded that there is no basis in the DSU for a panel to make a suggestion for "purposes of avoiding unnecessary discussions about what might or might not fall within the scope of a compliance panel."⁸²⁸ The United States further emphasized that, "[i]t is unreasonable that the [European Communities] is even asking this Panel to start from the premise that there would be a dispute as to compliance."⁸²⁹

⁸²⁵ Appellate Body Report, *US – Carbon Steel*, para. 142.

⁸²⁶ Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *EC – Hormones*, para. 132; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *Japan – Apples*, para. 222; Appellate Body Report, *Korea – Dairy*, para. 137; and Appellate Body Report, *US – Wheat Gluten*, para. 151.

⁸²⁷ Panel Report, para. 8.4.

⁸²⁸ Panel Report, para. 8.4.

⁸²⁹ United States' comments to the European Communities' response to Panel Question 4.

386. The Panel noted that Article 19.1 of the DSU stipulates that "when a panel or the Appellate Body finds a measure to be inconsistent with a covered agreement, it shall recommend that the measure be brought into conformity with the relevant agreement" and that, in such cases, "the panel or the Appellate Body may suggest ways in which such recommendation may be implemented."⁸³⁰ Having found that the United States acted inconsistently with its obligations under the *Anti-Dumping Agreement* and the GATT 1994, the Panel declined to make a suggestion as to how the DSB recommendations and rulings could be implemented by the United States. The Panel said that it is "evident" under the DSU, including Article 19.1, that "Members must implement DSB recommendations and rulings in a WTO-consistent manner."⁸³¹ The Panel added that it could not "presume that Members might act inconsistently with their WTO obligations in the implementation of DSB recommendations and rulings."⁸³² On this basis, the Panel declined the European Communities' request for a suggestion under the second sentence of Article 19.1.

387. On appeal, the European Communities raises two issues concerning Article 19.1 of the DSU. First, the European Communities asserts that the Panel committed "legal error"⁸³³ by declining to make a suggestion regarding implementation. Secondly, the European Communities asks that the Appellate Body exercise its discretion under Article 19.1 of the DSU to make such a suggestion in this appeal.⁸³⁴

388. We begin our analysis by examining the text of Article 19.1 of the DSU, which provides, in relevant part, as follows:

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

389. Article 19.1 contains two components. The first sentence is mandatory, *requiring* panels or the Appellate Body, if they find the challenged measure to be inconsistent with a provision of the covered agreements, to recommend that the respondent Member bring its measure into conformity with that agreement. The second sentence confers a discretionary right, authorizing panels and the Appellate Body to suggest ways in which those recommendations may be implemented. Therefore, as the right to make a suggestion is discretionary, a panel declining a request for such a suggestion does

⁸³⁰Panel Report, para. 8.6.

⁸³¹Panel Report, para. 8.7.

⁸³²Panel Report, para. 8.7.

⁸³³European Communities' appellant's submission, para. 218.

⁸³⁴European Communities' appellant's submission, para. 222.

not act contrary to Article 19 of the DSU. Accordingly, we do not find that the Panel committed legal error in declining to make a suggestion under the second sentence of Article 19.1.

390. We now consider the European Communities' request for the Appellate Body to make a suggestion pursuant to Article 19.1. We begin by detailing the request that the European Communities made to the Panel.

391. The European Communities asked the Panel to suggest that the United States cease using zeroing when calculating dumping margins in any anti-dumping proceeding with respect to the 18 measures identified in the annex to the European Communities' panel request.⁸³⁵ According to the European Communities, "[t]his suggestion would be appropriate to help promote the resolution of the dispute because it would provide helpful guidance to the United States as to what it must do in order to comply, and hopefully contribute to avoiding the need for further compliance proceedings, for example as a result of a switch by the United States to some other comparison method (such as transaction-to-transaction) but still based on zeroing."⁸³⁶ The European Communities also requested the Panel to suggest that the United States "should take all necessary steps of a general or particular nature to ensure that any further specific action against dumping by the United States in relation to the same products from the European Communities as referenced in the present dispute be WTO consistent, and specifically with reference to the question of zeroing."⁸³⁷ The European Communities explains that this "suggestion was intended to reduce the need for protracted and unnecessary discussions about the scope of any compliance panel."⁸³⁸

392. Referring to Articles 3.3 and 3.4 of the DSU, the European Communities argues that absent any "clear suggestion" from the Panel or the Appellate Body as to how the United States could implement the recommendation to bring its measures into conformity with its WTO obligations, the objectives of prompt settlement and achieving a satisfactory settlement of the matter "may simply not be achieved".⁸³⁹ The European Communities also emphasizes that "the circumstances of this dispute require clarity" and argues that a suggestion by the Appellate Body under Article 19.1 of the DSU could be "very useful for providing the necessary clarity as to the implications of the reports when adopted".⁸⁴⁰

⁸³⁵European Communities' appellant's submission, para. 215.

