

ANNEX C

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ANNEX C-1

SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

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<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 the Appellate Body Report, WT/DS294/AB/R
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<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 the Appellate Body Report, WT/DS322/AB/R

I. INTRODUCTION

1. The European Communities has never seen a WTO Member in such an isolated and entrenched position as the United States in this dispute. All third parties in this case which have made either written submissions¹ and/or oral statements² during the first substantive meeting of the Panel have expressly supported the position of the European Communities, underlying the absurdity of the position of the United States in view of the obvious interpretation of the rules and the clear case-law of the Appellate Body.

2. What is striking in the First Written Submission of the United States is the absence of reference to the Vienna Convention on the Law of Treaties while Article 3.2 of the DSU clearly imposes the Vienna Convention as the central interpretative tool of WTO rules.

3. In fact, the US line of arguments is result-oriented. It starts with the result it intends to achieve, namely justifying the zeroing method as being WTO-consistent and tries to find arguments supporting it, which are however not in accordance with the principles of treaty interpretation.

4. The correct interpretation of the relevant provisions of the *Anti-Dumping Agreement* and of the *GATT 1994* has been clarified by the Appellate Body which concluded, in a clear and consistent case-law, that the US zeroing methodology in original and in review investigations which is used in the various measures challenged in this dispute is inconsistent with WTO rules.

5. Regarding more specifically Article 2.4.2 of the *Anti-Dumping Agreement*, the United States focuses its defence on the meaning of the phrase "the existence of margins of dumping during the investigation phase" (the "Phrase"), arguing that this Phrase in Article 2.4.2 of the *Anti-Dumping Agreement* has a limited meaning, i.e. that of the investigation to determine the existence, degree and effect of any alleged dumping. This interpretation is, however, not a permissible interpretation, that is one "which is found to be appropriate after application of the pertinent rules of the Vienna Convention". Indeed, as the European Communities will explain in detail below, pursuant to a systematic application of the interpretative rules in the Vienna Convention, it is not permissible to interpret the Phrase in the manner advocated by the United States.

6. The European Communities offers the Panel an interpretation that not only respects all the principles of treaty interpretation but also makes economic and legal sense of all the relevant treaty terms and respects the overall design and architecture of the provisions concerned and of the *Anti-Dumping Agreement* as a whole.

7. In this Second Written Submission, the European Communities would (again) like to examine in the light of the agreed rules of interpretation of the Vienna Convention the various provisions concerned, notably Article XVI:4 of the WTO Agreement; Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 and VI:2 of the *GATT 1994*; Article 2.4 of the *Anti-Dumping Agreement*; Article 2.4.2 of the *Anti-Dumping Agreement* and Article 9.3 of the *Anti-Dumping Agreement*.

II. PRELIMINARY LEGAL ISSUES – REBUTTAL ARGUMENT

A. APPLICABLE STANDARD OF REVIEW

8. It is not disputed that the standard of review which is applicable to this Panel is to be found in Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the

¹ Japan; Korea; Norway and Thailand.

² Brazil; India; Japan; Korea; Mexico; Norway and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

"DSU") as complemented by Article 17.6 of the *Anti-Dumping Agreement*, in particular Article 17.6(ii) which concerns the Panel's legal interpretation of the *Anti-Dumping Agreement*.

9. Article 17.6(ii) provides that:

The panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

10. The Appellate Body clarified in *US – Hot Rolled Steel* that:

[T]he second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be '*permissible* interpretations'. In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* 'if it rests upon one of those permissible interpretations'.³

11. It follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*. In other words, "a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*".⁴

12. The Appellate Body thus clarified that Article 17.6(ii) of the *Anti-Dumping Agreement* does not call for "deference" to any "possible" interpretation. It is only if, after applying the interpretative rules of the *Vienna Convention*, two competing interpretations are found to be of equal merit, that the possibility of concluding that both are "permissible" arises.

13. In this case, the United States submits that there may be "multiple permissible interpretations of particular provisions of the AD Agreement".⁵ According to the United States, "negotiators" would have left a number of issues unresolved and the application of rules of interpretation would therefore lead to more than one permissible interpretation with respect to a given provision.⁶

14. However, as the European Communities explained in its First Written Submission and will explain in further detail in the present submission, the interpretation of the relevant provisions of the *GATT 1994* and the *Anti-Dumping Agreement* put forward by the United States is not a "permissible interpretation" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement* given that it is precluded by the correct application of the rules of the *Vienna Convention*.

15. Deciding whether an interpretation constitutes a "permissible" interpretation is the essence of the role of panels, and particularly the Appellate Body, when applying Article 3.2 of the DSU in order

³ Appellate Body Report, *US – Hot Rolled Steel*, para. 59.

⁴ Appellate Body Report, *US – Hot Rolled Steel*, paras. 59 - 60. Appellate Body Report, *US – Softwood Lumber V*, paras. 113 - 116; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 118; Appellate Body Report, *Thailand – H-Beams*, paras. 121 - 128; Appellate Body Report, *EC – Bed Linen*, paras. 63 - 65.

⁵ US First Written Submission, para. 27.

⁶ US First Written Submission, para. 26.

to clarify the meaning of the covered agreements, and particularly when dealing with appeals concerning questions of legal interpretation, pursuant to Article 17.6 of the DSU. The Appellate Body has made clear in various disputes that there is only one permissible interpretation of the relevant provisions of the *GATT 1994* and the *Anti-Dumping Agreement*, following which maintaining zeroing procedures in administrative reviews and sunset reviews is not permitted.

16. Indeed, in *US – Zeroing (Japan)*, the Appellate Body clarified that:

In our analysis, we have been mindful of the standard of review provided in Article 17.6(ii). However, we consider that there is no room for recourse to the second sentence of Article 17.6(ii) in this appeal. This is because, in our view, Articles 2.4, 2.4.2, 9.3, 9.5 and 11.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the *GATT 1994*, when interpreted in accordance with customary rules of public international law, as required by the first sentence of Article 17.6(ii), do not admit of another interpretation of these provisions as far as the issue of zeroing before us is concerned.⁷

17. Similarly, in *US – Zeroing (EC)*, the Appellate Body concluded that:

In our analysis of whether the zeroing methodology, as applied by United States in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*, we have been mindful of the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*. Article 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the *GATT 1994*, when interpreted in accordance with customary rules of interpretation of public international law, as required by Article 17.6(ii), do not, in our view, allow the use of the methodology applied by the United States in the administrative reviews at issue. This is so because, as explained above, the methodology applied by the USDOC in the administrative reviews at issue results in amounts of assessed anti-dumping duties that exceed the foreign producers' or exporters' margins of dumping. Yet, Article 9.3 clearly stipulates that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Similarly, Article VI:2 of the *GATT 1994* provides that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."⁸

18. In these prior cases, the Appellate Body has clearly rejected the interpretations put forward by the United States of Article VI:1 and VI:2 of the *GATT 1994* and Articles 2.1, 2.4, 2.4.2 and 9.3 and 11.3 of the *Anti-Dumping Agreement* as being "permissible" interpretations within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement*.

B. OBJECTIVE ASSESSMENT OF THE MATTER AND ROLE OF PRECEDENT

19. In its First Written Submission, the European Communities submitted that (i) there is a substantial and consistent case-law of the Appellate Body which has concluded that zeroing in weighted average-to-weighted average and transaction-to-transaction comparisons in original investigations, in weighted average-to-transaction comparisons in administrative review and sunset review investigations is inconsistent with the *Anti-Dumping Agreement* and the *GATT 1994* and that (ii) this Panel should follow this existing and consistent case-law, taking into account in particular the "security and predictability" which the dispute settlement system must provide to the multilateral

⁷ Appellate Body Report, *US – Zeroing (Japan)*, para. 189.

⁸ Appellate Body Report, *US – Zeroing (EC)*, para. 134.

trading system. It is what would be expected from this Panel in particular given that this case-law emanates from the Appellate Body, has been repeated in several cases consistently and has already addressed the arguments which are raised by the United States in this case.⁹

20. Disagreeing with the findings of the Appellate Body in these prior cases, the United States urges this Panel to disregard these findings. More precisely, the United States urges this Panel to disregard the findings of the Appellate Body in prior cases when they are contradictory to its position but relies on other findings of the Appellate Body in those same cases where they allegedly support its position.¹⁰ Apparently, the findings made in prior cases would only be legally relevant where they allegedly support the US position and would become legally irrelevant where they oppose the US position. This would depend, according to the United States, on whether these findings are "persuasive".¹¹ This is clearly a legally erroneous presentation of the question of the relevance of past DSB reports of the Dispute Settlement Body (the "DSB") to present disputes. Either findings in prior cases are legally relevant or they are not – and this cannot depend on the unilateral will of one of the Members.

21. The European Communities considers that the reports of panels (as eventually modified by the Appellate Body) and the Appellate Body in prior cases, which will be adopted by the DSB absent consensus opposing adoption, are legally relevant to subsequent panels.

22. In this case, the United States not only requests the Panel to disregard the findings of the Appellate Body which were adopted by the DSB but to follow instead the panel findings in those same cases that were never adopted by the DSB since they have been reversed by the Appellate Body.

23. Indeed, the panels' reports referred to by the United States¹² which have concluded that certain forms of zeroing were consistent with the GATT and the *Anti-Dumping Agreement* have all been reversed on appeal by the Appellate Body which has considered the panels' legal interpretation in those cases as being inconsistent with the provisions of the relevant Agreements. In all those disputes, the reports that have been adopted by the DSB include the Appellate Body report and the Panel report as modified by the Appellate Body report.

24. As noted by the Appellate Body, it is the "adopted panel reports [...] [that] create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute".¹³ In other words, such findings – which will have been adopted by the DSB absent consensus opposing adoption – are legally relevant. If the Appellate Body did not rule out, in *Japan – Alcoholic Beverages II*, that reasoning contained in an unadopted GATT panel report can nevertheless provide useful guidance to a subsequent panel, the Appellate Body thereby certainly did not mean WTO panel findings which it has itself reversed. Consequently, the findings of the panels invoked by the United States in various points of its First Written Submission are not legally relevant to the extent that they have been reversed by the Appellate Body and have not been adopted by the DSB.

25. In its First Written Submission, the United States argues that by requesting this Panel not to deviate from prior Appellate Body reports addressing the issue of zeroing, "the EC is urging the

⁹ EC First Written Submission, paras. 62 – 110.

¹⁰ e.g. US First Written Submission, para. 133 footnote 152 (the US agrees with the findings of the AB in *US – Zeroing (Japan)*) and para. 143 (the US disputes the findings of the AB in *US – Zeroing (Japan)*).

¹¹ US First Written Submission, para.33; US Closing Statement at the First Substantive Meeting of the Panel, para. 3.

¹² The United States refers frequently to the reports of the panels in *US – Zeroing (Japan)*, *US – Zeroing (EC)* and *US – Softwood Lumber Dumping (Article 21.5)*.

¹³ Appellate Body Report, *Japan – Alcoholic Taxes on Beverages II*, p. 14.

Panel [...] to ignore the Panel's obligation under Article 11 of the DSU to conduct an objective assessment of the matter before it".¹⁴

26. The European Communities strongly disagrees with this. On the contrary, ignoring the findings of the Appellate Body in previous disputes would be inconsistent with the Panel's obligation under Article 11 of the DSU. Indeed, if interpreted properly, this provision implies that panels should follow the findings of the Appellate Body in earlier disputes relating to precisely the same matter.

27. Article 11 of the DSU provides that:

[t]he function of panels is to assist the DSB in discharging its responsibilities under this understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. (emphasis added)

28. In accordance with the rules of treaty interpretation in the Vienna Convention, this provision, which includes two sentences, must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.¹⁵

29. The first sentence of Article 11 of the DSU clarifies that the function of panels is to assist the DSB in discharging its responsibilities. To the extent that the same issues have been examined by a panel and/or the Appellate Body in earlier disputes whose reports have been adopted by the DSB, it is to be expected that a panel in a subsequent case follows the findings of the panel/Appellate Body laid down in the reports as adopted by the DSB.

30. As noted above, the reports of panels which concluded that zeroing was consistent with the covered Agreements have all been reversed on appeal and in those cases the DSB adopted the findings of the Appellate Body. To the extent that they have been adopted by the DSB, these reports create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to a subsequent dispute.¹⁶

31. The second sentence of Article 11 of the DSU requests panels to make an objective assessment of the matter before it. The matter covers both factual and legal issues.

32. Article 3.2 of the DSU provides strong contextual support for the interpretation of Article 11 of the DSU. Article 3.2 of the DSU provides that:

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

¹⁴ US First Written Submission, para. 29.

¹⁵ Article 31 of the Vienna Convention on the Law of Treaties.

¹⁶ Appellate Body Report, *Japan – Alcoholic Taxes on Beverages II*, p. 14 and Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 107.

33. In its First Written Submission, the European Communities highlighted the importance for this Panel not depart from the previous rulings of the Appellate Body, *inter alia*, in view of the purpose of the dispute settlement system in Article 3.2 to "provide security and predictability to the multilateral trading system".¹⁷

34. The United States argues that "read in its context in Article 3.2, the reference to security and predictability in Article 3.2 supports the opposite conclusion [that this Panel should not follow the reasoning set forth in any Appellate Body report]". The United States further states that "[a] result which adds to or diminishes the rights or obligations of Members provided in the covered agreements is prohibited by the third sentence of Article 3.2 and is therefore the antithesis of the "security and predictability" referred to in the first sentence of Article 3.2. This conclusion does not change because the result in question had previously been reached by the AB".¹⁸

35. What the United States is thus actually saying is that the findings reached by the Appellate Body in the previous disputes which have found zeroing to be inconsistent with the WTO Agreements, add to or diminish the rights or obligations of WTO Members and therefore that this Panel should not follow them as this would not ensure security and predictability to the system.

36. This statement of the United States is highly worrying. It means that the United States not only disputes the fact that the Appellate Body correctly interpreted WTO law in those cases, but also that it is conducting its proceedings in accordance with the provisions of the DSU and more specifically that its findings are consistent with Article 3.2 of the DSU.

37. The Appellate Body is a standing body which has been established by the DSB. Hierarchically superior to panels, the Appellate Body's function is to "hear appeals from panel cases"¹⁹, the "appeal [being] limited to issues of law covered in the panel report and legal interpretations developed by the panel".²⁰ In discharging its function, the Appellate Body, just as panels must do, must apply the requirements set forth in Article 3.2. Thus, as a matter of principle, the Appellate Body's findings comply with the requirements laid down in Article 3.2 of the DSU. Accordingly, the findings of the Appellate Body should be followed by a panel in subsequent cases, in particular when the issues which are examined are the same. It cannot be argued, as the United States does, that, as a matter of principle, the findings of the Appellate Body should not be followed on the grounds that they add to or diminish the rights and obligations of WTO Members and are therefore inconsistent with Article 3.2 of the DSU.

38. The Appellate Body has expressly noted that:

It was appropriate for the Panel, in determining whether the SPB is a measure, to rely on the Appellate Body's conclusion in that case. Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.²¹
(emphasis added)

39. The European Communities is not arguing that the DSU contains an express rule providing that panels are legally bound by the findings of the Appellate Body in prior cases, but following these findings is what would be expected from panels. Panels should not depart, without good reasons, from the findings laid down in previous cases. These principles are of particular relevance in this case

¹⁷ EC First Written Submission, para. 87.

¹⁸ US First Written Submission, para. 32.

¹⁹ DSU, Article 17.1.

²⁰ DSU, Article 17.6.

²¹ Appellate Body Report, *US – OCTG Sunset Reviews*, para. 188.

where the issues raised before this Panel are identical to the issues examined by the Appellate Body in *US – Zeroing (Japan)*, *US – Zeroing (EC)* and *US – Softwood Lumber (21.5)*.

40. In other words, a proper interpretation of the standard of review of panels under Article 11 of the DSU implies that a panel, when assessing the applicability and the consistency of a measure with covered agreements, should follow the findings of the Appellate Body in prior cases. Indeed, it follows from Article 3.2 of the DSU that these findings are deemed to be consistent with the customary rules of interpretation of public international law and that following these findings will enhance the security and predictability of the dispute settlement system.

41. The United States is actually refusing to acknowledge that its arguments regarding zeroing have been fully considered by the Appellate Body and have in fact been rejected.

42. Finally, the European Communities would like to address a number of *false and incorrect assertions* of the United States in its First Written Submission.

43. First, the United States contends that that "the EC, in relying so extensively on examples from outside the WTO dispute settlement context, highlights the fact that there is no support for its approach in the DSU".²² This is incorrect. As was explained above, there is strong support for the position that panels should follow the findings of panels and the Appellate Body in previous disputes, in particular Articles 11 and 3.2 of the DSU. Furthermore, it is norm that in other dispute settlement systems, including those referenced by the European Communities, there is no express rule of "vertical precedent" in the legislation; and yet this does not preclude the application of such a rule by the dispute settlement system itself. There is thus a very substantial analogy in this respect between those other dispute settlement systems and the DSU; and it is the European Communities submission that that parallelism must of necessity extend to the question of the relationship between hierarchically superior courts and hierarchically inferior judicial instances – that is, between panel's and the Appellate Body.

44. Second, the United States submits that "the EC *erroneously* argues that 'the WTO inconsistency of ... [zeroing] has already been established in previous disputes'".²³ This statement is incorrect as is demonstrated by the consistent case-law of the Appellate Body concluding that zeroing is inconsistent with the *Anti-Dumping Agreement*.

45. Third, the United States, in the absence of valid counter-arguments, is trying to create confusion about the arguments submitted by the European Communities by saying that "the EC citations do not permit the Panel to simply adopt those findings here without an objective assessment of the facts at issue".²⁴ The European Communities has never argued that this Panel should not make an objective assessment of the facts. Rather, in reviewing the facts of this case, and in making its objective assessment, this Panel should conclude that the facts in this case are for all material purposes identical to the facts assessed in the previous disputes in which the Appellate Body concluded that zeroing was inconsistent with the *Anti-Dumping Agreement* and the GATT.

46. Fourth, in several paragraphs of its Written Submission, the United States argues that the Panel is not bound to apply the reasoning and findings of the Appellate Body. However, the European Communities disagrees with the view expressed by the United States according to which "Appellate Body reports should be taken into account only to the extent that the reasoning is persuasive" and that "the reasoning in such reports may be taken into account".²⁵ As explained above,

²² US First Written Submission, para. 29.

²³ US First Written Submission, para. 30.

²⁴ US First Written Submission, para. 30.

²⁵ US First Written Submission, para. 33.

the findings of the Appellate Body are either legally relevant for the purpose of subsequent panels or they are not. According to the European Communities, findings are legally relevant when they are included in reports that have been adopted by the DSB.

47. In conclusion, a proper interpretation of the standard of review of panels requires a panel, when making an objective assessment of the matter before it, to follow the findings of previously adopted reports, in particular when the issues are the same. In other words, panels are not simply entitled to follow these findings but should, as a matter of principle, do so. This conclusion is even stronger in this case since (i) the findings in previously adopted reports are the findings of the Appellate Body which is hierarchically superior and only deals with issues of law; (ii) these findings have been repeated in several cases so that there is now a consistent line of interpretation and (iii) the Appellate Body examined the same issues as those raised in this case and has expressly rejected the arguments and the interpretation put forward by the United States.

III. SUBSTANTIVE LEGAL ISSUES – REBUTTAL ARGUMENT

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

1. The Measures at issue

48. The first set of measures which the European Communities challenges in this dispute is the application or continued application in the 18 anti-dumping cases listed in the Annex to the Panel Request of anti-dumping duties which were calculated or maintained in place pursuant to the most recent administrative review, or as the case may be, original proceeding or changed circumstances or sunset review proceedings at a level which exceeds the anti-dumping duty which would result from the correct application of the *Anti-Dumping Agreement*, i.e. without zeroing.

49. In its First Written Submission, the United States submits that the claim concerning the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex "refers to an indeterminate number of alleged measures in connection with the 18 cases", "to the extent that the EC's request does not refer to the most recent identified measure".²⁶ The United States further submits that this claim "would challenge the calculation of anti-dumping duties in an indeterminate number of current and/or future reviews that Commerce allegedly is concluding or will conclude at some point in the future".²⁷

50. By arguing that the claim of the European Communities "refers to an indeterminate number of alleged measures", the United States is actually disputing the characterisation of the continued application or application of an anti-dumping duty as a measure. In other words, the United States is trying to create confusion between the two sets of measures identified by the European Communities in the Panel Request: on the one hand, the continued application or application of an anti-dumping duty in the 18 cases identified by product and country of origin concerned, which has been calculated or maintained in place at a level exceeding the anti-dumping margin which would result from the correct application of the *Anti-Dumping Agreement*; and on the other hand, the 52 anti-dumping proceedings.

51. Similarly, during the substantive meeting with the Panel, the United States spent much time in trying to discuss the scope of this dispute and the measures being challenged by the European Communities in this case.

²⁶ US First Written Submission, para. 51.

²⁷ US First Written Submission, para. 51.

52. In particular, with respect to the "application or continued application" of anti-dumping duties, the United States disputed the description of the first set of measures in the Panel Request as being "specific" in accordance with Article 6.2 of the DSU.²⁸

53. However, the European Communities has clearly identified the precise content of the first set of measures being challenged: that being a duty rate based on the use of the zeroing methodology which is being applied against imports of a specific product from a specific country. In other words, the duties being currently applied in the 18 anti-dumping cases listed in the Annex to the Panel Request are all duties which have been calculated and/or maintained pursuant to the zeroing methodology. In *US – Zeroing (EC)*²⁹ and *US – Zeroing (Japan)*³⁰, the Appellate Body has accepted that both the European Communities and Japan have described the "precise content" in the context of the methodology itself. It necessarily follows that what the European Communities has described in each of the 18 measures also meets the "precise content" requirement.

54. As noted by the Appellate Body in *US – Corrosion Steel*, in principle any act or omission attributable to a WTO Member can be a "measure" of that Member for purposes of WTO dispute settlement proceedings.³¹ In *Guatemala – Cement I*, the Appellate Body also noted that "in the practice established under the GATT 1947, a "measure" may be any act of a Member, whether or not legally binding and it can include even non-binding administrative guidance by a government. A measure can also be an omission or a failure to act on the part of a Member".³² Moreover, in *EC – Computer Equipment*, the Appellate Body observed that a "duty" can be a "measure" subject to dispute settlement proceedings.³³

55. There is thus no requirement as to the form of a "measure". The United States is therefore wrong in saying that measures which can be challenged cover either a framework law or original investigations, administrative review or sunset reviews.³⁴ The European Communities has in the Panel Request precisely identified the content of the measure being challenged. That is sufficient. It is not necessary that the measure takes the form either of an original proceeding or an administrative review proceeding or a sunset review proceeding.

56. Furthermore, the European Communities submits that there can reasonably be no dispute as to the existence of the 18 measures in the Panel Request. The Annex to the Panel Request precisely identifies the 18 anti-dumping measures, by product and country concerned, mentioning the relevant places where the measures were published in the United States and the duty rates imposed.

57. The reference to the duty as a measure is clear throughout Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*. Thus, the title of Article VI of the *GATT 1994* refers to "Anti-dumping ... Duties"; and Article VI:2 of the *GATT 1994* refers to "an anti-dumping duty". The title of the *Anti-Dumping Agreement* states that it implements Article VI of the *GATT 1994*; and Article 1 of the *Anti-Dumping Agreement*, which is titled "principles", refers to "[a]n anti-dumping measure", confirming that the duty is conceived of as a measure. Article 7.2 of the *Anti-Dumping Agreement* expressly confirms that "[p]rovisional measures may take the form of a provisional duty...". The final sentence of Article 8.6 of the *Anti-Dumping Agreement* similarly confirms the conceptual identity of "measures" and "duties". Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* repeatedly refer to the duty. Article 11.1 of the *Anti-Dumping Agreement* states that "[a]n anti-

²⁸ US Opening Statement at the First Panel Meeting, paras. 19 – 22.

²⁹ Appellate Body Report, *US – Zeroing (EC)*, paras. 185 – 205.

³⁰ Appellate Body Report, *US – Zeroing (Japan)*, para. 96.

³¹ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Steel*, para. 81.

³² Appellate Body Report, *Guatemala – Cement I*, footnote 47.

³³ Appellate Body Report, *EC – Computer Equipment*, para. 65.

³⁴ US Opening Statement at the First Panel Meeting, para. 22.

dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury". The term "in force" is significant, since that concept generally refers to a legal instrument, that is, a measure, which is here equated with the "duty". Article 11.2 refers repeatedly to the "duty", and to the "termination" of the "duty" – again confirming the nature of the duty as a measure. Article 11.3 of the *Anti-Dumping Agreement* is drafted in the same terms. Article 12.2.2 of the *Anti-Dumping Agreement* refers again to the imposition of the "duty". The first sentence of Article 15 of the *Anti-Dumping Agreement* refers to "anti-dumping measures", which is equated with the reference in the second sentence to "anti-dumping duties". Article 18.3.2 of the *Anti-Dumping Agreement* similarly refers to "anti-dumping measures", that is, duties, being "imposed".

58. For all of these reasons the European Communities respectfully requests the Panel to conclude that the measures at issue duly before the Panel include the 18 cases referred to by the European Communities; and respectfully requests the Panel to make the findings in relation to these 18 measures that the European Communities considers are its right under the *Anti-Dumping Agreement* and the DSU.

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

59. In its First Written Submission, the European Communities submitted that the United States violates Article XVI:4 of the WTO Agreement, not only as a consequential claim (*i.e.*, when a violation of other provisions of the *Anti-Dumping Agreement* has been found), but also as an independent claim of having laws, regulations or administrative procedures not in conformity with the covered agreements, as declared by adopted DSB reports.³⁵ Indeed, the reports of the panels and the Appellate Body adopted by the DSB in prior disputes and finding the same zeroing methodologies challenged in the present proceeding inconsistent with the covered agreements create an independent obligation for the United States.

60. Once the interpretation of the relevant rules was made and the violation was found and adopted by the DSB, it becomes evident that any attempt by the United States to keep the zeroing methodology in anti-dumping proceedings would run against its obligation to ensure the conformity of its existing laws, regulations, and administrative procedures with the *Anti-Dumping Agreement* and the *GATT 1994*. Such obligation can be invoked by any WTO Member, regardless of whether a Member was a Party to the dispute where the adopted DSB report found the violation. Indeed, the European Communities notes that the DSB reports are adopted by the whole WTO Membership. Thus, since the interpretation of the rules and the DSB reports are adopted by all Members, any Member can invoke Article XVI:4 of the WTO Agreement.

61. The United States contests the idea of an "independent international obligation" arising from adopted DSB reports. The United States submits that it cannot be reconciled with the fact that the Appellate Body and panel reports are not binding, except with respect to resolving the particular dispute between the Parties to that dispute. It further submits that it cannot be reconciled with the text of the DSU, in particular Articles 3.2 and 19.2 of the DSU. In other words, according to the United States, there can be no obligation arising from adopted reports given that panels and the Appellate Body cannot add to or diminish the rights and obligations of WTO Members.³⁶

62. The European Communities disagrees with the observations made by the United States on this point. In the view of the European Communities, the issue is not whether adopted DSB reports add to or diminish the rights and obligations of Members. Indeed, the adopted DSB reports clarify the interpretation of the relevant provisions of the covered agreements with respect to a particular law, regulation or practice on which the Parties to that particular dispute did not agree. It cannot be argued

³⁵ EC's First Written Submission, paras 122 - 132.

³⁶ US Opening Statement at the First Panel Meeting, para. 12.

that, because an interpretation is negative for a Member, such interpretation of the rules "adds to or diminishes rights and obligations of Members". In other words, the obligation of the panels and the Appellate Body not to add to or diminish the rights and obligations of the Members relates to the content of their findings. In that respect, the panels and the Appellate Body are not entitled to make findings that would add to or diminish the rights and obligations of the WTO Members as laid down in the various WTO Agreements. The issue here is different. It relates to the consequences for the losing Member arising from those adopted DSB reports.

