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ANNEX A-1

FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

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

Short Title	Full Case Title and Citation
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, (22 October 2001) adopted 21 November 2001
US – Softwood Lumber V	*United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report, WT/DS264/AB/R, DSR 2004:V, 1937
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, 11 August 2004 adopted 31 August 2004, DSR 2004:V, 1875
US – Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measures on Shrimp from Ecuador*, WT/DS335/R, circulated to WTO Members 30 January 2007, adopted on 20 February 2007
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R and Corr.1, adopted 9 May 2006
US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, modified by Appellate Body Report, WT/DS294/AB/R
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, circulated to WTO Members 9 January 2007, adopted 23 January 2007
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, circulated to WTO Members 20 September 2006, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R

I. INTRODUCTION

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

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

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

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

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

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

II. FACTS

A. ORIGINAL INVESTIGATIONS

1. Imposition of anti-dumping duties

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

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

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

2. Method of comparing normal value and export price

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

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

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

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

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

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

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

[8] Regulations, Section 351.414(c).

[9] Regulations, Section 351.414(c).

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

3. Model Zeroing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. ADMINISTRATIVE REVIEWS

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

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

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

[19] Regulations, Sections 351.212 and 351.213.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Method of comparing normal value and export price

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

3. Simple zeroing

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

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

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

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

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

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

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

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

C. SUNSET REVIEWS

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

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

D. MEASURES AT ISSUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CLAIMS AND ARGUMENTS

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

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

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

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

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

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

1. Model Zeroing in Original Investigations

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

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

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

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

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

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

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

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

2. Simple Zeroing in Administrative Reviews

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

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

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

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

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

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

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

3. Zeroing in Sunset Reviews

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

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

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

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

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

4. Conclusions

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

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

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

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

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

1. Introduction

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

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

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

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

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

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

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[60] Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May, 2002) p. 510 (Exhibit EC – 8).

[61] Brownlie, *Principles of Public International Law*, (5th ed. 1988), p. 3 (Exhibit EC-9).

[62] ICJ Statute (Exhibit EC-10).

[63] Arnull, *the European Union and its Court of Justice* (2006), p. 623 (Exhibit EC-11).

[64] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages II*, footnote 30, p. 14.

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

(a) Principle of Consistency and Predictability of Jurisprudence

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

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

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

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

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

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

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

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

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

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

[68] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The WTO dispute settlement system

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

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

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

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

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

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

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

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

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

4. Precedential value of case law of the Appellate Body

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Precedential value of Appellate Body reports on zeroing

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

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

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

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

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

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

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

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

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

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

6. Conclusions

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

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

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

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

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

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

1. The Measures at Issue

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

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

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

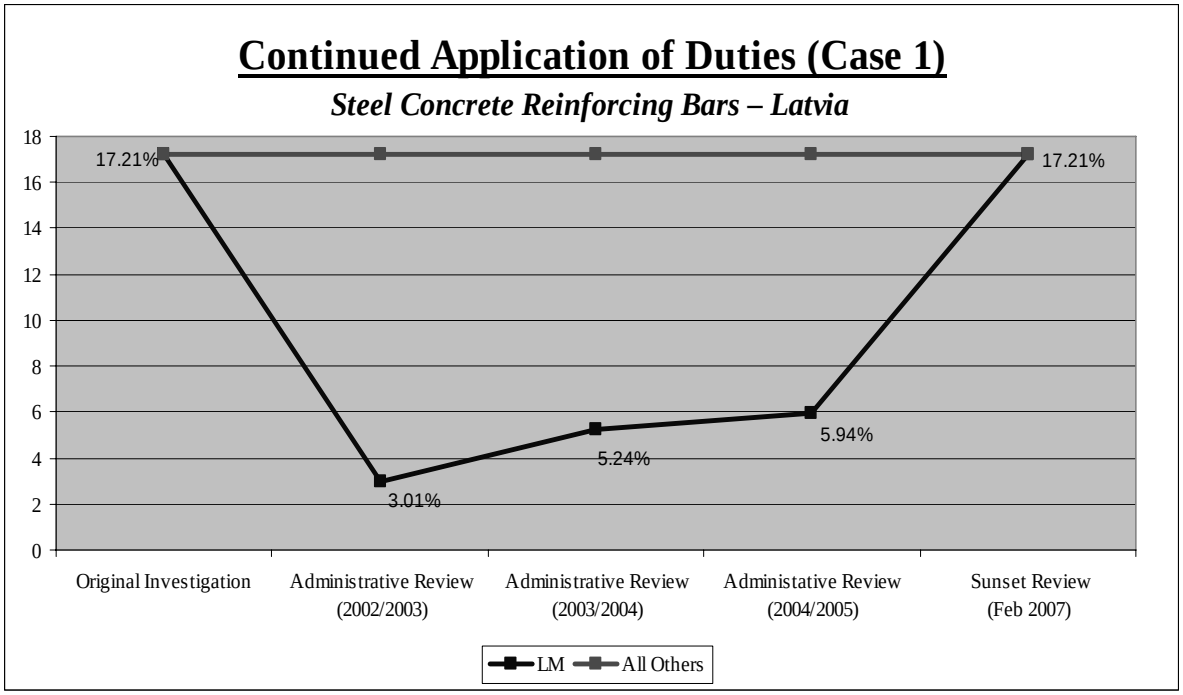
114. A measure can exist where there is evidence of a generally applicable rule or norm of prospective application, such as when there is a consistent practice that can only be explained by the existence of a general rule that is being applied. In *US – Zeroing (Japan)*, the Appellate Body confirmed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

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

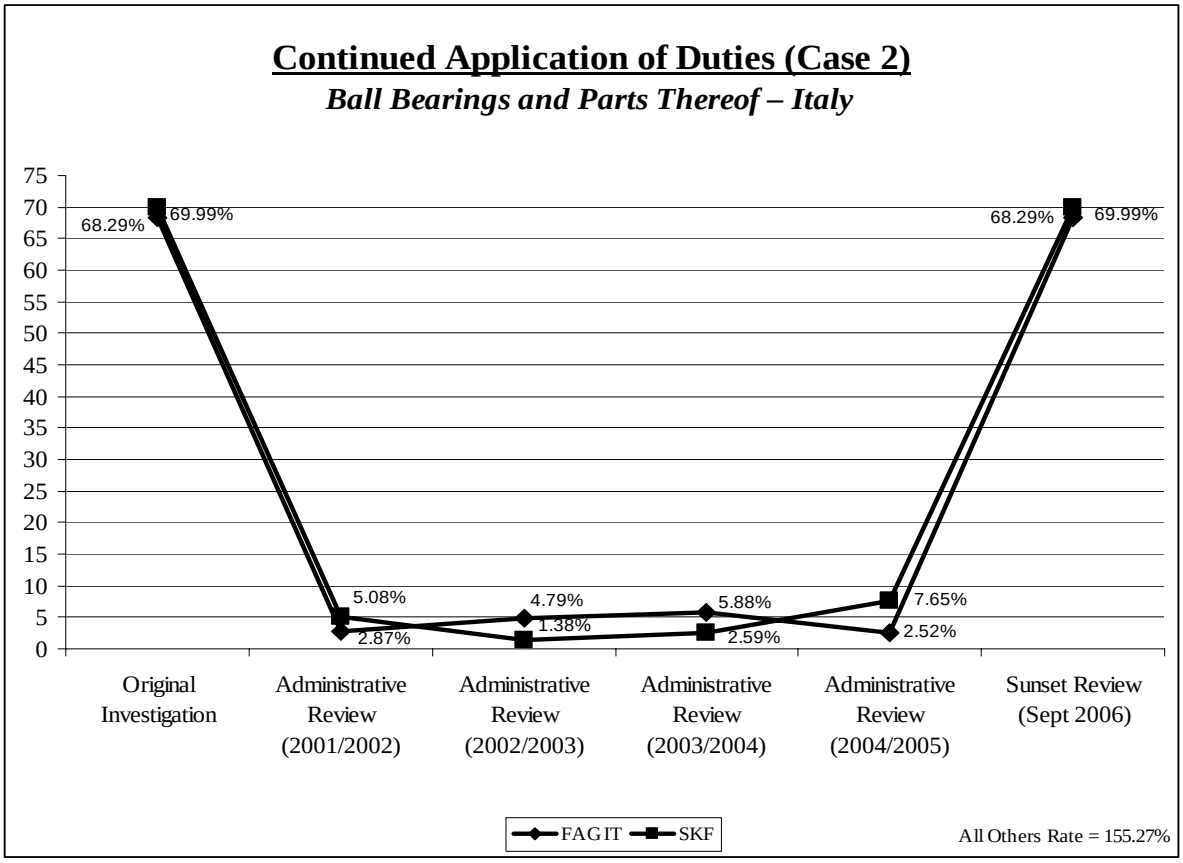
[91] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.
[92] *Id.*, para. 86.
[93] *Id.*, para. 87.
[94] Appellate Body Report, *US – Zeroing (Japan)*, at para 88.

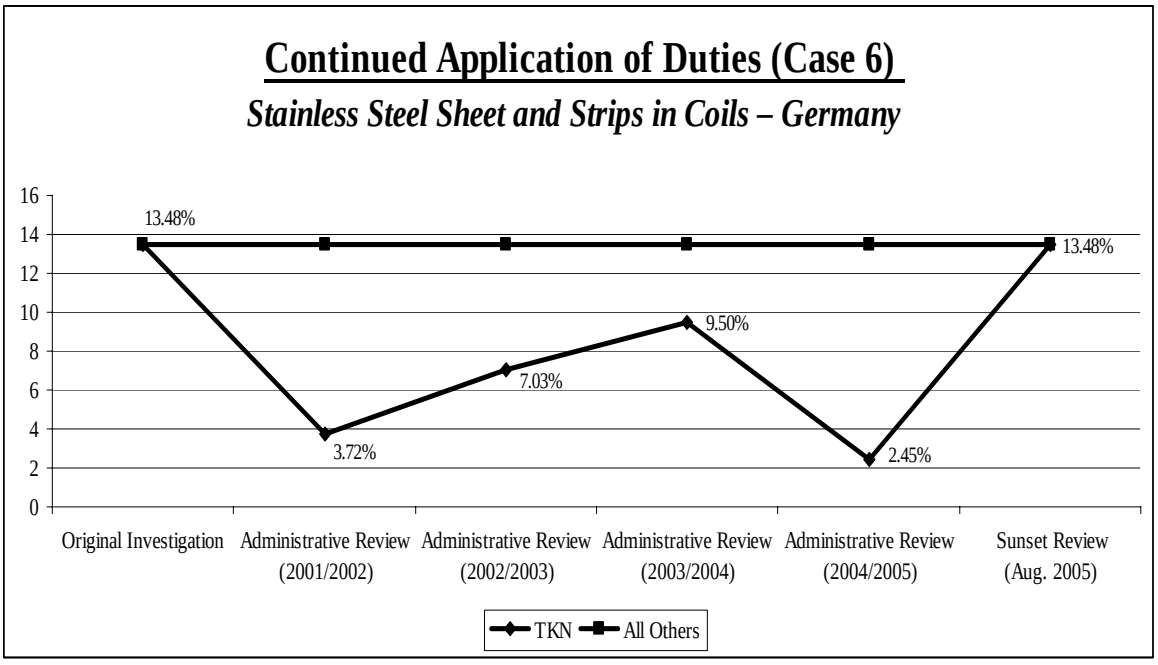
measure adopted by the United States which is equally inconsistent with the *Anti-Dumping Agreement* and the GATT 1994.