⁸³⁶European Communities' appellant's submission, para. 215 (referring to European Communities' first written submission to the Panel, Panel Report, Annex A-1, p. A-59, para. 266).

⁸³⁷European Communities' appellant's submission, para. 216 (referring to European Communities' closing statement at the second Panel meeting).

⁸³⁸European Communities' appellant's submission, para. 216.

⁸³⁹European Communities' appellant's submission, para. 219.

⁸⁴⁰European Communities' appellant's submission, para. 221.

393. The Appellate Body observed in the recent compliance proceedings in *EC – Bananas III*, that "suggestions made by panels or the Appellate Body may provide useful guidance and assistance to Members and facilitate implementation of DSB recommendations and rulings, particularly in complex cases."⁸⁴¹ In the present case, the European Communities appears to request that the Appellate Body suggest that the United States cease using zeroing when calculating dumping margins in "any anti-dumping proceeding"⁸⁴² with respect to the 18 cases identified in the annex to the European Communities' panel request.

394. We have upheld the Panel's findings that simple zeroing as applied by the United States in 29 periodic reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. We have also found that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in respect of five additional periodic reviews. Moreover, we have upheld the Panel's findings that the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in eight sunset reviews by relying on margins of dumping calculated through the use of zeroing. In the light of these findings, and our findings regarding the European Communities' claims against the continued application of the zeroing methodology in 18 cases, we do not consider it necessary to further consider the European Communities' request for a suggestion under Article 19.1 of the DSU.

X. Findings and Conclusions

395. For the reasons set out in this Report, the Appellate Body:

- (a) regarding the European Communities' claims concerning the continued application of the 18 anti-dumping duties at issue:
 - (i) reverses the Panel's finding that the European Communities failed to comply with Article 6.2 of the DSU, and finds, instead, that the panel request identifies the specific measures at issue;
 - (ii) declines to make additional findings concerning whether the Panel acted inconsistently with Articles 7.1, 7.2, 11, and 12.7 of the DSU;
 - (iii) concludes that the continued application of the anti-dumping duties in each of the 18 cases was identified in the request for consultations;

⁸⁴¹Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 325.

⁸⁴²European Communities' appellant's submission, para. 215.

- (iv) finds that the continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 anti-dumping duty orders are maintained, constitute measures that can be challenged in WTO dispute settlement;
 - (v) regarding *Ball Bearings and Parts Thereof from Italy* (Case II), *Ball Bearings and Parts Thereof from Germany* (Case III), *Ball Bearings and Parts Thereof from France* (Case IV), and *Stainless Steel Sheet and Strip in Coils from Germany* (Case VI):
 - finds that the Panel's factual findings sufficiently establish the continued use of the zeroing methodology in successive proceedings whereby duties in these cases are maintained;
 - concludes that the application and continued application of anti-dumping duties is inconsistent with Articles 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 to the extent that the duties are maintained at a level calculated through the use of the zeroing methodology in periodic reviews;
 - concludes that the application and continued application of anti-dumping duties is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* to the extent that reliance is placed upon a margin of dumping calculated through the use of the zeroing methodology in making sunset review determinations; and
 - declines to make additional findings under Articles 2.1, 2.4, 2.4.2, and 11.1 of the *Anti-Dumping Agreement*, Article VI:1 of the GATT 1994, and Article XVI:4 of the *WTO Agreement* for purposes of resolving this dispute;
 - (vi) declines to complete the analysis in respect of the remaining 14 of the 18 anti-dumping cases at issue; and
- (b) regarding the European Communities' claims concerning four preliminary determinations:
- (i) reverses the Panel's finding that the European Communities' claims concerning the four preliminary determinations were outside the Panel's terms of reference; and