63. Whether adopted DSB reports create an independent international obligation which may be invoked by any WTO Member needs to be answered on the basis of the texts of the WTO Agreement and of the DSU in accordance with the relevant principles of treaty interpretation. In particular, the fact that adopted DSB reports create an independent obligation for the losing party which can be invoked by any WTO Member is supported by various provisions of the DSU, in particular Articles 3.2, 3.4, 3.8 and 17.14 of the DSU.

64. Article 3.2 of the DSU states that a central element of the WTO is "providing security and predictability to the multilateral trading system". The dispute settlement system is thus supposed to "clarify" the various rules of the covered agreements. This objective obviously supports the notion of the desirability of developing a jurisprudence that not only would accord in particular some predictability and reliability, but also would be available to all government members of the WTO. Further, Article 3.4 of the DSU provides that "recommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter", which means a settlement which is consistent with all obligations under the covered agreements. Moreover, as Article 3.8 of the DSU states, if an infringement of the obligations assumed under a covered agreement has been found by an adopted DSB report, it is presumed that the measure concerned causes nullification or impairment for "other Members parties to the covered agreements". Thus, any WTO Member can invoke nullification or impairment when an infringement has been found and adopted by the DSB. Last but not least, Article 17.14 of the DSU provides for the obligation on the Parties to the dispute to *unconditionally* accept the reports adopted by the DSB. The losing Member cannot argue that it has unconditionally accepted the DSB reports if, in a new dispute concerning the same matter, it denies that the same measures violated the covered agreements. Since the adoption of those reports take place by negative consensus, this implies that all WTO Members adopt the interpretation of the relevant provisions of the covered agreements with respect to a particular law, regulation or practice contained in the adopted report. Again, this independent obligation for the United States arising from the adopted DSB reports can be invoked by any WTO Member, as a violation of Article XVI:4 of the WTO Agreement.

65. The principles included in those provisions would be frustrated if it was not acknowledged that an independent obligation exists under Article XVI:4 of the WTO Agreement for Members to ensure conformity of their laws, regulations and administrative procedures with the covered agreements, once it has been clarified by adopted DSB reports that existing laws, regulations or administrative procedures are inconsistent with the Members' WTO obligations.

66. Moreover, it should be noted that the fact that Article XVI:4 of the WTO Agreement creates an independent obligation is supported by the important treaty interpretation principle according to which the interpretation of clauses or paragraphs of a treaty cannot lead to redundancy or *inutility*.³⁷ Indeed, Article XVI:4 of the WTO Agreement must be given a meaning by itself. As the Appellate Body mentioned in *US – Gasoline*, an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.³⁸ Treating this provision

³⁷ Appellate Body Report, *Japan – Alcoholic Beverages*, paras. 12 - 13.

³⁸ Appellate Body Report, *US – Gasoline*, p. 23, footnote 45.

as a purely consequential claim when a violation of another provision has been found would render this provision inutile.

67. Finally, the European Communities clarifies that it is not asking this Panel to rule on whether the United States has complied or failed to comply with DSB recommendations and rulings in past disputes. Rather, the European Communities is asking this Panel to take into account the fact that the United States, by its own admission, bases its entire defence on its refusal to unconditionally accept the Appellate Body Reports in DS294 and DS322.

68. In light of the foregoing, the European Communities requests this Panel to make a specific finding that the United States, by applying and continuing to apply zeroing in original investigations, administrative review and sunset review proceedings, has violated Article XVI:4 of the WTO Agreement. The European Communities also requests the Panel to examine the argument based on Article XVI:4 of the WTO Agreement first, as an independent claim, and to refrain from exercising judicial economy on this point.

B. THE ZEROING METHODOLOGY AS APPLIED IN 52 ANTI-DUMPING PROCEEDINGS, INCLUDING ORIGINAL INVESTIGATIONS, ADMINISTRATIVE REVIEW AND SUNSET REVIEW PROCEEDINGS

1. Original Investigations

69. The European Communities challenges four original investigations contained in the Annex to the request for establishment of the Panel (Cases XV to XVIII) as being inconsistent with *the Anti-Dumping Agreement* and the *GATT 1994*.³⁹

70. The United States does not dispute these claims, thereby acknowledging their inconsistency with the *GATT 1994* and the *Anti-Dumping Agreement*.⁴⁰

2. Administrative Reviews

(a) Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* and Article VI of the *GATT*: the duty must not exceed the margin of dumping as determined with respect to the product as a whole

71. The European Communities claims that, in the relevant measures at issue, the United States did not correctly establish the anti-dumping duty amount or the margin of dumping, consistent with the obligations set out in Articles 9.3 and 2 of the *Anti-Dumping Agreement* and Article VI of the *GATT 1994*. This is so because the simple zeroing used by USDOC in the measures at issue did not allow for the calculation of the margin of dumping for the *product as a whole*.

72. In its First Written Submission, the United States contests this. In essence, the disagreement between the parties flows from their respective interpretations of the terms "dumping" and "margins of dumping" in the *Anti-Dumping Agreement* and whether these terms apply at the level of the product as whole or at the level of a comparison between a weighted average normal value and an individual export transaction.

73. The United States contends that the terms of "dumping" and "margins of dumping" are not defined in the *GATT* and in the *Anti-Dumping Agreement* so as to require that export transactions be examined at an aggregate level.⁴¹ According to the United States, the definition of "dumping" as included in Article 2.1 of the *Anti-Dumping Agreement* "describes the real-world commercial conduct

³⁹ EC First Written Submission, paras 135 – 179.

⁴⁰ US First Written Submission, para. 155.

⁴¹ US First Written Submission, paras 82 – 98.

by which a product is imported into a country, i.e. transaction by transaction".⁴² The United States further submits that "there is nothing in the *GATT 1994* or the *Anti-Dumping Agreement* that suggests that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at non-dumped price".⁴³

74. The interpretation put forward by the United States is not permissible as it is directly contradicted not only by the ordinary meaning of the text of Articles 2 and 9.3 of the *Anti-Dumping Agreement* and Article VI of the *GATT 1994*, but also by their context and the well-established and consistent findings of the Appellate Body in previous disputes according to which the terms "dumping" and "margins of dumping" as defined in Article 2.1 of the *Anti-Dumping Agreement* and in Article VI:1 of the *GATT 1994* apply to the *product under investigation as a whole*.⁴⁴

75. The European Communities first examines Article VI:1 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement* which defines "dumping". Article VI:1 defines "dumping" as occurring where "products of one country are introduced into the commerce of another country at less than the normal value of the products". This definition is reiterated in Article 2.1 of the *Anti-Dumping Agreement* as follows: "For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if [...]". It is clear from the texts of these provisions that dumping is defined in relation to a product as a whole as defined by the investigating authority.

76. This is further clear from the context of the Agreement. Indeed, the purpose of Article VI of the *GATT 1994* and of the *Anti-Dumping Agreement* is to determine the conditions for the application of anti-dumping measures. Article 1 of the *Anti-Dumping Agreement* states that "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the *GATT 1994* and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement" (emphasis added). For the purpose of the investigation, the investigating authority must identify the "product under consideration"⁴⁵ which will have to be used consistently throughout the investigation for various purposes including the determination of the volume of dumped imports, the injury determination, the causal link, etc. Article VI:2 of the *GATT 1994* clarifies that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater than the margin of dumping in respect of such product". Article 6.10 clarifies that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". It is thus clear that "dumping", within the meaning of Article VI:1 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement*, can be found only for the product under investigation as a whole, and cannot be found to exist only for a type, model or category of that product, including a "category" of one or more relatively low priced export transactions.

77. Other provisions of the *Anti-Dumping Agreement* confirm this view. For example, Article 9.2 stipulates that an anti-dumping duty is to be imposed in respect of the product under investigation. In addition, Article 6.10 provides that the "investigating authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation".

⁴² US First Written Submission, para. 82.

⁴³ US First Written Submission, para. 85.

⁴⁴ Appellate Body Report, *EC – Bed Linen*, para 53; Appellate Body Report, *US – Hot-Rolled Steel*, para 118; Appellate Body Report, *US – Softwood Lumber V*, paras 91 to 103; Appellate Body Report, *US – Zeroing (EC)*, paras 123 to 135; Appellate Body Report, *US – Zeroing (Japan)*, paras 108 to 116.

⁴⁵ This flows from Article 2.6 of the *Anti-Dumping Agreement* which defines the "term 'like product' as a product which is identical, i.e. alike in all respects to the product under consideration".

78. The United States is therefore clearly wrong when stating that "there is nothing in the *GATT 1994* or the AD Agreement that suggests that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price".⁴⁶

79. Second, the European Communities examines the terms "margin of dumping". While "dumping" refers to the introduction of a product into the commerce of another country at less than its normal value, the term "margin of dumping" refers to the magnitude of dumping. Indeed, as noted in Article VI:2 of the *GATT 1994* "[...] the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1 [of Article VI of the *GATT 1994*]". As with dumping, margins of dumping can be found only for the product under investigation as a whole. As noted by the Appellate Body in *US – Hot Rolled Steel* "'margins' means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product. This margin reflects a comparison that is based upon examination of all of the relevant home market and export market transactions".⁴⁷

80. It is clear that an investigating authority may undertake multiple intermediate comparisons between a weighted average normal value and individual export transactions. However, the results of any such multiple comparisons are not "margins of dumping". Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating all these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole.

81. The European Community fails to see how margins of dumping can properly be established for the product as a whole without aggregating all of the "results" of the multiple comparisons. Aside from the exception provided for by the targeted dumping provisions, there is no textual basis in the *Anti-Dumping Agreement* that would justify taking into account the "results" of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other "results".

82. In its First Written Submission, the United States does not explain how, in the light of the rules of treaty interpretation embodied in the Vienna Convention on the Law of Treaties, the terms "dumping" and "margins of dumping" could be interpreted as referring to the product at individual transaction level.

83. The United States largely relies on the findings of the panels in *US – Zeroing (Japan)* and in *US – Softwood Lumber (Article 21.5)*. However, these findings have been reversed by the Appellate Body which has concluded and explained why "dumping" and "margins of dumping" can only be established for the product under investigation as a whole. In *US – Zeroing (Japan)*, the Appellate Body stated that:

A product under investigation may be defined by an investigating authority. But "dumping" and "margins of dumping" can be found to exist only in relation to that product as defined by that authority. They cannot be found to exist for only a type, model or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the level of an individual transaction. Thus, when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather, they are merely inputs that are to be aggregated in order to establish the margin of

⁴⁶ US First Written Submission, para.85.

⁴⁷ Appellate Body Report, *US – Hot Rolled Steel*, para. 118.

dumping of the product under investigations for each exporter or producer.⁴⁸
(emphasis added)

84. In fact, there is a continuous and consistent line of findings of the Appellate Body in *EC – Bed Linen*, *US – Softwood Lumber*, *US – Zeroing (EC)* and *US – Zeroing (Japan)* according to which "dumping" and "margins of dumping can only be established for the product under investigation as a whole".

85. The United States errs in arguing that "in *US – Softwood Lumber V*, the Appellate Body reasoned that zeroing was not permitted in the context of "multiple averaging", on the basis of the phrase "all comparable export transactions" but did not explain how zeroing could be prohibited in the context of "multiple comparisons" generally.⁴⁹ On the contrary, as the Appellate Body made clear in *US – Softwood Lumber V*, these principles are based most fundamentally on Articles VI:1 and VI:2 of the *GATT 1994* and on Article 2.1 of the *Anti-Dumping Agreement*⁵⁰ and are confirmed by Articles 9.2 and 6.10 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the *GATT 1994*.⁵¹ The Appellate Body explicitly rejected the notion that these principles apply only in original proceedings. Referring to Article VI:1 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement*, the Appellate Body concluded: "it is clear from the texts of these provisions that dumping is defined in relation to a product as a whole as defined by the investigating authority. Moreover, we note that the opening phrase of Article 2.1 "for the purposes of this Agreement" indicates that the definition of "dumping" as contained in Article 2.1 applies to the entire agreement...".⁵² In *US – Softwood Lumber V*, the Appellate Body referred generally to the use of zeroing in relation to the use of "multiple comparisons" when it stated that, "[i]f an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole".⁵³

86. The United States submits that the examination of the term "product" as used throughout the *Anti-Dumping Agreement* and the *GATT 1994* demonstrates that the term "product" in these provisions does not exclusively refer to "product as a whole" and that it can have either a collective meaning or an individual meaning.⁵⁴ However, the unique example that the United States gives where the word "product" would be used in the individual sense of the object of a particular transaction is Article VII:3 of the *GATT 1994*. However, Article VII:3 of the *GATT 1994* is a provision concerning customs valuation issues. It has thus nothing to do with anti-dumping. As explained above, the term "dumping" as defined in Article 2.1 of the *Anti-Dumping Agreement* must be interpreted in the specific context of the determination of the framework in which anti-dumping measures can be applied, i.e. pursuant to an investigation which focuses on a specific "product under investigation" as defined by the investigating authorities. Therefore, we do not consider this example to be relevant.

87. In any case, as the Appellate Body correctly noted in *US – Softwood Lumber (Article 21.5)*, "the Appellate Body referred to Article VI:1 and 2 of the *GATT 1994*, together with Article 2.1 of the *Anti-Dumping Agreement*, to interpret the term "margins of dumping" in Article 2.4.2. The Appellate Body did not address the meaning of "product" in the other paragraphs of Article VI or in other provisions of the *GATT 1994*".⁵⁵

⁴⁸ Appellate Body Report, *US – Zeroing (Japan)*, para. 115.

⁴⁹ US First Written Submission, para.91.

⁵⁰ Appellate Body Report, *US – Softwood Lumber V*, paras. 91 - 93.

⁵¹ Appellate Body Report, *US – Softwood Lumber V*, para. 94.

⁵² Appellate Body Report, *US – Softwood Lumber V*, para. 93.

⁵³ Appellate Body Report, *US – Softwood Lumber V*, para. 98 quoted by the Appellate Body in Appellate Body Report, *US – Softwood Lumber V (Article 21.5)*, para. 114.

⁵⁴ US First Written Submission, para. 92.

⁵⁵ Appellate Body Report, *US – Softwood Lumber V (Article 21.5)*, para. 113.

88. Indeed, even though it could be demonstrated that the word "product" may have various meanings across the GATT and the *Anti-Dumping Agreement*, it is clear from both the text and context that in the framework of Article 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the *GATT 1994* the word product refers to "product under investigation" and thus the product as a whole.

89. The view that "dumping" and "margins of dumping" can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping proceeding. Thus, having defined the product under investigation, the investigating authority must treat that *product* as a whole for, *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. Moreover, according to Article VI:2 of the *GATT 1994* and Article 9.2 of the *Anti-Dumping Agreement*, an antidumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole, and export transactions in the so-called "non-dumped" sub-groups (that is, those sub-groups in which the weighted average normal value is less than the weighted average export price) are not excluded. The European Communities sees no basis, under the *Anti-Dumping Agreement*, for treating the very same sub-group transactions as "non-dumped" for one purpose and "dumped" for other purposes.⁵⁶

90. The obligations and methodologies that apply when a margin of dumping is investigated or relied upon are the same for the entire *Anti-Dumping Agreement*, including administrative review investigations. The use of zeroing by the United States is thus equally inconsistent in both the calculation of a revised margin of dumping for cash deposit purposes and in the calculation of the amount of duty retrospectively assessed. The US calculation of a revised margin for cash deposit purposes is identical in all relevant respects to the margin calculation performed in the original proceeding. There is no basis on which it is possible to argue that zeroing, which is prohibited in original proceedings, becomes somehow permissible in the same calculation in an administrative review.

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

91. As a preliminary remark, the European Communities notes that it appears undisputed by the United States that the fair comparison requirement in Article 2.4 also applies to proceedings governed by Article 9.3 of the *Anti-Dumping Agreement*. The Parties, however, disagree as to the content of this obligation and as to whether, as a result, the simple zeroing method used by the United States in the relevant measures at issue results in the calculation of a dumping margin which violates Article 2.4 of the *Anti-Dumping Agreement*.

(i) *Content of the "fair comparison" requirement in Article 2.4*

92. Referring to the quotation which the European Communities makes in its First Written Submission of the Appellate Body's findings in *US – Zeroing (Japan)*, the United States submits that "the rationale followed by the Appellate Body [in that case] was based on the *results* of the comparison methodology in relation to the previously interpreted 'margin of dumping' rather than on any inherently unfair aspect of the comparison methodology itself" and therefore that "the EC claim of unfairness depends not on the text of Article 2.4 but on whether it is permissible to interpret the term 'margin of dumping' as used in Article 9.3 as applying to transactions".⁵⁷ This is an incorrect description of the European Communities' claim which, on the contrary, and as explained further

⁵⁶ Appellate Body Report, *US – Softwood Lumber V*, para. 99.

⁵⁷ US First Written Submission, para. 143.

below, is based on an inherent analysis of the fair comparison requirement which demonstrates the inherently unfair nature of the simple zeroing method used by the United States in its administrative reviews.

93. The first argument presented by the United States to support the view that there is no inconsistency with Article 2.4 is that if "it is permissible to understand the term 'margin of dumping' as used in Article 9.3 as applying to an individual transaction, then the challenged assessment will not exceed the margin of dumping" and there will therefore be no basis for a finding of inconsistency with Article 2.4.⁵⁸ It implies that, according to the United States, whether the use of simple zeroing in the context of administrative reviews is consistent with the fair comparison requirement in Article 2.4 or not depends on whether Article 9.3 would authorize the use of zeroing. According to the United States, since it is permissible to interpret "margin of dumping" as used in Article 9.3 as applying to an individual transaction, there is no obligation to aggregate transactions in calculating margins of dumping in an assessment proceeding, and there can be no obligation to "offset" the antidumping duty liability for a transaction to reflect the extent to which other transactions were not dumped. As a result, there is no basis for inconsistency with Article 2.4.⁵⁹ The United States does not offer any explanation as to why the simple zeroing method would be consistent with Article 2.4 apart from saying that if such method is authorized by Article 9.3, there is no inconsistency with Article 2.4.

94. The United States' approach is incorrect as it conflicts with the independent and general nature of the fairness requirement in Article 2.4 of the *Anti-Dumping Agreement*. Since the fairness requirement of Article 2.4 is an independent and general obligation, it cannot be reduced to whether the simple zeroing method applied by the United States is permitted or not under the other provisions of the *Anti-Dumping Agreement*.

(ii) *"Inherently biased"*

95. In its First Written Submission, the European Communities noted that the term "fair" is generally understood to connote impartiality, even-handedness or lack of bias.⁶⁰ The simple zeroing used in administrative reviews is inherently biased because when an exporter makes some sales above normal value and some below normal value, the use of zeroing will inevitably result in a margin higher than would otherwise be calculated. This increase in the margin is not attributable to any change in the pricing behaviour of the exporter but is the result of the United States' choice to apply a calculation methodology which has the effect of ignoring the negative intermediate comparison results.⁶¹

96. The United States disputes the European Communities' claim that zeroing in administrative reviews is inconsistent with Article 2.4 since it is inherently biased. According to the United States, there is "nothing in the text of the Agreement to support its contention that a methodology can be designated as "fair" or "unfair" within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down".⁶²

⁵⁸ US First Written Submission, para. 144.

⁵⁹ US First Written Submission, para. 144.

⁶⁰ EC First Written Submission, para. 167. According to the dictionary, fair means "just, unbiased, equitable, impartial, legitimate, in accordance with the rules of standards" and "offering an equal chance of success" (Shorter Oxford English Dictionary; 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol.1, p.915), quoted by the Appellate Body in *US – Lumber V (Article 21.5)*, para. 138.

⁶¹ EC First Written Submission, para. 200.

⁶² US First Written Submission, para.146.

97. In this regard, the European Communities notes that the *Anti-Dumping Agreement* does not contain a definition of the concept of "fairness". However, various panels and the Appellate Body have analysed the "fair" nature of both dumping and injury determinations. Any methodology or approach taken by investigating authorities in the framework of either dumping determinations or injury determinations and which makes it more likely to find either dumping (or higher dumping margins) or injury, is not "fair". As a result, a methodological choice such as the simple zeroing method in administrative reviews which systematically and inevitably result in a higher dumping where there is no change in pricing behaviour is inherently biased and therefore unfair within the meaning of Article 2.4 of the *Anti-Dumping Agreement*.

98. Furthermore, the Appellate Body in *US – Hot Rolled Steel* examined the "objective examination" requirement in Article 3.1 of the *Anti-Dumping Agreement* and underlined that "the word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness. In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party or group of interested parties, in the investigation".⁶³

99. Applying this test in *EC – Bed Linen (Article 21.5)*, the Appellate Body found that:

The approach taken by the European Communities in determining the volume of dumped imports was not based on an "objective examination". The examination was not "objective" because its result is predetermined by the methodology itself. Under the approach used by the European Communities, whenever the investigating authorities decide to *limit* the examination to some, but not all, producers—as they are entitled to do under Article 6.10—all imports from *all non*-examined producers will *necessarily always be included* in the volume of dumped imports under Article 3, as long as any of the producers examined individually were found to be dumping. This is so because Article 9.4 permits the imposition of the "all others" duty rate on imports from *non*-examined producers, *regardless* of which alternative in the second sentence of Article 6.10 is applied. In other words, under the European Communities' approach, imports attributable to *non*-examined producers are simply *presumed*, in all circumstances, to be *dumped*, for purposes of Article 3, solely because they are subject to the imposition of anti-dumping duties under Article 9.4. This approach makes it "more likely [that the investigating authorities] will determine that the domestic industry is injured", and, therefore, it cannot be "objective". Moreover, such an approach tends to favour methodologies where *small numbers* of producers are examined individually. This is because the *smaller* the number of individually-examined producers, the *larger* the amount of imports attributable to *non*-examined producers, and, therefore, the larger the amount of imports *presumed* to be *dumped*. Given that the *Anti-Dumping Agreement* generally requires examination of *all* producers, and only exceptionally permits examination of only *some* of them, it seems to us that the interpretation proposed by the European Communities cannot have been intended by the drafters of the Agreement.⁶⁴ (emphasis added)

100. Similarly, the European Communities argues that the simple zeroing method used by the United States in its administrative reviews is to be regarded as "unfair" since the use of zeroing makes it more likely that the investigating authorities find dumping or higher margins of dumping and cannot

⁶³ Appellate Body Report, *US – Hot Rolled Steel*, para. 193.

⁶⁴ Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 132.

therefore be regarded as being "fair" within the meaning of Article 2.4 of the *Anti-Dumping Agreement*.

(iii) *Unjustified imbalance*

101. The obligation imposed by Article 2.4 to conduct a fair comparison precludes the simple zeroing method used by the United States in the measures at issue. Given the ordinary meaning of the word "fair"⁶⁵, the obligation to make a fair or equivalent comparison must necessarily involve a fairly balanced comparison, being one that, subject to the targeted dumping exception, takes equivalent account of all the data relating to normal value and export price, in calculating a "margin of dumping" for each exporter. The United States in fact used a simple zeroing method without any justification, and for that reason acted in a manner inconsistent with its obligation to make a fair comparison, pursuant to Article 2.4.

102. The Panel and Appellate Body reached a similar conclusion in *US Hot – Rolled Steel*, regarding the "arm's length" and "aberrationally high" price tests for determining whether or not domestic sales are made in the ordinary course of trade. The panel observed that the mere fact that a domestic sale is at a relatively low price does not necessarily mean that it can no longer be considered to have been made in the ordinary course of trade. Similarly, in the present case, the mere fact that an export sale is at a relatively high price does not mean that it ceases, for that reason alone, to be comparable. The panel further observed that the United States' methodology excluded lower priced domestic sales, skewing the normal value upward, thereby inflating the margin of dumping. Similarly, in the present case, the United States' methodology partially excludes higher priced export sales, skewing the export price downward, thereby inflating the margin of dumping. The Appellate Body agreed with the panel that the United States was systematically exercising discretion in a manner that was not even-handed and that was unfair, automatically resulting in the distortion and inflation of the margin of dumping, to the disadvantage of exporters.⁶⁶

(iv) *Internal Inconsistency*

103. Just as an anti-dumping proceeding concerns "a product" (the subject product), so it also concerns a margin of dumping based on a comparison of sales made during the investigation period (whatever type of anti-dumping proceeding is being conducted). Just as the *Anti-Dumping Agreement* contains no express rule governing the definition of the "subject product", so it contains no express rule governing the definition of the investigation period. The investigation period might be a shorter period or a longer period (such as a year), provided that it is a sustained period, in relation to which market fluctuations or other vagaries do not distort a proper evaluation.⁶⁷ Just like product characteristics, time is typically a parameter by reference to which markets – that is, categories of goods or services with a certain competitive relationship or degree of comparability - are defined. Just as the United States defined the "subject product", so the United States defined the investigation period in the measure at issue. Just as the European Communities does not take issue, in this case, with the definition of the subject product, so the European Communities does not take issue, in this case, with the definition of the investigation period. Just as in the case of model zeroing, having defined the investigation period, the United States was obliged to ensure that the margin of dumping

⁶⁵ A comparison that is "just, unbiased, equitable, impartial", "offering an equal chance of success", conducted "honestly, impartially" and "evenly, on a level" (*The New Shorter Oxford English Dictionary*).

⁶⁶ Panel Report, *US – Hot-Rolled Steel*, paras 7.110 to 7.112; Appellate Body Report, *US – Hot-Rolled Steel*, paras 144, 145, 148, 154 and 158.

⁶⁷ Appellate Body Report, *EC – Tube or Pipe Fittings*, para 80.

for that period was fairly calculated in conformity with Article 2.4. The United States had become bound by its own logic.⁶⁸

104. The United States having fixed the investigation period, it had effectively decided that, in principle, and due account being taken of all necessary adjustments, any transaction during the investigation period, at whatever time it was made, was potentially comparable with any other transaction during the investigation period, at whatever time it was made. In short, the reasoning of the Appellate Body in the *EC – Bed Linen* and *US – Softwood Lumber V* cases in relation to model zeroing also applies whenever an investigating authority decides to fix the parameters of its investigation, whether in relation to subject product, region, time or any other parameter. The investigating authority thereby becomes bound by its own logic, and must complete its analysis on the basis of the same logic.⁶⁹

105. The European Communities finds contextual support for the preceding analysis in Article 2.4.2, which refers to certain other parameters of the determination, including "time periods". This indicates that, having fixed the temporal parameters of its investigation, the United States had become bound by its own logic, unless the exceptional targeted dumping situation described in the second sentence of Article 2.4.2 was present (which it was not). The same is true in respect of any other parameters of the investigation fixed by the investigating authority, notably the purchasers and regions concerned, these also being matters referred to in the second sentence of Article 2.4.2. The simple zeroing method used by the United States is offensive to any one of these parameters, because it is performed at the most disaggregated level, that is, at the level of individual transactions. In other words, instead of treating all the relevant export transactions as a whole, the United States methodology is based on treating each export transaction individually in the same manner as model zeroing is based on treating each model separately.

106. Further contextual support may be found in other provisions of the *Anti-Dumping Agreement* which indicate that temporal considerations are relevant to the calculation of a margin of dumping. For example, below cost domestic sales may only be disregarded if they are made within an extended period of time. That period should normally be one year (the typical length of an investigation) but in no case less than six months. Cost allocations must be adjusted appropriately for non-recurring items of cost which benefit future production (so that such cost items are not entirely allocated to the investigation period, inflating the normal value, thus artificially generating a finding of "dumping"). Exporters must be allowed at least 60 days to have adjusted prices to reflect sustained movements in exchange rates. In the ordinary course of trade costs and prices typically vary in the very short term, even if in the medium term things average out. Dumping only occurs when a situation in which export prices are below normal value becomes the norm. Similar contextual support may be found in the *Anti-Dumping Agreement* in relation to both purchasers and regions.