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



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





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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

132. Consequently, by maintaining and applying the model and simple zeroing procedures, which are administrative procedures not in conformity with various provisions of the *Anti-Dumping Agreement* and the GATT 1994, the European Communities submits that the United States failed to take all necessary steps to ensure it complies with its WTO obligations. Accordingly, the United States also violated its obligation under Article XVI:4 of the WTO Agreement.

4. Conclusions

133. In light of the above, the European Communities submits that the United States has failed to comply with its obligations pursuant to Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994 as well as Article XVI:4 of the WTO Agreement, by using zeroing when calculating dumping margins in the original proceedings and in their subsequent review proceedings mentioned in the Annex to the Panel request.

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

134. The European Communities also submits that the 4 original investigations, 37 administrative review proceedings and 11 sunset review proceedings covering the 18 anti-dumping measures concerned are inconsistent with Articles 2.1, 2.4, 2.4.2, 9.3., 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994. Indeed, as the European Communities will show below, the United States used model or simple zeroing when calculating the dumping margins in those cases. The European Communities will address first the claims with respect to the original investigations concerned, to then continue with the arguments concerning administrative and sunset review proceedings.

1. Original Investigations

135. The European Communities considers that the United States has failed to comply with its obligations under the *Anti-Dumping Agreement* and the GATT 1994 with respect to the determinations carried out in the original investigations contained in the Annex to the request for establishment of the Panel (Cases XV to XVIII). The European Communities will describe below the main facts and findings made by the US in **Case XVI**, *Purified Carboxymethylcellulose – Netherlands (A-421-811), No. 50* (Exhibit EC-26), and the violations of the *Anti-Dumping Agreement* and the GATT resulting thereof. For the sake of simplicity, the European Communities will not repeat the same arguments with respect to the other three original investigations. The relevant sections of USDOC determination showing the use of model zeroing in the other cases will be mentioned instead.

1.1 Purified Carboxymethylcellulose – Netherlands (A-421-811)

(a) The Measure at issue

136. In the "Notice of Antidumping Duty Orders" published in the Federal Register[100], margins of dumping of 14.88 per cent (Noviant B.V.), 13.39 per cent (Akzo Nobel) and 14.57 per cent (all others) were calculated with respect to the period of investigation from 1 April 2003 to 31 March 2004 and the product concerned.

[100] Exhibit EC-26, Appendix I, pp. 28277 and 39735.

137. The application of the standard program and, thus zeroing, to *Noviant BV* is reflected in the program code as follows:[101]

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

138. The application of zeroing is also reflected in the program log as follows:[102]

```
6934
6935  PROC MEANS NOPRINT DATA = MARGIN;
6936    WHERE EMARGIN GT 0;
6937    VAR EMARGIN QTYU VALUE;
6938    OUTPUT OUT = ALLPUDD  (DROP = _FREQ_ _TYPE_)
6939          SUM = TOTPUDD MARGQTY MARGVAL;
6940  RUN;

NOTE:  There were 243 observations read from the data set WORK.MARGIN.
    WHERE EMARGIN>0;
NOTE: The data set WORK.ALLPUDD has 1 observations and 3 variables.
NOTE: PROCEDURE MEANS used (Total process time):
    real time          0.01 seconds
    cpu time           0.02 seconds
```

139. The relevant tables containing the calculations with respect to *Noviant BV* show that zeroing was used in this case.[103] Indeed, on Page 22 the percentage of value with AD margins (63.3199) and the percentage of quantity with AD margins (69.1105) can be found. Thus, for the remaining transactions, no dumping was found and no offsets were provided. The final anti-dumping duty rate using zeroing was 14.8815.

140. The tables containing the calculations with respect to *Noviant BV* without zeroing show that, with the same data, the final anti-dumping margin would have been 12.1508 (*i.e.*, by taking 100 per cent of the transactions and offsetting positive and negative dumping margins found).[104]

141. Consequently, in this case, to determine the anti-dumping duties to be imposed as a result of the original investigation proceeding, USDOC calculated margins of dumping using a W-to-W comparison that included the standard model zeroing procedures. In aggregating the results of the multiple comparisons to obtain the overall weighted average dumping margin, only those comparisons for which there were positive results were taken into account. In this respect, USDOC disregarded any comparisons with a negative value. As a result, the sum total amount of dumping was inflated by an amount equal to the excluded negative values. Without zeroing, the results of those calculations would have been lower.

[101] Exhibit EC-26, Appendix III, p. 31 of the Program Code, Calculate overall margin.
[102] Exhibit EC-26, Appendix IV, p. 56 of the Program Log, Calculate overall margin.
[103] Exhibit EC-26, Appendix V.
[104] Exhibit EC-26, Appendix V, p. 23.

(b) Violation of Article 2.4.2 of the Anti-Dumping Agreement

142. The European Communities submits that the "model zeroing" method used by the United States in this case is not in conformity with its obligations contained in Article 2.4.2 of the *Anti-Dumping Agreement*.

143. As mentioned in Section III.A, several panels and the Appellate Body have repeatedly found inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*[105] the use of "model zeroing" in original investigations. In particular, in a recent case, *i.e.*, *US – Anti-Dumping Measure on Shrimp from Ecuador*, the panel, after explaining the Appellate Body's reasoning on this issue in *US – Softwood Lumber V*, affirmed that:

> We further note that the Appellate Body report in *US – Zeroing (EC)* also referred to its reasoning and findings in *US – Softwood Lumber V*. In our view, **there is now a consistent line of Appellate Body reports**, from *EC – Bed Linen to US – Zeroing (EC)* **that holds that "zeroing" in the context of the weighted average-to-weighted average methodology in original investigations (first methodology in the first sentence of Article 2.4.2) is inconsistent with Article 2.4.2**.[106] (emphasis added)

144. The European Communities submits that, following the findings of the Appellate Body in the above-mentioned disputes, the Panel in the present case should conclude on the same basis that zeroing in the context of the weighted average-to-weighted average methodology in original investigations is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

145. The European Communities also notes that the United States failed to contest the claim of inconsistency with Article 2.4.2 of the *Anti-Dumping Agreement* before the Appellate Body in *US – Zeroing (EC)* as well as before the panels in *US –Zeroing (Japan)*, and *US – Zeroing (Ecuador)*. In fact, USDOC has published a Notice indicating its intention to eliminate the use of zeroing in original investigations when comparisons are made on an average-to-average basis.[107]

146. Regardless of this, for the sake of completeness, the arguments supporting the claim that the United States failed to complied with Article 2.4.2 of the *Anti-Dumping Agreement* when using "model zeroing" in original investigations are explained and detailed below.

(i) "Dumping" and "margins of dumping" are determined with respect to a product as a whole

147. Article 2.4.2 of the *Anti-Dumping Agreement* provides that:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of **margins of dumping** during the investigation phase shall normally be established

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[105] See Panel Report, *EC – Bed Linen*, para. 6.119; Appellate Body Report, *EC – Bed Linen*, para. 66; Panel Report, *US – Lumber V*, para. 7.224; Appellate Body Report, *US – Lumber V*, para. 117; Panel Report, *US – Zeroing (EC)*, para. 7.32; Panel Report, *US – Shrimp from Ecuador*, para. 7.43.

[106] Panel Report, *US – Shrimp (Ecuador)*, para. 7.40.

[107] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 FR 77722 (USDOC) (27 December 2006) (final modification), stating that it is "modifying its methodology in antidumping investigations" to "no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons". *See* also *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations*, 72 FR 3783 (USDOC) (26 January 2007), stating that the effective date for implementation of this modification was 22 February 2007. In addition, on 9 April 2007 the United States publicly announced that it is implementing the WTO panel decision in *US – Zeroing (EC)* with respect to twelve original determinations disputed in that case (Exhibit EC-27).

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

148. Article 2.1 of the *Anti-Dumping Agreement* provides that:

> For the purpose of this Agreement, **a product** is to be considered as being **dumped**, i.e. introduced into the commerce of another country at less than its normal value, if the export price of **the product** exported from one country to another is less than the comparable price, in the ordinary course of trade, for **the like product** when destined for consumption in the exporting country. (emphasis added)

149. This definition reiterates the definition of "dumping" in Article VI:1 of the GATT 1994.[108] Thus, it is clear from Article 2.1 that "dumping" is determined in relation to a specific product as defined by the investigating authority. As noted by the Appellate Body, Article 2.1 of the *Anti-Dumping Agreement* makes "clear (…) that dumping is defined in relation to a product as a whole", and not in relation to a "type, model or category" of a product".[109] Given that Article 2.1 applies to the entire *Anti-Dumping Agreement* (since Article 2.1 clearly indicates that the definition included therein is laid down "for the purpose of this Agreement"), it also applies to Article 2.4.2 of the *Anti-Dumping Agreement* and, thus, "margins of dumping" under Article 2.4.2 must also be established for the product as a whole.[110]

150. Consequently, it flows from Article VI:1 of the GATT 1994 and Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement* that "dumping" and "margin of dumping" can only exist with respect to the product as a whole and not with respect to a category, type or model of that product.