- (ii) declines the European Communities' request for a finding that the four preliminary determinations are inconsistent with "the provisions of the GATT 1994 and the *Anti-Dumping Agreement* cited in the Panel proceedings";
- (c) upholds the Panel's finding that the 14 periodic and sunset reviews were within the Panel's terms of reference;
- (d) upholds the Panel's finding that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying simple zeroing in the 29 periodic reviews, and accordingly declines to rule on the conditional appeals of the European Communities regarding the Panel's finding;
- (e) as regards the European Communities' claims concerning the seven periodic reviews:
 - (i) finds that the Panel acted inconsistently with Article 11 of the DSU when it found that the European Communities had not shown that simple zeroing was used in the seven periodic reviews at issue and, consequently, reverses this finding of the Panel;
 - (ii) completes the analysis and finds that the European Communities has shown that simple zeroing was used, and that the United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by applying simple zeroing in the periodic reviews in *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3); *Stainless Steel Bar from Germany* (Case IX – No. 33); *Stainless Steel Bar from Germany* (Case IX – No. 34); *Stainless Steel Bar from Italy* (Case XI – No. 39); and *Certain Pasta from Italy* (Case XIII – No. 43); and
 - (iii) declines to complete the analysis in respect of the periodic reviews in *Stainless Steel Bar from France* (Case V – No. 20) and *Stainless Steel Bar from France* (Case V – No. 21);
- (f) dismisses the United States' claim that the Panel acted inconsistently with Article 11 of the DSU in finding that the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* with regard to the eight sunset reviews and, consequently, upholds this finding of the Panel; and

- (g) rejects the European Communities' request for a suggestion under Article 19.1 of the DSU.

396. The Appellate Body recommends that the DSB request the United States to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994 and the *Anti-Dumping Agreement*, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 20th day of January 2009 by:

Yuejiao Zhang
Presiding Member

Luiz Olavo Baptista
Member

David Unterhalter
Member

ANNEX I

**WORLD TRADE
ORGANIZATION**

WT/DS350/11
10 November 2008

(08-5429)

Original: English

**UNITED STATES – CONTINUED EXISTENCE AND APPLICATION
OF ZEROING METHODOLOGY**

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 6 November 2008, from the Delegation of the European Communities, 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 – Continued Existence and Application of Zeroing Methodology* (WT/DS350/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.

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 and complete the analysis, with respect to the following errors of law and legal interpretations contained in the Panel Report:

- (a) With respect to each of the 18 measures, the Panel erred when finding that the European Communities failed to identify in the panel request the specific measure at issue, as required by Article 6.2 of the *DSU*, and that consequently the European Communities' claims with respect to these 18 measures did not fall within the Panel's terms of reference (paragraphs 7.40 – 7.67, particularly paragraph 7.61, and paragraph 8.1(b) of the Panel Report). The Panel also erred in law when it found that each of the 18 measures is not a measure within the meaning of Article 3.3 of the *DSU* (paragraph 7.56 of the Panel Report, final sentence). In particular, the European Communities submits that the Panel Report:
- erroneously confounds the procedural legal analysis under Article 6.2 of the *DSU* on the question of whether or not the European Communities' Panel Request identified the 18 specific measures at issue and the substantive legal analysis under Article 3.3 of the *DSU* on the question of whether or not the 18 measures at issue are measures within the meaning of that provision, susceptible to dispute settlement (particularly, but not only, at paragraphs 7.41 and 7.50 of the Panel Report);