107. The European Communities does not enter into a discussion of the several mooted economic rationales for the anti-dumping rules, much discussed in the literature and well known. The fact remains, however – and this much is uncontroversial – that they are all economic. Articles VI:1 and VI:2 of the *GATT 1994* repeatedly use words such as "commerce", "trade", "price", "sale", "cost" and "profit". In this respect, it is highly significant that Article VI, paragraph 1, second subparagraph and Article 2.7 of the *Anti-Dumping Agreement* disapply certain rules with respect to Members in which there is no market economy. The preamble to the *GATT 1994* refers to "trade and economic endeavour", "expanding the production and exchange of goods" and "international commerce". Similarly, the preamble to the WTO Agreement refers to "trade and economic

⁶⁸ Appellate Body Report, *EC – Bed Linen*, paras 57, 58, 60 and 62; Appellate Body Report, *US – Softwood Lumber V*, paras 93 and 99.

⁶⁹ Panel Report, *US – Stainless Steel*, paras 6.121 to 6.123.

endeavour" and "expanding the production of and trade in goods" and "international trade relations" and the objective "to develop an integrated, more viable and durable multilateral trading system".

108. The application of the discipline of economics requires a minimum of consistency. Investigating authorities cannot, from one day to the next, and in a random or capricious manner, or even within the same proceeding, chop and change the basic legal economic concepts used in the *Anti-Dumping Agreement* – such as, for example, the concept of sales not "in the ordinary course of trade" or the concept of what is an "exporter or producer" or related company, and so on. On certain matters, Members may have a certain latitude in deciding what rule they will apply. But once they have made their choice, they must apply the rule in an even-handed way.

109. Thus, it is not by chance that the *Anti-Dumping Agreement* uses the words "market" or "competition" or "compete" 28 times⁷⁰, these being the indispensable and basic building blocks of consistent economic analysis. It is particularly significant that Article 2.2 refers repeatedly to a "market of the exporting country". And it is not by chance that the basic parameters by which markets are defined: product (or physical characteristics)⁷¹, geography⁷² and time⁷³ play a central role in the *Anti-Dumping Agreement*. Nor is it chance that these are also the basic parameters essentially referred to in the second sentence of Article 2.4.2. Finally, it must come as no surprise that part of the reasoning of the Appellate Body in the model zeroing cases is essentially about consistency with respect to one of these parameters: product definition. The Appellate Body has recently confirmed that a market is "a place with a demand for a commodity or service ... a geographical area of demand for commodities or services ... the area of economic activity in which buyers and sellers come together and the *forces of supply and demand affect prices*".⁷⁴

110. Viewed in this light, it is impossible to measure international price discrimination in two different markets (the domestic market and the export market), if the fundamental methodology for defining and measuring price in each of the markets is different. Absent good reason (targeted dumping – that is, distinct markets), such an approach is actually *incapable* of measuring alleged international price discrimination. And in this sense it is unfair, because it is internally inconsistent. As Jacob Viner observed:

... sufficient justification is to be found in the usage of the most authoritative writers and in the considerations of economy and precision of terminology for confining the term dumping to *price-discrimination between national markets*. This definition, I venture to assert, will meet all reasonable requirements

... The one essential characteristic of dumping, I contend, is price-discrimination between purchasers in different national markets.⁷⁵

(v) *Unjustified discrimination*

111. Article 9.2 of the *Anti-Dumping Agreement* obliges WTO Members to collect any anti-dumping duty on a non-discriminatory basis on imports of such products from all sources found to be

⁷⁰ *Anti-Dumping Agreement*, Articles 2.2 (thrice), 2.2.1, 2.2.2(i), 2.2.2(ii), 2.2.2(iii), 2.4.1, 3.1, 3.3 (twice), 3.4, 3.5, 3.7(i), 3.7(ii) (twice), 4.1(ii) (seven times), 4.2, 4.3, 5.2(ii), 5.2(iv), footnote 2.

⁷¹ See particularly Article 2.6 of the *Anti-Dumping Agreement*.

⁷² See particularly Article 4 of the *Anti-Dumping Agreement*.

⁷³ See the repeated references to the investigation "period" in the *Anti-Dumping Agreement*.

⁷⁴ Appellate Body Report, *US – Upland Cotton*, para 404.

⁷⁵ Jacob Viner, *Dumping, A Problem in International Trade*, First Edition 1923, Reprinted 1991, Chapter I, *The Definition of Dumping*, pages 3 and 4 (original italics, footnote omitted).

dumped and causing injury. The United States' zeroing method results in imposition and collection on the basis of unfair and unjustified discrimination.

112. Indeed, in relation to the same period, some firms may be assessed and have to pay anti-dumping duties at the rate resulting from the original proceeding and the methodology used therein (model zeroing). Other firms, exporting the same product from the same country during the same period, may be assessed at a revised rate, in "administrative review" proceedings, calculated on the basis of a different methodology (simple zeroing).

113. Similarly, some firms may be subject to a measure imposed on the basis of model zeroing in the original proceeding; whilst other firms subject, for example, to a new shipper proceeding may be subject to a measure imposed on the basis of simple zeroing. In such a case, it would appear that, in the logic of the United States, a firm could be penalised simply for having begun exports to the United States after the end of the original period of investigation.

(vi) *Case-law confirming United States' simple zeroing unfair*

114. The above-mentioned conclusions are confirmed by the findings of the Appellate Body in several cases, as indicated in the First Written Submission of the European Communities.⁷⁶

(vii) *Article 2.4.2 second sentence*

115. The United States defends itself by submitting that "an interpretation of Article 2.4 that gives rise to a general prohibition of zeroing renders the second sentence of Article 2.4.2 'inutile'".⁷⁷ However, the issue which this Panel needs to examine is not whether there is a "general prohibition of zeroing" but whether the simple zeroing method applied by the United States in the administrative review proceedings concerned is consistent or not with the fair comparison requirement in Article 2.4.

116. Furthermore, the United States incorrectly assumes that what an investigating authority must necessarily do in a targeted dumping analysis is the same as the simple zeroing method discussed in this case. But this is not so. Article 2.4.2 second sentence does not specify in every detail how an investigating authority might conduct its targeted dumping analysis. For example, an investigating authority faced with a pattern of export transactions at different prices into two different regions might simply make a margin of dumping calculation for the region in which targeted dumping is occurring. In such a case, the investigating authority will simply have re-set the parameters of its investigation, consistent with the targeted dumping provisions.

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

117. The European Communities' claim with respect to Article 2.4.2 is double. First, the European Communities claims that by using the asymmetrical method of comparison of the second sentence of Article 2.4.2, the United States violates Article 2.4.2. Second, the European Communities also claims that by using simple zeroing in the measures at issue, which involves a downward adjustment of the relatively high export prices, and the making of the dumping calculation based only or preponderantly on the relatively low export transactions, the United States breaches Article 2.4.2.

118. The obligation under Article 2.4.2 to normally make price comparisons on a symmetrical basis is not coextensive with the obligation not to zero in aggregating the results of intermediate comparisons, although the different issues are related. The obligation not to zero primarily derives from the requirements in Article VI of the *GATT 1994* and in Articles 2.1 and 9.3 of the *Anti-*

⁷⁶ EC First Written Submission, paras. 171 - 175.

⁷⁷ US First Written Submission, para. 145.

Dumping Agreement that the dumping margin must be computed for the product as a whole without distortion in the aggregation of intermediate comparisons; and from the obligation in Article 2.4 of the *Anti-Dumping Agreement* to effect a fair comparison. All of these obligations apply to the determinations in the measures at issue by virtue of the rule in Article 9.3 that the amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2.

(i) *Method for comparing normal value and export price: asymmetrical method*

119. In its first written submission, the European Communities submitted that the United States violates Article 2.4.2 *inter alia* by using the asymmetrical method of comparison of the second sentence in Article 2.4.2.⁷⁸

120. It appears to the European Communities that the US First Written Submission does not contain any assertions to the effect that the United States did not use the average-to-transaction method or that the conditions required by Article 2.4.2 were fulfilled or that the required explanation was provided. Therefore, the European Communities concludes that, apart from the alleged restricted meaning of the word "investigation" in Article 2.4.2, the United States does not contest the claims and arguments of the European Communities on that point.

(ii) *The word "investigation" in Article 2.4.2 of the Anti-Dumping Agreement*

121. In its First Written Submission, the United States repeatedly refers to what it asserts is the limited application of Article 2.4.2, based on the allegedly limiting meaning of the Phrase "the existence of margins of dumping during the investigation phase". That limited meaning, according to the United States, is an "original investigation" or an "investigation to determine the existence, degree and effect of any alleged dumping" under the terms of Article 5.1 of the *Anti-Dumping Agreement*. According to the United States, there is no prohibition against zeroing that would apply in the context of assessment proceedings since Article 2.4.2, by its very terms, is limited to the "investigation phase" considered by the United States to mean "original proceeding". The United States even goes so far as to assert that the text leaves no doubt that the Members did not intend to extend these obligations to any phase beyond the investigation phase" (emphasis added).⁷⁹

122. It is incumbent on the United States to establish that the word "investigation" in Article 2.4.2 does have the limited or defined or special meaning that the United States asserts it to have. However, the United States merely repeats this assertion without explaining the reasons for such assertion.⁸⁰ In particular, it never refers to the Vienna Convention on the Law of Treaties (the "Vienna Convention") and to its rules.

(iii) *Applicable rules of Treaty interpretation*

123. Pursuant to Article 3.2 of the DSU, any legal analysis must be conducted in accordance with the customary rules of interpretation of public international law. Various panels and the Appellate Body have confirmed this requirement as allowing resort to be made to the Vienna Convention.

124. It is striking when reading the United States' First Written Submission that there is no reference at all to the Vienna Convention. Actually, in its First Written Submission, the United States submits that Article 2.4.2 would not be applicable to assessment proceedings since Article 2.4.2 limits

⁷⁸ EC First Written Submission, paras 209 - 226.

⁷⁹ US First Written Submission, para. 102.

⁸⁰ See for instance at para. 102 the statement that "the limited applicability of Article 2.4.2 could not be plainer".

its application to the "investigation phase" and that "to require the application of Article 2.4.2 to Article 9 assessment proceedings would read out the AD Agreement Article 2.4.2's express limitation to investigations". According to the United States, such a result would be inconsistent with the principle of effectiveness, under which all the terms of an agreement should be given a meaning.⁸¹

125. However, the systematic application of the Treaty interpretation rules as included in the Vienna Convention leads to the very clear conclusion that Article 2.4.2 applies to administrative review investigations covered by Article 9.3 and that the asymmetrical comparison method using zeroing applied by the United States in its administrative reviews is inconsistent with Article 2.4.2.

126. Article 31 of the Vienna Convention entitled "General rule of interpretation" provides that:

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

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one of more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;

3. There shall be taken into account, together with the context

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

127. Article 32 of the Vienna Convention entitled "Supplementary means of interpretation" further provides that:

"Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

⁸¹ US First Written Submission, para. 99.

128. In accordance with the above-mentioned rules, the European Communities will analyse below in details the relevant Phrase in the first sentence of Article 2.4.2 (i.e. "the existence of margins of dumping during the investigation phase"), including (i) the ordinary meaning of the Phrase (ii) the context of the Phrase and (iii) in the light of the object and purpose.

(iv) *Ordinary meaning of the Phrase*

◆ Investigation

129. The United States considers the word "investigation" in Article 2.4.2 first sentence as being determinative of the issue as to whether Article 2.4.2 applies only to original proceedings or also to other types of proceedings. However, the United States refrains from analyzing the ordinary meaning of that word. According to the United States, the term "investigation" as used in Article 2.4.2 has the same specific meaning as in Article 5, namely "an investigation to determine the existence, degree and effect of any alleged dumping".⁸² The United States submits that "panels have consistently found that the references to "investigations" in Article 5 only refer to the original investigation and not to subsequent phases of an anti-dumping proceeding".⁸³ It is not disputed that "investigations" in Article 5 only refer to original investigations since these are "investigations to determine the existence, degree and effect of any alleged dumping". However, there is no such limitation to the word "investigation" in Article 2.4.2. Therefore, why would "investigations" in Article 2.4.2 equate to an "investigation to determine the existence, degree and effect of any alleged dumping" as this term is used in Article 5, while it is clear that this word does not have a particular meaning in all provisions of the Agreement?

130. In its First Written Submission, the European Communities highlights the fact that dictionary meanings strongly support the view that the ordinary meaning of the word "investigation" indicates a systematic examination or inquiry or careful study of or research into a particular subject.⁸⁴

131. Indeed, the New Shorter Oxford English Dictionary gives the following meaning for the word "investigation": "the action or process of investigating; systematic examination; careful research ... An instance of this; a systematic inquiry; a careful study of a particular subject". This is not a rare or specific meaning but a common and even universal meaning.

132. The United States does not dispute this definition but argues that "the Panel in *US – Zeroing (EC)* squarely rejected that the decisive element regarding the interpretation of the scope of Article 2.4.2 is the word "investigation" which has not been defined in the AD Agreement and which must therefore be interpreted strictly by reference to a dictionary definition".⁸⁵

133. The European Communities does not argue that the dictionary meaning is the decisive criterion, but that it is a relevant element that must be included in the analysis.⁸⁶ In other words, in considering the ordinary meaning, it is appropriate to have regard to the meanings provided by dictionaries as a part of the analysis. In that respect, it is interesting to note that no dictionary indicates that the word "investigation" has the special meaning argued for by the United States.

⁸² US First Written Submission, para. 101.

⁸³ US First Written Submission, para. 101.

⁸⁴ EC First Written Submission, para. 213.

⁸⁵ US First Written Submission, para. 107.

⁸⁶ The Appellate Body has observed that dictionaries are a "useful starting point" for the analysis of "ordinary meaning" of a treaty term even if they are not necessarily dispositive. See Appellate Body Report, *EC – Chicken Cuts*, para.175. See also Appellate Body Report, *US – Softwood Lumber IV*, para. 59; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248; and Appellate Body Report, *US – Gambling*, para. 166.

134. Additional evidence supports the European Communities' interpretation of the word "investigation".

135. First, numerous panels and Appellate Body reports refer to "original investigations".⁸⁷ If, by definition, all investigations were "original", it would not be necessary to specify that the investigations are "original". It is thus clear that the term "original investigations" has been used to limit the meaning of the word investigations. In all these cases, the use of the word "original" is used as a shorthand way of referring to the words "to determine the existence, degree and effect of any alleged dumping" as referred to in Article 5.1.

136. Second, there are panel reports which have used the word "investigation" to describe "sunset review investigations". For instance, in *US – Countervailing Duties on certain EC Products*, the Panel stated: "We consider that in a sunset review investigation the importing Member is obliged..."⁸⁸

137. Third, in *US – DRAMs*, the Panel expressly noted that:

The DOC initiated the first annual review of DRAMs from Korea on 15 June 1994 and investigated whether the Korean companies made sales of DRAMs less than normal values, (i.e. dumped) during the period of review.⁸⁹

138. Fourth, there are numerous examples in US practice in which the word "investigation" is used in the context of review investigations.

139. Referring to the web site of the United States International Trade Commission, the European Communities notes that that investigating authority clearly does believe itself to be involved in the conduct of "investigations" – giving that word its ordinary meaning – since it refers expressly and repeatedly, for example, to "changed circumstances review investigations" and "Five-Year Review (Sunset) Investigations".

140. In addition, the Rules of Practice and Procedure of the International Trade Commission⁹⁰ contain the following provision:

Investigation to review outstanding determination

(a) Request for review. Any person may file with the Commission a request for the institution of a review investigation under Section 751(b) of the Act. The person making the request shall also promptly serve copies on the request on the parties to the original investigation upon which the review is to be based. All request shall set forth a description of changed circumstances sufficient to warrant the institution of a review investigation by the Commission. (emphasis added)

141. A review under Section 751(b) of the Tariff Act is a changed circumstances review, as provided for in Article 11.2 of the *Anti-Dumping Agreement*.

142. As a matter of fact, this language is also to be found in specific determinations adopted by the ITC relating to individual cases – the European Communities does not wish to burden the Panel with these documents, but can provide examples on request.

⁸⁷ For example, Appellate Body Report *US – OCTG Sunset Reviews* (54 instances).

⁸⁸ *US – Countervailing Duties on certain EC Products*, footnote 295 para.7.114.

⁸⁹ Panel Report, *US – DRAMs*, paras 2.3 – 2.4.

⁹⁰ 63 FR 30599.

143. Finally, it is also consistent with the way in which the *Anti-Dumping Agreement* has been implemented by the European Communities.⁹¹

144. In the light of the foregoing, and recalling that the burden of proof and persuasion that the word "investigation" has the special meaning advocated by the United States falls on or has been shifted to the United States, the correct conclusion is that the ordinary meaning of the word investigation in Article 2.4.2 is that advanced by the European Communities.

◆ Existence

145. The United States has previously sought to rely on the term "existence", arguing that this refers only to a question addressed during an original investigation, and that it appears only in Article 5.1 of the *Anti-Dumping Agreement*. The United States is mistaken. The term "existence" also appears in the title to Article 2 of the *Anti-Dumping Agreement* (in the French and Spanish language versions). Furthermore, also during an assessment proceeding an investigating authority is concerned not only with the amount but also with the existence of dumping: if the amount of dumping is found to be zero, then dumping does not exist. In this respect, and for these purposes, it is not possible to dissociate the concept of "dumping" and the concept of "margin of dumping", as the Appellate Body confirmed in *US – Zeroing (Japan)*. In other words, by definition, it is not possible to state whether or not an exporter is dumping without actually making a precise calculation in that respect of the supposed amount or margin of dumping.

146. Furthermore, in making such an argument, the United States actually confirms another point that the European Communities has consistently made: the grammatical structure of the Phrase compels the conclusion that the term "during ... phase" refers to a distinct period of time in which dumping margins exist, that is, an investigation period; and not, as the United States would have it, the time period referred to in Article 5.10 of the *Anti-Dumping Agreement*. In other words, the grammatical structure of the Phrase precludes the US interpretation, and confirms that it is not permissible. The United States has consistently demonstrated itself unable or unwilling to be responsive to this point.

◆ "during... phase"

147. The *New Shorter Oxford English Dictionary* provides that the meanings of the term "during" include "through the duration of; in the course of; in the time of". It further provides that the meanings of the term "phase" include "a distinct period or stage in a process of change or development; any one aspect of a thing of varying aspects". The European Communities considers that the ordinary meaning of the term "during ... phase" considered as a whole has a temporal aspect to it and coincides with a distinct period. The terms "during ... phase" indicate a determinate temporal stage in the passage of time. However, nothing indicates that the "distinct period" referred to is the period of time in which the "margins of dumping" must be established, as the United States would have it, as opposed to the period of time in which the "margins of dumping" must have existed.

148. The United States is wrong to assume that the terms "during ... period" and "during ... phase" cannot be equated. In other words, there is no rule of interpretation of public international law that

⁹¹ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, *Official Journal of the European Communities*, L 56, 6.3.1996, p.1, as amended, Article 2.11 ("existence of margins of dumping during the investigation period") and 11.2, third sub-para, 11.3, third sub-para, 11.5, third sub-para, 11.9 and 11.10 (references to new shipper, changed circumstances, sunset, and refund investigations).

rigidly and *mechanistically*⁹² precludes synonyms. The Appellate Body has held that the terms "contingent", "conditional", "tied to" and "tie" are synonymous in the context of Articles 3.1(a) and footnote 4 of the *SCM Agreement*.⁹³ Similarly, the Appellate Body has held that the terms "nature of competition" and "quality of competition" may be considered synonymous⁹⁴; as may the terms "like" and "similar"⁹⁵; and the terms "jural society", "state" and "organized political community".⁹⁶ The Appellate Body has also effectively agreed with the United States that the term "except" in Article 2.4 of the *Agreement on Textiles and Clothing* is synonymous with the terms "only", "provided that" and "unless".⁹⁷ Remarkably, the United States itself elsewhere considers that the terms "investigation" and "investigation to determine the existence, degree and effect of any alleged dumping" are also synonymous.⁹⁸ The conclusion that the meaning of the terms "during ... period" and "during ... phase" coincide is a far more reasonable and balanced conclusion, consistent with all other considerations of context and object and purpose; than the conclusion that all the Members intended the terms "investigation" and "investigation to determine the existence, degree and effect of any alleged dumping" to be synonymous.

149. Furthermore, the fact that the word "phase" is only used in Article 2.4.2, i.e. is unique, is not significant. Indeed, the Vienna Convention does not indicate that "uniqueness" in itself is a basic principle of treaty interpretation.⁹⁹

150. In addition, the United States' interpretation implies that because of the word "phase" in Article 2.4.2, each of the five types of anti-dumping proceeding, that is, Article 5 (original), 9.5 (new shipper), 11.2 (changed circumstances), 11.3 (sunset) and 9.3 (assessment), are to be re-labelled "phases". Such a proposition flatly contradicts the text of the *Anti-Dumping Agreement* which refers to five types of anti-dumping "proceedings" and not "phases". Thus, the word "proceedings" is used, for example, in Article 5.9 to include original proceedings. Article 9.5 refers to "duty assessment ... proceedings". Article 9.5 also refers to "review proceedings", meaning changed circumstances or sunset proceedings. Finally, footnote 20 refers to "judicial review proceedings". The *Anti-Dumping Agreement* therefore does not refer to five "phases", but rather five types of "proceeding".

◆ The Phrase as a whole – Grammatical meaning

151. It is now necessary to consider whether or not combining terms in the Phrase or considering the Phrase as a whole, changes the conclusion concerning the ordinary meaning(s).

152. First, the European Communities considers that the ordinary grammatical meaning of the Phrase as a whole is that the term "during the investigation phase" refers to the term "existence" and not to the term "established". Thus, the Phrase refers to a distinct period in which margins of dumping exist, i.e. an investigation period.

⁹² Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 93 and 178; Appellate Body Report, *US – OCTG Sunset Reviews*, paras 208, 213 and 214.

⁹³ Appellate Body Report, *Canada – Autos*, para 107.

⁹⁴ Appellate Body Report, *Korea – Alcoholic Beverages*, paras 133 to 134.

⁹⁵ Appellate Body Report, *EC – Asbestos*, para 91.

⁹⁶ Appellate Body Report, *Canada – Dairy*, para 97 and footnote 73. See also Panel Report, *EC – Hormones (United States)*, para 8.60: "good veterinary practice" synonymous with "good animal husbandry practice" synonymous with "Good Practice in the Use of Veterinary Drugs".

⁹⁷ Appellate Body Report, *US – Wool Shirts and Blouses*, page 9, second para; and page 16, final para.

⁹⁸ US First Written Submission, paras 101 - 102.

⁹⁹ Panel Report, *EC – Chicken Cuts*, para. 7.172; Appellate Body Report, *EC – Chicken Cuts*, para. 218 (rejecting argument about the significance of the uniqueness of a treaty term).

153. The grammatical units of English are: word, phrase, clause and sentence. In English grammar, there are nine word classes: verb; noun; adjective; adverb; preposition; determiner; pronoun; conjunction; and interjection. There are five kinds of phrase: verb phrase; noun phrase; adjective phrase; adverb phrase and prepositional phrase. These are the elements of an English sentence or clause: subject; verb; object; complement; adverbial. The subject precedes the verb. The relevant clause contains one verb phrase, "shall ... be established", in the passive: the verb "be" and the passive participle "established", it being understood that it is the investigating authority that will do the "establishing". The use of the modal auxiliary verb "shall" and the future tense of the verb "be" indicates a formal or binding rule, of prospective application.¹⁰⁰

154. The word "during" is a preposition of time. The term "during the investigation phase" is a temporal modifier of the term "the existence of margins of dumping". The indivisible subject of the clause is the entire Phrase "the existence of margins of dumping during the investigation phase".

155. Thus, applying basic rules of English grammar, the term "during the investigation phase" cannot be construed as a modifier either of the object of the clause, which is, by implication, the investigating authorities; or of the verb phrase ("shall ... be established"). It can only be construed as a temporal modifier of the term "the existence of margins of dumping"; and as an integral part of the subject of the clause. In this respect, the rules of English grammar are clear; and there is no basis for reaching any other conclusion. Any other conclusion would directly and manifestly contradict the basic rules of English grammar.

156. In order for the term "during the investigation phase" to modify the verb, the clause would have to be drafted differently, for example:

"during the investigation phase, the existence of margins of dumping shall normally be established on the basis of ..."; or

"the existence of margins of dumping shall normally be established, during the investigation phase, on the basis of ..."; or

"the existence of margins of dumping shall, during the investigation phase, normally be established on the basis of ...".

157. The Members had these and many other alternatives open to them – all of which they rejected, opting instead for the specific grammatical structure of the text as it now stands.

158. The word "normally" is an adverb that modifies the verb phrase "shall ... be established". It shows that the Members were perfectly aware of the possibility of modifying the verb phrase with an adverbial; and that they chose to do that with the word "normally", but not with the term "during the investigation phase".

159. The same conclusion results from a consideration of the grammatical structure of the French and Spanish texts of the *Anti-Dumping Agreement*.¹⁰¹

160. This is confirmed by the preparatory work. In each of the New Zealand I, II and III texts the phrase "during the investigation phase" appears at the end of the first sentence, in such a way that it could refer to "when establishing" or to "the existence of dumping margins". In the final Dunkel Draft text the Members decided to eliminate this ambiguity, moving the phrase "during the

¹⁰⁰ *Oxford Guide to English Grammar*, John Eastwood, Oxford University Press (1994), pages 1, 2, 3, 4, 7, 96, 97, 130 and 135.

¹⁰¹ Vienna Convention, Article 33(3).

investigation phase" to a new position in the grammatical structure of the first sentence, so that it unambiguously refers to "the existence of margins of dumping" and does not refer to "shall ... be established". This change in the final Dunkel Draft text marks a significant difference. This *carefully negotiated* language, which reflects an equally carefully drawn balance of rights and obligations of Members, must be respected.¹⁰² It is not now possible to reverse and eliminate the meaning achieved through negotiation, and counterbalanced by other concessions and to re-instate precisely the structure discarded by the Members during the negotiations.

161. Furthermore, the European Communities considers the term "existence of *margins* of dumping". The word "margin" in the term "margins of dumping", as opposed to the word "dumping" on its own, confirms that Article 2.4.2 is concerned with a precise numerical determination, by contrast, for example, with Article 11.3, which is concerned with a prospective determination of "dumping". Thus, the term "margin" does not refer to a "binary" yes or no answer to the hypothetical question: does *dumping* "exist". This confirms the position of the European Communities.

162. Finally, the European Communities considers the significance of reading the special term "margins of dumping" together with the general term "during ... phase". Any interpretation of the general term "during ... phase" must take into account the special meaning of the term "margins of dumping" which precedes it, the two terms being inseparable parts of the subject of the relevant clause. This further supports the view that the Phrase cannot be interpreted in the manner advocated by the United States.

163. Having carefully considered the ordinary meanings of the terms in the Phrase, the European Communities fails to see how combining these terms in itself leads to an ordinary meaning of the Phrase as a whole that supports the United States defence.

164. The above thus clearly demonstrates that the ordinary meaning of the word "investigation" as flowing not only from dictionaries but also by the practice of the United States and as supported by numerous references of panel and Appellate Body reports refers to the general notion of "systematic analysis" as advanced by the European Communities. The correct conclusion is that the word "investigation" in Article 2.4.2, and the Phrase as a whole, has the meaning advocated by the European Communities.

(v) *Context of the Phrase*

165. In accordance with the principles of treaty interpretation, the context is an important tool for the purposes of interpretation. Not all context carries equal weight. Some context may be more persuasive than other context. The weight to be given to a particular contextual argument must be considered on a case-by-case basis. The European Communities will consider first the immediate context, moving progressively to more remote context. Thus, the European Communities begins with provisions to which the Phrase expressly and directly refers; then the provisions of Article 2 of which the Phrase is a part; then other provisions of the *Anti-Dumping Agreement* that cross-refer the Phrase; then other specific provisions of the *Anti-Dumping Agreement* in the order in which they appear in the *Anti-Dumping Agreement*; finally contextual arguments derived from the *Anti-Dumping Agreement* as a whole.