151. Other provisions in the *Anti-Dumping Agreement* also provide contextual support to this conclusion. First, Article VI:2 of the GATT 1994 provides that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount that the margin of dumping in respect of that product". Second, Article 9.2 of the *Anti-Dumping Agreement* also refers to the imposition of an anti-dumping duty with respect to *a product*. Third, Article 6.10 of the *Anti-Dumping Agreement* also states that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of *the product under investigation*". Thus, in light of these provisions, it clear that "dumping" and "margins of dumping" can only be defined with respect to a product and not with respect to a category, model or type of that product.

152. The necessity to determine margins of dumping for the product as a whole does not prevent, however, investigating authorities from calculating intermediate results with respect to various averaging groups. In other words, investigating authorities are entitled to calculate a dumping margin on the basis of multiple comparisons for sub-divisions of the product.[111] However, the results of these multiple comparisons at the sub-group level do not constitute "margins of dumping" within the

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[108] Appellate Body Report, *US – Softwood Lumber V*, para. 92.

[109] Appellate Body Report, *US – Softwood Lumber V*, para. 93, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 126.

[110] Appellate Body Report, *US – Softwood Lumber V*, para. 93 and 96.

[111] *Id.*, para. 97.

meaning of Article 2.4.2 of the *Anti-Dumping Agreement* but only intermediate calculations.[112] It is only on the basis of aggregating all these intermediate values that an investigating authority can establish a margin of dumping for the product under investigation as a whole.[113]

153. As the Appellate Body pointed out in *US – Softwood Lumber V*, this analysis is not affected by the use of the plural "margins of dumping" in article 2.4.2 of the *Anti-Dumping Agreement*. Indeed, pursuant to Article 6.10 of the *Anti-Dumping Agreement* which provides that authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation, as soon as there are more than one producer or exporter in an investigation, there should be several dumping margins. Similarly, nothing precludes investigating authorities to investigate more than one country in a single proceeding.[114] For these reasons, a single proceeding may result in more than one margin of dumping. Therefore, the plural used in Article 2.4.2 of the *Anti-Dumping Agreement* with respect to margins of dumping has logic to it, independently from the fact that investigating authorities choose to calculate dumping on the basis of averaging groups.

154. This analysis is similarly unaffected by the use of the word "comparable" in Article 2.4.2 of the *Anti-Dumping Agreement*. From the moment the investigating authorities define the product under investigation and consider that it was sufficiently comparable to justify the calculation of a single dumping margin and the imposition of a singe duty, the investigating authority is not entitled to decide that certain models, namely those where the "export price" exceeded the "normal value", have ceased to become comparable.

155. Accordingly, in determining the existence of dumping, and in calculating the margin of dumping for the product as a whole, Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, together with Articles VI:1 and VI:2 of the GATT 1994, prohibit a Member from disregarding the results of any multiple comparisons undertaken by the authorities. As explained below, in the case at hand, the United States failed to comply with these requirements.

(ii) The United States failed to establish the margin of dumping with respect to the product concerned as a whole

156. In this case, the United States defined the product as follows: "all purified carboxymethylcellulose (CMC), sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off–white, non–toxic, odorless, biodegradable powder, comprising sodium CMC that has been refined and purified to a minimum assay of 90 per cent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross–linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by–product portion of the product to less than ten percent. The merchandise subject to this investigation is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 3912.31.00". The United States then decided to make "averaging groups" for the purpose of determining dumping and calculating the dumping margins for each exporter. The European Communities submits that while the United States was entitled to calculate dumping on the basis of multiple comparisons at sub-group levels, this could not be done in breach of the requirements of Article 2.4.2, namely to determine dumping margins for the product as a whole.

157. When combining the intermediate results calculated for each averaging group, in order to calculate the margin of dumping of the product under investigation, the United States disregarded

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[112] *Id.*

[113] *Id.*, paras 93 and 99: "We see no basis, under the *Anti-Dumping Agreement*, for treating the very same sub-group transactions as "non-dumped" for one purpose and "dumped" for other purposes".

[114] Articles 3.3(a) and 6.10 of the *Anti-Dumping Agreement*.

those averaging groups for which the export price exceeded the normal value, thereby inflating the overall margin of dumping for the product concerned.[115]

158. For these reasons, the European Communities considers that the United States, once having defined the product subject to the anti-dumping proceeding, could not zero the negative intermediate results calculated for certain averaging groups. This is inconsistent with the obligation arising under Article 2.4.2 of the *Anti-Dumping Agreement*.

(c) Violation of Article 2.4 of the Anti-Dumping Agreement

159. The European Communities also submits that the United States failed to comply with the basic principle of *fair comparison* enshrined in Article 2.4 of the *Anti-Dumping Agreement* when applying model zeroing in the case at hand.

(i) "Fair comparison": an independent and overarching obligation

160. Pursuant to Article 2.1 of the *Anti-Dumping Agreement*, in order to determine whether dumping has occurred with respect to a given product, a comparison must be made between the normal value and export price of that product. Article 2.4 of the *Anti-Dumping Agreement* clarifies how this comparison must be made. It provides that:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

161. Thus, the first sentence of Article 2.4 requires that a fair comparison be made between the export price and normal value. This requirement under Article 2.4 to make a fair comparison between the export price and the normal value constitutes an *independent* and *overarching* obligation. In other words, the scope of the "fair comparison" requirement in Article 2.4 is not exhaustively determined by the remainder of the paragraph regarding the steps to be taken to carry out price comparability.[116] It means that the legal obligation created by the first sentence of Article 2.4 is independent from the other obligations created in the second and third sentences of Article 2.4 of the *Anti-Dumping Agreement*.

162. This interpretation is confirmed by the modification brought to that provision in the Uruguay Round *Anti-Dumping Agreement*. Indeed, the text of the Uruguay Round *Anti-Dumping Agreement* contains an important and significant innovation by comparison with the text of the previous Tokyo

[115] See Exhibit EC-26, Appendix IV (Program Log used in this case containing the zeroing line – WHERE EMARGIN GT 0).

[116] Panel Report, *US – Zeroing (EC)*, para. 7.2; and Appellate Body Report, *US – Zeroing (EC)*, para. 146.

Round Anti-Dumping Code, in which the equivalent or similar provisions to the first and second sentences of Article 2.4 of the Uruguay Round *Anti-Dumping Agreement* were contained in the same sentence.[117] In the Uruguay Round *Anti-Dumping Agreement*, however, the words "fair comparison (…) between the export price and the normal value" were lifted up and placed on their own in a new first sentence of Article 2.4. This change confirms that Article 2.4 contains and overarching and independent obligation to make a fair comparison.

(ii) "Fair comparison": a general obligation

163. The requirement pursuant to Article 2.4 to make a fair comparison between the export price and the normal value is not limited to the price comparability under paragraph 4 of Article 2. In other words, the "fair comparison" obligation constitutes a *general* obligation which applies not to only to price comparability under Article 2.4 but also to sub-paragraphs 2.4.1 and 2.4.2.

164. This is supported by the fact that Article 2.4.2 expressly indicates that the rule included therein is "subject to the provisions governing fair comparison in paragraph 4".

165. The general character of the "fair comparison" obligation has been underlined by the Appellate Body in *EC – Bed Linen*:

> "Article 2.4 sets forth **a general obligation** to make a "fair comparison" between export price and normal value. This is a general obligation, that, in out view, informs all of Article 2 but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparisons in [Article 2.4]."[118] (emphasis added)

(iii) Unfairness of the model zeroing comparison method used by the United States

166. The European Communities submits that the obligation imposed by Article 2.4 of the *Anti-Dumping Agreement* to conduct a fair comparison precluded the model zeroing comparison method used by the United States in this case.

167. The term "fair" is generally understood to connote impartiality, even-handedness or lack of bias.[119] However, the use of model zeroing under the weighted average-to-weighted average comparison methodology when aggregating the results of the "averaging groups" comparisons for purposes of calculating the "margins of dumping" is inherently biased.

168. The model zeroing comparison method involves an unfair comparison. By excluding the negative results of any comparisons from the aggregation of total dumping, the zeroing procedures overstate the total amount of dumping by an amount equal to the excluded negative values. As a result, the dumping margin is inflated. Moreover, in situations where the aggregate value of excluded negative results exceeds the aggregate value of the included positive results, the zeroing procedures produce a dumping determination where the product as a whole is not dumped. In consequence,

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[117] Tokyo Round Anti-Dumping Code, Article 2.6, first sentence: "In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1 (b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time".

[118] Appellate Body Report, *EC – Bed Linen*, para. 59; see also Panel and Appellate Body Reports, *US – Zeroing (EC)*, paras 7.254- 7.255 and 146 respectively.

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

USDOC conducts its investigation "in such a way that it becomes *more likely* that [it] will determine that" there is dumping.[120] By rendering a dumping determination more likely, and by systematically inflating the dumping margin, the zeroing procedures deprive the comparison of normal value and export price of even-handedness. Instead, the procedures systematically favour the interests of petitioners, and systematically prejudice the interests of exporters.

169. The use of model zeroing could even lead to a situation where dumping is found while there is in fact no dumping. In the case at hand, the dramatic effect which the inherently biased zeroing method used by the United States had on the outcome of the calculation for Noviant B.V. was an automatic increased in the duties by 2.73 per cent. The other exporting companies were also subject to the same calculation, leading to the same inflationary effect on the margins of dumping calculated.

170. Therefore, the method of zeroing which the United States employs is biased because when an exporter makes some sales above normal value and some sales below normal value, the use of zeroing will inevitably result in a margin higher than would otherwise be calculated. A methodological choice that systematically and inevitably results in a higher margin when there has been no change in pricing behaviour is inherently biased and unfair and is thus inconsistent with the *Anti-Dumping Agreement*.

(iv) Existing case-law confirms United States model zeroing unfair

171. The above-mentioned conclusions are confirmed by the findings of the Appellate Body in the *EC – Bed Linen* case:

> "Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value.[121]
>
> Furthermore, we are also of the view that a comparison between export price and normal value that does *not* fully take into account the prices of *all* comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2".[122]

172. They are further confirmed by the findings of the Appellate Body in *US-Carbon Steel from Japan*:

> "However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provision in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*.[123]
>
> It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood

[120] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.
[121] Appellate Body Report, *EC – Bed Linen*, para. 59.
[122] *Id.* para. 55.
[123] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 127.