- is inconsistent with Article 7.1 of the *DSU* regarding a panel's terms of reference; with Article 12.1, Appendix 3 and paragraphs 4 and 13 of the Working Procedures of 24 July 2007 regarding the timeliness of submissions including requests for preliminary rulings; with the rule that the United States had the burden of raising an issue under Article 3.3 of the *DSU*; and with the rule that the Panel must not make the case for the defending Member – insofar as the Panel made findings regarding the existence and precise content of the 18 measures, which relate to Article 3.3 of the *DSU*, and concern matters never raised by the United States;
- is based on an erroneous interpretation of Article 6.2 of the *DSU*, insofar as it requires, in effect, that the Article 3.3 *DSU* standard be met in the panel request (particularly, but not only, at paragraph 7.50 of the Panel Report);
- is based on an erroneous interpretation of Article 3.3 of the *DSU* (and/or Article 6.2 of the *DSU*), insofar as it effectively interpreted that provision or those provisions so as to conclude that the European Communities had not demonstrated the existence and precise content of the 18 measures at issue (particularly, but not only, at paragraphs 7.50, third sentence and paragraphs 7.50, fifth and seventh sentences of the Panel Report). The 18 measures are simply case specific instances of the application of the zeroing methodology, the *existence* and *precise content* of which has been repeatedly established. These measures are presently experienced directly by EC exporters paying anti-dumping duty rates inflated by zeroing;
- is based on an erroneous interpretation of Article 6.2 of the *DSU* insofar as it interpreted that provision so as to conclude that the European Communities' Panel Request did not identify the specific measures at issue. The 18 measures are simply more specific instances of the application of the zeroing methodology (identified by reference to particular products, a particular exporting Member and particular duties);
- is inconsistent with Article 7.2 of the *DSU* insofar as the Panel did not, with respect to this issue, address relevant provisions of the GATT 1994 (Articles II.2(b), VI.1, VI.2 and XXIII) and the *Anti-Dumping Agreement* (Articles 1, 7.2, 8.6, 9.1, 9.2, 9.3, 11.1, 11.2, 11.3, 12.2.2, 15, 17.4 and 18.3.2) cited in this dispute;
- is inconsistent with Article 11 of the *DSU*, insofar as the Panel failed 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; and
- is inconsistent with Article 12.7 of the *DSU* insofar as the Panel did not set out the basic rationale behind its findings and recommendations.

Having modified or reversed the Panel's findings, the European Communities requests the Appellate Body to complete the analysis by finding that, with respect to the 18 measures, the European Communities' Panel Request identified the specific measures at issue as required by Article 6.2 of the *DSU* and, insofar as the Appellate Body reaches the issue, that the European Communities demonstrated the existence and precise content of 18 measures within the meaning of Article 3.3 of the *DSU*. The European Communities further requests the Appellate Body to complete the analysis by finding that, because of the use of zeroing, each of the 18 measures is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1 and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.

If the Appellate Body accepts this part of the appeal and completes the analysis as requested by the European Communities, then the European Communities would accept that parts (b) and (c) of this appeal could be dealt with by the Appellate Body declaring the Panel's findings moot and of no legal effect.

- (b) The Panel erred when excluding four preliminary determinations from its terms of reference on the basis of Articles 17.4 and 7.1 of the *Anti-Dumping Agreement* (paragraphs 7.70 – 7.77, particularly paragraph 7.77, and paragraph 8.1(c) of the Panel Report). The determinations in question were not provisional measures within the meaning of Article 7, but part of the continuing application of existing definitive anti-dumping duties based on zeroing, being preliminary outcomes of one of the five types of anti-dumping proceeding.

Having modified or reversed the Panel's findings, the European Communities requests the Appellate Body to complete the analysis by finding that the administrative review preliminary determination is inconsistent with Articles VI:2 of the GATT 1994, Articles 2.1, 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*; and that each of the three sunset review preliminary determinations is inconsistent with Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.

- (c) The Panel made factual and legal errors in violation of, inter alia, Article 11 of the *DSU* when concluding that the European Communities had not shown that simple zeroing was used in seven administrative reviews (paragraph 7.158 of the Panel Report and, by omission, paragraph 8.1(e) of the Panel Report). In particular, the European Communities contends that:

- the Panel failed to carry out an objective assessment of the facts as required by Article 11 of the *DSU* when concluding that the European Communities did not make a prima facie case that simple zeroing was used in seven administrative reviews (paragraphs 7.145 – 7.158 of the Panel Report, particularly, paragraphs 7.151, 7.152, 7.153, 7.154, 7.155, 7.156, 7.157 and (concluding) 7.158). The Panel Report ignores the totality of the evidence provided by the European Communities to show the use of zeroing in this case. For each measure the European Communities demonstrated that the methodology was part of the measure, and provided additional evidence over and above what was required to make a prima facie case. Furthermore, in essence, the Panel Report is based on the disavowing of documents imputable to the United States regarding the use of zeroing, and particularly the disavowing of paper copies or print runs of electronic documents provided directly by and imputable to the United States, which documents are expressly referenced in and form part of the measures at issue. The original documents are held on file by the United States, but the United States declines to produce or consult the originals. At the same time the United States does not assert that the documents have been improperly altered by the European Communities nor did the United States contest the accuracy of any of the relevant data contained in the copies produced by the European Communities;
- the Panel failed to apply a reasonable burden of proof (paragraphs 6.5 – 6.20, particularly paragraph 6.20, of the Panel Report); and
- the Panel made an error when disregarding the European Communities' request for the Panel to ask further information pursuant to Article 13 of the *DSU* (paragraph 6.20 and footnote 20 of the Panel Report).