¹⁰² Appellate Body Report, *US – Wool Shirts and Blouses*, page 16, penultimate para; Appellate Body Report, *US – Underwear*, page 15.

◆ Article VI:2 of the GATT

166. The Phrase contains one direct link to other treaty terms: the term "margins of dumping" has a special defined meaning, as provided for in Article VI:2 of the *GATT 1994*.¹⁰³ There are only a handful of defined terms in Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*¹⁰⁴, and they have a significance that goes beyond a mere cross-reference.¹⁰⁵ Furthermore, the *Anti-Dumping Agreement* implements the *GATT 1994*¹⁰⁶; and Article 2 of the *Anti-Dumping Agreement* implements the defined term "margin of dumping".

167. Article VI:1 of the *GATT 1994* defines the word "dumping"; whilst Article VI:2 of the *GATT 1994* defines the term "margin of dumping".¹⁰⁷ Thus, whenever the *Anti-Dumping Agreement* uses the word "dumping" (such as, for example, in Article 11.3), that word has the special meaning given to the defined term "dumping"; and whenever the *Anti-Dumping Agreement* uses the term "margin of dumping" (such as, for example, in Article 2.4.2) that phrase has the special meaning given to the defined term "margin of dumping". It results from the text of Article 2.1 of the *Anti-Dumping Agreement* ("a product is to be considered as being dumped ...") that Article 2.1 implements the definition of "dumping". Similarly, it results from the text of Article 2.2 ("the margin of dumping shall be determined ...") and the text of Article 2.4 ("margins of dumping") that Articles 2.1 to 2.4 also implement the definition of "margin of dumping". There are no other provisions of the *Anti-Dumping Agreement* that concern themselves with how to calculate a margin of dumping.

168. In these circumstances, the European Communities fails to see how the United States may be permitted to see the defined term "margin of dumping" in Article VI:2 of the *GATT 1994* in one way for one anti-dumping proceeding (all of the provisions of Article 2 in the case of an original proceeding), and in other ways for other anti-dumping proceedings (only some of the provisions of Article 2). That would mean that the defined term "margin of dumping" in Article VI:2 of the *GATT 1994* would have multiple meanings: one meaning for original proceedings; and different meanings for each of the other four types of anti-dumping proceeding. This would be fundamentally inconsistent with the basic concept of a definition. The purpose of defining a term is to give it one meaning; subsequently to refer to that meaning by referring to the defined term; and to achieve a particularly high degree of consistency. The *implementation* of a definition cannot result in its negation, and certainly not merely on the basis of an interpretation that is grammatically incorrect; ignores the ordinary meaning; relies on remote context; and relies on object and purpose arguments that lead to a result that is manifestly absurd or unreasonable.

169. There is no textual basis for such a proposition in Article VI of the *GATT 1994*. On the contrary, those provisions set out definitions of "dumping" and "margin of dumping" of general application in all anti-dumping proceedings. This is further confirmed by the reference in Article VI:2 of the *GATT 1994* to "levy", a term defined in the *Anti-Dumping Agreement* as referring to final assessment or collection of a duty, including those made under Article 9.¹⁰⁸ This further confirms that the concept of "margins of dumping" applies to all anti-dumping proceedings, whenever investigating authorities calculate or rely on margins of dumping; or levy an anti-dumping duty.

¹⁰³ Article VI:2 of the *GATT 1994*, second sentence: "For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1".

¹⁰⁴ Dumping, margin of dumping, injury, domestic industry, like product, interested parties, authorities, initiated, levy (Articles VI:1 and VI:2 of the *GATT 1994*; Articles 2.6, 4.1, 6.11 and footnotes 1, 3, 9 and 12 of the *ADA*).

¹⁰⁵ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para 126.

¹⁰⁶ The title of the *ADA* is: "Agreement on *Implementation* of Article VI of the General Agreement on Tariffs and Trade 1994".

¹⁰⁷ Appellate Body Report, *US – Softwood Lumber V*, paras 91 to 96.

¹⁰⁸ *ADA*, footnote 12: "As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax".

Since any interpretation of the general term "during ... phase" must take into account the special meaning of the term "margins of dumping" which precedes it, the two terms being inseparable parts of the subject of the relevant clause, this further supports the view that the Phrase cannot be interpreted in the manner advocated by the US.

170. In conclusion, the use of the term "margins of dumping" in the Phrase, together with the defined term "margin of dumping" in Article VI:2 of the *GATT 1994*, as implemented in Article 2 of the *Anti-Dumping Agreement* and used in other provisions of the *Anti-Dumping Agreements*, supports the European Communities' claim; and must be given weight commensurate with the express and direct link between the Phrase and the definition.

◆ Article 2

171. The European Communities considers that the context of Article 2 supports its position.

172. The first sentence of Article 2.4.2 continues, after the Phrase, with the words "shall normally be established ...". The use of the word "normally" suggests that these obligations and methodologies apply in most situations. That is at odds with the view expressed by the United States that the comparison rules only apply in one situation: an original proceeding; and do not apply to the investigation of or reliance on margins of dumping in any of the other four types of anti-dumping proceeding. That is, according to the United States, these obligations would only apply in 1 out of 5 types of proceeding. This ratio increases when it is taken into account that one original proceeding will typically spawn several other types of proceeding, particularly "administrative review" proceedings, so that the final ratio is likely to be 1 in 10 or more. This would make the rules in Article 2.4.2, first sentence, at best, the *exception* as opposed to the norm, and this is inconsistent with the use of the word "normally". In the structure of Article 2.4.2, the *exception* is contained in the second sentence. The European Communities therefore submits that the context of this part of the first sentence of Article 2.4.2 does not support the US defence.

173. Article 2.4.2 begins: "[s]ubject to the provisions governing fair comparison in paragraph 4". This includes the third to fifth sentences of Article 2.4. The fourth sentence of Article 2.4 contains a further reference to Article 2.3, which concerns constructed export price. There is nothing in these provisions to support the view that they apply only in one type of proceeding under the *Anti-Dumping Agreement*. On the contrary, the drafting of the provisions supports the view that they apply whenever an authority investigates or relies on a "margin of dumping". We conclude that the context of this part of the first sentence of Article 2.4.2 does not support the US defence. Precisely the same is true of the second sentence of Article 2.4.2; as well as the other provisions of Article 2.4; and the provisions of Article 2 as a whole, which implements the definitions of "dumping" and "margin of dumping" in Article VI of the *GATT 1994*. In particular, Article 2.2 contains rules according to which "the margin of dumping shall be determined" and refers eight times to the word "investigation". In relation to each of these specific provisions US municipal anti-dumping law implements the *Anti-Dumping Agreement* not just for original proceedings, but for all types of proceedings under the *Anti-Dumping Agreement* in which margins of dumping are investigated or relied on. The SAA expressly states that this is "required or appropriate". The United States admits that these obligations apply to all types of proceedings, and not just to original proceedings. Furthermore, the words "in the course of the investigation" in Article 2.2.1.1 and "during the investigation" in footnote 6 refer to the period of time in which the investigation is to be conducted; yet the United States admits that these obligations apply to all types of proceedings under the *Anti-Dumping Agreement*. Finally, the title of

Article 2, in the French and Spanish texts, demonstrates that the whole of Article 2 is concerned with the "existence" of dumping.¹⁰⁹

174. In the light of the foregoing, the European Communities concludes that the context of Article 2 confirms the ordinary meaning of the word "investigation" in the Phrase as referring to all types of proceeding under the *Anti-Dumping Agreement* in which margins of dumping are investigated or relied on, and does not support the US defence.

◆ Article 9.3

175. The European Communities submits that its interpretation of Article 2.4.2 is further supported by Article 9.3 of the *Anti-Dumping Agreement*.

176. According to Article 9.3: "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The reference to "Article 2" must be taken to be a reference to the whole of Article 2. The cross-references in the *Anti-Dumping Agreement* make express provision when they refer only to certain paragraphs or sub-paragraphs of an article, particularly when the cross-reference is between different articles¹¹⁰, or when they are restricted in some way¹¹¹, or when the provision to which reference is made is to be modified when applied in certain circumstances.¹¹² There is no such express provision in Article 9.3. Article 9.3 does not provide, for example, that the amount of the anti-dumping duty is not to exceed the margin of dumping as provided under Article 2, with the exception of Article 2.4.2; or as provided in Article 2, with the exception of the rules for comparing duly adjusted normal value and export price; or *mutatis mutandis*. This confirms that, in the context of Article 9.3, a "margin of dumping" is to be established by reference to the whole of Article 2, consistent with the use of the defined term "margin of dumping".¹¹³

177. If the cross-reference in Article 9.3 to Article 2 was intended to mean all of the provisions of Article 2, except Article 2.4.2, then the text of the *Anti-Dumping Agreement* would have said that, as in other instances. If this would mean *mutatis mutandis*, then the text of the *Anti-Dumping Agreement* would say that, as in other instances. The text of Article 2.4.2 does not contain such limitation. To get to that result, the following steps must be taken: break the grammatical structure of the Phrase; ignore the changes in the final Dunkel Draft; ignore the defined term "margin of dumping"; ignore the coinciding ordinary meaning of "during ... period" and "during ... phase"; transpose the Phrase into the second sentence of Article 2.4.2; deduce from the word "phase" that the *Anti-Dumping Agreement* refers to anti-dumping "phases" when it in fact refers to anti-dumping proceedings; read the 11 words "to determine the existence, degree and effect of any alleged dumping" into the Phrase;

¹⁰⁹ "*Determination de l'existence d'un dumping*"; "*Determinacion de la existencia de dumping*"; Vienna Convention, Article 33(3): "The terms of the treaty are presumed to have the same meaning in each authentic text".

¹¹⁰ For example: Article 11 (footnote 21) cross-refers to "paragraph 3 of Article 9"; Article 11 (footnote 22) cross-refers to "subparagraph 3.1 of Article 9"; Article 9.3.3 cross-refers to "paragraph 3 of Article 2"; Article 9.4 cross-refers to "paragraph 10 of Article 6", "paragraph 8 of Article 6" and "subparagraph 10.2 of Article 6"; Article 4.4 cross-refers to "paragraph 6 of Article 3"; Article 10.1 cross-refers to "paragraph 1 of Article 7" and "paragraph 1 of Article 9".

¹¹¹ For example: Article 11.4 cross-refers to "The provisions of Article 6 regarding evidence and procedure ..."; Article 7.5 cross-refers to "The relevant provisions of Article 9 ...".

¹¹² For example: Article 11.5 cross-refers to Article 8 "*mutatis mutandis*"; Article 12.3 cross-refers to Articles 11 and 10 "*mutatis mutandis*".

¹¹³ Appellate Body Report, *US – Softwood Lumber V*, paras 93 ("... which includes, of course, Article 2.4.2. ...") and 99 ("... Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*, an anti-dumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole ...").

conclude, *a contrario*, that the obligation does not apply outside an original proceeding; rely on an alleged object and purpose that is manifestly absurd or unreasonable; ignore the absence of any such intent on the part of the Members; and ignore the preparatory work.

◆ Article 5

178. The European Communities next considers Article 5 of the *Anti-Dumping Agreement*, this being the provision to which the United States first refers in its defence. According to the United States, Article 5 limits its application to "the investigation phase of an anti-dumping proceeding".¹¹⁴ However, Article 5 does not refer to the "investigation phase". It refers to investigation to "determine the existence, degree and effect of any alleged dumping".

179. As underlined above, the European Communities agrees that the provisions of Article 5 are limited to original proceedings, precisely because of the limiting words "to determine the existence, degree and effect of any alleged dumping" that appear in Article 5.1, to which the other provisions of Article 5 refer.

180. The parties agree that Article 5.1 refers to "an investigation to determine the existence, degree and effect of any alleged dumping"; that through a series of cross-references the other provisions of Article 5 that refer to investigations equally refer to "an investigation to determine the existence, degree and effect of any alleged dumping"; that Article 5 does not contain a definition of the word "investigation" for the purposes of the *Anti-Dumping Agreement*; and that there are no cross-references between Articles 2 and 5.

181. Titles do not themselves generally contain or create rights or obligations. The title of Article 5 does not define its subject matter. The purpose of a title is to quickly convey to a reader the essential content of an article, part or annex. The *Anti-Dumping Agreement* and the *GATT 1994* contain several definitions, but no definition of the term "investigation". The Members were aware of definitions, discussing them at length during the preparatory work, and used them when they sought a particularly high degree of consistency. The Members chose, however, not to define the term "investigation" (or for that matter, the terms "proceeding" and "review"), and those choices must be respected. In these circumstances, it would be an error to interpret the *Anti-Dumping Agreement*, under the guise of context or otherwise, as if Article 5 contains a definition of "investigation", when manifestly it does not.

182. The European Communities does not agree that it is natural to read into Article 2.4.2 the 11 words "to determine the existence, degree and effect of any alleged dumping", an exercise that would significantly contribute to completely changing the ordinary meaning of the Phrase. Nor does it consider that it is natural to interpret Article 2 by reference to provisions that the reader has not yet even reached (Article 5), and absent any definition or cross-reference. Nor does it consider that it is natural to read the Phrase in a manner that is grammatically erroneous. Nor does it consider that it is natural to assume that all the Members intended such a result, given that they chose not to use the various simple means at their disposal to achieve it (different drafting, definitions, cross-references), and when the evidence overwhelmingly supports the view that the Members intended no such thing.

183. On the contrary, the European Communities considers that it is natural to read Article 2 as containing the consistent *methodologies* for determining "dumping" and "margins of dumping". The Phrase must be read in the only manner that is grammatically correct. Therefore, the term "during ... phase" must be interpreted as synonymous with "during ... period", given that the ordinary meanings coincide. Furthermore, given the repeated references to the investigation period in Article 2,

¹¹⁴ US First Written Submission, para. 101.

especially taken together with the grammatical link, and given the inherent logic of and even necessity for such a rule, the Phrase must be read as referring to the investigation period. Finally, the European Communities considers that it is most natural to give the word "investigation" its ordinary meaning; and most natural to read the words "to determine the existence, degree and effect of any alleged dumping" in Article 5.1 not as redundant, but rather as delimiting the scope of the particular type of investigation with which Article 5 is concerned.

◆ Article 6

184. Consistent with the progressive analysis of the context, the European Communities turns to the next provision of the *Anti-Dumping Agreement*: Article 6. The European Communities argues that the application of the word "investigation" in Article 6 to changed circumstances and sunset proceedings is context supporting its claim.

185. Article 6 of the *Anti-Dumping Agreement* apply to "reviews" within the meaning of Article 11 of the *Anti-Dumping Agreement* because of the express cross-reference from Article 11.4 to Article 6. The European Communities notes that Article 11.4, cross-referring to the provisions of Article 6 regarding evidence and procedure, does not contain the words "*mutatis mutandis*", such as are used in Articles 11.5 and 12.3. Consequently, absent any further express cross-reference, the relevant provisions of Article 6 apply, without any modification, to changed circumstances and sunset proceedings. The European Communities notes that the relevant provisions of Article 6 refer repeatedly to an "investigation". Consequently, a plain reading of the text supports the view that an investigating authority engaged in the conduct of a changed circumstances or sunset proceeding is engaged in an "investigation" within the meaning of these provisions. The European Communities further notes that this is consistent with US municipal anti-dumping law, which refers expressly to "changed circumstances review investigations" and "sunset review investigations".¹¹⁵ In conclusion, the meaning of the word "investigation" in these provisions is not limited to "an investigation to determine the existence, degree and effect of any alleged dumping". This supports the view of the European Communities that the meaning of the word "investigation" in the Phrase is also not limited to the type of investigation conducted in original proceedings.

186. The method by which it is confirmed that the relevant provisions of Article 6 apply to changed circumstances and sunset proceedings does not have any bearing on this analysis. To reason that "but for" the cross-reference in Article 11.4 the relevant provisions of Article 6 would be limited to investigations in *original* proceedings is to pre-judge the very question into which we are supposed to be enquiring, because such reasoning is based on the (erroneous) premise that the word "investigation" has the special meaning *original* investigation throughout the *Anti-Dumping Agreement*.

187. Furthermore, the European Communities notes that in a US administrative review the investigating authority makes two determinations: it not only establishes final liability for payment on a retrospective basis; but at the same time it reviews and changes (that is, varies) the "cash deposit rate", that is, the anti-dumping duty rate at which the measure will be prospectively applied until the next administrative review. The European Communities considers that this second determination varying the duty rate is *also* subject to the obligations set out in Article 11.2, which refers expressly to a proceeding in which the duty is "varied" in this way. This is confirmed by footnote 21, which states that the determination of final liability for payment *itself* is not a review, indicating that any variation of the duty is; and by footnote 22, which again confirms the distinction between final assessment proceedings and changed circumstances proceedings. The European Communities does not express a view on whether or not the United States is *required*, when conducting a final assessment proceeding, to also review the duty rate. The European Communities considers only that if an investigating

¹¹⁵ See Section III.B.2(c)(iv)(a).

authority chooses to rely on or calculate a varied duty rate, it must do so in accordance with the provisions of Article 11.2. The European Communities sees no other provisions of the *Anti-Dumping Agreement* that deal directly with the variation of the duty rate.

188. Accordingly, the European Communities concludes that the provisions of Article 6 also apply, without modification, to the variation of the duty rate. It thus further concludes that the variation of the duty rate also involves an "investigation" within the meaning of Article 6. It notes that the calculation of an exporter's margin of dumping for the purposes of a variation of the rate of duty, and the calculation of an exporter's margin of dumping for the purpose of retrospective assessment of final liability for payment, are based on identical facts and investigative activity, and are in these respects inseparable. The European Communities does not see how the United States may be permitted to see these identical and inseparable facts and activities in one way for one purpose (there is an investigation for the purposes of varying the rate of duty) and in another way for another purpose (there is no investigation for the purposes of calculating final liability).

189. In conclusion, Article 6 of the *Anti-Dumping Agreement* supports the claims of the European Communities.

◆ Article 18

190. According to the United States, "Article 18.3 of the AD Agreement explicitly recognizes the difference between investigations, which may lead to the imposition of a measure, and "reviews" of existing measures".¹¹⁶ Thus, the United States considers that the word "investigations" in Article 18.3 means original proceedings and that this indicates that the word "investigation" has that particular meaning throughout the *Anti-Dumping Agreement*, including in Article 2.4.2.

191. Article 18.3.1 indicates that where, as in the present case, the measures at issue are "refund procedures under paragraph 3 of Article 9" in which the authorities investigate "margins of dumping", then in the first refund procedure the investigating authorities are obliged to apply the same rules as were used in the original proceeding to determine "margins of dumping". Those rules are set out in Article 2, and include the comparison rules in Article 2.4.2. The European Communities concludes that Article 18.3.1 confirms its position in this case.

192. The European Communities does not believe that the word "investigations" in Article 18.3 is necessarily limited to the type of investigation conducted in original proceedings. Rather, the fact that Article 18.3 is "subject to" Article 18.3.1 suggests that "refunds" could be either "investigations" or "reviews". Given that Article 9.5 clearly indicates that duty assessments are *not* reviews¹¹⁷, the only logical conclusion would be that "administrative review" proceedings do involve investigations, giving that word its ordinary meaning.

193. In any event, even if the word "investigations" in Article 18.3 did carry the special meaning argued for by the United States, it would still not be the case that Article 18.3 defines the word "investigation" for the purposes of the *Anti-Dumping Agreement*. The review of the use of the word "investigation" in the *Anti-Dumping Agreement* leads the European Communities to the conclusion that it does not have a particular special meaning throughout the *Anti-Dumping Agreement* (that is, investigations in original proceedings); but that in each case its meaning must be discerned through the application of customary rules of interpretation of public international law. However Article 18.3 would be interpreted, that conclusion remains the same. Such an interpretation would therefore have no implications for our interpretation of the Phrase. The European Communities concludes that such

¹¹⁶ US First Written Submission, para. 105.

¹¹⁷ "... Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member ...".

context as is provided by Article 18.3 does not support the United States' defence, but rather confirms the position of the European Communities.

◆ Different types of anti-dumping proceeding and the word "phase"

194. The United States refers to the "distinctions between investigations and other segments of an anti-dumping proceeding" and later on in the same paragraph to the "purpose of an assessment proceeding".¹¹⁸ This is incoherent. On the one hand, the United States submits that there would be within a given anti-dumping proceeding various segments or phases, the first of these phases being the "original investigation". On the other hand, the word "proceeding" would refer to each of these segments or phases. The United States' analysis collapses in a morass of confusion because the United States is unable to state to what it is referring: phase or proceeding.

195. As noted above, such a proposition contradicts the terms of the *Anti-Dumping Agreement* which refers to five types of anti-dumping proceedings, not "phases". For instance, in Article 5.9, the word "proceedings" is used to refer to original proceedings. Article 9.5 refers to "duty assessment ... proceedings". Article 9.5 also refers to "review proceedings", meaning changed circumstance or sunset proceedings.

(vi) *Object and Purpose*

196. According to the United States, the fact that Article 2.4.2 would apply to original investigations only is consistent with the distinction between original proceedings and other types of proceedings and the fact that they serve different purposes¹¹⁹ and have different functions. The United States further argues that "the limited application of Article 2.4.2 to the investigation phase is consistent with the divergent functions of investigations and other proceedings under the *Anti-Dumping Agreement*".¹²⁰

197. However, that the disciplines in Article 2 apply whenever an authority investigates or relies on a "margin of dumping" does not have as result that there is no longer any meaningful distinction between different types of anti-dumping proceedings.

198. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body noted that "Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins. As observed earlier, we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins" (emphasis added).¹²¹ The findings of the Appellate Body are clear and logical. If investigating authorities rely on dumping margins for the purposes of proceedings other than original proceedings, the calculation of these margins will have to comply with the disciplines of Article 2.4. If Article 2.4 and 2.4.2 were limited to "original investigations", that would open up in the *Anti-Dumping Agreement* a vast loophole on the fundamental issue of how to calculate a margin of dumping. It would also make the results of an original investigation worthless.¹²²

¹¹⁸ US First Written Submission, para. 108.

¹¹⁹ US First Written Submission, para. 108.

¹²⁰ US First Written Submission, para. 110.

¹²¹ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 187.

¹²² EC First Written Submission, para. 221.

(vii) *No proof that Member intended special meaning (Article 31(4) of the Vienna Convention)*

199. According to Article 31(4) of the Vienna Convention, "a special meaning shall be given to a term if it is established that the parties so intended". This means the Members and *all* the Members. The burden of proof is on the Member seeking to establish the intent, in this case, the United States. The first place to look for evidence of the Members' intent is the text of the *Anti-Dumping Agreement* and the *GATT 1994*. In this respect, it is appropriate to bear in mind that if the Members intend to give a term a special meaning, there is a simple means of doing that: define it, or at least use a cross-reference. The *Anti-Dumping Agreement* and the *GATT 1994* contain several definitions and many cross-references, but no definition of the word "investigation", and no cross-reference between Articles 2 and 5.¹²³

200. In our view, if the Members had "intended" the Phrase to have the result argued for by the United States, they would not have tried to "implement" the definition of "margin of dumping" by fragmenting that definition and introducing internal inconsistencies in the *Anti-Dumping Agreement* and the *GATT 1994*; they would not have confined the Phrase to the first sentence of Article 2.4.2; they would not have grammatically tied the words "during the investigation phase" to the word "existence" as opposed to the word "established" (in English, French and Spanish); they would not have changed the drafting in the final Dunkel Draft precisely in order to achieve this grammatical link; they would have expressly defined or cross-referenced or referred to "an investigation to determine the existence, degree and effect of any alleged dumping"; they would have made express provision for investigating authorities to disregard the relevant data, as they did in Articles 2.2.1, 2.7, 9.4 and Annex II, paras 5 to 7; they would not have inserted the cross-reference to all of Article 2 in Article 9.3; and they would not have used the word "investigation" in Articles 2, 6 and elsewhere in the *Anti-Dumping Agreement* to refer to different types of anti-dumping proceeding.

201. The Phrase uses the words "during ... phase" rather than the words "during ... period". However, the ordinary meaning of these two phrases coincides, both terms referring to: "a distinct period". Furthermore, there are other words that appear only once in the *Anti-Dumping Agreement* without that meaning, mechanistically, that those words have a special meaning.¹²⁴ And there is no general mechanistic rule against synonyms. Taking all of these matters fairly into consideration, and considering the range of options open to the Members, it is simply not possible to reasonably conclude that *all* the Members intended, merely by the use of the word "phase", placed in a grammatically irrelevant position, to render the disciplines of Article 2 on the calculation of the defined term "margin of dumping" worthless – and this for all practical purposes, that is, for all final payments, given that the results of the first refund procedure are applied from the date on which provisional duties are first imposed.

202. The United States did not adduce any evidence in support of the proposition that the Members intended the Phrase to have the special meaning argued for by the United States. Instead, the European Communities refers to several pieces of evidence.

¹²³ Panel Report, *US – FSC (Article 21.5 - EC)*, para 8.93: "... it is not clear to us that the term has obtained a universally agreed upon special meaning. ... no such definition or meaning has been included in the *SCM Agreement* as a common understanding among WTO Members. Therefore ... we do not impose a single rigid definition or interpretation of the term ..."; confirmed by Appellate Body Report, *US – FSC (Article 21.5 - EC)*, para 138 and footnote 115.

¹²⁴ For example "accelerated" in Article 9.5; "fragmented" in footnote 13; "zero" in Article 9.4; "offset" in Article 11.2. In the context of the present dispute, what matters is the ordinary meaning of the word "investigation". The ordinary meaning of the word phase is of much less significance – and in any event merely confirms the position of the European Communities.

203. First, the European Communities refers to the preparatory work, and provides an analysis of those documents.¹²⁵ If all the Members had intended to take a step as important as that argued for by the United States, one might expect to find some trace of that decision in those documents, which run to several hundred pages, and span seven years. However, these documents offer no support to the United States. On the contrary, they support the European Communities.

204. Second, the European Communities refers to and has previously adduced a complete copy of the notifications made by 105 WTO Members to the WTO of municipal laws implementing the *Anti-Dumping Agreement*, together with an analysis of those laws. None of these notifications indicate any Member that has taken the same line as the United States. It is not to be expected that the Members would intend one thing when concluding the *Anti-Dumping Agreement*, and systematically do something different on implementation. Whether or not the legislation pre-dates the *WTO Agreement* is irrelevant, if it has subsequently been notified as implementing the *Anti-Dumping Agreement*. The European Communities also cites this in support of its case as "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention.

205. In the light of the preceding matters, it is clear that the United States has not established that all the WTO Members intended to give the special meaning to the Phrase argued for by the United States.

(viii) *Preparatory Work*

206. A correct interpretation of the Phrase according to Article 31 of the Vienna Convention does not leave the meaning ambiguous or obscure and does not lead to a result which is manifestly absurd or unreasonable. It just means that the United States' defence fails. And this is *confirmed* by the preparatory work. However, the interpretation adopted by the United States *does* lead to a result that is manifestly absurd or unreasonable. That interpretation cannot therefore prevail without a proper analysis of the preparatory work. The relevant aspects of the preparatory work may be summarised as follows.

207. A review of the negotiating history up until the first draft of a revised agreement from the chair shows that many Members repeatedly raised the issues of definitions; of the need for a consistent, balanced and fair approach; of changes in international trade; and of asymmetry and zeroing.