> determination to be made in a sunset review under Article 11.3. Accordingly, we reverse the Panel's consequential finding, in paragraph 8(1)(d)(ii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4.[124]
>
> As explained above, if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too. Thus, the consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of USDOC's likelihood determination in the CRS sunset review. In the CRS sunset review, USDOC based its determination that "dumping is likely to continue if the [CRS] order were revoked" on the "existence of dumping margins" calculated in the administrative reviews. If these margins were indeed calculated using a methodology that is inconsistent with Article 2.4 – an issue that we examine below – then USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3".[125]

173. The Appellate Body went on to recall its findings in the *EC – Bed Linen* case, and stated that:

> "**When investigating authorities use a zeroing methodology such as that examined in *EC-Bed Linen* to calculate a dumping margin**, whether in an original investigation or otherwise, **that methodology will tend to inflate the margins calculated**. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing … may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing". **Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping**."[126] (emphasis added)

174. These conclusions were again confirmed by the panel in *US – Softwood Lumber V*, the issue before the panel being whether United States model zeroing was "consistent with the obligations imposed by Article 2.4.2 and the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*".[127] The Appellate Body in that case again found that:

> "[z]eroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as whole."

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[124] *Id.*, para. 128.
[125] *Id.*, para. 130.
[126] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[127] Panel Report, *US – Softwood Lumber V*, paras 7.196.

175. Finally, the Appellate Body in *US – Zeroing (Japan)*, again, confirmed that the use of model zeroing in original investigations was, as such, inconsistent, *inter alia*, with the fair comparison principle enshrined in Article 2.4 of the *Anti-Dumping Agreement*.[128]

(v) The United States failed to carry out a fair comparison

176. The European Communities submits that, in the present case, the model zeroing methodology used by the United States involved an inherent bias that had the effect of inflating the margin of dumping. The determination in this case was therefore inconsistent with the obligation imposed on the United States by Article 2.4 of the *Anti- Dumping Agreement* to make a fair comparison between normal value and export price. The model zeroing method used by the United States was not fair within the meaning of Article 2.4 of the *Anti-Dumping Agreement*. It failed to duly reflect the actual prices of the export transactions that took place during the period of investigation, as it should have done once the United States had fixed the parameters of its investigation in terms of subject product.

(d) Conclusions

177. In light of the foregoing, the European Communities submits that the United States violated Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994 when using model zeroing in the original investigation proceedings mentioned in the Annex to the Panel request as Case XVI.

1.2 Other Measures at Issue

178. The European Communities submits that the other three original investigations contained in the Annex to the request for establishment of the Panel are inconsistent with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* on the basis of the same arguments mentioned above. For the sake of simplicity, the European Communities will not repeat the arguments mentioned before. Instead, in Exhibits EC-28 to 30, the relevant sections of the United States' determination showing the use of model zeroing are mentioned.

1.3 Conclusions

179. From the foregoing, the European Communities concludes that the United States violated Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994 when applying model zeroing in the 4 original investigation proceedings mentioned in the Annex to the Panel request.

2. Administrative Reviews

180. The European Communities considers that the United States has failed to comply with its obligations under the *Anti-Dumping Agreement* and the GATT 1994 with respect to the determinations carried out in the administrative review investigations contained in the Annex to the request for establishment of the Panel.

181. The European Communities will describe below the main facts and findings made by the United States in **Case II**, *Ball Bearings and Parts Thereof – Italy (A-475-801), No. 5* (Exhibit EC-31), and the violations of the *Anti-Dumping Agreement* and the GATT resulting thereof. For the sake of simplicity, the European Communities will not repeat the same arguments with respect to the other administrative review proceedings. The relevant sections of USDOC determination showing the use of simple zeroing will be mentioned instead.

[128] Appellate Body Report, *US – Zeroing (Japan)*, paras 146 and 147.

2.1 Ball Bearings from Italy (A-475-801)

(a) The measure at issue

182. In the "Final Results of Anti-Dumping Duty Administrative Reviews", Notice published in the Federal Register[129], margins of dumping of 7.65 per cent and of 2.52 per cent were calculated respectively for *SKF Italy* and for *FAG Italy*.

183. At point 1 of the Issues and Decision Memorandum, entitled "Offsetting of Negative Margins", USDOC states its position with regard to the respondent's arguments concerning zeroing. USDOC refers to its established practice. It explains that it considers itself directed by United States Statute to use the zeroing methodology. In particular, USDOC insists on the definition of "dumping margin" in Section 771(35)(A) of the Act which is the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise". According to USDOC, this means that a dumping margin exists only when normal value is greater than the export price or the Constructed Export Price (CEP). As no dumping margins exist with respect to sales where normal value is equal to or less than export or CEP, USDOC did not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. USDOC also considered that it had no obligation to act on the basis of Appellate Body reports in *US – Softwood Lumber* and *US – Zeroing (EC).*[130]

184. The application of the standard program and, thus simple zeroing, to *FAG Italy* was reflected in the Final Margin Program Log as follows:[131]

> MPRINT(US14_MARGINS): PROC MEANS NOPRINT DATA = MARGCALC;
> MPRINT(US14_MARGINS): **WHERE EMARGIN GT 0**;
> MPRINT(US14_MARGINS): VAR EMARGIN QTYU USVALUE;
> MPRINT(US14_MARGINS): WEIGHT WTFACT
> MPRINT(US14_MARGINS): OUTPUT OUT = ALLPUDD (DROP=_FREQ_ _TYPE_) SUM = TOTPUDD MARGQTY MARGVAL;
> MPRINT(US14_MARGINS): RUN;
> NOTE: There were [155] observations read from the data set WORK.MARGCALC.
> WHERE EMARGIN>0;
> NOTE: The data set WORK.ALLPUDD has [1] observations and [3] variables.
> NOTE: PROCEDURE MEANS used (Total process time):
> real time 0.01 seconds
> cpu time 0.02 seconds

185. In the Final Margin Program Log with respect to *SKF Italy*, the application of the standard program and, thus simple zeroing, was reflected as follows:[132]

> MPRINT(US14_MARGINS): PROC MEANS NOPRINT DATA = MARGCALC;
> MPRINT(US14_MARGINS): **WHERE EMARGIN GT 0**;
> MPRINT(US14_MARGINS): VAR EMARGIN QTYU USVALUE;
> MPRINT(US14_MARGINS): WEIGHT WTFACT
> MPRINT(US14_MARGINS): OUTPUT OUT = ALLPUDD (DROP=_FREQ_ _TYPE_) SUM = TOTPUDD MARGQTY MARGVAL;
> MPRINT(US14_MARGINS): RUN;
> NOTE: There were [ ] observations read from the data set WORK.MARGCALC.

[129] Exhibit EC-31, Appendix I.
[130] Exhibit EC-31, Appendix II, p. 11.
[131] Exhibit EC-31, Appendix III, p. 41.
[132] Exhibit EC-31, Appendix IV, pp. 43-44.

WHERE EMARGIN>0;
NOTE: The data set WORK.ALLPUDD has [ ] observations and [3] variables.
NOTE: PROCEDURE MEANS used (Total process time):
real time 0.00 seconds
cpu time 0.01 seconds

186. In both cases, when zeroing is not applied, the dumping calculations with respect to *FAG Italy* and *SKF Italy* show no dumping. In fact, the dumping margin would have been negative. The tables containing the calculations with respect to FAG Italy without zeroing show that, with the same data, the final anti-dumping margin would have been negative, -30.27 (*i.e.*, by taking 100 per cent of the transactions and taking account of all positive and negative instances of dumping found, no dumping took place).[133] By contrast, the use of zeroing in this case resulted in duties being imposed at 2.52 per cent.

187. Likewise, the tables containing the calculations with respect to *SKF Italy* without zeroing show that, with the same data, the final anti-dumping margin would have been negative, -4.00.[134] By contrast, the use of zeroing in this case resulted in duties being imposed at 7.65 per cent.

188. Consequently, in this case, to determine the anti-dumping duties to be collected for entries made during the period of review (*i.e.*, the assessment rate), and to determine the deposit rate for future entries, USDOC calculated margins of dumping using a W-to-T comparison that included the standard simple zeroing procedures. USDOC, therefore, made multiple comparisons between a weighted normal value and export price for a series of comparable individual export transactions. In terms of USDOC's standard simple zeroing procedures, in aggregating the results of the multiple transaction-based comparisons to obtain the overall weighted average dumping margin, only those comparisons for which there were positive results were taken into account. In other words, USDOC disregarded any comparisons with a negative value. As a result, the sum total amount of dumping was inflated by an amount equal to the excluded negative values. Without zeroing, the results of those calculations would have been negative for each of these two respondents, and no anti-dumping duties would have been assessed or collected.

(b) Violation of Articles 2.1, 2.4, 2.4.2 and 9.3 of the Anti-Dumping Agreement

189. The European Communities considers that, by using the simple zeroing methodology in the administrative review at issue, the United States acted in a manner inconsistent with Articles 2.1, 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement*. This is so because USDOC determination did not reflect the margin of dumping for the product as a whole. Rather, USDOC used, without justification, an asymmetrical method of comparison between normal value and export price. USDOC, therefore, did not comply with its obligation to ensure that the amount of the anti-dumping duty collected does not exceed the margin of dumping in accordance with Article 9.3 of the *Anti-Dumping Agreement*.

190. The administrative review concerned includes final retrospective assessments as provided for in Article 9.3.1 of the *Anti-Dumping Agreement*. It is therefore not disputed that such administrative review must be consistent with, *inter alia*, the relevant obligations set out in Article 9.3 of the *Anti-Dumping Agreement*, which provides that:

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

[133] Exhibit EC-31, Appendices V and VII.
[134] Exhibit EC-31, Appendices VI and VIII.