Having modified or reversed the Panel's findings, the European Communities requests the Appellate Body to complete the analysis by finding that each of the seven administrative review determinations is inconsistent with Articles VI:2 of the *GATT 1994*, Articles 2.1, 2.4,

2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.

- (d) The Panel made a legal error when disregarding the European Communities' requests for suggestions (paragraph 8.7 of the Panel Report) and the European Communities requests the Appellate Body to modify or reverse the findings in the Panel Report and complete the analysis by making suggestions pursuant to Article 19.1 of the *DSU*, such as those requested by the European Communities in the Panel proceedings, or as otherwise considered appropriate by the Appellate Body.

The European Communities also makes two conditional appeals.

First, if the Panel Report is construed as finding that a panel can invoke "cogent reasons" for departing from previous Appellate Body findings on the same issue of legal interpretation (paragraphs 7.180 and 7.182 of the Panel Report), then the European Communities requests the Appellate Body to modify or reverse those findings and complete the analysis, for all the reasons set out by the Appellate Body in its report in *US – Stainless Steel from Mexico*. The European Communities considers that a panel may invoke "cogent reasons" in order to depart from previous panel findings; but only the Appellate Body can invoke "cogent reasons" in order to depart from previous Appellate Body findings.

Second, if the United States appeals the findings in paragraphs 7.183 and 8.1(e) of the Panel Report (particularly as regards what the Panel refers to as "the role of jurisprudence"); and if the Appellate Body modifies or reverses those findings in whole or in part; then the European Communities requests the Appellate Body to modify or reverse (and complete the analysis) with respect to the substantive findings or the exercise of false judicial economy in the Panel Report on the substantive issue of zeroing in administrative reviews.¹ In such eventuality, the European Communities submits that the measures are inconsistent with Articles VI:2 of the *GATT 1994*, Articles 2.1, 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*, for the reasons set out in full in its pleadings before the Panel, and in the separate opinion (paragraphs 9.1 to 9.10 of the Panel Report).

¹Panel Report, para. 7.162, seventh sentence; para. 7.163, fourth sentence; para. 7.164, second sentence; para. 7.165, third sentence; para. 7.166, second sentence; para. 7.167, third sentence; para. 7.168, final sentence; and para. 7.169, first sentence.

ANNEX II

**WORLD TRADE
ORGANIZATION**

WT/DS350/12
21 November 2008

(08-5691)

Original: English

**UNITED STATES – CONTINUED EXISTENCE AND APPLICATION
OF ZEROING METHODOLOGY**

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 under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 18 November 2008, from the Delegation of the United States, is being circulated to Members.

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 – Continued Existence and Application of Zeroing Methodology* (WT/DS350/R) (“Panel Report”) and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel’s finding that Members need not consult on a measure prior to requesting a panel to review that measure. In particular the United States seeks review by the Appellate Body of the Panel’s finding that the 14 periodic reviews and sunset reviews that were identified in the EC’s panel request, but not in the EC’s consultations request, were within the Panel’s terms of reference.¹ This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including an incorrect interpretation of Articles 4, 6, and 7 of the DSU and Articles 17.3, 17.4, and 17.5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”).

2. The United States seeks review of the Panel’s conclusion that the United States acted inconsistently with its obligations under Article VI:2 of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and Article 9.3 of the AD Agreement by applying simple zeroing in the 29 periodic reviews at issue in this dispute.² This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations, including the improper interpretation and application of Article 17.6(ii) of the AD Agreement, Article 9.3 of the AD Agreement, and Article VI:2 of the GATT 1994.

¹See, e.g., Panel Report, paras. 7.17-7.28; 8.1(a).

²See, e.g., Panel Report, paras. 7.162-7.169; 7.178-7.183; 8.1(e).

3. The United States requests the Appellate Body to find that the Panel failed 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” as required by Article 11 of the DSU with respect to the EC’s claims that the United States acted inconsistently with its obligations under Article 11.3 of the AD Agreement in the eight sunset reviews at issue.³ The Panel’s failure to undertake an objective assessment includes the erroneous finding that the EC made a *prima facie* case that the margins in the underlying prior investigations were obtained through so-called model zeroing.

³See, e.g., Panel Report, paras. 7.192-7.202; 8.1(f).