208. At the meetings of the MTN Negotiating Group on 31 January-2 February and 19-20 February 1990 the Members generally presented and discussed the submissions made up until that moment; and the Chairman circulated a paper "which could provide a structured agenda for future work". Aside from the continuing pre-occupation with the need for balance and definition issues, the discussion on the price comparison issue is revealing:

Some delegations said that it was fair to have the principles of symmetry of price calculation and symmetry of adjustment in normal value and in export price inscribed in Article 2.6. One delegation said that the practice of comparing the average of the normal value with export prices on a transaction-by-transaction basis was duly described and commented upon in Table 1 of MTN.GNG/NG8/W/64, as well as in MTN.GNG/NG8/W/51/Add.1, paragraphs 14-15. This was an obvious area of prejudice against exporters; the Code should be amended to require comparison to be made between the weighted average of the normal value and the weighted average of the export price.

...

¹²⁵ See below Section III.B.2(c)(viii).

One delegation considered that it would be too large a burden upon the investigating authority if it were to investigate possible factors leading to adjustments, without the mentioning of such factors by the exporters. It was normal that even small exporters at least drew attention to the factors that might lead to adjustment, and that they provide evidence, since they alone had it. It did not think that on the basis of Article 2.6 there was a symmetry problem; it required a comparison of prices at the same level of trade and adjustments for factors that affected price comparability. The main reason for the practice of averaging on a transaction-by-transaction basis was to prevent exporters from practising selective dumping. This phenomenon was of great concern and manifested itself by successive attacks of unfair trade practices on different parts of an importing market. Such a strategy should not leave the authorities concerned without the possibility to react. It added, concerning the table in MTN.GNG/NG8/W/64, that it was common to break down the periods in case of significant fluctuations; differences should not be calculated in an artificial manner which for given time periods did not exist. However, it believed current practices took care of this.

One delegation said that the problem remained that the method used against selective dumping was applied to all, by way of which protectionist barriers were raised across the board.

One delegation said that there was a real problem of selective dumping whether on a regional basis or along product-lines within a single "like product" category. However, it also understood the concerns of some other delegations. The Group should try to find solutions to accommodate the legitimate concerns of both sides.

209. In this discussion one sees the juxtaposition between the two sides and critically, one sees the express statement that the reason for the practice of comparing a weighted-average normal value with export prices transaction-by-transaction was to combat targeted dumping. Finally, one sees the launching of the solution "to accommodate the legitimate concerns of both sides" – that being Article 2.4.2 of the *Anti-Dumping Agreement* as it stands today.

210. Duty assessment was also discussed (see page 26 of the note), but only with reference to the question of the "lesser duty rule". Once again, it is highly significant that at no time was there any indication or suggestion in the discussion of different treatment for original investigations and retrospective assessments on the fundamental question of how to calculate a margin of dumping.

211. Further meetings of the MTN Negotiating Group followed on 21-22 March 1990¹²⁶, with a submission from the European Communities¹²⁷, and on 1 May 1990¹²⁸, discussing a submission by the Nordic Countries¹²⁹, broadly speaking maintaining its established line on symmetry and zeroing. The notes of the 1 May 1990 and 1 June 1990¹³⁰ meetings of the MTN Negotiating Group recall that the negotiations were continuing under the chair of Mr. C. R. Carlisle, Deputy Director-General. Japan submitted a further communication¹³¹ stating:

(b) The Code should set out clear guidelines that ensure symmetrical comparison of "normal value" and "export price" at the same level of trade, and eliminate the possibility of asymmetrical comparison, in disregard of certain costs actually incurred, and thereby artificially creating "dumping" when none actually exist. The Code should also be clarified, as another aspect of "symmetrical comparison", to disallow the practice of calculating "normal value" on an average basis and then to compare it to "export price" on an individual basis.

¹²⁶ MTN.GNG/NG8/16.

¹²⁷ MTN.GNG/NG8/W/74.

¹²⁸ MTN.GNG/NG8/17.

¹²⁹ MTN.GNG/NG8/W/76, at page 3.

¹³⁰ MTN.GNG/NG8/18.

¹³¹ MTN.GNG/NG8/W/81.

212. Thus, the conclusions about the negotiating process are as follows:

213. First, the negotiators were acutely aware of and sensitive to the issue of definitions. Every single one of the documents in the negotiating history, without exception, whether drafted by Members or by the secretariat, refers to and discusses several definitions. The documents repeatedly and at length discuss the merits of having definitions or not having definitions. There is never one voice raised against the basic assumptions that underlie these discussions. There is consensus: it really matters whether or not something is defined; and the fact that some terms are defined and others not must be given meaning.

214. Second, there was general consensus on the need for a consistent, balanced and fair application of anti-dumping measures.

215. Third, there was broad consensus on both sides of the debate that international markets and business had evolved, and that the *Anti-Dumping Agreement* should be up-dated accordingly.

216. Fourth, at no point in the debate was it ever suggested that there should be different treatment for original investigations and retrospective assessments on the fundamental question of how to calculate a margin of dumping. This is so notwithstanding the fact that assessment and refund issues were repeatedly discussed in detail and at length, with regard to the "duty as a cost" and "lesser duty" issues.

217. Fifth, there is a clear and strong indication of consensus that the interests of both parties in the asymmetry and zeroing debate could be accommodated in the targeted dumping provisions that eventually became the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*.

218. Sixth, there is an overwhelming indication of consensus that the presence of the word "investigation", used repeatedly in what was to become Article 2.2 of the *Anti-Dumping Agreement*, did not mean that those provisions were to be irrelevant when a margin of dumping was calculated in retrospective assessments.

219. Following the MTN Negotiations, successive drafts of what eventually became Article 2.4.2 of the *Anti-Dumping Agreement* are referred to as: Carlisle I¹³², Carlisle II, New Zealand I, New Zealand II, New Zealand II Ramsauer and the Dunkel draft. All of these drafts reflect the basic "solution to accommodate the interests of both sides" that emerged from the MTN Negotiating Group, as outlined above: symmetry, with an exception in the case of targeted dumping.

220. In all of the drafts, the word "investigation" or the words "investigation period" were used several times in the draft provisions that were eventually incorporated into Article 2, and particularly Article 2.2, of the current *Anti-Dumping Agreement*. At no time was there any indication or suggestion that this meant that these provisions would only apply in an original investigation, as opposed to any circumstances in which a margin of dumping was to be re-calculated, including a retrospective assessment. The United States has fully implemented the provisions of Article 2.2 in its municipal anti-dumping law also for "reviews", considering this "required or appropriate". In these circumstances, the mere introduction of the word "investigation" into what eventually became Article 2.4.2, in the New Zealand I text, was not such as to indicate any exceptional or special or limited or defined meaning for that word, distinguishing it from the other provisions of what eventually became Article 2.2. And this situation was not altered by the use of the word "phase", given the ordinary meaning of that word.

¹³² MTN.GNG/NG8/W/83/Add.5 and Corr.1.

221. The negotiating history does not record which Member or Members – if any – proposed the particular form of words "during the investigation phase" or why. It may or may not be that one or more persons acting for the *United States* (but not all the other Members of the WTO) *thought* that retrospective assessments had thereby been excluded. However, they were mistaken. They erred because they made the mistake of assuming that the word "investigation" – as it may or may not be commonly understood in United States municipal anti-dumping law – *always* means in WTO anti-dumping law, an *original* investigation. But that is not true. Because, unlike many other terms, the word "investigation" is not defined in the *Anti-Dumping Agreement*. And a brief perusal of the *Anti-Dumping Agreement* reveals that the word "investigation" cannot be construed as *always* meaning an investigation "to determine the existence, degree or effect of any alleged dumping" – that is, an original investigation. They also made the mistake, apparently, of forgetting about the rules of interpretation of customary international law, as set out in the Vienna Convention, expressly incorporated into the *Anti-Dumping Agreement*, according to which terms must be given their ordinary meaning (referring to a dictionary where appropriate), having regard to context, object and purpose. If they had paused for thought for a moment – for *legal* thought as opposed to *wishful thinking* – they would have instantly recognised the errors in their thinking.

222. At the same time, *all the other Members* of the WTO, not knowing which Member or Members (if any) were at the origin of the relevant Phrase, and not being privy to the points of view now expressed by the United States before this Panel, would not have had any particular reason to associate the Phrase with the municipal anti-dumping law of the United States – nor draw inspiration from that law for the purposes of interpreting the revised text. In any event, not having the power of mind reading, they would have had no reason whatsoever, based on proper legal considerations of correct interpretation, to view the insertion of the words "investigation" (already littered about in the draft of Article 2.2) or "phase" as having the consequences argued for by the United States – namely the complete negation of all the concerns about asymmetry and zeroing consistently expressed throughout the MTN negotiations. There would be complete negation, because the results of the first retrospective assessment displace entirely the results of the original investigation. That would not be a balanced solution. Nor would it be a solution that "accommodates the legitimate interests of both sides".

223. And the final proof of that is that when the United States negotiators brought the text home, they were obliged, in the SAA, unilaterally, and in an attempt at *ex post* rationalisation of the negotiations, to insert the words they no doubt so dearly wished were in Article 2.4.2 – words that they had neglected or chosen not to place fairly and squarely on the table during the negotiations: "(not reviews)".

224. Making the reasonable assumption that the Members negotiated in full cognizance of the customary rules of interpretation of public international law, including Articles 31 and 32 of the Vienna Convention, it may reasonably be assumed that they negotiated in good faith, just as they agreed that the terms of the *Anti-Dumping Agreement* were to be interpreted in good faith.¹³³ In such negotiations, one would neither expect nor accept that what is clearly given, after lengthy debate, with one hand (agreement not to use asymmetry, absent targeted dumping), would be *entirely* taken away with the other, on the basis of an obscure, unarticulated, unilateral and erroneous "interpretation" of the relevant provisions. In these circumstances, insofar as the United States claims paternity of the Phrase, it cannot be allowed to rely on its own failure either to have the Phrase drafted so as to convey the meaning now argued for by the United States, or its failure to explain the supposed object and purpose of the Phrase to its negotiating partners, as an excuse for unilaterally ignoring other clear obligations clearly entered into. That would be inconsistent with basic requirements of legal security and legal stability in international relations, which also inform subsequent negotiations. Members are

¹³³ Panel Report, *Korea – Procurement*, para 7.100: "Parties have an obligation to negotiate in good faith just as they must implement the treaty in good faith". See also, Vienna Convention, Article 48.

not entitled to any reservation other than to the extent clearly provided for in the *Anti-Dumping Agreement*.¹³⁴

(ix) *Panel and Appellate Body Reports referred to by the United States*

225. In support of its assertion that Article 2.4.2 is limited to original proceedings, the United States refers to various panel and Appellate Body reports.

226. The United States refers to the findings of the Panel in *US – Zeroing (EC)* which have been overruled by the Appellate Body and are therefore not legally relevant.

227. The United States also refers to the Appellate Body Report in *Brazil – Desiccated Coconut*. According to the United States, "Article 18.3 of the AD Agreement explicitly recognises the difference between investigations, which may lead to the imposition of a measure, and "reviews" of existing measures. In *Brazil – Desiccated Coconut (AB)*, the Appellate Body analysing an identical distinction in Article 32.3 of the SCM Agreement, noted that the imposition of "definitive" duties ends the investigative phase".¹³⁵

228. However, the United States does not provide any quotation. Footnote 116 in the US First Written Submission refers to "p. 9" of the Appellate Body Report in that case which appears to mean "page 9". However, page 9 contains no statement by the Appellate Body, but merely summarises arguments of the parties.

229. *First*, the Appellate Body has never stated in that case that "the imposition of "definitive" duties ends the investigative phase" as alleged by the United States. In particular, the Appellate Body makes no reference to an investigation "phase". In that respect, the European Communities would like to draw the Panel's attention to the weakness of references such as these which are even not quotations and the non-transparent manner in which they are presented to the Panel by the United States. *Second*, in that dispute, the Appellate Body was not concerned with considering the meaning of the word "investigation" in general terms, but about the transitional provisions of the *SCM Agreement* and its relationship with *GATT 1994*. The European Communities therefore disagrees with the United States' assertion that the Appellate Body was in that case, "analysing [the] ... distinction in Article 32.3" of the *SCM Agreement* between investigations and reviews. This is simply not an accurate description of that case. In that case, the Appellate Body had to determine whether *GATT 1994* Article VI and the *SCM Agreement* apply to a countervailing duty imposed pursuant to an investigation initiated by Brazil pursuant to an application for an investigation filed prior to the entry into force of the WTO Agreement for Brazil. In this context, the Appellate Body considered Article 32.3 of the *SCM Agreement* as a clear statement that for countervailing duty investigations or reviews the dividing line between the application of the GATT 1947 system of agreements and the WTO Agreement is to be determined by the date on which the application was made for the countervailing duty investigation or reviews.¹³⁶

230. The United States refers to the Appellate Body findings in *US - OCTG Sunset Reviews*.¹³⁷ This case does not, however, support the United States in the present dispute. Indeed, in that case, the Appellate Body dealt with an entirely different issue, i.e. the application of rules on cumulation in sunset reviews. The European Communities agrees that Article 3.3 of the *Anti-Dumping Agreement* is limited to original proceedings, given the cross-reference to Articles 5.8 and 5.1 which are expressly limited by their own terms to original proceedings. That has no bearing on the meaning of the word

¹³⁴ Article XVI.5 of the WTO Agreement.

¹³⁵ US First Written Submission, para. 105.

¹³⁶ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.

¹³⁷ US First Written Submission, para. 106.

"investigation" in Article 2.4.2 of the *Anti-Dumping Agreement*. In fact, that case supports the European Communities' position to the extent that the Appellate Body notes that when the rationale for a certain provision applies to different types of anti-dumping proceedings, it would be anomalous to read the *Anti-Dumping Agreement* as limiting such provisions to original proceedings.¹³⁸

231. The United States' reference to the Panel's findings in *US – DRAMs* is inappropriate.¹³⁹ The full quotation reads:

In this regard, we note that Korea has not argued before us that an Article 9.3 duty assessment procedure should be included within the notion of "investigation" for the purpose of Article 5.8. In the context of Article 5 of the AD Agreement, it is clear to us that the term "investigation" means the investigative phase leading up to the final determination of the investigating authority.

232. In the first place the European Communities takes note that the United States does not quote the full text of footnote 519, nor even the full text of the second sentence of that footnote. Rather, it chooses to omit the important opening words "In the context of Article 5 of the AD Agreement ...". This probably reflects an awareness on the part of the United States that the meaning of the word "investigation" in Article 2.4.2 is an entirely different legal matter from the meaning of that word in various provisions of Article 5 of the *Anti-Dumping Agreement*. Furthermore, the existence of those opening words also indicates that an important and significant degree of care was being exercised by the drafter of the panel report in *US – DRAMs*. The drafter took care to limit the observation to the context of Article 5 – saying nothing about Article 2.4.2 – and with good reason. As repeated several times already, it is not disputed that Article 5 of the *Anti-Dumping Agreement* only deals with original proceedings. Actually, this statement of the Panel would support the European Communities' case in that it implies that there may be investigative phases other than the one leading up to the final determination of the investigating authority in the context of Article 5.

233. The United States also refers¹⁴⁰ to para. 7.70 of the Panel Report in *US – Corrosion-Resistant Steel Sunset Reviews* which states:

[T]he text of paragraph 8 of Article 5 refers expressly to the termination of an investigation in the event of *de minimis* dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews.

234. The European Communities agrees that the outcome in that panel on this point is correct. Article 5.8 of the *Anti-Dumping Agreement* refers expressly to "[a]n application under paragraph 1 ..." and paragraph 1 of Article 5 refers expressly to "an investigation to determine the existence, degree and effect of any alleged dumping" – that is, to an original investigation. That said, the European Communities would point out that in that case the panel was enquiring into whether or not certain obligations contained in Article 5 apply only to original investigation, or also in other types of investigation or proceeding. The panel was not enquiring into the meaning of the word "investigation" in Article 2.4.2 of the *Anti-Dumping Agreement*, which is an entirely different legal matter. There was no argument and no findings in that case on the meaning of the word "investigation" in Article 2.4.2 of the *Anti-Dumping Agreement*. In these circumstances, the case provides no support for the position of the United States in these proceedings.

¹³⁸ Appellate Body Report, *US – OCTG Sunset Reviews*, para. 297.

¹³⁹ US First Written Submission, para. 106.

¹⁴⁰ United States first written submission, para 101.

(x) *Article 2.4.2 second sentence*

235. The United States submits that the prohibition of zeroing in duty assessment proceedings would be inconsistent with Article 2.4.2 which provides for an alternative "targeted dumping" methodology that may be utilized in certain circumstances. According to the United States, the implication of a general prohibition of zeroing is that the targeted dumping clause would be reduced to inutility since the targeted dumping methodology mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons.¹⁴¹

236. As a preliminary matter, the European Communities would like to recall that the United States does not argue that the use of zeroing in its administrative review proceedings is justified by the fact that they address targeted dumping within the meaning of Article 2.4.2 second sentence. In other words, the United States is not defending itself by submitting that its investigating authorities have found a pattern of export prices which differ significantly among different purchasers, regions or time periods, and that an explanation has provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

237. Actually, this third method can only be used by investigating authorities in exceptional circumstances. According to the wording, the circumstances justifying the use of that exceptional method is where the investigating authorities find a "pattern" of "export prices" which "differ significantly among purchasers, regions or time periods". This provision thus focuses on the existence of a "pattern" which affects "export prices". The second condition to use this methodology is that these differences cannot appropriately be addressed by one of the two symmetrical comparison methods. These conditions are not fulfilled with respect to the measures at issue – which the United States does not dispute.

238. Since the United States does not submit that the second sentence of Article 2.4.2 is applicable to the administrative review proceedings, the European Communities considers that the issue of whether zeroing is or not permitted under the asymmetrical comparison method contained in that provision is not an issue here.

239. In any event, the European Communities would like to respond to the arguments submitted by the United States as follows.

240. First, the United States refers to a "general prohibition of zeroing". However, recourse to targeted dumping is an exceptional remedy under the Anti-Dumping agreement and is of no relevance as regards the fairness of otherwise of zeroing in other situations.

241. In *US – Softwood Lumber (21.5)*, the Appellate Body expressly noted that "the methodology in the second sentence of Article 2.4.2 is an exception. [...] Being an exception, the comparison in the second sentence of Article 2.4.2 alone cannot determine the interpretation of the two methodologies provided in the first sentence, that is, transaction-to-transaction and weighted average-to-weighted average".¹⁴²

242. Second, in any case, there appears to be a number of ways of responding to targeted dumping that do not involve zeroing, such as restricting the universe of export transactions to those in the pattern in which case there would be no mathematical equivalence.

¹⁴¹ US First Written Submission, para. 112.

¹⁴² Appellate Body Report, *US – Lumber (Article 21.5)*, para. 97.

243. In *US – Lumber (21.5)*, the Appellate Body expressed this by saying that:

the United States' "mathematical equivalence" argument assumes that zeroing is prohibited under the methodology set out in the second sentence of Article 2.4.2. The permissibility of zeroing under the weighted average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is not before us in this appeal, nor have we examined it in previous cases. We also note that there is considerable uncertainty regarding how precisely the third methodology should be applied.¹⁴³

244. Third, the United States' mathematical equivalence argument is simply legally erroneous. As underlined by the Appellate Body, "[o]ne part of a provision setting forth a methodology is not rendered inutile simply because, in a specific set of circumstances, its application would produce results that are equivalent to those obtained from the application of a comparison set out in another part of that provision".¹⁴⁴

245. The United States further submits that "if the Appellate Body is correct that dumping may only be determined for the product as a whole, there is no textual basis for inferring that the targeted dumping comparison methodology is an exception to that provision".¹⁴⁵

246. The methodology described in Article 2.4.2 second sentence applies in very specific circumstances. It permits a comparison between a weighted average normal value and the export transactions that fall within the pattern. Excluding the export transactions outside the pattern would not be inconsistent with the basic rule that the dumping margin must be calculated for the product as a whole because the targeted dumping provisions are an exception to the normal rule which permits an authority to unmask targeted dumping that would otherwise be hidden.

247. All of this reasoning was effectively confirmed by the Appellate Body in *US – Zeroing (EC)*, and with even greater force in *US – Zeroing (Japan)*.

(d) Article 9.3

248. In its First Written Submission, the European Communities has indicated that the provision in Article 9.3 according to which "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2" clearly means that Article 2.4.2 applies in administrative reviews as well. The United States spends much time in its First Written Submission in trying to argue why Article 2.4.2 would not be applicable to administrative reviews, on the basis of Article 9.3. More specifically, the United States submits that Article 2.4.2 is not applicable to assessment proceedings because the general reference to Article 2 in Article 9.3 necessarily would include any limitations found in the text of Article 2 and that since Article 2.4.2 would be limited by its own terms to original investigations, such limitation would be included in the reference to Article 2 in Article 9.3.¹⁴⁶

249. For the reasons already set out in this submission, this argumentation has no merit. The US method is inconsistent with Article VI of the *GATT 1994* and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*. Although these issues have largely been dealt with above, for the convenience of the Panel, in this section the European Communities groups together and re-visits various issues related to the interpretation of Article 9.3, and Article 9 more generally.

¹⁴³ Appellate Body Report, *US – Lumber (Article 21.5)*, para. 98.

¹⁴⁴ Appellate Body Report, *US – Lumber (Article 21.5)*, para. 99.

¹⁴⁵ US First Written Submission, para. 116.

¹⁴⁶ US First Written Submission, para. 120.

250. In the first place, the interpretation put forward by the United States is directly contradicted by the text itself which indeed refers to Article 2. The cross-references in the *Anti-Dumping Agreement* make express provision when they refer only to certain paragraphs or sub-paragraphs of an article, particularly when the cross-reference is between different articles¹⁴⁷, or when they are restricted in some way¹⁴⁸, or when the provision to which reference is made is to be modified when applied in certain circumstances.¹⁴⁹ There is no such express provision in Article 9.3. Article 9.3 does not provide, for example, that the amount of the anti-dumping duty is not to exceed the margin of dumping as provided under Article 2, with the exception of Article 2.4.2; or as provided in Article 2, with the exception of the rules for comparing duly adjusted normal value and export price; or *mutatis mutandis*. This confirms that, in the context of Article 9.3, a "margin of dumping" is to be established by reference to the whole of Article 2, consistent with the use of the defined term "margin of dumping".¹⁵⁰

251. The United States tries to find support for its position in the Panel's Report *Argentina – Poultry* according to which "Article 9.3 does not refer to the margin of dumping established "under Article 2.4.2", but to the margin established "under Article 2". In our view, this simply means that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2".¹⁵¹ This statement simply confirms that the duty applied cannot exceed the dumping margin as established in accordance with Article 2, including all its provisions. What the panel is saying is that the reference to Article 2 in Article 9.3 includes the entire Article 2, including Article 2.1, 2.4 and 2.4.2.

252. In addition, it is important to recall the context of these findings of the panel. In that dispute, Argentina had imposed a variable duty which was based on the difference between the invoiced f.o.b. price and a "minimum export price" calculated for each exporter found to have dumped. Therefore, depending on the amount of the invoiced f.o.b. price for a given import transaction, this difference (and the resultant duty) could sometimes exceed the dumping margin "calculated for the relevant exporter during the investigation". Brazil claimed that this was inconsistent with Article 9.3 and Article 2.4.2, particularly because of the reference in Article 2.4.2 to the words "during the investigation phase". Brazil claimed that the variable anti-dumping duties at issue are inconsistent with Article 9.3 because they are collected by reference to a margin of dumping established at the time of collection and that duties cannot exceed the margin of dumping established during the investigation. The panel correctly concluded that the variable duties at issue are not inconsistent with Article 9.3 simply because they are collected by reference to a margin of dumping established at the time of collection. The panel expressly noted that Brazil had not argued that the anti-dumping duties actually collected by the authorities exceeded the margin of dumping prevailing at the time of duty collection.¹⁵²

¹⁴⁷ For example: Article 11 (footnote 21) cross-refers to "paragraph 3 of Article 9"; Article 11 (footnote 22) cross-refers to "subparagraph 3.1 of Article 9"; Article 9.3.3 cross-refers to "paragraph 3 of Article 2"; Article 9.4 cross-refers to "paragraph 10 of Article 6", "paragraph 8 of Article 6" and "subparagraph 10.2 of Article 6"; Article 4.4 cross-refers to "paragraph 6 of Article 3"; Article 10.1 cross-refers to "paragraph 1 of Article 7" and "paragraph 1 of Article 9".

¹⁴⁸ For example: Article 11.4 cross-refers to "The provisions of Article 6 *regarding evidence and procedure* ..."; Article 7.5 cross-refers to "*The relevant provisions of Article 9* ...".

¹⁴⁹ For example: Article 11.5 cross-refers to Article 8 "*mutatis mutandis*"; Article 12.3 cross-refers to Articles 11 and 10 "*mutatis mutandis*".

¹⁵⁰ Appellate Body Report, *US – Softwood Lumber V*, paras 93 ("... which includes, of course, Article 2.4.2. ...") and 99 ("... Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*, an anti-dumping duty can be levied only on a dumped product. *For all these purposes*, the product under investigation is treated as a whole ...").

¹⁵¹ US First Written Submission, para. 121.

¹⁵² Panel Report, *Argentina – Poultry*, para. 7.364.

253. The United States further submits that the European Communities' position that investigating authorities cannot make asymmetrical comparisons in assessment proceedings is contradicted by the fact that Article 9 provides for comparisons between weighted average normal values and individual export transactions, in particular in Article 9.4(ii).¹⁵³

254. Article 9.4(ii) relates to sampling and has thus no relevance to the present dispute, in which sampling is not an issue.

255. Even if Article 9.4(ii) of the *Anti-Dumping Agreement* is taken as a confirmation that Members may apply a system of so-called "variable duties", by which a duty may be imposed if and to the extent by which the price of an export transaction is below a *prospective* normal value, the essential fact remains that the provision refers to a *prospective* normal value. Thus, the provision does not mean, and cannot be taken to mean, that in a *final* assessment of anti-dumping duties, based on *actual* (contemporaneous) exporter-specific margins of dumping, the basic disciplines governing the calculation of a margin of dumping, contained in Article VI of the *GATT 1994* and Article 2 of the *ADA*, no longer apply. The collection of anti-dumping duties on the basis of *prospective* normal values is only an intermediate stage of collection, since it is subject to final assessment under Article 9.3.1 and "a prompt refund, upon request" under Article 9.3.2. Members must ensure that the obligations in Article 9.3 are complied with, particularly whenever the "amount of the anti-dumping duty is assessed on a prospective basis"; and there is nothing in Article 9.4 that releases authorities from the obligations in Article 9.3, including Articles 9.3.1 and 9.3.2. In short, the possibility for Members to use a variable duty system such as that referred to in Article 9.4(ii), based on a *prospective* normal value, offers no support for the position of the United States.

256. The United States then argues that "the calculation of transaction-specific anti-dumping duties in assessment reviews has been found consistent with the *ADA*"¹⁵⁴ and refers again to the panel's report in *Argentina – Poultry* in that respect.

257. However, in *Argentina – Poultry*, the panel has never stated that the calculation of transaction-specific anti-dumping duties in assessment reviews was consistent with the *Anti-Dumping Agreement*. In that case, the question arose as to whether the fact that anti-dumping duties are collected by reference to a margin of dumping established at the time of collection was consistent with the *Anti-Dumping Agreement*. The Panel concluded that the imposition of variable duties were consistent with the *Anti-Dumping Agreement*, referring *inter alia* to Article 9.4(ii) of the *Anti-Dumping Agreement* which, according to the panel, "is describing the use of variable anti-dumping duties, which are calculated by comparing actual (i.e. at the time of collection) export price with a prospective normal value".¹⁵⁵ However, the Panel clearly clarifies that "a properly designed variable duty system would include a refund mechanism consistent with Article 9.3.2".¹⁵⁶ In addition, the Panel expressly noted that it does not examine whether the anti-dumping duties actually collected by the Argentinean authorities exceeded the margin of dumping (prevailing at the time of duty collection) since Brazil had not made this claim before the panel.¹⁵⁷ The panel has thus admitted that one issue is whether the fact that variable anti-dumping duties may be collected, i.e. on a transaction-basis level and another issue is whether such anti-dumping duties do not exceed the relevant dumping margin.