191. Article 9.3 of the *Anti-Dumping Agreement* does not prescribe a specific methodology according to which the duties should be assessed. As noted by the Appellate Body in *US – Zeroing (EC)*:

> "In particular, a reading of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 does not suggest that final anti-dumping duty liability cannot be assessed on a transaction- or importer-specific basis, or that the investigating authorities may not use specific methodologies that reflect the distinct nature and purpose of proceedings governed by these provisions, for purposes of assessing final anti-dumping duty liability, provided that the total amount of anti-dumping duties that are levied does not exceed the exporters' or foreign producers' margins of dumping."[135]

192. However, although Article 9.3 of the *Anti-Dumping Agreement* does not prescribe a specific methodology according to which the duties should be assessed, it sets out a requirement regarding the amount of the anti-dumping duties to be assessed. As noted by the Appellate Body:

> "[I]nvestigating authorities are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping as established for that exporter. In other words, the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding".[136] (emphasis added)

193. Given that Article 9.3 explicitly refers to Article 2 of the *Anti-Dumping Agreement*, it must be ensured that the margins of dumping which operate as a *ceiling* for the amount of assessed anti-dumping duties are established in accordance with Article 2.[137]

(i) The duty must not exceed the margin of dumping as determined with respect to the product as a whole

194. As discussed above in Section III.D.1.1(b)(i), "dumping" and "margins of dumping" as defined in Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* are concepts that are strictly defined in relation to the "product" under investigation.[138] The terms "dumping" and "dumping margins" in the *Anti-Dumping Agreement*, therefore, apply to the product under investigation *as a whole* and do not apply to sub-group levels.[139] These definitions apply throughout the Agreement in each of the five types of anti-dumping proceeding (including original investigations and administrative reviews) and with respect to all comparison methodologies (*i.e.*, comparisons made on an average-to-average, transaction-to-transaction, and average-to-transaction basis).[140]

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[135] Appellate Body Report, *US – Zeroing (EC)*, para. 131.

[136] Appellate Body Report, *US – Zeroing (EC)*, para. 130.

[137] This is, in addition, consistent with the Appellate Body's finding in *US – Corrosion Steel Sunset Review* according to which "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins" (para. 127).

[138] Appellate Body Report, *US – Zeroing (Japan)*, para. 110.

[139] Appellate Body Report, *US – Softwood Lumber V*, para. 102.

[140] *Id.*, para. 93; and Appellate Body Report, *US – Zeroing (Japan)*, para. 115.

195. Investigating authorities may undertake multiple intermediate comparisons between a weighted average "normal value" and individual export transactions. However, the results of such multiple comparisons are not "margins of dumping" within the meaning of Article 9.3 of the *Anti-Dumping Agreement*. It is only on the basis of aggregating all these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole.[141]

196. The European Communities argues that the simple zeroing used by USDOC in the administrative review at issue did not allow for the calculation of the margin of dumping for the product as a whole. As explained before, USDOC disregarded the results of the intermediate comparisons when the export price exceeded the contemporaneous average normal value when calculating the overall margin of dumping for determining the new exporter-specific cash deposit and importer-specific assessment rates. By systematically disregarding intermediate price comparison results where the export price exceeds the normal value, the margin of dumping determined by USDOC only *partially* reflects the transactions under consideration and, therefore, fails to reflect the product as a whole.

197. Accordingly, in the administrative review at issue, the amount of duties assessed by USDOC exceeded the foreign producer's or exporter's margin of dumping for the product under consideration under Article 2. The European Communities submits that this directly violates the obligation to calculate the margin of dumping for the product as a whole and results in collections above the *ceiling* established pursuant to Article 2 of the *Anti-Dumping Agreement*, and inflated cash deposit rates, and are, therefore, inconsistent with Articles 2 and 9.3 of the *Anti-Dumping Agreement*.[142]

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

198. As a preliminary observation, it should be underlined, as noted by the Appellate Body, that one implication of the fact that the fair comparison is expressed in terms of a general and abstract standard is that this requirement is also applicable to proceedings governed by Article 9.3 of the *Anti-Dumping Agreement*.[143]

199. The European Communities submits that the simple zeroing method used by the United States in the relevant measures at issue results in the calculation of a margin of dumping, whether expressed as an amount or a percentage rate, that is unbalanced and inherently biased and, therefore, is inconsistent with the fair comparison requirement under Article 2.4 of the *Anti-Dumping Agreement*.

200. As mentioned before, the term "fair" is generally understood to connote impartiality, even-handedness or lack of bias.[144] Rather than being "fair", the use of simple zeroing in administrative reviews is inherently biased because when an exporter makes some sales above normal value and some sales below normal value, the use of zeroing will inevitably result in a margin higher than would otherwise be calculated. This increase in the margin is not attributable to any change in the pricing behaviour of the exporter. Rather, this increase is the direct result of the United States' decision to limit the numerator of its dumping calculation to those transactions with positive intermediate comparison results. A methodological choice that systematically and inevitably results in a higher

[141] Appellate Body Report, *US – Zeroing (EC)*, paras 126 and 132.
[142] *Id.*, para. 133; and Appellate Body Report, *US – Zeroing (Japan)*, para. 155.
[143] Appellate Body Report, *US – Zeroing (EC)*, para. 146.
[144] According to the dictionary, fair means "just, unbiased, equitable, impartial, legitimate, in accordance with the rules of standards" and "offering an equal chance of success" (Shorter Oxford English Dictionary; 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol.1, p. 915), quoted by the Appellate Body in *US – Lumber V (Article 21.5)*, at para. 138.

margin where there has been no change in pricing behaviour is inherently biased and unfair and, thus, inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.

201. These conclusions are confirmed if one considers the situation from the exporter's point of view. Having been made subject to an anti-dumping duty following the original investigation, an exporter will most likely wish to remedy this situation by increasing its prices so as to eliminate the margin of dumping as established during the original investigation. However, the removal of the original margin of dumping will not prevent the exporter from being subject to the further imposition of a duty following a United States "administrative review" of the amount of duty, unless the exporter actually increases its prices by *more than* the margin of dumping. This cannot be consistent with the general overarching principle that comparisons between normal value and export price be fair.

202. As mentioned in Section III.A.2 above, previous panels and Appellate Body reports have confirmed this interpretation of Article 2.4 of the *Anti-Dumping Agreement*. In *EC – Bed Linen*, the Appellate Body noted that:

> "Furthermore, we are also of the view that a comparison between export price and normal value that does *not* fully take into account the prices of *all* comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2".[145]

203. In *US – Carbon Steel from* Japan, the Appellate Body went on to recall its findings in the *EC – Bed Linen* case, and stated that:

> "When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or *otherwise*, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, 'zeroing … may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing'. Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping".[146] (*emphasis added*)

204. These conclusions were again essentially confirmed by the panel in *US – Softwood Lumber V*, the issue before the panel being whether United States model zeroing was "consistent with the obligations imposed by Article 2.4.2 and the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*"[147]. The Appellate Body in that case again found that:

> "[z]eroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as whole".[148]

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[145] Appellate Body Report, *EC – Bed Linen*, para 55.
[146] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para 135.
[147] Panel Report, *US – Softwood Lumber V*, paras 7.196.
[148] Appellate Body Report, *US – Softwood Lumber V*, para 101.

205. Similarly, in *US – Lumber V (Article 21.5 – Canada)*, the Appellate Body concluded that the use of zeroing in the Section 129 Determination is inconsistent with Article 2.4:

> "The term "fair" is generally understood to connote impartiality, even handedness, or lack of bias. For the reasons stated below, we consider that the use of zeroing under the transaction-to-transaction comparison methodology is difficult to reconcile with the notions of impartiality, evenhandedness, and lack of bias reflected in the "fair comparison" requirement in Article 2.4.
>
> First, the use of zeroing under the transaction-to-transaction comparison methodology when aggregating the transaction-specific comparisons for purposes of calculating the "margins of dumping", distorts the prices of certain export transactions because export transactions made at prices above normal value are not considered at their real value. The prices of these export transactions are artificially reduced when zeroing is applied under the transaction-to-transaction comparison methodology. As the Appellate Body explained in the original dispute, "[z]eroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are".
>
> Secondly, the use of zeroing in the transaction-to-transaction comparison methodology, as in the weighted average-to-weighted average methodology, tends to result in higher margins of dumping. As the Appellate Body underscored in *US – Corrosion-Resistant Steel Sunset Review*, the use of zeroing:
>
> ... will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. ... Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.
>
> In sum, the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. This way of calculating cannot be described as impartial, even-handed, or unbiased. For this reason, we do not consider that the calculation of "margins of dumping", on the basis of a transaction-to-transaction comparison that uses zeroing, satisfies the "fair comparison" requirement within the meaning of Article 2.4 of the *Anti-Dumping Agreement*".[149]

206. Finally, in *US – Zeroing (Japan)*, the Appellate Body stated with respect to zeroing in administrative reviews that:

> "If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a "fair comparison" within the meaning of the first sentence of Article 2.4. This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2, as we have explained previously. Therefore, Panels and the Appellate Body have clarified that the use of model

[149] Appellate Body Report, *US – Lumber V (Article 21.5 – Canada)*, paras 139 to 142.

> zeroing in administrative reviews runs against the fair comparison obligation contained in Article 2.4 of the Anti-Dumping Agreement".[150]

207. The European Communities submits that, in the present case, the zeroing methodology used by the United States involved an inherent bias that had the effect of inflating (or super-inflating) the margin of dumping, and even of turning a negative margin into a positive one.[151] Indeed, the calculations with respect to *FAG Italy* with and without zeroing show that, with the same data, the final anti-dumping margin ranges from -30.27 to 2.52 per cent. A range from -4.00 to 7.65 per cent can be seen with respect to *SKF Italy*. The determination in this case was, therefore, inconsistent with the obligation imposed on the United States by Article 2.4 of the *Anti-Dumping Agreement* to make a fair comparison between normal value and export price.

208. Consequently, the simple zeroing method used by the United States in this case was not fair within the meaning of Article 2.4 of the *Anti-Dumping Agreement*.

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

209. The European Communities submits that by using the asymmetrical method of comparison of the second sentence of Article 2.4.2 and by using simple zeroing in the measure at issue, the United States breached Article 2.4.2 of the *Anti-Dumping Agreement*.

210. Article 2.4.2 of the *Anti-Dumping Agreement* provides that:

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

211. Article 2.4.2 thus sets out three comparison methodologies that investigating authorities may use to calculate dumping margins. The first sentence of Article 2.4.2 provides for two comparison methodologies involving symmetrical comparisons of normal value and export price (weighted average-to-weighted average and transaction-to-transaction comparisons). Article 2.4.2 stipulates that these two methodologies "shall normally" be used by investigating authorities to establish margins of dumping. As an exception to the two normal methodologies, the second sentence of Article 2.4.2 sets out a third comparison methodology which involves an asymmetrical comparison between weighted average normal value and prices of individual export transactions. This methodology may only be used if the circumstances defined in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement* are met.