ANNEX III

ORGANISATION MONDIALE
DU COMMERCE

ORGANIZACIÓN MUNDIAL
DEL COMERCIO

WORLD TRADE ORGANIZATION

APPELLATE BODY

United States – Continued Existence and Application of Zeroing Methodology
AB-2008-11

Procedural Ruling

1. On 14 November 2008, the Division hearing this appeal received a request from the European Communities to allow observation by the public of the oral hearing in the above appellate proceedings. On 17 November 2008, the United States also requested the Division to authorize public observation of the oral hearing.¹ The participants argued that nothing in the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") or the *Working Procedures for Appellate Review* (the "*Working Procedures*") precludes the Appellate Body from authorizing public observation of the oral hearing.²

2. On 18 November 2008, we invited the third participants to comment in writing on the requests of the participants. In particular, we asked the third participants to provide their views on the permissibility of opening the hearing under the DSU and the *Working Procedures*, and, if they so wished, on the specific logistical arrangements proposed in the requests. We received comments on 24 November from Brazil, China, Egypt, India, Japan, Korea, Mexico, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand. Japan, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu expressed their support for the requests of the participants. Brazil, China, Egypt, India, Mexico, and Thailand expressed the view that the provisions of the DSU do not allow public hearings at the appellate stage. Korea shared these concerns but did not object to the opening of the oral hearing to the public in these proceedings; at the same time, it requested the Appellate Body to treat its written and oral statements as confidential. According to these third participants, the oral hearing forms part of the proceedings of the Appellate Body and, therefore, is subject to the requirement of Article 17.10 of the DSU that "[t]he proceedings of the Appellate Body shall be confidential."

3. We are making the following ruling on the requests of the participants, having carefully considered the comments of the third participants. Article 17.10 must be read in context, particularly in relation to Article 18.2 of the DSU. The second sentence of Article 18.2 expressly provides that "[n]othing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public". Thus, under Article 18.2, the parties may decide to forego confidentiality protection in respect of their statements of position. The third sentence of Article 18.2 states that "Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." This provision would be redundant if Article 17.10 were interpreted to require absolute confidentiality in respect of all elements of appellate proceedings. There would be no need to require, pursuant to Article 18.2, that a

¹The participants expressed a preference for simultaneous, closed-circuit television broadcast to another room, with the transmission switched off when those third participants who do not wish to make their statements public take the floor.

²Similar requests were made in the appeals in *United States / Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* and *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Article 21.5 – Ecuador / United States)*.

Member designate certain information as confidential. The last sentence of Article 18.2 ensures that even such designation by a Member does not put an end to the right of another Member to make disclosure to the public. Upon request, a Member must provide a non-confidential summary of the information contained in its written submissions that it designated as confidential, which can then be disclosed to the public. Thus, Article 18.2 provides contextual support for the view that the confidentiality rule in Article 17.10 is not absolute. Otherwise, no disclosure of written submissions or other statements would be permitted during any stage of the proceedings.

4. In practice, the confidentiality requirement in Article 17.10 has its limits. Notices of Appeal and Appellate Body reports are disclosed to the public. Appellate Body reports contain summaries of the participants' and third participants' written and oral submissions and frequently quote directly from them. Public disclosure of Appellate Body reports is an inherent and necessary feature of our rules-based system of adjudication. Consequently, under the DSU, confidentiality is relative and time-bound.

5. In our view, the confidentiality requirement in Article 17.10 is more properly understood as operating in a relational manner.³ There are different sets of relationships that are implicated in appellate proceedings. Among them are the following relationships. First, a relationship between the participants and the Appellate Body. Secondly, a relationship between the third participants and the Appellate Body. The requirement that the proceedings of the Appellate Body are confidential affords protection to these separate relationships and is intended to safeguard the interests of the participants and third participants and the adjudicative function of the Appellate Body, so as to foster the system of dispute settlement under conditions of fairness, impartiality, independence and integrity. In this case, the participants have requested authorization to forego confidentiality protection for their communications with the Appellate Body at the oral hearing. The requests of the participants do not extend to any communications, nor touch upon the relationship, between the third participants and the Appellate Body. The right to confidentiality of third participants *vis-à-vis* the Appellate Body is not implicated by these requests. The question is thus whether the participants' requests to forego confidentiality protection satisfy the requirements of fairness and integrity that are the essential attributes of the appellate process and define the relationship between the Appellate Body and the participants. If the requests meet these standards, then the Appellate Body would incline towards authorizing them.