258. The United States further submits that "the obligation set forth in Article 9.3 to assess no more in anti-dumping duties than the margin of dumping, is similarly applicable at the level of

¹⁵³ US First Written Submission, para. 124.

¹⁵⁴ US First Written Submission, para. 126.

¹⁵⁵ Panel Report, *Argentina – Poultry*, para. 7.359.

¹⁵⁶ Panel Report, *Argentina – Poultry*, para. 7.362.

¹⁵⁷ Panel Report, *Argentina – Poultry*, para. 7.364.

individual transactions".¹⁵⁸ The United States quotes various findings of panels in *US – Zeroing (EC)* and *US – Zeroing (Japan)* to support its contention that in duty assessment proceedings, the term "margin of dumping" can be interpreted as applying on a transaction-specific basis.¹⁵⁹

259. However, this is contradicted by the text and context of the *Anti-Dumping Agreement*. Article 6.10 of the *Anti-Dumping Agreement* provides relevant context for the interpretation of the term "margin of dumping". It provides that "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned for the product under investigation". Therefore, under Article 6.10, margins of dumping for a product must be established for exporters or foreign producers. The text of Article 6.10 does not limit the application of this rule to original investigations and is thus relevant to duty assessment proceedings governed by Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*. As noted by the Appellate Body in *US – Zeroing (EC)*:

We note that in *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body confirmed that the term "margin of dumping" in the *Anti-Dumping Agreement* in general refers to the margins of dumping for exporters or foreign producers.²³⁰ The Appellate Body made that observation in relation to the interpretation of the term "margin of dumping" in Article 5.8 of the *Anti-Dumping Agreement*. The Appellate Body also referred to a previous report, *US – Hot-Rolled Steel*, where the Appellate Body indicated, in the context of Article 2.4.2 of the *Anti-Dumping Agreement*, that the term "margin of dumping" "means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product". In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated, in the context of sunset reviews under Article 11.3 of the *Anti-Dumping Agreement*, that, "should investigating authorities choose to rely upon dumping margins in making their ... determination, the calculation of these margins must conform to the disciplines of Article 2.4."²³² The Appellate Body noted that there are "no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins". The Appellate Body made it clear in *US – Hot-Rolled Steel*, in the context of Article 2.4.2, that the term "margin of dumping" refers to margins of dumping for exporters and foreign producers. Therefore, the Appellate Body's findings in *US – Corrosion-Resistant Steel Sunset Review* imply that the margins of dumping that might be established in a sunset review under Article 11.3 are margins of dumping for exporters or foreign producers. Establishing margins of dumping for exporters or foreign producers is consistent with the notion of dumping, which relates to the foreign producer's or exporter's pricing behaviour. Indeed, it is the exporter, not the importer, that engages in practices that result in situations of dumping. For all of these reasons, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*, margins of dumping are established for foreign producers or exporters.¹⁶⁰

260. By stating that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2", Article 9.3 sets a requirement regarding the amount of the assessed anti-dumping duties.¹⁶¹ However, it does not prescribe any specific methodology according to which the duties should be assessed. In particular, it is not suggested that final anti-dumping duty cannot be assessed on a transaction- or importer-specific basis. However, in any case, the anti-dumping duty

¹⁵⁸ US First Written Submission, para. 127.

¹⁵⁹ US First Written Submission, paras. 129 – 132.

¹⁶⁰ Appellate Body Report, *US – Zeroing (EC)*, para. 129.

¹⁶¹ Appellate Body Report, *US – Zeroing (EC)*, para. 130.

cannot exceed the dumping margin as established in accordance with Article 2. As explained by the Appellate Body in *US – Zeroing (Japan)*:

Under any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter. To the extent that duties are paid by an importer, it is open to that importer to claim a refund if such a ceiling is exceeded. Similarly, under its retrospective system of duty collection, the United States is free to assess duty liability on a transaction-specific basis, but the total amount of anti-dumping duties that are levied must not exceed the exporters' or foreign producers' margins of dumping.¹⁶²

261. The United States further argues that an exporter-based approach to Article 9.3 of the *Anti-Dumping Agreement* is unreasonable because importers for which the amount of dumping is greatest will have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports. This argument is based on one very obvious flaw: exporters can dump (i.e. discriminate between normal value and export price); importers cannot. Therefore, only exporters can have margins of dumping. If an exporter has a dumping margin of zero, it may be that this margin is composed of the aggregation of transactions with two importers with the first importer having a dumping amount of 5 and the second of -5. In this situation, no duty can be collected from the first importer because the exporter has not dumped.

262. The United States further refers to Article 9.4(ii) to support its contention that in a prospective system, the amount of liability for payment of anti-dumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. According to the United States, if in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of anti-dumping duties, without regard to whether or not prices of other export transactions exceed normal value, there is no reason why liability for payment of anti-dumping duties may not be similarly assessed on the basis of export price less than normal value in the retrospective systems.¹⁶³

263. This argument is not convincing. As a matter of principle, under any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter. To the extent that duties are paid by an importer, it is open to that importer to claim a refund if such a ceiling is exceeded. The collection of anti-dumping duties on the basis of *prospective* normal values is only an intermediate stage of collection, since it is subject to final assessment and "a prompt refund, upon request" under Article 9.3.2 of the *Anti-Dumping Agreement*. Similarly, under its retrospective system of duty collection, the United States is free to assess duty liability on a transaction-specific basis, but the total amount of anti-dumping duties that are levied must not exceed the exporters' or foreign producers' margins of dumping.¹⁶⁴

264. Finally, the United States asserts that the provisions of Article 2.4.2 apply when determining the existence of margins of dumping during the investigation phase and do not apply to Article 9.3 proceedings.¹⁶⁵ In other words, the United States considers itself bound by the methodologies contained in Article 2.4.2 of the *Anti-Dumping Agreement* when calculating the original duty rates (and establishing cash deposits accordingly) but, when calculating the duties to be collected in assessment proceedings pursuant to Article 9.3, it can use any method. Again, the

¹⁶² Appellate Body Report, *US – Zeroing (Japan)*, para. 162.

¹⁶³ US First Written Submission, par. 139.

¹⁶⁴ Appellate Body Report, *US – Zeroing (Japan)*, para. 162.

¹⁶⁵ Addendum: US Answers to the EC's Questions, para. 16.

European Communities notes that the interpretation suggested by United States is flatly inconsistent with all elements of the agreed rules of interpretation in the Vienna Convention. The relevant provisions of the *Anti-Dumping Agreement* cannot be interpreted so as to leave investigating authorities entirely free to decide the amount of duties to be collected.

3. Sunset Reviews

265. In its First Written Submission, the sole defence of the United States with respect to the claims of the European Communities concerning sunset reviews is that "the EC has not demonstrated that a calculation done in accordance with the EC's approach would result in zero or *de minimis* dumping margins in the cited cases, leading to a revocation of the order".¹⁶⁶

266. The European Communities submits that to the extent that it has demonstrated that the measures concerned were WTO inconsistent, it is entitled to a finding in that respect and a recommendation that the United States brings its measures into conformity with it. The argument put forward by the United States that it is incumbent on the European Communities to demonstrate that the sunset reviews at issue would have resulted in a different outcome in case dumping margins would have been calculated without zeroing is therefore irrelevant. It is sufficient to demonstrate that the United States used a method which systematically and inevitably makes it more likely to find dumping (or higher margins of dumping).

267. With respect to the sunset reviews contained in the Annex to the request for establishment of the Panel, the European Communities submitted that the United States failed to comply with its obligations under the *Anti-Dumping Agreement* and the *GATT 1994* by relying on dumping margins calculated in prior investigation proceedings using zeroing and that in so doing, the United States violated Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement*.

IV. CONCLUSIONS

268. In conclusion, the European Communities would respectfully re-iterate its request that the Panel make the findings and recommendations requested in its first written submission.

¹⁶⁶ US First Written Submission, para. 154.

ANNEX C-2

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

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<i>Argentina – Poultry (Panel)</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>Brazil – Aircraft (AB)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999
<i>Chile – Price Band System (Panel)</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207/AB/R
<i>EC – Audiocassettes</i>	GATT Panel Report, <i>EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan</i> , ADP/136, circulated 28 April 1995 (unadopted)
<i>EC – Bed Linen (Article 21.5) (AB)</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
<i>EC – Cotton Yarn</i>	GATT Panel Report, <i>EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil</i> , ADP/137, adopted 30 October 1995
<i>Guatemala – Cement I (AB)</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998
<i>Mexico – HFCS</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
<i>Mexico – Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>US – Carbon Steel (Panel)</i>	Panel Report, <i>United States – Carbon Steel</i> , WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by the Appellate Body Report, WT/DS213/AB/R and Corr.1
<i>US – Carbon Steel (AB)</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
<i>US – Certain EC Products (AB)</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
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</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

Short Form	Full Citation
<i>US – Softwood Lumber Dumping (Article 21.5) (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/RW, adopted 1 September 2006, as modified by the Appellate Body Report, WT/DS264/AB/RW
<i>US – Zeroing (EC) (Panel)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
<i>US – Zeroing (Japan) (Panel)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R
<i>US – Zeroing (Mexico) (Panel)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, circulated to WTO Members 20 December 2007 (on appeal)

I. INTRODUCTION

1. In this dispute, the European Communities ("EC") has asked this Panel to read an obligation into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), notwithstanding the lack of any textual basis for the obligation that the EC proposes. The EC also would like the Panel to consider as binding Appellate Body reports finding "zeroing" in certain contexts inconsistent with the covered agreements, despite the absence of *stare decisis* in the WTO dispute settlement system. The EC goes so far as to argue that Article XVI:4 of the *Agreement Establishing the World Trade Organization* ("WTO Agreement") imposes on the United States some sort of continuing international obligation to eliminate "zeroing".

2. At the same time that the EC uses terms like "good faith" it presents the Panel with a wildly inaccurate version of the negotiating history of the AD Agreement, as discussed more fully below. In particular, not only did the EC never agree to any of the Uruguay Round proposals that would have limited or eliminated zeroing, the EC was one of the participants in the negotiations that had defended the use of zeroing under the similar language in the Tokyo Round Code and continued to use it after the WTO came into force. Indeed, the EC defended the use of zeroing under the WTO in the *Bed Linen* dispute. The United States is unsure which prospect it finds more disturbing, that the EC has knowingly presented this incorrect negotiating history, or that it did not bother to check the actual negotiating history before making its representations to the Panel. Far from a "unilateral" interpretation of the AD Agreement¹, the interpretation that the EC disparages is one that the EC itself held and advocated.

3. The United States has asked that this Panel remain faithful to its obligation under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), which calls on each panel to make its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. Moreover, the United States has emphasized that under Articles 3.2 and 19.2 of the DSU the Panel cannot add to or diminish the rights and obligations provided for in the covered agreements. Acceptance of the EC's interpretation of the AD Agreement, the GATT 1994, and the WTO Agreement would improperly add to the obligations of the United States under the covered agreements. Such a result would undermine the very security and predictability of the multilateral trading regime that the WTO dispute settlement system is designed to preserve.

4. The United States is confident that the Panel will conduct an objective assessment of the matter before it, and find that there is no general obligation to provide offsets for non-dumped transactions in assessment reviews. We believe that the Panel should find persuasive the reasoning of panels in four other disputes – *US – Zeroing (EC)*, *US – Softwood Lumber Dumping (Article 21.5)*, *US – Zeroing (Japan)* and *US – Zeroing (Mexico)* – which all conducted an objective assessment as required by Article 11 and found that "zeroing" was not inconsistent with the covered agreements outside the context of weighted average-to-weighted average comparisons in investigations.

5. In this rebuttal, the United States first responds to the EC's arguments against the US request for preliminary rulings. As the United States shows, the EC has added 14 measures to its panel request that were not identified in its consultations request. Under Articles 4 and 6 of the DSU, these measures cannot fall within the Panel's terms of reference. The EC's attempted reliance on prior Appellate Body reports cannot support its position that it was entitled to add 14 new measures to its panel request.

¹ EC Opening Statement at the First Substantive Meeting with the Parties, para. 14 ("EC First Opening Statement").

6. The United States also addresses the EC's attempt to include 18 measures, identified as the application or continued application of antidumping duties in 18 cases listed in the Annex to its panel request. These alleged measures were the subject of considerable debate at the first meeting with the Panel. As the United States explains, the EC failed to specifically identify these 18 "measures" as required by Article 6.2 of the DSU. The EC is trying to reach indefinite subsequent proceedings that were not identified in its panel request and that were not in existence at the time of that request. It now would like the Panel to treat any duties in the 18 cases as some type of free-standing measure, divorced from the underlying determinations. Such an approach is inconsistent with the requirement to identify the specific measures at issue.

7. The United States also objects to the EC's challenge to four preliminary measures. Under Article 17.4 of the AD Agreement, only those measures where "final action has been taken by the administering authorities" may be referred to a panel. The EC claims that the Panel should allow these preliminary measures, even though it has not demonstrated that the exception under Article 17.4 applies here. In fact, the EC asks the Panel to take into account so-called "specific circumstances" of this case that are not contained in the AD Agreement or anywhere else in the covered agreements.

8. The United States also addresses several arguments that the EC made in its first written submission, at the first substantive meeting with the parties, and in its answers to the Panel's questions concerning methodologies in assessment proceedings. At the meeting with the Panel, the EC seemed almost singularly focused on its flawed argument that Article 2.4.2 of the AD Agreement applies outside the context of investigations. In this submission, the United States demonstrates that, based on the application of customary rules of treaty interpretation, the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 is inextricably and uniquely linked to Article 5 investigations to determine the "existence, degree and effect" of dumping. The United States further rebuts the EC's assertion that Article 9.3.1 of the Antidumping Agreement requires an exporter-oriented analysis, and shows that the undesirable outcome of such a requirement would be to reward importers involved in the transactions priced furthest below normal value. Lastly, the United States demonstrates that it is not at all clear that the EC made a claim against the alleged use of the "third methodology" in Article 2.4.2 in assessment reviews.

II. THE PANEL SHOULD GRANT THE US REQUEST FOR PRELIMINARY RULINGS

A. THE EC'S PANEL REQUEST CONTAINED MEASURES THAT WERE NOT IDENTIFIED IN ITS REQUEST FOR CONSULTATIONS

9. The United States objects to the EC's addition of measures in its panel request that were not contained in its request for consultations. As the United States explained in its first written submission and at the first meeting with the Panel, a measure cannot fall within a panel's terms of reference unless it was first identified in the request for consultations.² Under Article 7.1 of the DSU, a panel's terms of reference are based on the complaining party's request for the establishment of a panel. In turn, Article 6.2 of the DSU provides that a panel request must "identify *the specific measures at issue*" in a dispute.³ Under DSU Article 4.7, however, a Member may only request the establishment of a panel with regard to a measure upon which the consultations process has run its course. Finally, Article 4.4 of the DSU requires that the request for consultations state the reasons for the request, "including identification of *the measures at issue*".⁴ There is thus a clear progression

² US First Written Submission, paras. 47-65; US Opening Statement at the First Substantive Meeting with the Parties, paras. 13-18. ("US First Opening Statement").

³ Emphasis added.

⁴ Emphasis added.

from consultations request to panel request, and measures not identified in the consultations request, but later identified in the panel request, cannot properly form part of the panel's terms of reference.⁵

10. The EC would have this Panel apply legal standards that are not found in the DSU. The EC asserts that there is no need for measures in the panel request to be identified in the request for consultations, as long as they "involve essentially the same matter" or "relate to the same matter" as those identified in the request for consultations.⁶ Moreover, provided the additional measures have a "direct relationship" with the measures in the request for consultations, the EC claims that they are properly before the Panel.⁷ The EC's interpretation disregards the text of Articles 4 and 6 of the DSU – a panel's terms of reference cannot include measures that were not the subject of a request for consultations – and should be rejected.

11. Here, the EC added 14 new proceedings, as well as an imprecise reference to the application and continued application of antidumping duties in 18 cases, to its panel request.⁸ These measures were not identified anywhere in its consultations request, and pursuant to Articles 4 and 6 of the DSU, they are not within this Panel's terms of reference. This finding is supported by the Appellate Body in *US – Certain EC Products*, which agreed that the scope of measures subject to establishment of a panel is defined by the consultations request, and that new, legally distinct measures may not be added in the panel request.⁹

12. The EC erroneously relies on the Appellate Body report in *Brazil – Aircraft*, which is distinguishable from the matter before this Panel.¹⁰ In that case, the Appellate Body considered whether certain regulatory instruments relating to the Brazilian regional aircraft export subsidies program PROEX were properly before the panel.¹¹ Canada had included new regulatory measures under PROEX in its panel request, but not in its request for consultations. The Appellate Body found that the new regulations "did not change the essence" of the export subsidies that were at issue in the dispute and included in the request for consultations, and that they therefore were properly before the panel.¹²

13. The critical question here is whether the measures added to the panel request are in essence the same measures as those identified in the consultations request. In *Brazil – Aircraft*, the new regulatory instruments were simply periodic re-enactments of the identical measures that were specified in a consultations request as part of Canada's challenge to payments under those measures. In this dispute, however, the EC identified in its consultations request separate antidumping measures that are legally distinct under US law, and added new and legally distinct antidumping measures to its panel request. The four new administrative review determinations and 10 new sunset review

⁵ The AD Agreement imposes parallel requirements in Articles 17.3-17.5. US First Written Submission, paras. 56-58.

⁶ EC Response to the US. Request for Preliminary Rulings, paras. 17, 21, 22, 24, 29 ("EC Response"). The EC fails to understand what "matter" means for purposes of dispute settlement. The Appellate Body has stated that the "matter" consists of two elements: "the specific *measures* at issue and the *legal basis for the complaint* (or the *claims*)". *Guatemala – Cement I (AB)*, para. 72. The EC, however, describes the "matter" for purposes of its legal standard as "the application of zeroing methodologies when calculating the dumping margins in the specific anti-dumping proceedings with respect to a particular product originating from one specific country". EC Response, para. 17. This is not the "matter". The EC's definition does not encompass the specific measures, nor does it encompass the legal basis for the complaint. In short, the EC would also like the Panel to apply a standard that relies on an erroneous view of what the "matter" is.

⁷ EC Response, paras. 25, 29.

⁸ US First Written Submission, paras. 49-50, provides a specific list of the new "measures".

⁹ *US – Certain EC Products (AB)*, paras. 70, 82.

¹⁰ EC Response, paras. 18-19.

¹¹ *Brazil – Aircraft (AB)*, paras. 127-29.

¹² *Brazil – Aircraft (AB)*, para. 132.

determinations, even if they involve the same subject merchandise as the measures listed in the consultations request, resulted from completely different proceedings than those identified in the consultations request. They each involve different time frames, and different calculations using different information and data. The results from one administrative review do not apply to entries of subject merchandise for any other administrative review. Moreover, a sunset review results in a determination about whether an antidumping order should be revoked going forward, and does not affect the results of an administrative review, which is conducted independently of a sunset review. The EC's reference to the "continued application, or application" of antidumping duties in 18 cases also appeared for the first time in its panel request, and is legally distinct from the separate challenge to the "zeroing methodology" as applied in separate antidumping proceedings that was identified in the consultations request. None of the new "measures" can be considered a mere "re-enactment" of identical measures identified in the consultation request, as in *Brazil – Aircraft*.

14. The EC also invokes the Appellate Body report in *Mexico – Rice* as supporting its view that there is "no need for identity between the specific measures that were the subject of the request for consultations and those subject of the Panel request provided that they involve essentially the same matter".¹³ In *Mexico – Rice*, however, the question was whether provisions of the covered agreements that the United States added to its claims against Mexico in its panel request were within the panel's terms of reference.¹⁴ Here, the EC has not added to the *legal basis* for its complaint; rather, it added to the *measures* at issue that were identified in its consultations request.

15. The EC relies on the panel report in *Chile – Price Band System* to support its assertion that "the inclusion of new measures which amount to an extension or a modification of measures previously mentioned in the request for consultations do not affect the consistency of the panel request with the consultations carried out between the parties".¹⁵ In *Chile – Price Band System*, Chile promulgated a regulation which extended the period of application of a definitive safeguard measure. The extension was not identified in the consultations request. The panel, examining the text of the Agreement on Safeguards, considered that the extension was not a distinct measure, and instead a mere continuation in time of the definitive safeguard measure that was identified in the consultations request. The panel concluded that the extended safeguard measure fell within the panel's terms of reference.¹⁶

16. The EC's reliance on the panel report in *Chile – Price Band System* is misplaced. The EC's challenge does not pertain to a safeguard measure whose "duration" has been extended. The EC explicitly listed determinations from original investigations, administrative reviews, and sunset reviews in its consultations request. Its focus was on the determinations in the individual proceedings in which the alleged "zeroing methodology" was applied. The EC then tried to expand the number of proceedings by adding 10 new sunset review determinations, as well as four new administrative review determinations, to its panel request. Each of these measures is separate and legally distinct, and not a mere "extension" or "modification" of another identified antidumping determination.

17. The EC has relied on semantics ("essentially the same matter", "direct relationship") and has asked the Panel to consider Appellate Body and panel reports that do not support its position in this dispute. Nothing the EC does, however, can avoid the logical outcome of a proper analysis under Articles 4 and 6 of the DSU: the specific proceedings identified in the EC's panel request for the first time – 14 new antidumping determinations and the application or continued application of duties in 18 cases – cannot properly fall within the panel's terms of reference.

¹³ EC Response, paras. 20-21.

¹⁴ *Mexico – Rice (AB)*, para. 133.

¹⁵ EC Response, para. 23.

¹⁶ *Chile – Price Band Systems (Panel)*, paras. 7.110-7.120.

B. THE EC'S "18 MEASURES" FAIL FOR A LACK OF SPECIFICITY

18. Under Article 6.2, a panel request must identify the "*specific measures* at issue" in the dispute¹⁷, and a panel's terms of reference under Article 7.1 are limited to those specific measures. The EC in its panel request identified as "measures" the "continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding". The United States objects to the EC's failure to specifically identify these "18 measures" as required by Article 6.2 of the DSU.¹⁸ As the United States explained at the first meeting with the Panel, these "measures" have been the source of considerable confusion¹⁹; armed with further attempted clarifications from the EC, we would like to explain why these measures do not meet the specificity requirement and why they are not within this Panel's terms of reference.

19. In its October 5 Response to the US Request for Preliminary Rulings, the EC admitted the broad, indeterminate nature of the 18 measures when it noted that its panel request pertained to all "subsequent measures" adopted by the United States with respect to the 18 measures, and to "any subsequent modification of the measures (*i.e.*, the duty levels)".²⁰ In its response to the Panel's questions, the EC also asserted that the term "continued application" reaches "subsequent proceedings".²¹

20. Under the DSU, such "subsequent measures", "subsequent proceedings", and "subsequent modifications" cannot be subject to dispute settlement – among other things, they were not in existence at the time of the Panel's establishment.²² Each determination that sets a margin of dumping for a defined period of time is distinct and separate, and under Article 6.2 of the DSU, the EC must identify each such measure in its panel request.²³ The EC is improperly trying to include the application or continued application of duties resulting from determinations that have not yet been made – the EC even admits that these "measures" have "a life stretching an indeterminate time into the future".²⁴ As we stated at the first meeting with the Panel, the United States is unable to determine when these determinations were or will be made, what calculations they did or will include, what duty rates they have established or will establish, and what individual companies they did or will cover.²⁵

21. The EC invokes several Appellate Body and panel reports to support its argument that "subsequent measures" are properly before the Panel.²⁶ In these disputes, a law of general application, or framework law, was identified in a panel request, and the subsequent implementing regulations

¹⁷ Emphasis added.

¹⁸ US First Written Submission, paras. 66-71; US First Opening Statement, paras. 19-22; US Closing Statement at the First Substantive Meeting with the Parties ("US First Closing Statement"), paras. 7-15.

¹⁹ US First Closing Statement, paras. 7-15. The Panel itself has asked for clarification about the description of the "18 measures" that the EC identified in its panel request. *See* Panel Question 1. The EC, despite all indications to the contrary, still considers the 18 measures "simpler to understand and conceptualise". EC Answer to Panel Question 2, para. 13.

²⁰ EC Response, paras. 47-48.

²¹ EC Answer to Panel Question 1(b), para. 10. The EC claims that variation in the phrasing "application or continued application" throughout its first written submission "is for ease of reference", but that it "has no incidence on the legal assessment to be conducted by the Panel". However, that very phrasing, and any variations thereto, is related to the way in which the EC described the 18 measures, and is directly relevant to how the Panel analyzes the specificity of those alleged measures.

²² US First Closing Statement, para. 9.

²³ US First Written Submission, para. 67.

²⁴ EC Answer to Panel Question 3, para. 20.

²⁵ US First Opening Statement, para. 21.

²⁶ EC Response, paras. 37, 43-47.

issued after the panel request were considered to fall within the panel's terms of reference. For example, in *Japan – Film*, the United States discussed various measures for the first time in its written submission. Japan objected on the grounds that these measures were not identified in the United States' panel request and that the United States had therefore failed to meet the specificity requirement of Article 6.2 of the DSU. The panel found that subsequent measures promulgated under a framework law that was identified in the panel request fell within its terms of reference. It considered these measures "subsidiary" or "so closely related" to the law of general application specifically identified that the responding party could reasonably be found to have received adequate notice of the scope of the claims.²⁷

22. Unlike *Japan – Film* and the other reports, this dispute does not involve subsequent regulations issued under a law of general application. The EC instead is asking this panel to consider any and all subsequent antidumping measures related to 18 specified cases. Such subsequent measures, however, are not "subsidiary" or "so closely related" to all of the antidumping proceedings that were identified in the panel request. The application or continued application of antidumping duties results from distinct legal proceedings leading to a final determination. Each proceeding, whether an original investigation, administrative review, or sunset review, involves different time periods, different entries of merchandise, and different information and data. The EC's challenge to application or continued application of duties related to all subsequent and previously unidentified proceedings is not the equivalent of a challenge to regulations promulgated under the general authority of a framework law after a panel request has been made.

23. The EC also seems to indicate, as it did at the hearing, that the 18 measures cover the application or continued application of the "zeroing" methodology in 18 cases. The EC tells the Panel that the word "continued" in the description of the 18 measures "reflects the fact that the US continues to use the zeroing methodology throughout the various proceedings in the 18 anti-dumping cases".²⁸ Moreover, the EC claims that "[t]he 18 measures are instances of the application of the zeroing methodology".²⁹ To the extent the EC is saying that it is challenging the application or continued application of zeroing in 18 cases (a description not found anywhere in its panel request), that "measure" lacks specificity. The EC cannot make a generalized reference to the application of zeroing in 18 broadly-defined cases without indicating the exact determinations where "zeroing" was applied.

24. In response to the Panel's questions, the EC has put further spin on its description of the 18 measures. It now speaks of the concept of "duty as measure".³⁰ To the EC, the 18 measures contain a methodology that is "like a computer virus replicating itself"³¹ and "have a life which stretches, at least potentially, further into the future than the 52 measures".³² Moreover, the EC incorrectly analogizes the duties to "a subsidy programme under the *SCM Agreement*"³³, without even explaining the exact nature of the analogy.

25. The EC's analysis of the 18 measures, when defined in this way, does not assist its position. It is entirely circular for the EC to suggest that it has described measures with specificity because it asserts that "duties" are "measures". In the first place, to repeat the terms of the Antidumping Agreement (as the EC does in paragraphs 2 through 3 of its answers) tells the Panel nothing about specifically what measures the EC is challenging *in this dispute*. Moreover, the EC ignores the fact

²⁷ *Japan – Film (Panel)*, paras. 10.8-10.14.

²⁸ EC Answer to Panel Question 1(b), para. 10.

²⁹ EC Answer to Panel Question 3, para. 20.

³⁰ EC Answer to Panel Question 1(a), para. 7.

³¹ EC Answer to Panel Question 1(a), para. 4.