212. The European Communities will address below the issue of the application of Article 2.4.2 of the *Anti-Dumping Agreement* to all types of investigations undertaken pursuant to Article VI of the GATT 1994 and the *Anti-Dumping Agreement* in which margins of dumping are calculated or relied upon. In this respect, the European Communities submits that Article 2.4.2 of the *Anti-Dumping*

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[150] Appellate Body Report, *US – Zeroing (Japan)*, at para. 168.
[151] Exhibit EC-31, Appendices V to VIII.

Agreement applies not only in the context of original investigation proceedings but also in the context of review proceedings, including "administrative reviews".

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

213. Article 2.4.2 refers to the determination of the "existence of margins of dumping during the *investigation* phase" (emphasis added). The ordinary meaning of the word "investigation" indicates a systematic examination or inquiry or a careful study of or research into a particular subject.[152] According to the European Communities, what that particular subject is may be limited by the terms of a particular provision of the *Anti-Dumping Agreement*.

214. For instance, Article 5.1 of the *Anti-Dumping Agreement* refers to an investigation "to determine the existence, degree and effect of any alleged dumping" such as is conducted in an original investigation (emphasis added). The words in inverted commas would be redundant if the United States' previous assertions about the "limited" or special meaning of the word investigation would be correct. Similarly, Article 9.5 of the *Anti-Dumping Agreement* calls for an investigation into the existence and degree of dumping by a new shipper; Article 11.2 of the *Anti-Dumping Agreement* calls for an investigation into whether or not the continued imposition of the duty is necessary to offset dumping or whether injury would be likely to continue or recur if the duty were removed or varied; Article 11.3 of the *Anti-Dumping Agreement* calls for an investigation into whether or not the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury; and Article 9.3.1 of the *Anti-Dumping Agreement* calls for an investigation into the amount of anti-dumping duty that should be retrospectively assessed.

215. It is apparent that in all the above cases, and particularly when assessing the amount of duty to be paid under its system of retrospective assessment, an investigating authority is required to engage in a "systematic examination" or a "careful study". Article 2.4.2 of the *Anti-Dumping Agreement* contains no limiting language in that regard. To read any other limiting language –such as that found in Article 5.1 of the *Anti-Dumping Agreement*– into Article 2.4.2 of the *Anti-Dumping Agreement*, when there is simply no such language there, would thus be legally incorrect.

216. This good faith interpretation is confirmed by the ordinary meaning of all the terms in the phrase, considered in isolation and together, including the grammatical structure of the phrase, in its context and having regard to its object and purpose. It is also unequivocally confirmed by the preparatory work.

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

217. The application of Article 2.4.2 to all types of investigations in which margins of dumping are calculated or relied upon is supported by the context of Article 2.4.2 of the *Anti-Dumping Agreement*, in particular Article VI of the GATT 1994 as well as Article 9.3 of the Anti-Dumping Agreement.

218. Article 2.4.2 contains one direct link to other treaty terms: the term "margins of dumping" in Article 2.4.2 has a special defined meaning as provided for in Article VI:2 of the GATT 1994. Article VI:1 of the GATT 1994 defines the word "dumping" whilst Article VI:2 of the GATT 1994 defines the term "margin of dumping". Thus, whenever, the *Anti-Dumping Agreement* uses the word "dumping", that word has the special meaning given to the defined term "dumping" and whenever the *Anti-Dumping Agreement* uses the term "margin of dumping", that phrase has the special meaning given to the defined term "margin of dumping". Article 2.1 of the *Anti-Dumping Agreement*

[152] Investigation: "The action or process of investigating; systematic examination; careful research (…). An instance of this; a systematic inquiry; a careful study of a particular subject" (The New Shorter Oxford English Dictionary) (Exhibit EC-32).

implements the definition of "dumping". Similarly, Articles 2.1 to 2.4 of the *Anti-Dumping Agreement* implement the definition of "margins of dumping". There are not other provisions in the *Anti-Dumping Agreement* which concern themselves with how to calculate a margin of dumping.

219. Given that Article 2.4 implements the provisions of Article VI:2 of the GATT 1994 concerning "margins of dumping", it must necessarily apply across the Agreement. The term "margins of dumping" which has a precise definition in Article VI:2 of the GATT 1994 cannot have different meanings in the context of various investigations.

220. As noted by the Appellate Body in *US – Corrosion-Resistant Steel*, in the framework of sunset reviews under Article 11.3 –but this is equally applicable to administrative reviews– "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins".[153]

221. This is logical. If both Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* were limited to "original investigations", that would open up in the *Anti-Dumping Agreement* a vast loophole on the fundamental issue of how to calculate a margin of dumping. In addition, it would make the results of an original investigation effectively worthless. It would void entirely of content the overarching and independent obligation contained in Article 2.4. This would lead to absurd results, in particular in the context of the US anti-dumping system in which the results of retrospective assessments eclipse entirely the results of the original investigation. Indeed, suppose that as a result of an original investigation proceeding without zeroing, duties are imposed at 5 per cent. Assuming that the exporter made the same number of transactions at equal prices during the following year, the use of zeroing in the first administrative review proceeding would automatically inflate the dumping margin and the amount to be collected. In other words, this would thus allow the United States to re-introduce unlawful zeroing methodology by the "back door", in an administrative review conducted as soon as possible following the imposition of duties, the results of which would annul entirely the results of the original investigation proceeding.

222. Also, according to Article 9.3 of the *Anti-Dumping Agreement*, "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The reference to Article 2 must be taken to be a reference to the whole of Article 2. There is no exclusion of parts of Article 2 in that cross-reference. The cross-references in the *Anti-Dumping Agreement* clarify when they refer only to certain paragraphs or sub-paragraphs of an article or when they are restricted some way. This is not the case of the cross-reference in Article 9.3 to Article 2. This confirms that, in the context of Article 9.3, a "margin of dumping" is to be established by reference to the whole of Article 2, consistent with the use of the defined term "margins of dumping" in Article 2.4.2.

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

223. In light of the above, the European Communities submits that the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 of the *Anti-Dumping Agreement* is not limited to original investigations but also to other investigation proceedings, *e.g.*, reviews. Indeed, there are five different types of anti-dumping proceedings expressly referred to in the text of the *Anti-Dumping Agreement*: original *proceedings* (see, for example, Article 5.9); changed circumstances *proceedings* (see, for example, Article 9.5 "normal (…) review proceedings"); sunset *proceedings* (see, for example, Article 9.5 "normal (…) review proceedings"); and assessment or refund *proceedings* (see, for example, Article 9.5 "normal (…) review proceedings"). Assessment proceedings under Article 9.3.1 or refund proceedings under Article 9.3.2 are therefore to be

[153] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

distinguished from original proceedings under Article 5. These different types of proceedings have different purposes and are not all subject to all the provisions of the *Anti-Dumping Agreement*.

224. However, all of these proceedings generally involve an investigation into something. In the case of Article 5, an investigation into the existence, degree an effect of any alleged dumping; in the case of Article 9.5 an investigation into the new comer's margin of dumping; in the case of Article 11.2, an investigation into whether or not changed circumstances warrant a variation of the duty; in the case of Article 11.3, an investigation into whether or not expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury; and in the case of Article 9.3, an investigation into the actual (contemporaneous) margin of dumping and final liability for payment of duties. Consistent with the definition of the term "margin of dumping" in Article VI:2 of the GATT 1994, as implemented in all of Article 2, and the cross-reference in Article 9.3 to all of Article 2, whenever an authority investigates or relies on a "margin of dumping" in any of these anti-dumping proceedings, that margin of dumping must be calculated in a manner consistent with Article 2, that is, for the product *as a whole*.

225. Consequently, as explained in Section III.D.1.1(b), since Article 2.4.2 of the *Anti-Dumping Agreement* prohibits the zeroing of negative intermediate results calculated for certain transactions, the United States also violated this provision in the administrative review proceeding at issue pursuant to Article 9.3 of the *Anti-Dumping Agreement*.

(iv) Conclusions

226. In light of the foregoing, the European Communities considers that, by using the simple zeroing methodology in the administrative review at issue, the United States violated Articles 2.1, 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement*, since USDOC's determination did not reflect the margin of dumping for the product as a whole.

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

227. As mentioned in Section II.B.1, as a result of administrative reviews carried out by the United States, duties are collected with respect to a previous period of review (POR) and a revised estimated anti-dumping duty deposit rate is imposed with respect to future imports.

228. The European Communities argues that the United States re-investigation of the cash deposit rate, which is carried out in conjunction with the retrospective assessment proceeding, must also be consistent with the obligations set out in Article 11.2. That provision refers to the re-investigation of the margin of dumping calculated during the original proceeding. The European Communities considers that, if an investigating authority makes or relies on a dumping determination for the purposes of Article 11.2 of the *Anti-Dumping Agreement*, it is bound to establish any such dumping margin in conformity with the provisions of Article 2.4, including Article 2.4.2 of the *Anti-Dumping Agreement*. In this respect, Article 11.2 must be read in conjunction with the other provisions of the *Anti-Dumping Agreement*, including, necessarily, those that contain relevant definitions, such as Article 2, which defines dumping.

229. Article 11.2 of the *Anti-Dumping Agreement* states that:

> "The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[21] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were

> removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.
>
> [21] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article".

230. The focus of Article 11.2 of the *Anti-Dumping Agreement* is on reviewing the need to continue with the anti-dumping duty. The principle remains that insofar as the importing Member needs to consider margins of dumping in the course of an Article 11.2 review, or varies the anti-dumping duty as a result of an Article 11.2 review, the margin of dumping shall be established in accordance with the provisions of Article 2, and the amount of anti-dumping duty shall not exceed the margin of dumping so established.

231. The European Communities submits that the reassessment of a cash-deposit rate to be applied to future entries also constitutes a "review" of whether the continued imposition of the anti-dumping duty is necessary to counteract dumping that is causing injury.

232. The European Communities is of the view that "administrative reviews" carried out by the United States comprise two steps: first, the determination of the definitive amount of duties; and, second, the establishment of new exporter-specific deposit rates for future entries. In this respect, the first part would be covered by the provisions in Article 9.3 whereas the second part would fall under Article 11.2 of the *Anti-Dumping Agreement*.

233. Footnote 21 to the *Anti-Dumping Agreement*, in the context of Article 9.3.1, does not contradict this conclusion. This Footnote states that:

> "A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article [Article 11.2 *Anti-Dumping Agreement*]."