6. We note that the DSU does not specifically provide for an oral hearing at the appellate stage. The oral hearing was instituted by the Appellate Body in its *Working Procedures*, which were drawn up pursuant to Article 17.9 of the DSU. The conduct and organization of the oral hearing falls within the authority of the Appellate Body (*compétence de la compétence*) pursuant to Rule 27 of the *Working Procedures*. Thus, the Appellate Body has the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality at the request of the participants as long as this does not adversely affect the rights and interests of the third participants or the integrity of the appellate process. As we observed earlier, Article 17.10 also applies to the relationship between third participants and the Appellate Body. Nevertheless, in our view, the third participants cannot invoke Article 17.10, as it applies to their relationship with the Appellate Body, so as to bar the lifting of confidentiality protection in the relationship between the participants and the Appellate Body. Likewise, authorizing the participants' requests to forego confidentiality does not affect the rights of third participants to preserve the confidentiality of their communications with the Appellate Body.

7. The powers of the Appellate Body are themselves circumscribed in that certain aspects of confidentiality are incapable of derogation—even by the Appellate Body—where derogation may undermine the exercise and integrity of the Appellate Body's adjudicative function. This includes the situation contemplated in the second sentence of Article 17.10, which provides that "[t]he reports of

³This relational view of rights and obligations of confidentiality is consistent with the approach followed in domestic jurisdictions with respect to similar issues, such as privilege.

the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made." Confidentiality of the deliberations is necessary to protect the integrity, impartiality, and independence of the appellate process. In our view, such concerns do not arise in a situation where, following requests from the participants, the Appellate Body authorizes the lifting of the confidentiality of the participants' statements at the oral hearing.

8. The Appellate Body has fostered the active participation of third parties in the appellate process in drawing up the *Working Procedures* and in appeal practice. Article 17.4 provides that third participants "may make written submissions to, and be given an opportunity to be heard by, the Appellate Body." In its *Working Procedures*, the Appellate Body has given full effect to this right by providing for participation of third participants during the entirety of the oral hearing, while third parties meet with panels only in a separate session at the first substantive meeting. The rights of third participants are distinct from those of the main participants to a dispute. They have a systemic interest in the interpretation of the provisions of the covered agreements that may be at issue in an appeal. Although their views on the questions of legal interpretation that come before the Appellate Body are always valuable and thoroughly considered, these issues of legal interpretation are not inherently confidential. However, it is not for the third participants to determine how the protection of confidentiality in the relationship between the participants and the Appellate Body is best dealt with. We do not consider that the third participants have identified a specific interest in their relationship with the Appellate Body that would be adversely affected if we were to authorize the participants' requests.

9. The requests for public observation of the oral hearing in this dispute have been made by the European Communities and the United States. As we explained earlier, the Appellate Body has the power to authorize the requests by the participants to lift confidentiality, provided that this does not affect the confidentiality of the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process. The participants have suggested alternative modalities that allow for public observation of the oral hearing, while safeguarding the confidentiality protection enjoyed by the third participants that seek such protection. The modalities include simultaneous or delayed closed-circuit television broadcasting in a room separate from the room used for the oral hearing. Finally, we do not see the public observation of the oral hearing, using the means described above, as having an adverse impact on the integrity of the adjudicative functions performed by the Appellate Body.

10. For these reasons, the Division authorizes the public observation of the oral hearing in these proceedings on the terms set out below. Accordingly, pursuant to Rule 16(1) of the *Working Procedures*, we adopt the following additional procedures for the purposes of this appeal:

- (a) The oral hearing will be open to public observation by means of simultaneous closed-circuit television. The closed-circuit television signal will be shown in a separate room to which duly registered delegates of WTO Members and members of the general public will have access.
- (b) Oral statements and responses to questions by third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation.
- (c) Any third participant that has not already done so may request that its oral statements and responses to questions remain confidential and not be subject to public observation. Such requests must be received by the Appellate Body Secretariat no later than 5:00 p.m. Geneva time on Thursday, 4 December 2008.
- (d) An appropriate number of seats will be reserved for delegates of WTO Members in the room where the closed-circuit broadcast will be shown.

- (e) Notice of the oral hearing will be provided to the general public through the WTO website. WTO delegates and members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat.
- (f) Should practical considerations not allow simultaneous broadcast of the oral hearing, deferred showing of the video recording will be used in the alternative.

Geneva, 28 November 2008