³² EC Answer to Panel Question 2, para. 17; *see also* EC Answer to Panel Question 2, para. 13; EC Answer to Panel Question 3, para. 20; EC Answer to Panel Question 5(b), para. 28.

³³ EC Answer to Panel Question 1(a), para. 5; EC Answer to Panel Question 3, para. 20.

that, for any given importation, the antidumping duty assessed depends on a particular underlying administrative determination, whether that be an original investigation, assessment review, new shipper review, or changed circumstances review, while the continuation of that duty depends on an underlying sunset review.³⁴ The EC must identify the specific determination leading to the particular application or continued application of an antidumping duty, and cannot merely refer to "duty" in a general and detached way.

26. The EC's description also appears to demonstrate what the EC asserted at the first meeting with the Panel – that the 18 measures are some sort of "as applied/as such" measures.³⁵ By considering a duty to be the equivalent of a subsidy program, the EC seems to think that it can challenge "as such" a duty resulting from the application of "zeroing". It is difficult to understand how the EC could be making an "as such" claim when it has defined the measure as "the *application* or the continued *application*" of antidumping duties. Moreover, the EC has explicitly stated that it decided not to make an "as such" claim in this dispute.³⁶ The United States still is unsure whether the EC is trying make "as such" claims.

27. Apparently then, the EC is not seeking to challenge particular measures, but rather to have the Panel make a general, overall pronouncement with respect to the future and "zeroing" without regard to whether such a pronouncement would apply to real measures that were in existence at the time of the consultations request or even at the time of the Panel's findings.³⁷ The EC cannot ignore the specificity requirement of Article 6.2 of the DSU and define "measures" in such a way so as to reach indeterminate future antidumping determinations.³⁸ The Panel should reject the EC's attempt to expand the scope of this proceeding beyond what is permissible under the DSU.

28. The EC also claims that the Panel request adequately informs the United States of the challenged measures.³⁹ According to the EC, "the United States has failed to show that the Panel request is so flawed that the defending party's rights of defence are prejudiced . . .".⁴⁰ The implication of this argument is that even with a failure to identify the specific measures at issue, those measures can be considered by the Panel, as long as the responding party is not prejudiced. (Apparently the EC is not concerned with the rights of Members whose decision as to whether to participate as a third party is based on which measures are specifically identified in the EC's panel request.) This prejudice requirement, however, is not found in Article 6.2 of the DSU, or anywhere else in the covered agreements. The requirements of the DSU are clear: the complaining party must specifically identify the measures at issue, or those measure cannot properly fall within a panel's terms of reference.

C. THE EC'S REQUEST INCLUDED MEASURES WHICH WERE NOT FINAL AT THE TIME OF ESTABLISHMENT

29. The United States has asked the Panel to exclude from consideration four measures which were not final at the time of the EC's request for panel establishment.⁴¹ Under Article 17.4 of the AD Agreement, only those measures where "final action has been taken by the administering authorities"

³⁴ AD Agreement, Articles 1, 5, 7, 9, 11.

³⁵ US First Closing Statement, paras. 12-13.

³⁶ EC First Written Submission, para. 2, 115.

³⁷ EC Answer to Panel Question 4(b), paras. 25-26; EC First Written Submission, paras. 127-28.

³⁸ As the EC acknowledges, "findings concerning the 18 measures will have a broader impact than those concerning the 52 measures". EC Answer to Panel Question 1(a), para. 8.

³⁹ EC Response, paras. 40-42.

⁴⁰ EC Response, para. 42.

⁴¹ US First Written Submission, paras. 72-74; US First Opening Statement, paras. 23-24.

may be referred to a panel.⁴² As the United States explained in the first written submission, the EC added three on-going sunset reviews, and one on-going administrative review to its request for establishment. Therefore, under Article 17.4 of the AD Agreement, the four preliminary measures in the EC's panel request cannot properly form part of the Panel's terms of reference.

30. In rebutting the United States, and in responding to the Panel's questions, the EC has complicated an issue which is not very complicated at all. The EC first claims that its challenge to the application or continued application of antidumping duties in 18 cases includes "subsequent measures, including preliminary determinations setting out the duty levels (wrongly calculated by applying zeroing) and insofar as those duties are still in place"⁴³, and that therefore the preliminary measures are properly before the Panel. Aside from the fundamental problem with the EC's attempt to include "subsequent measures" in its panel request⁴⁴, the United States fails to see how preliminary measures in existence at the time of panel request are "subsequent measures". Moreover, neither on-going administrative reviews, nor on-going sunset reviews, can be the basis for the "application or continued application" of antidumping duties, as the EC seems to think. A preliminary determination in an administrative review does not affect the cash deposit rate or the assessment rate – those rates are set in the final determination, and until then, the rates in effect from the prior administrative review remain in effect. In addition, a sunset review can only result in the continuation of an order beyond the five-year sunset period once a final determination has been made by both the US Department of Commerce and the US International Trade Commission. Most importantly, the EC's argument ignores the plain text of Article 17.4. The investigating authority must take final action by the time of the panel request, which has not happened here; otherwise, the antidumping measure cannot fall within the panel's terms of reference.⁴⁵

31. The EC attempts to confuse the Panel by citing to the panel report in *Mexico – HFCS* and asserting that other panels have allowed claims against preliminary measures.⁴⁶ *Mexico – HFCS* involved a claim that Mexico had applied a provisional measure for longer than six months, and thereby violated Article 7.4 of the AD Agreement. Mexico argued that because the United States failed to identify the provisional measure in its panel request, the claim concerning that measure fell outside the panel's terms of reference. The United States, however, had identified the definitive antidumping duty in its panel request, and argued that it was asserting a violation of Article 7 not with reference to the provisional measure as a "measure" in the dispute, but rather as one of its legal claims related to the final antidumping measure. The panel concluded that the claim was related to the definitive antidumping duty identified in the panel request and therefore fell within the scope of the proceeding.⁴⁷

32. Unlike the United States in *Mexico – HFCS*, the EC has not even challenged a final determination in any of the four proceedings, so there is no question as to whether the preliminary determination is somehow related to the final measure. There is no textual basis under which the EC can bring these claims, when it can wait until the issuance of final results and challenge those as

⁴² Under Article 17.4, a provisional measure may only be challenged when it "has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7". The EC has not demonstrated the applicability of this exception.

⁴³ EC Response, para. 50; EC Response to Panel Question 6, para. 29.

⁴⁴ See Part II.B, *supra*.

⁴⁵ The EC also challenges 52 determinations, among which are four preliminary determinations. The EC's alleged defence neglects to address the fact that the EC is making separate claims as to these preliminary determinations. It now appears that the EC is abandoning its claims with respect to the four preliminary measures insofar as they are part of its claims against zeroing as applied in 52 antidumping proceedings.

⁴⁶ EC Response, para. 53.

⁴⁷ *Mexico – HFCS (Panel)*, paras. 7.44-7.55.

inconsistent with the AD Agreement. The plain text of Article 17.4 is clear: the EC's specific claims against preliminary measures are outside this Panel's terms of reference.

33. The Panel asked the EC whether the exception to the finality requirement under Article 17.4 of the AD Agreement was applicable in this dispute as to the four preliminary measures identified by the EC.⁴⁸ The EC's response is anything but clear, and does violence to the text of Article 17.4. The EC first seems to be saying that the conditions "are in any event met in this case", but then contradicts itself in the very next sentence by claiming that "the EC is however not challenging provisional measures in the sense of Article 17.4".⁴⁹ It is difficult to see how the exception could be applicable, if the exception requires that the measures be provisional within the meaning of Article 17.4. Moreover, the EC does not demonstrate that it is making a claim under Article 7.1 of the AD Agreement, as required by the terms of Article 17.4.

34. The EC also asks the Panel "to take into account the specific circumstances of this case".⁵⁰ To the EC, these include the "fact that the EC is complaining about what is essentially a mathematical formula that is essentially identical" wherever it is used; the alleged response of the United States to Appellate Body reports on "zeroing" in wholly unrelated disputes; and the nonsensical reasoning that Article 17.1 refers to Article 7.1 and Article 7.5 refers to Article 9 of the AD Agreement, the "provision that the US has already been found to have infringed".⁵¹ The EC asserts that these "specific circumstances" have a "significant impact" on the EC, and that it is "within the Panel's discretion" to exercise jurisdiction.⁵²

35. These EC essentially would like the Panel to act as a court of equity. However, this Panel is bound by the terms of the DSU and the covered agreements, which do not accord it the authority to assume jurisdiction over a matter which otherwise would not be within the Panel's terms of reference. It is improper to take into account "specific circumstances" that are nowhere to be found in the text of Article 17.4. Most egregiously, the EC is asking the Panel to consider the alleged US response to prior Appellate Body reports on "zeroing", which is another manifestation of the EC's attempt to improperly bring into this dispute for what allegedly has happened in separate, distinct disputes. The EC, however, cannot escape the fact that it is challenging preliminary measures, and that under Article 17.4, such measures are not within the Panel's terms of reference.

III. THE PANEL SHOULD REJECT THE EC'S ARGUMENTS CONCERNING THE METHODOLOGIES IN ASSESSMENT PROCEEDINGS

A. US ASSESSMENT REVIEWS ARE DISTINCTIVELY DIFFERENT FROM INVESTIGATIONS

36. The EC's proposed approach in this dispute fails to appreciate what is happening in investigations and assessment reviews. The United States would like briefly to discuss for the Panel how investigations and administrative reviews operate under US law.

37. In the investigation phase, US law provides that the US Department of Commerce ("Commerce") will normally use the average-to-average method for comparing transactions during the period of investigation. US law also authorizes the use of transaction-to-transaction comparisons

⁴⁸ Panel Question 6.

⁴⁹ EC Answer to Panel Question 6, para. 29.

⁵⁰ EC Answer to Panel Question 6, para. 30.

⁵¹ EC Answer to Panel Question 6, para. 30.

⁵² EC Answer to Panel Question 6, para. 30. The EC attempts to create confusion by using the "significant impact" language of the exception under Article 17.4. However, as demonstrated above, the EC is not even challenging a provisional measure under Article 7.1 of the AD Agreement, so the exception is not applicable in the first instance.

and, provided that there is a pattern of prices that differs significantly by region or time period, among other things, the average-to-transaction method.

38. In the second phase of a US antidumping proceeding – the "assessment phase" – Commerce's focus is on the retrospective calculation and assessment of antidumping duties on individual customs entries covered by an antidumping order. While an antidumping investigation typically covers a broad range of exporters, foreign producers, and US importers, antidumping duties are paid by US importers, who become liable when they enter goods into the United States. Thus, the US retrospective assessment system seeks to calculate the duty based on specific entries by importers during the period covered by the review.

39. In the US system⁵³, while an antidumping duty liability attaches at the time of entry, duties are not actually assessed at that time. Instead, the United States collects a security in the form of a cash deposit at the time of entry. Once a year (during the anniversary month of the orders) interested parties may request a "periodic review" to determine the final amount of duties owed on each entry made during the previous year.⁵⁴ Antidumping duties are calculated on a transaction-specific basis, and are paid by the importer of the transaction. If the final antidumping duty liability exceeds the amount of the cash deposit, the importer must pay the difference. If the final antidumping duty liability is less than the cash deposit, the difference is refunded. If no periodic review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties. To simplify the collection of duties calculated on a transaction-specific basis, the absolute amount of duties calculated for the transactions of each importer are summed up and divided by the total entered value of that importer's transactions, including those for which no duties were calculated. US customs authorities then apply that rate to the entered value of the imports to collect the correct total amount of duties owed. A similar calculation is performed for each exporter to derive a new estimated antidumping duty deposit rate.

40. The US retrospective duty assessment system is more complex to operate, and requires a larger expenditure of administrative resources and personnel. However, it allows US authorities to closely calibrate the imposition of antidumping duties to the actual levels of dumping during the period covered by a periodic review. In addition, it encourages exporters and importers to adjust prices on their own – either through the exporter reducing prices in their home market to bring down the "normal value", the importer and exporter agreeing to a higher "export price", or in the case of a related importer, if the importer raises its US sales price – in order to eliminate dumping margins and avoid paying antidumping duties. Thus, in the United States the level of antidumping duties actually collected from importers typically declines sharply during the period covered by an order.⁵⁵ This means that prices in the marketplace can adjust without the actual collection of duties.

41. In contrast, while a prospective assessment system is more predictable (because the duty does not change)⁵⁶, it is also more punitive and inflexible because an importer generally is subject to the original *ad valorem* rate or reference price found in an original investigation or sunset review for the next five-year period, regardless of price fluctuations or changing competitive conditions in the market. While refunds are theoretically available under Article 9 in such systems, antidumping

⁵³ See *US – Zeroing (Mexico)*, paras. 7.98-7.100.

⁵⁴ The period of time covered by U.S. assessment proceedings is normally twelve months. However, in the case of the first assessment proceeding following the investigation, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures during the investigation.

⁵⁵ On average, margins in the US system decline by approximately 75-80 per cent. This, of course, varies by case, and there are exceptions, such as where the respondents do not cooperate and margins must be calculated on the basis of the facts available.

⁵⁶ The main advantage of the prospective assessment system is that an importer knows its maximum antidumping liability in advance – for better or worse.

authorities often tend to strongly "discourage" requests for a refund, and most sophisticated importers are well aware of the "risks" of seeking one (or simply discover that no refund procedure exists under the antidumping law, e.g. India). A prospective *ad valorem* system also typically results in the collection of much higher amounts of duties from a revenue standpoint, since the antidumping duty effectively serves as an additional tariff for the five-year period, as opposed to being adjusted annually as in the United States.

B. THE EC FAILED TO ESTABLISH THAT ARTICLE 2.4.2 APPLIES OUTSIDE OF AN INVESTIGATION

42. The EC focused much attention at the first meeting with the Panel on its arguments concerning its allegedly proper reading of Article 2.4.2 of the AD Agreement. It is the EC's position that any time a Member makes "a systematic examination or inquiry" as to dumping, that Member is conducting an investigation subject to the disciplines of Article 2.4.2.⁵⁷ The United States has fully demonstrated in its first written submission and response to the Panel's questions⁵⁸, that Article 2.4.2 does not apply to each and every segment of an antidumping proceeding that happens to involve a systematic examination or inquiry.

43. A critical examination of each of the words in the phrase "the existence of margins of dumping during the investigation phase", independent of one another, support the US position. Additionally, when the phrase is considered in its entirety, it is clear that the obligations in Article 2.4.2 do not extend beyond an investigation within the meaning of Article 5.

44. An Article 5 investigation is a *sui generis* proceeding that resolves the threshold question of "the existence, degree, and effect" of dumping. An analysis of the relationship between Article 2.4.2 and an Article 5 investigation begins with the text of Article 1, which provides as follows:

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to *investigations initiated*¹ and conducted in accordance with the provisions of this Agreement

¹ The term "*initiated*" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.⁵⁹

45. The text of Article 1, when read with its footnote, provides that "investigations initiated and conducted in accordance with the provisions of this Agreement" are investigations initiated pursuant to Article 5. Article 5 defines the nature of the investigation for which it provides:

[A]n investigation to determine the *existence*, degree and effect of any alleged dumping shall be initiated. . . .⁶⁰

46. Thus, Article 1 defines the "initiation" of the investigation phase that leads to an antidumping measure as "the procedural action by which a Member formally commences an investigation as provided in Article 5". Article 5.1, in turn, provides that investigations are initiated upon a written application, or pursuant to other specified conditions, to determine the "existence, degree and effect" of alleged dumping. Consequently, there is no ambiguity as to the nature of the "investigations initiated and conducted" pursuant to Article 1. There is only one type of investigation provided for in Article 5, and footnote 1 to Article 1 explicitly refers to "an investigation as provided in Article 5", thus, Article 1 can only be referring to Article 5 investigations.

⁵⁷ EC First Written Submission, paras. 213-216; EC Answer to Panel Question 9, paras. 54-65.

⁵⁸ See US First Written Submission, para. 107-110, *see also* US Answer to Panel Question 9, paras. 18-19 (discussing, among other things, the meaning of the word "phase").

⁵⁹ AD Agreement, Article 1 (emphasis added).

⁶⁰ AD Agreement, Article 5.1 (emphasis added).

47. Additionally, the term "existence" must be considered as it is a necessary part of an Article 5 investigation which may lead to applying an antidumping measure consistent with Article 1. "Existence" is used in connection with the term dumping in only one other place in the AD Agreement besides Article 5.1: Article 2.4.2. Article 2.4.2 provides for the manner in which the "existence" of dumping margins is to be established, "[T]he *existence* of margins of dumping during the investigation phase shall normally be established on the basis of a comparison . . .".⁶¹ The ordinary meaning of the word "existence" according to *The New Shorter Oxford English Dictionary* is "the fact or state of existing; actual possession of being; a mode or kind of existing; dealing with the existence of a mathematical or philosophical entity". The word "existence" before the phrase "of margins of dumping" indicates that Members are to determine the "existence of [the] mathematical or philosophical entity" referred to as "margins of dumping".

48. The drafters' intent to limit Article 2.4.2 exclusively to Article 5 investigations is further demonstrated by the use of the *definite* article "the" before the term "investigation phase", rather than the *indefinite* article "an". According to *The New Shorter Oxford English Dictionary*, the ordinary meaning of the article "the" is "designating one or more persons or things already mentioned or known, particularized by context, or circumstances, inherently unique, familiar or otherwise sufficiently identified". If, as the EC contends, the term "investigation" in the context of Article 2.4.2 may be interpreted in generic terms, rather than as a term of art referring to the Article 5 phase, the drafters would have used the *indefinite* article "an".

49. The EC has argued that ordinary rules of grammar compel its reading of "during the investigation phase" as any investigation (in the sense of an inquiry) undertaken by the investigating authority. For the reasons given above, the United States disagrees. In this regard, it is notable that the Appellate Body itself has used the phrase "the investigation phase" in order to describe how obligations in Article 11 of the SCM Agreement (the parallel provision to Article 5 of the AD Agreement)⁶² are limited to original investigations and do not apply to any reviews. In particular, in the dispute *United States – Carbon Steel*, in rejecting a claim by the EC that the *de minimis* standard in Article 11.9 applied also to sunset reviews pursuant to Article 21.3, the Appellate Body noted:

Although the terms of Article 11.9 are detailed as regards the obligations imposed on authorities thereunder, none of the words in Article 11.9 suggests that the *de minimis* standard that it contains is applicable beyond *the investigation phase* of a countervailing duty proceeding.⁶³

Indeed, before the panel in that dispute, the EC *itself* used the phrase "the investigation phase" to mean the initial investigation and not any reviews.⁶⁴ The EC was not acting contrary to the ordinary rules of grammar but rather used the phrase according to its ordinary, and grammatical, sense.

⁶¹ Emphasis added.

⁶² Article 11 of the SCM Agreement is entitled "Initiation and Subsequent Investigation". Article 5 of the AD Agreement is entitled "Initiation and Subsequent Investigation".

⁶³ *US – Carbon Steel (AB)*, para. 68 (italics added; footnote omitted); *see id.*, para. 68 n. 58 ("We do not subscribe to the view, expressed by Japan, that the use of the word "cases" (rather than the word "investigation") in the second sentence of Article 11.9 means that the application of the *de minimis* standard set forth in that provision must be applied in *all* phases of countervailing duty proceedings - not only in investigations. The use of the word "cases" does not alter the fact that the terms of Article 11.9 apply the *de minimis* standard only to *the investigation phase*.") (italics added); *id.*, para. 89 ("For these reasons, we consider that the non-application of an express *de minimis* standard at the review stage, and limiting the application of such a standard to *the investigation phase* alone, does not lead to irrational or absurd results.") (italics added).

⁶⁴ *US – Carbon Steel (Panel)*, para. 5.97 (reproducing EC oral statement at the first panel meeting: "The US also draws (at para. 67) the wrong conclusions from the distinction between *the investigation phase* and the review phase of a CVD proceeding.") (italics added; underlining in original).

50. The limited application of Article 2.4.2 to the investigation phase is further consistent with the divergent functions of investigations and other proceedings under the AD Agreement. The Appellate Body has already recognized that investigations and other proceedings under the AD Agreement serve different purposes and have different functions, and therefore are subject to different obligations under the Agreement.⁶⁵ Contrary to the EC's contention, the AD Agreement does not require Members to examine whether margins of dumping "exist" in the assessment phase. Article 9 assessment proceedings are not concerned with the existential question of whether injurious dumping "exists" above a *de minimis* level such that the imposition of antidumping measures is warranted. That inquiry would have already been resolved in the affirmative in the investigation phase. Instead, Article 9, by its terms, focuses on the amount of duty to be assessed on particular entries, an exercise that is separate and apart from the calculation of an overall dumping margin during the threshold investigation phase of an antidumping proceeding.

51. Even the EC recognizes that "different types of proceedings have different purposes and are not all subject to all the provisions of the *Anti-Dumping Agreement*".⁶⁶ Thus, as the panel in *US – Zeroing (EC)* found, the qualitative differences between Article 5 and Article 9.3 make reasonable an interpretation that different methodologies could be applied to address the different purposes of the separate and distinct proceedings.⁶⁷

52. Among the various alternative definitions that the EC posits for the meaning of "during the investigation phase" in Article 2.4.2, it claims that the phrase may be read as synonymous with the term "period of investigation".⁶⁸ However, this suggested interpretation denies meaning to the drafters' decision to utilize the unique "investigation phase" terminology in Article 2.4.2. As the panel in *Argentina – Poultry* found: "Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping 'during the investigation phase'".⁶⁹ Numerous provisions in the AD Agreement refer to a "period of investigation",⁷⁰ and the drafters' use of the different term "the investigation phase" was deliberate and must be given separate meaning.

53. Furthermore, the EC's argument that duties calculated in assessment proceedings are subject to Article 2.4.2 because "margin of dumping" has only one meaning, is premised on the incorrect presumption that margins of dumping must be calculated for the product as a whole in all contexts, and that transaction-specific margins are not permitted.⁷¹ No confusion or inconsistency is present if, as the AD Agreement provides, transaction-specific margins are permitted. In Article 9 assessment proceedings, because it is the importers that will incur liability for duties, it is appropriate to determine liability on an importer- and transaction-specific basis. Additionally, the general reference to Article 2 in Article 9.3 necessarily includes any limitations found in the text of Article 2. Article 2.4.2 by its own terms is limited explicitly to the investigation phase, whereas Article 9 contains certain procedural obligations applicable in assessment reviews⁷², but does not prescribe methodologies for assessment proceedings such as those established in Article 2.4.2 for the

⁶⁵ *US – Corrosion-Resistant Steel AD Sunset Review (AB)*, para. 87.

⁶⁶ EC First Written Submission, para. 223.

⁶⁷ *US – Zeroing (EC) (Panel)*, paras. 7.113-7.223 (considering and rejecting arguments the EC raises here in connection with the term "investigation phase"). The Appellate Body "[did] not express [] any view" on the Panel's analysis of Article 2.4.2. *US – Zeroing (EC) (AB)*, paras. 160-164.

⁶⁸ EC Answer to Panel Question 9, para. 53.

⁶⁹ *Argentina – Poultry (Panel)*, para. 7.357.

⁷⁰ See, e.g., AD Agreement, Articles 2.2.1, 2.2.1.1, 2.2.1.1 n.6, 2.4.1.

⁷¹ EC Answer to Panel Question 9, para. 58.

⁷² *Argentina – Poultry*, para. 7.355 ("The primary focus of Article 9.3, read together with subparagraphs 1-3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected").

investigation phase. Thus, there is no basis in Article 9 for ignoring the explicit language in Article 2.4.2, limiting its reach to investigations.

54. The Appellate Body in *EC – Bed Linen* found that there is no connection between Article 9.3 and Article 2.4.2, and that the "requirements of Article 9 do not have a bearing on Article 2.4.2, because the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties".⁷³ As the panel in *Argentina – Poultry* concluded, if "the drafters of the *AD Agreement* had intended to refer exclusively to Article 2.4.2 in the context of Article 9.3, the latter provision would have stated that 'the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.4.2'".⁷⁴

55. Finally, the EC's arguments related to the negotiated placement of various terms within the phrase "the existence of margins of dumping during the investigation phase shall normally be established" are based on mere speculation.⁷⁵ The negotiating history does not define "investigation phase" and does not comment on the reason for moving the text. Further, as the Panel observed in *US – Zeroing (EC) (Panel)*, moving the text could have been a compromise to limit ability to impose an order, but to maintain the ability to extend an order once in place.⁷⁶

C. ARTICLE 9.3.1 DOES NOT REQUIRE AN "EXPORTER-ORIENTED" ANALYSIS

56. The EC's assertions that an exporter-oriented approach to Article 9.3.1 assessment proceedings is appropriate because "exporters can dump [and] . . . importers cannot"⁷⁷ is unsupported by the plain text of the AD Agreement because it ignores that it is *importers* who participate in export transactions and are ultimately liable for the antidumping duties. By its terms, the function of an Article 9.3.1 assessment proceeding is to determine "the final liability for payment of anti-dumping duties". This function is fundamentally different from that of Article 2.4.2, which sets forth the comparison methodologies to be used to establish the "existence of margins of dumping during the investigation phase".

57. Although, as stated by the Appellate Body in *US – Zeroing (Japan)*, dumping involves differential pricing behaviour of exporters or producers between its export market and its normal value⁷⁸, in the real world dumping occurs at the level of an importer's individual transactions. It is the importer who negotiates the "export price" when purchasing a product from a foreign producer or exporter, or, in a related-party transaction, when selling to an unrelated purchaser in the United States. Thus, while the foreign producer may control the "normal value" by virtue of its sales prices in its home market, it is the importer who actually helps determine whether a product is "dumped" in the United States by agreeing on an "export" price and thus becoming liable for any resulting antidumping duties. Moreover, under both prospective and retrospective assessment systems, the remedy for dumping in Article VI:2 of GATT 1994, *i.e.*, antidumping duties, is applied at the level of individual customs entries and paid by importers who thereby incur liability for the additional duties.

58. The US retrospective assessment system is designed to ensure that an individual importer's liability reflects the actual level of dumping associated with its transactions. Put another way, an importer should not pay duties because another importer has bought dumped goods, or escape liability because another importer has bought non-dumped goods. In addition, one of the underlying goals of the US retrospective assessment system is not to collect large amounts of antidumping duties from importers, but to encourage exporters and importers to adjust prices on their own to bring them in line

⁷³ *EC – Bed Linen (Article 21.5) (AB)*, paras. 123-124 (emphasis in original).

⁷⁴ *Argentina – Poultry (Panel)*, para. 7.358 (emphasis added).

⁷⁵ EC Answer to Panel Question 9, para. 57.

⁷⁶ *US – Zeroing (EC) (Panel)*, paras. 7.212, 7.219.

⁷⁷ EC Answer to Panel Question 8, para. 45.

⁷⁸ *US – Zeroing (Japan) (AB)*, para. 156.

with fair market value. Thus, upon issuance of a US order, sophisticated exporters and importers typically will work together to adjust either the home market price or US export price to eliminate the dumping margins and avoid future liability for antidumping duties. Thus, the US system encourages importers to raise resale prices (or exporters to reduce prices in their home market) to cover the amount of the antidumping duty liability, thereby eliminating injurious dumping. This achieves the goals of the US antidumping law (and GATT Article VI) of preventing injurious dumping, while avoiding subjecting importers to additional duties.

59. If under *US – Zeroing (EC) (AB)* and *US – Zeroing (Japan) (AB)*, the amount of one importer's antidumping margin must be aggregated with other importers to account for the amount by which some other transaction involving an entirely different importer was sold at above normal value, and *vice versa*, then an importer could be subjected to liability for dumped imports made by another importer over whom he or she has no control. This also means the importer who is engaged in dumped transactions would receive a windfall, because he or she may escape antidumping duties, or have his or her liability sharply reduced through the actions of another importer who behaved responsibly by eliminating its dumping margin.