234. The European Communities would like to draw the Panel's attention to the words "by itself". Indeed, the collection of final duties pursuant to an administrative review falls under Article 9.3.1 of the *Anti-Dumping Agreement*, which calls for an investigation into the amount of anti-dumping duty that should be retrospectively assessed. This, *by itself*, does not constitute a "review" pursuant to Article 11.2 of the *Anti-Dumping Agreement*. By contrast, the imposition of new deposit rates for future entries after a reassessment of the dumping margin, something which is different from the collection of definitive duties, also amounts to a "review" of whether the continued imposition of the anti-dumping duty is necessary to counteract dumping that is causing injury.

235. In this respect, the European Communities wishes to add that the effects of reviews pursuant to Article 11.2 of the *Anti-Dumping Agreement* and the reassessment of deposit rates for future entries in administrative reviews are the same. Indeed, in administrative reviews[154], the United States fixes an up-dated period of review, gathers all necessary data about normal value and export price during that new period, re-calculate normal values and export prices, make a comparison and re-calculate a margin of dumping. In this sense, the Unites States reviews the current duty levels in light of the most recent data, assesses final liability for anti-dumping duties and imposes new deposit rates for future entries.

236. In this specific measure at issue, as mentioned in Section III.D.2.1, as a result of the unlawful zeroing method described in this submission, the margin of dumping determined by the United States

[154] See Section II.B above.

was not calculated in conformity with Article 2 of the *Anti-Dumping Agreement*, and particularly Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.

237. The United States also acted in this case in a manner inconsistent with its obligations under Article 11.2 of *the Anti-Dumping Agreement.* It failed to consider whether or not the imposition of the duty was necessary to offset "dumping" as defined in Article 2 of the *Anti-Dumping Agreement*. Rather, the United States sought to justify the continued imposition of the duty as necessary to offset something that did not constitute dumping within the meaning of Article 2 of the *Anti-Dumping Agreement*. Indeed, in the measure at issue, the calculation of the dumping margin without using zeroing would have resulted in a negative result (*i.e.*, no dumping).

(d) Conclusions

238. Therefore, the European Communities considers that United States has violated Articles 2.1, 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement* by using the simple zeroing methodology in the administrative review proceeding examined herein.

2.2 Other Measures at Issue

239. Exhibits EC-33 to EC-68 contain documents for the other cases, including generally, the Final Results, Issues and Decision Memorandum, Final Margin Program Log and Output, and margin calculation without zeroing. These documents generally demonstrate: that simple zeroing was used, that there were some negative intermediate margins –set to zero by USDOC; and the super-inflationary effect of simple zeroing.

240. The same unlawful zeroing method was used by the United States, to similar effect, in each of these cases. Accordingly, for the same reasons, in each of these cases, the United States acted inconsistently with the obligations imposed on it by Articles 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement*.

2.3 Conclusions

241. In light of the foregoing, the European Communities submits that the United States violated Articles 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT when using model zeroing in the administrative reviews included in the Annex to the Panel request.

3. Sunset Reviews

242. As mentioned in Section II.C, in sunset reviews, five years after publication of an anti-dumping duty order, USDOC and USITC review whether revocation of the order "would be likely to lead to continuation or recurrence of dumping (…) and of material injury".[155] In doing so, USDOC relies on dumping margins calculated in a prior original investigation or an administrative review as the basis for the review determination. Accordingly, USDOC necessarily relies on margins that are calculated using either the model or simple zeroing procedures, one of which is always a feature of USDOC's margin calculations.

243. The European Communities submits that, with respect to the sunset reviews contained in the Annex to the request for establishment of the Panel, the United States failed to comply with its obligations under the *Anti-Dumping Agreement* and the GATT 1994 by relying on dumping margins calculated in prior investigation proceedings using zeroing.

[155] Tariff Act, Section 751(c)(1).

244. The European Communities will describe below the main facts and findings made by the United States in **Case XII**, *Stainless Steel Sheet & Strip in Coils – Italy (A-475-824), No. 42* (Exhibit EC-69), and the violations of the *Anti-Dumping Agreement* and the GATT resulting thereof. For the sake of simplicity, the European Communities will not repeat again the same arguments with respect to the other 10 cases. The European Communities submits evidence of the reliance upon margins that were calculated using standard zeroing procedures in Exhibits EC-70 to EC-79.

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

(a) The Measure at issue

245. In the Notice titled "Continuation of Antidumping Duty Orders on Stainless Steel Sheet and Strip in Coils from Germany, Italy, Japan, the Republic of Korea, Mexico, and Taiwan, and Countervailing Duty Orders on Stainless Steel Sheet and Strip in Coils from Italy and the Republic of Korea" published in the Federal Register[156], the United States decided in the course of the expedited sunset review that revocation of the anti-dumping duty order on stainless steel sheet and strip in coils from Italy would be likely to lead to continuation or recurrence of dumping at the following percentage weighted average percentage margins: 11.23 per cent, with respect to *ThyssenKrupp Acciai Speciali Terni, S.A.* (*TKAST*), and 11.23 per cent for all others.

246. The Decision Memorandum of the International Trade Administration dated 22 November 2004 (69 FR 67894) states in its Page 4 that: "After considering the dumping margins determined in the investigation and subsequent reviews, the Department determines that it is appropriate to report to the USITC for *TKAST* and "all others" the rates from the amended final determination because they are the only calculated rates that reflect the behaviour of companies without the discipline of the order. Therefore, we will report to the USITC the rates as published in the amended final determination, as listed in the next section".[157]

247. It can be observed that the duties imposed as a result of the sunset review investigation were identical to the duty levels as calculated in the original investigation, *i.e.*, 11.23 per cent (see *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order; Stainless Steel Sheet and Strip in Coils From Italy*, 64 FR 40567, of 27 July 1999).[158] It should therefore not be disputed that the United States, in accordance with its regulations, manual of proceedings, standard programs, etc, used model zeroing in original investigations, including this one.[159]

248. In the case at hand, the result of the program log in the original investigation proceeding shows that zeroing was used:[160]

[156] Exhibit EC-69, Appendices I and II.
[157] Exhibit EC-69, Appendix III.
[158] Exhibit EC-69, Appendix IV.
[159] Indeed, the European Communities will like to recall several statements made by the United States where it acknowledges the use of model zeroing in original investigations in the past (Exhibit EC-80).
[160] Exhibit EC-69, Appendix V.

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3813
3814
3815            ****************************************
3816            ***  CALCULATE OVERALL MARGIN.  ***
3817            ****************************************
3818
3819            PROC MEANS NOPRINT DATA = MARGIN;
3820                    VAR VALUE QTY;
3821                    OUTPUT OUT = ALLVAL (DROP = _FREQ_  _TYPE_)
3822                            SUM = TOTVAL TOTQTY;
3823            RUN;

NOTE:           The data set WORK.ALLVAL has 1 observations and 2 variables.
NOTE:           The PROCEDURE MEANS used 0.08 seconds.

3824
3825            PROC PRINT DATA = ALLVAL (
SYMBOLGEN:              Macro variable PRINTOBS resolves to 10
3825                                    OBS = &PRINTOBS);
3826                    TITLE3 "TOTAL VALUE AND QUANTITY OF U.S. SALES";
3827            RUN;

NOTE:           The procedure PRINT used 0.02 seconds.