60. No panel that has considered this issue has agreed that it is reasonable for one importer's liability to be reduced because another importer paid a "less dumped" price.⁷⁹ The panel in *US – Zeroing (Japan)* observed that mandating an exporter-oriented approach in Article 9.3 assessment reviews, where assessment liability is determined based on the product as a whole, would mean WTO Members with retrospective assessment systems "may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value".⁸⁰ The panel in *US – Zeroing (Mexico)* agreed that such "competitive disincentive to engage in fair trade could not have been intended by the drafters of the Antidumping Agreement and should not be accepted . . . as consistent with a correct interpretation of Article 9.3".⁸¹

61. Furthermore, an exporter-oriented approach, where assessment liability is determined for the product as a whole, makes no sense in the context of a prospective normal value duty assessment system, because the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. Under Article 9.4(ii), in a prospective normal value system⁸², the importer's liability for payment of antidumping duties must be determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value.⁸³ As a result, an importer who imports a product, the export price of which is equal to or higher than the prospective normal value, cannot be subjected to liability for payments of antidumping duties. If other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers.⁸⁴

⁷⁹ US First Written Submission, paras. 133-136, quoting *US – Zeroing (Japan) (Panel)*, para. 7.199 and *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.54-5.57; see also *US – Zeroing (Mexico)*, para. 7.146.

⁸⁰ *US – Zeroing (Japan) (Panel)*, para. 7.199.

⁸¹ *US – Zeroing (Mexico)*, para. 7.146, quoting Oral Statement of the United States at the Second Meeting, para. 18.

⁸² *US – Zeroing (Japan) (Panel)*, para. 7.201.

⁸³ *US – Zeroing (Japan) (Panel)*, para. 7.201; See also *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53.

⁸⁴ *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.54-5.57.

62. It would be manifestly absurd to interpret Article 9 as requiring offsets between importers in a retrospective assessment system while capping the importer's liability based on individual transactions in a prospective system.⁸⁵ As the panel in *US – Zeroing (Japan)* concluded, "the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transaction below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value".⁸⁶ If in a prospective normal value system individual export transactions at prices less than normal value can lead to liability for antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, the clear implication is that liability for payment of antidumping duties can be similarly assessed on the basis of individual export prices for less than normal value in the retrospective system applied by the United States.

63. The EC's exporter-oriented approach suggests that investigating authorities must assess antidumping duties based on the aggregated pricing behaviour of exporters, without regard to the actual margin of dumping associated with the particular import transaction.⁸⁷ This approach turns Article 9.3 on its head as it divorces the amount of antidumping duty assessed with respect to an import from the dumping margin associated with that import transaction, and is inconsistent with the importer- and import-specific character of the obligation to pay an anti-dumping duty.⁸⁸ Nothing in the text or context of Article 9.3.1 supports such a result. This argument reflects the EC's effort to force the requirements of Article 2.4.2 with respect to the *existence* of margins of dumping during the investigation phase, into Article 9.3, with its focus on *duty liability*. However, as we fully set forth above, and in our first written submission and answers to the Panel's questions⁸⁹, the provisions of Article 2.4.2 are irrelevant to Article 9.3.1 assessment proceedings.

64. Furthermore, the EC's proposed "solution"⁹⁰ only serves to demonstrate the absurdity of its argument. The EC suggests that even though some importers import subject merchandise at less than normal value, the importing Member should only be permitted to assess a partial amount of the duties owed on those transactions. The panel in *US – Zeroing (Japan)*, correctly observed that the "[i]mplication of such an interpretation is that a Member . . . may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value".⁹¹ Such a result would be inconsistent with the notion that injurious dumping is to be condemned and may be remedied under the Antidumping Agreement.

65. Finally, the EC's contention that importer-specific dumping duties are unnecessary because the targeted dumping provision is available when low-price exporter transactions are attributable to only one importer⁹² does not resolve the mathematical equivalency problem discussed in our first written submission and in our answer to the Panel Question 10. Nor, has the EC, in its answers to Question 10, provided a viable solution to the fact that the targeted dumping provision is rendered *inutile* by its suggested interpretation. On the contrary, despite its asserted concern with the customary rules of treaty interpretation, the EC states that the fact that the mathematical equivalence

⁸⁵ *US – Zeroing (Mexico)*, para. 7.133.

⁸⁶ *US – Zeroing (Japan) (Panel)*, para. 7.205; *see also US – Zeroing (EC) (Panel)*, para. 7.206.

⁸⁷ EC Answer to Panel Question 8, para. 45 ("only an exporter can have a dumping margin").

⁸⁸ *US – Zeroing (Japan)(Panel)*, para. 7.199.

⁸⁹ US First Written Submission, paras. 99-111; 119-28; US Answer to Panel Question 119(c) & (d), paras. 31-34.

⁹⁰ EC Answer to Panel Question 8, para 49.

⁹¹ *US – Zeroing (Japan) (Panel)*, para. 7.199

⁹² EC Answer to Panel Question 8, para. 48.

caused by a general prohibition on zeroing in all contexts renders an entire provision in the Agreement redundant, "doesn't matter".⁹³

D. THE EC'S CHALLENGE WITH RESPECT TO AN ASYMMETRICAL METHOD OF COMPARISON WITHOUT JUSTIFICATION IS NOT APPARENT FROM THE EC'S PANEL REQUEST AND FIRST WRITTEN SUBMISSION

66. The United States disagrees that the EC made "very clear" that it intended to make a separate claim that the "use of the third methodology in periodic reviews" violates Article 2.4.2 of the Antidumping Agreement.⁹⁴ The EC's citations to its panel request in support of its assertion that it made such a claim are, at best, veiled references. Moreover, the EC provided no discussion in support of this claim in its first written submission. Given that the EC's panel request was unclear, and that it did not attempt to make a *prima facie* case in its first written submission, it is hardly meaningful that the United States did not respond more fully in its first written submission to such an alleged claim by the EC.

E. BECAUSE THE CHALLENGED MEASURES ARE BASED ON A PERMISSIBLE INTERPRETATION, THE PANEL SHOULD FIND THEM TO BE IN CONFORMITY WITH THE AD AGREEMENT

67. With respect to the EC's substantive arguments, the Panel should reject the EC's request that this Panel create an obligation to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same assessment proceeding exceed normal value, notwithstanding the absence of any textual basis for such an obligation. For the reasons set forth in the US first written submission, the United States respectfully requests the Panel to refrain from reading into the AD Agreement and Article VI of the GATT 1994 an obligation that is not reflected in the text. Furthermore, for the reasons discussed above, interpreting "the existence of margins of dumping during the investigation phase" under Article 2.4.2 as referring to an investigation under Article 5 is a permissible interpretation because it follows from the application of the customary rules of interpretation of public international law to the text of the AD Agreement. Therefore, the United States requests that this Panel remain faithful to the standard of review under Article 17.6(ii) of the AD Agreement by finding that the US actions in the assessment proceedings at issue rest upon a permissible interpretation of the AD Agreement under the customary rules of interpretation of public international law.

IV. THE EC HAS DISTORTED THE NEGOTIATING HISTORY OF THE AD AGREEMENT

68. The EC stated at the first meeting with the Panel that "*all* of the interpretive elements in the Vienna Convention support the position of the EC".⁹⁵ Among these elements is the recourse to negotiating history. The EC, however, relies on an inaccurate and revisionist version of that history to support its argument that "zeroing" is prohibited in all contexts. The United States would like to set the record straight and discuss the proper version of the negotiating history of the AD Agreement.

69. Zeroing is not a new subject for the GATT/WTO system. It was discussed extensively during the Uruguay Round. It was also the subject of two major disputes under the Tokyo Round Antidumping Code. On July 8, 1991, Japan initiated a dispute settlement proceeding challenging an EC antidumping decision in *EC – Audiocassettes*.⁹⁶ A short time later, in November 1991, Brazil requested consultations regarding an EC antidumping decision in *EC – Cotton Yarn*.⁹⁷ Both cases

⁹³ EC Answer to Panel Question 10, para. 66.

⁹⁴ EC Answer to Panel Question 11(b), para. 73.

⁹⁵ EC First Opening Statement, para. 22.

⁹⁶ *EC – Audiocassettes*, para. 360.

⁹⁷ *EC – Cotton Yarn*, para. 502.

challenged numerous aspects of the EC's antidumping methodology, including zeroing. Both Japan's and Brazil's zeroing claims turned on a now familiar argument that zeroing violated the "fair comparison" requirement of Article 2.6 of the Tokyo Round Antidumping Code, the predecessor to Article 2.4 of the AD Agreement. In both cases, the panels rejected Japan's and Brazil's claims. The panels found no basis in Article 2.6 of the Tokyo Round Antidumping Code to support an expansive reading of "fair comparison". As a result, they concluded that the EC's zeroing practices were not a violation of the Code. As the *EC – Cotton Yarn* panel stated:

In the view of the Panel the argument of Brazil was that the requirement to make due allowance for differences affecting price comparability had to be interpreted in light of the object and purpose of Article 2.6, which was to effect a fair comparison. However Brazil had not made any independent arguments designed to establish that apart from the requirements of the first sentence, and the allowances required by the second sentence of Article 2.6, there was a further requirement that any comparison of normal value and export price must be "fair". The Panel was of the view that although the object and purpose of Article 2.6 is to effect a fair comparison, the wording of Article 2.6 "[i]n order to effect a fair comparison" made clear that if the requirements of that Article were to be met, any comparison thus undertaken was deemed to be "fair".

70. In this regard, Brazil noted at the outset that it "was not arguing against zeroing per se".⁹⁸ Instead, Brazil conceded that "zeroing" is normally permissible, but argued that in an environment of high inflation like Brazil the EC's zeroing methodology had an especially prejudicial effect on the calculation of dumping margins.⁹⁹

71. The Panel, however, rejected Brazil's expansive reading of "fair comparison". Instead, it read "fair comparison" narrowly as relating strictly to allowances and adjustments:

The Panel noted that the first sentence of Article 2.6 concerned the actual comparison of prices at the same level of trade and in respect of sales made as nearly as possible the same time. The Panel considered that the second sentence of Article 2.6 concerned allowances to be made for the relevant differences in the factors that affected price determination in the respective markets sufficient to ensure the required comparability of prices. The Panel took the view that the second sentence of Article 2.6 required that allowances necessary to eliminate price comparability be made prior to the actual comparison of the prices, in order to eliminate the differences which could affect the subsequent comparison. The Panel considered that "zeroing" did not arise at the points at which the actual determination of the relevant prices was undertaken pursuant to the second sentence of Article 2.6. In the Panel's view, "zeroing" was undertaken subsequently to the making of allowances necessary to ensure price comparability in accordance with the obligation contained in the second sentence of Article 2.6. It related to the subsequent stage of comparison of prices; a stage which was not governed by the second sentence of Article 2.6. Therefore, the Panel dismissed Brazil's argument that the EC had failed to make due allowances for the effects of its so-called "zeroing" methodology.¹⁰⁰

⁹⁸ *EC – Cotton Yarn*, para. 486.

⁹⁹ The Panel noted: "Brazil argued that even if so-called "zeroing" could be defended in most circumstances, it could not be defended in cases where due to high inflation very high fluctuations in positive and negative dumping margins occurred". *EC – Cotton Yarn*, para. 498.

¹⁰⁰ *EC – Cotton Yarn*, para. 500.

72. In other words, the *EC – Cotton Yarn* panel did not agree with Brazil's contention that the term "fair comparison" in Article 2.6 of Tokyo Round Antidumping Code¹⁰¹ incorporates a broad prohibition zeroing. Instead, the panel interpreted "fair comparison" as referring only to the use of adjustments or allowances for purposes of facilitating price comparability.

73. In sum, these panel decisions provide important context on the meaning of the term "fair comparison" in the Tokyo Round Code. In these disputes, Tokyo Round Antidumping Code panels did not interpret identical language in the Code as a prohibition on zeroing or a requirement to average negative antidumping margins. Both panels rejected Japan's and Brazil's attempts to give this term the expansive meanings sought by the EC in this case. It is also noteworthy that Brazil was prepared to admit at the outset that zeroing is permissible in "most" cases, and thus did not challenge zeroing *per se*. In short, a prohibition on zeroing, if it exists, must have come into being in the Uruguay Round, since it did not exist in the Tokyo Round Antidumping Code. This would have required a textual change, but where is that change? As we now show, the Uruguay Round did not result in any new "common understanding" on a broad-based zeroing prohibition. Instead, the key textual provisions that have been cited by the Appellate Body in its previous findings remained virtually unchanged from GATT 1947 Article VI, the Kennedy Round Antidumping Code, and the Tokyo Round Antidumping Code, including such phrases as "product", "products", "margin of dumping", and "fair comparison".

74. During the Uruguay Round negotiations, Japan, Norway, Hong Kong, and Singapore repeatedly sought to add a ban on "zeroing" to the draft AD Agreement text. They argued vehemently that zeroing is inherently unfair; provided lengthy negotiating proposals discussing the treatment of "negative dumping" and "non-dumped sales" under GATT Article VI and the Tokyo Round Antidumping Code; and submitted detailed textual proposals to ban zeroing or require consideration of non-dumped sales. Their proposals, however, were strongly opposed at that time by the EC, the United States, and Canada, and were not incorporated into the final AD Agreement. As a result, as we now show, careful analysis of the negotiating history pursuant to Article 32 of the Vienna Convention demonstrates conclusively that the AD Agreement does not incorporate a broad ban on zeroing or a requirement to aggregate individual transactions under Article 9.3.

75. In September 1987, Japan submitted an initial proposal to the Uruguay Round Negotiating Group on MTN Agreements and Arrangements ("MTN Negotiating Group"), which had jurisdiction over the Tokyo Round Antidumping Code. The Japanese proposal called attention to the need to build a "common understanding" to address the role of "non-dumped" sales in calculating the "export price", as follows:

Although the Code states that, in order to effect a fair comparison between export price and domestic price, two prices are to be compared at the same level of trade and due allowance be made for the differences in conditions of sale, it is still susceptible of authority's subjective discretion. To clarify elements to be counted for adjustment in order to assure the same level of trade and to enumerate the content of the differences in conditions of sale would help the authorities to assure a fair comparison.

Certain Signatories use the weighted average of prices in all transactions in calculating the "normal value" whereas they use the weighted average of dumped prices exclusively in calculating the "export price". There is a need, therefore, to

¹⁰¹ This provision was incorporated in Article 2.4 of the AD Agreement, which deals with adjustments.

build a common understanding on the calculation of dumping margin in order to eliminate such an arbitrary calculation.¹⁰²

76. The Japanese submission is noteworthy because it underscores that at that time Japan fully recognized that: (1) there was no "common understanding" on zeroing and (2) the Tokyo Round language on "fair comparison" did not incorporate a "common understanding" to prohibit "zeroing" or to require the inclusion of "non-dumped sales" in the export price.

77. Japan submitted a second "zeroing" proposal to the Uruguay Round Negotiating Group on MTN Agreements and Arrangements in June 1988:

In cases where sales prices vary among many transactions, certain signatories, using the weighted-average of domestic sales price as the normal value with which each export price is compared, calculate the average dumping margin in such a way that the sum of the dumping margins of transactions the export prices of which are lower than normal value is divided by total amount of export prices. In this method, however, negative dumping margins, i.e., the amount by which export price exceeds normal value, are ignored.

Consequently, dumping margins occur in cases where export prices vary over time ... or where export prices vary due to different routes of sale ..., even if the average level of export prices is equal to that of domestic sales prices.¹⁰³

Accordingly, the second Japanese proposal explicitly referenced the role of "negative dumping margins".

78. In July 1989, Hong Kong submitted a competing proposal to address "zeroing" in what was then Article 2.6 of the "Carlisle draft"¹⁰⁴ (and would later become Article 2.4 of the AD Agreement) as follows:¹⁰⁵

Negative dumping margin (Article 2.6)

14. In calculating the overall dumping margin of the producer under investigation, certain investigating authorities compare the normal value (calculated on a weighted average basis) with the export price on a transaction by transaction basis. For transactions where normal value is higher than the export price (i.e. dumping occurs), the dumping margin by which the normal value exceeds the export price of each transaction in value terms will be added up. The grand total will then be expressed as a percentage of the total value of the transactions under investigation. This will then represent the overall dumping margin in percentage terms. For transactions where normal value is lower than the export price (i.e. no dumping occurs) the "negative" dumping margin by which the normal value falls below the export price in value terms will be treated as zero instead of being added to the other transactions to offset the dumping margin. As a result, it would be technically easy to find dumping with an inflated overall dumping margin in percentage terms.

¹⁰² *Communication From Japan*, MTN.GNG/NG8/W/11, at item II.1(4) (Sept. 28, 1987) (emphasis added).

¹⁰³ *Communication From Japan*, MTN.GNG/NG8/W/30, at item I.4(3) (June 20, 1988) (emphasis added).

¹⁰⁴ Referring to the then Deputy Director General of the GATT, Charles Carlisle.

¹⁰⁵ MTN.GNG/NG8/W/51/Add.1, p. 3 (22 Dec. 1989) (emphasis added).

79. In a separate communication entitled "Principles and Purposes of Anti-Dumping Provisions", Hong Kong discussed the imposition of duties on an individual transaction basis:

The second way in which anti-dumping duties are imposed on goods which are not dumped, arises out of the tendency to apply an anti-dumping duty as though it were an import levy on all imports from a named country because certain suppliers from that country have been found to have dumped at some time in the past. This ignores the fact that under Article VI, an anti-dumping duty is a levy on dumped imports of products, not on all such products from a named source which may be found to be dumping such products in the past. *By a strict interpretation, it would appear that only an entry-by-entry system is fully consistent with Article VI; and any variations to such a system to address administrative difficulties must be carefully assessed as to whether this basic requirement of Article VI is still met.*¹⁰⁶

80. Similar concerns about "negative dumping" were expressed by Singapore in a paper regarding "Proposed Elements for a Framework for Negotiations, Principles and Objectives for Antidumping Rules".¹⁰⁷ Singapore argued that: "In calculating dumping margins, "negative" dumping should be taken into account i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value".

81. On November 15, 1989, the GATT Secretariat summarized the status of discussions in the Negotiating Group as follows:¹⁰⁸

13. Use of weighted averages in the comparison of export price and normal value

29. The following were among comments made:

- the problem arose from practices where the normal value, established on a weighted-average basis, was compared to the export price on a transaction-by-transaction basis. Thereby, dumping might be found merely because a company's export price varied in the same way as its own domestic price. Even when domestic profit margin was the same as in the export market, any variations in the export price would, due to the disregard of negative dumping margins, cause dumping to be found, or a dumping margin to be increased;

- if negative margins were included in the calculation, one would not deal with instances in which dumping was targeted to a particular portion of a product line or to a particular region; sales at fair value in one region or in one portion of a product line did not offset injury caused in the other;

- given the definition of like products in Article 2:2, it was difficult to see the relevance of the product line argument. Injury to producers in certain areas presupposed market segmentation which was dealt with in Article 4:1(ii);

¹⁰⁶ MTN.GNG/NG8/W/46, p.8 (underlining in original; italics added). This communication represents the view not just of one participant in the MTN Agreements negotiations, but the statement by a skilled and sophisticated WTO Member. This Member's view that ideally the imposition of dumping should apply at an individual importer level based on individual entries suggests that the findings in *US – Zeroing (EC) (AB)* and *US – Zeroing (Japan) (AB)* that the calculation of a dumping margin must be done on the basis of the "product as a whole" are misplaced.

¹⁰⁷ MTN.GNG/NG8/W/55, p.7 (13 Oct. 1989).

¹⁰⁸ *Meeting of 16-18 October 1989 of the Negotiating Group on MTN Arrangements*, MTN.GNG/NG8/13, at para. 29 (Nov. 15, 1989) (emphasis added).

- the issue at stake was masked, selective dumping, the effects of which could be considerable;
- an important question was whether non-dumped imports should also have to be included in the examination of injury.

82. In short, there was no consensus. The Secretariat's report underscores the lack of agreement within the Negotiating Group on modifying Article 2.6 to prohibit "zeroing". While some participants, *e.g.* Japan, Hong Kong, Singapore, and the Nordics strongly supported such a proposal, others were concerned that it would facilitate "selective dumping" into specific markets or for specific product lines.

83. When the negotiations shifted to the drafting of a proposed text, the Nordic Countries submitted proposed amendments to the Code as follows:¹⁰⁹

Due allowances and fair comparison

Amend present Article 2.6 (i.e. new Article 2.7) to read as follows and add a footnote: In order to effect a fair comparison between the normal value, as determined in accordance with paragraphs 4 and 5 above and the export price, both prices shall be calculated in a uniform and consistent manner*

...

(Footnote) * A uniform and consistent manner of calculation implies that when normal value is determined, *e.g.* by calculating the weighted or arithmetical averages, the export price shall also be determined by similar weighted or arithmetical average calculations. . .

Nothing even vaguely resembling the Nordic footnote appears in the final text of the AD Agreement.

84. An alternative proposal to revise Article 2.6 of the Tokyo Round Antidumping Code was offered by Singapore, as follows:

E. Determination of normal value and comparison between normal value and export price

(a) [T]here should be no asymmetrical adjustment. Comparisons between the export price and the normal value should be conducted on a fair and symmetrical basis in determining the dumping margin.

(b) Normal value should reflect the normal costs in the country of origin or exportation, plus profits which are commercially acceptable.

(c) If Normal Value is to be constructed, the investigating authorities should reflect as closely as possible the real conditions in the country of export. In particular, they should reflect the actual production costs and the commercially accepted profit margin in that exporting country. Cost allocation rules should follow the generally-accepted accounting practices in the country of export. Furthermore, the cost-of-production provisions should recognize the need to amortize "start-up" costs and extraordinary costs, such as R&D development costs.

¹⁰⁹ MTN.GNG/NG8/W/76 (11 April 1990) (underlining in original).

(d) In calculating dumping margins, "negative" dumping should be taken into account i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value. . . .

Again, none of the language in Singapore's proposed text appears in the final Uruguay Round AD Agreement.

85. Finally, in December 1989, Hong Kong submitted a textual proposal to address "negative dumping". Like Japan's and Singapore's, the Hong Kong proposal was framed as a revision to Article 2.6 of the Tokyo Round Antidumping Code, which became Article 2.4 of the AD Agreement, as follows:

In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provision of Article VI:1(b) of the General Agreement, the prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. The investigating authorities shall give due allowance [shall be made] in each case [on the merits] for the differences in conditions and terms of sale, for the differences in taxation, and for [the] all other differences affecting price comparability in order to put normal value and the export price on a comparable basis and effect a fair comparison. In the cases referred to in paragraph 5 of Article 2 allowance for costs, including duties and taxes, incurred between importation and sale, and for profits accruing, should also be made. Normal value and export price shall be established on a weighted average basis of all sales on the relevant markets for purposes of determining the dumping margin.

(Explanatory note – To ensure that comparison between the normal value and export price be made on an equal basis. Please refer to paragraphs 15 and 15 of paper W/51/Add.1.)

Underlined text is new language proposed by Hong Kong. Bracketed language reflects deletions from Article 2.6 of the Tokyo Round Antidumping Code.

Accordingly, like Japan and Singapore, Hong Kong did not view the existing Tokyo Round Antidumping Code provisions regarding "fair comparison" or "margin of dumping" as incorporating a ban on zeroing, but instead sought to introduce new obligations to the text through the addition of new language. Again, Hong Kong's language did not appear in the final AD Agreement text.

86. In sum, the negotiating history of the Uruguay Round shows that the negotiators were well aware of zeroing. Japan and Brazil had already initiated GATT disputes challenging the EC's zeroing practices under the Tokyo Round Antidumping Code. Japan, Singapore, Hong Kong, and the Nordic Countries had submitted negotiating proposals to prohibit zeroing, and Japan, Singapore, and the Nordic Countries had submitted textual language to implement such a ban. The negotiators from Japan, Singapore, Hong Kong, Brazil, and the Nordic Countries were some of the most skilled and sophisticated in the GATT. Given past practice, they were also well aware that they needed to secure major changes in the existing language of GATT 1947 Article VI and the Tokyo Round Antidumping Code in order to achieve their objective of banning zeroing. It was no secret that there was no "common understanding" under GATT 1947 Article VI and the Tokyo Round Antidumping Code of such terms as "fair comparison", "margin of dumping", "product", or "products". As a result, they sought to introduce new obligations to the WTO Agreement through the addition of new textual provisions to mandate A-to-T comparisons and require averaging in all contexts. Unfortunately, none of the language cited above appeared in the final WTO AD Agreement. Instead, the key terms of the

WTO text (apart from the "all comparable export transactions" provision which is limited to A-to-A comparisons in investigations and is not at issue here) were virtually identical to GATT 1947 Article VI and the Tokyo Round Antidumping Code. Accordingly, an analysis of the "preparatory work of the treaty and the circumstances of its conclusion" for purposes of Article 32 of the Vienna Convention shows beyond doubt that there was no common understanding in the Uruguay Round to bar zeroing.

87. While the panel reports in *EC – Cassettes* and *EC – Cotton Yarn* were issued after the conclusion of the Uruguay Round, Japan, Brazil, Singapore, Hong Kong, and the Nordics were well aware that the EC was contesting Japan and Brazil's claims that the Tokyo Round Code prohibited zeroing, because they, like other Members of the Antidumping Code Committee, participated in discussions of the consultation request and the decisions to establish Antidumping Code Panels. In other words, it would have been foolish for Japan, Brazil, Singapore, Hong Kong, and the Nordics to count on some "hidden meaning" in the text being carried over to the WTO AD Agreement from the same terms in its GATT 1947/Tokyo Round predecessors, when they knew the meaning of these terms was cloudy and in dispute. To the extent that they made a bet that they would succeed in inserting a zeroing prohibition into the existing "fair comparison" language of the Tokyo Round Code through the dispute settlement process, the panel reports in *EC – Audiocassettes* and *EC – Cotton Yarn* indicate that this was a wager that they lost. Indeed, the *EC – Cotton Yarn* panel report, upon its adoption by the Antidumping Committee, represented an important interpretation of the Tokyo Round Antidumping Code under the dispute settlement procedures in effect at that time. This phrase, as discussed above, did not change in any material way when it was carried over to the WTO AD Agreement.

88. In short, the lack of any explicit textual reference in the Uruguay Round AD Agreement to prohibiting zeroing, or any meaningful elaboration on the longstanding GATT 1947 and Tokyo Round Antidumping Code terms relating to the "margin of dumping", "fair comparison", "product", or "products", speaks for itself. No common understanding was reached on zeroing in the Uruguay Round. No consensus could be reached because despite extensive efforts by Japan, Hong Kong, Singapore, and the Nordic Countries, their proposals were firmly opposed by the EC, the United States and Canada¹¹⁰, who had long used zeroing in their antidumping programs under GATT Article VI and the Tokyo Round Code, and continued to use zeroing after the WTO entered into force (and in the case of the EC and Canada continue to use zeroing today, despite their protestations otherwise). Any effort by the EC to read a "zeroing" prohibition into the WTO AD Agreement, therefore, flies in the face of reality.

V. CONCLUSION

89. For the reasons set forth above, along with those set forth in the United States' first written submission, oral statements at the first substantive meeting with the Panel, and responses to the Panel's questions, the United States requests that the Panel reject the EC's claims.

¹¹⁰ See e.g., "Meetings of 31 January - 2 February and 19-20 February 1990, MTN/GNG/NG8/15, p. 19 (15 March 1990) (discussing problem of targeted dumping); Meeting of 23 July 1990 MTN/GNG/NG8/19, p. 5 (US delegation expresses concern regarding "the use of average export values"); Meeting of 16-18 October 1989, pp. 13-14, MTN/GNG/NG8/13 (Nov. 15, 1989) (noting that negative comments included "if negative margins were included in the calculation, one could not deal with instances in which dumping was targeted to a particular portion of a product line or to a particular region" and another delegation commented that "the issue at stake was masked, selective dumping").