3828
3829            PROC MEANS NOPRINT DATA = MARGIN;
3830                    WHERE EMARGIN GT 0;
3831                    VAR PCTEMARG;
3832                    OUTPUT OUT = MINMAX (DROP = _FREQ_  _TYPE_)
3833                            MIN = MINMARG MAX = MAXMARG;
3834            RUN;
```

249. The tables containing the results of the preliminary calculations show that, with zeroing, the dumping margin found for *TKAST* was 3.52461 whereas, with the same data but without zeroing, no dumping would have been found (-12.94723). The final determination without zeroing would have resulted in a negative dumping margin (-0.41), rather than 11.23 per cent.[161]

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

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

250. In sunset reviews, pursuant to Article 11.3 of the *Anti-Dumping Agreement*, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be likely to lead to continuation or recurrence of *dumping*.

251. Article 11.3 of the *Anti-Dumping Agreement* does not define the word "dumping". However, the definition of dumping which is laid down in Article VI:1 of the GATT 1994 and in Article 2.1 of the *Anti-Dumping Agreement* applies to sunset reviews. Indeed, the words "for the purposes of this

[161] Exhibit EC-69, Appendices VI and VII.

Agreement" in Article 2.1 clearly indicate that the definition of dumping contained in that provision applies to the entire Agreement, including its Article 11.3. This interpretation is supported by the fact that Article 11.3 of the *Anti-Dumping Agreement* does not indicate, expressly or implicitly, that "dumping" has a different meaning in the context of sunset reviews than in the rest of the *Anti-Dumping Agreement*. As a result, in sunset reviews, the question for the investigation authorities is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping of the product subject to the duty (that is, to the introduction of that product into the commerce of the importing country at less than its normal value).[162]

252. As indicated above, Article 2.1 of the *Anti-Dumping Agreement* makes clear that dumping is defined in relation to a product as a whole and not in relation to a type, model or category of a product. Thus, if dumping margins are used in the likelihood-of-dumping determination in sunset reviews, they must be determined for the product as a whole.

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

253. In a sunset review, investigating authorities are not entitled to rely on dumping margins which are inconsistent with the *Anti-Dumping Agreement*, in particular with Article 2. In *US – Corrosion-Resistant Steel*, the Appellate Body clarified that:

> "Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins. As observed earlier, we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, **should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4**. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*".[163] (emphasis added)

254. Thus, if investigating authorities decide to rely on dumping margins calculated in original investigations or subsequent administrative review investigations, those margins must be calculated in a manner consistent with Article 2.4 of the *Anti-Dumping Agreement*.

255. The European Communities submits that to the extent that the dumping margins on which USDOC relied in this sunset review have been determined on the basis of zeroing, they are inconsistent with Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement*. Indeed, as mentioned before, the USDOC relied on the dumping margins published in the amended final determination as the only ones reflecting the behaviour of companies without the discipline of the order.[164] These had been calculated by using model zeroing.[165]

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

256. Articles 11.1 and 11.3 of the *Anti-Dumping Agreement* provide that:

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[162] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 109.
[163] *Id.*, para. 127.
[164] Exhibit EC-69, Appendix III, p. 4.
[165] Exhibit EC-69, Appendices V to VII.

> "11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."
>
> "11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review."

257. As highlighted by the Appellate Body in *US – Corrosion-Resistant Steel*, if a likelihood determination under Article 11.3 of the *Anti-Dumping Agreement* is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too and, thus, USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3 of the *Anti-Dumping Agreement*.

258. Even if an investigating authority does not rely on margins of dumping calculated since the original proceeding, it must still necessarily rely on the margin of dumping calculated in the original proceeding itself. That is because the terms "recur" and "continue" necessarily relate to something that not only is going to occur in the future, but which also occurred in the past. If there is nothing in the past, there is nothing that can recur or continue. Consequently, at least in the case where the use of zeroing in the original proceeding had the effect of creating a more than *de minimis* dumping margin, when in fact there was no dumping or only a *de minimis* amount of dumping, then the sunset measure will *by definition* be inconsistent with the *Anti-Dumping Agreement*.

259. On the basis of the foregoing, the European Communities submits that by relying in this sunset review on margins calculated in prior proceedings using model zeroing, USDOC did not comply with its obligations pursuant to Articles 2.1, 2.4 and 2.4.2 because these margins were not based on a fair comparison and not calculated for the product as a whole.[166] As a result, USDOC acted in breach of Article 11.3 of the *Anti-Dumping Agreement*. Also, because USDOC reviews conducted pursuant to these provisions are flawed, the United States failed to comply with the obligation in Article 11.1 of the *Anti-Dumping Agreement*.

260. These conclusions were also reached by the Appellate Body in *US – Zeroing (Japan)*. In that case, the Appellate Body noted that since USDOC relied on margins of dumping established in prior proceedings in its likelihood-of-dumping determination which were calculated during administrative reviews on the basis of simple zeroing and since such zeroing is inconsistent with Articles 2.4 and 9.3, the likelihood-of-dumping determinations in sunset reviews on the basis of those previous dumping margins are inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.[167]

(d) Conclusions

261. Therefore, the European Communities submits that the United States violated Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement* in the sunset review mentioned in the Annex to the Panel request as **Case XII**, *No. 42* when relying on margins of dumping calculated in prior investigations using the zeroing methodology.

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[166] *Id.*
[167] Appellate Body Report, *US – Zeroing (Japan)*, para. 184 – 187.

3.2 Other Measures at Issue

262. The European Communities submits that the other 10 sunset review proceedings contained in the Annex to the request for establishment of the Panel are inconsistent with Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement* on the basis of the same arguments mentioned above. For the sake of simplicity, the European Communities will not repeat these arguments. Instead, in Exhibits EC-70 to EC-79, the relevant sections of USDOC's determinations showing the use of zeroing are mentioned.

3.3 Conclusions

263. In light of the foregoing, the European Communities submits that the United States has violated Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement* in the sunset reviews mentioned in the Annex to the Panel request when relying on margins of dumping calculated in previous proceedings using the zeroing methodology.

IV. FINDINGS AND RECOMMENDATION REQUESTED

264. For the reasons stated above, the European Communities respectfully requests this Panel to make the following findings:

- The United States failed to comply with Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement since it continues applying duties which were calculated by using zeroing in the 18 anti-dumping measures mentioned in the Annex to the Panel request.

- The United States violated Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994 when applying model zeroing in the 4 original investigation proceedings mentioned in the Annex to the Panel request.

- The United States violated Articles 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT when using model zeroing in the 37 administrative review proceedings included in the Annex to the Panel request.
- The United States violated Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement* in the sunset review proceedings mentioned in the Annex to the Panel request when relying on margins of dumping calculated in prior investigations using the zeroing methodology.

265. The European Communities notes that, contrary to Article 4.2 of the Dispute Settlement Understanding, the United States has so far failed to give duly consideration to the European Communities' representations on this matter. In view of the obligations contained in Article 3 of the Dispute Settlement Understanding, in particular the obligation for WTO Members to engage in procedures in good faith in an effort to resolve dispute, the European Communities once again invites the United States to comply with its obligations under the WTO Agreements.

266. In order to make effective these obligations, the European Communities requests this Panel to recommend, pursuant to Article 19 of the Dispute Settlement Understanding, that the United States takes the steps necessary to bring its measures into conformity with the cited WTO provisions. In particular, in the view of the European Communities, the Panel should suggest that the United States cease using zeroing when calculating dumping margins in any anti-dumping proceeding with respect to the 18 measures mentioned in the Annex to the Panel request or any other. This recommendation will be appropriate to help promote the resolution of the dispute.

LIST OF EXHIBITS

EC-1	Request for Establishment of the Panel (DS350)
EC-2	Tariff Act 1930 (extract)
EC-3	Regulations (in three parts)
EC-4	Manual (by Chapter)
EC-5	Detailed Explanation of Computer Language
EC-6	US Notice on Zeroing in Original Investigations
EC-7	Sunset Policy Bulletin
EC-8	Waincymer, WTO Litigation: Procedural Aspects of Formal Dispute Settlement (Cameron May, 2002), p.510
EC-9	Brownlie, Principles of Public International Law (5th ed. 1988) pp. 3-5, pp. 20-21
EC-10	ICJ Statute
EC-11	Arnull, The European Union and its Court of Justice (2006) pp. 622-638
EC-12	Zweigert and Kötz, An Introduction to Comparative Law (3rd ed. 1988), pp. 256-265
EC-13	Rosas, "The European Court of Justice: sources of law and methods of interpretation", in The WTO at Ten (2006), pp. 482-489
EC-14	Shahabuddeen, Precedent in the World Court (1996), pp. 234-241
EC-15	Treves, "The International Tribunal for the Law of the Sea", in The WTO at 10, (1996), pp. 490-500
EC-16	Reid, A Practitioner's Guide to the European Convention on Human Rights (2nd ed. 2004), p. 51
EC-17	ICC Statute
EC-18	Kmiec, The Origin and Current Meanings of "Judicial Activism", Comment, California Law Review, October 2004, 1422-1477
EC-19	ECJ Statute
EC-20	Neville and Kennedy, The Court of Justice of the European Communities (2000), pp. 370-377
EC-21	Reid, A Practitioner's Guide to the European Convention on Human Rights (1st ed. 1998), p. 43

EC-22	International Criminal Tribunal for the former Yugoslavia: Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement 24 March 2000, pp. 41-48 and Declaration of Judge David Hunt
EC-23	ICSID Secretariat Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration", 22 October 2004
EC-24	ICSID Secretariat Working Paper, "Suggested Changes to the ICSID Rules and Regulations", 12 May 2005
EC-25	Jackson, "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out", 98 American Journal of International Law 109 (2004)
EC-26	[A-421-811] Purified Carboxymethylcellulose from the Netherlands (No. 50) Appendix I: Final USDOC Determination (70 FR 28275) and Final Order (70 FR 39734) Appendix II: USITC Determination (70 FR 39334) Appendix III: Program Code of Noviant BV Appendix IV: Program Log of Noviant BV Appendix V: Tables containing calculations with zeroing for Noviant BV Appendix VI: Tables containing calculations without zeroing for Noviant BV
EC-27	Issues and Decision Memorandum for the Final Results of the Section 129 Determinations (9 April 2007)
EC-28	[A–401-808] Purified Carboxymethylcellulose from Sweden (No. 49) Appendix I: USDOC Determination (70 FR 28278) Appendix II: USITC Determination (70 FR 39334) Appendix III: Final Order (70 FR 39734)
EC-29	[A–405-803] Purified Carboxymethylcellulose from Finland (No. 51) Appendix I: USDOC Determination (70 FR 39734) Appendix II: USITC Determination (70 FR 39334) Appendix III: Final Order (70 FR 28279)
EC-30	[A–469-814] Purified Carboxymethylcellulose from Spain (No. 52) Appendix I: USDOC Determination (70 FR 24506) Appendix II: USITC Determinations (70 FR 36205) Appendix III: Final Order (70 FR 36562) Appendix IV: Program Log of Aragonesas Delsa S.A.
EC-31	[A-475-801] Ball Bearings and Parts Thereof from Italy (No. 5) Appendix I: USDOC Determination (71 FR 400064) Appendix II: Issues and Decision Memorandum Appendix III: Program Logs of FAG Appendix IV: Program Logs of SKF Appendix V: Tables containing calculations with zeroing for FAG Appendix VI: Tables containing calculations with zeroing for SKF Appendix VII: Tables containing calculations without zeroing for FAG Appendix VIII: Tables containing calculations without zeroing for SKF
EC-32	Investigation, New Shorter Oxford English Dictionary

EC-33	[A-449-804] Steel Concrete Reinforcing Bars from Latvia (No. 1) Appendix I: Notice of Final Results (71 FR 74900) Appendix II: Issues and Decision Memorandum Appendix III: Program used with respect to LM Appendix IV: Program Log of LM Appendix V: Tables containing LM's calculations with zeroing Appendix VI: Tables containing LM's calculations without zeroing
EC-34	[A-449-804] Steel Concrete Reinforcing Bars from Latvia (No. 2) Appendix I: Notice of Final Results (71 FR 7016) Appendix II: Issues and Decision Memorandum Appendix III: Program used with respect to LM Appendix IV: Program Log of LM Appendix V: Tables containing LM's calculations with zeroing Appendix VI: Tables containing LM's calculations without zeroing
EC-35	[A-449-804] Steel Concrete Reinforcing Bars from Latvia (No. 3) Appendix I: Notice of Final Results (69 FR 74498) Appendix II: Program used with respect to LM Appendix III: Program Log of LM Appendix IV: Tables containing LM's calculations with zeroing Appendix V: Tables containing LM's calculations without zeroing
EC-36	[A-475-801] Ball Bearings and Parts Thereof from Italy (No. 6) Appendix I: Notice of Final Results (70 FR 54711) Appendix II: Issues and Decision Memorandum Appendix III: Program Log of FAG Italy Appendix IV: Program Log of SKF Italy Appendix V: Table containing calculations with zeroing for FAG Italy Appendix VI: Table containing calculations with zeroing for SKF Italy Appendix VII: Table containing calculations without zeroing for FAG Italy Appendix VIII: Tables containing calculations without zeroing for SKF Italy
EC-37	[A-475-801] Ball Bearings and Parts Thereof from Italy (No. 7) Appendix I: Notice of Final Results (69 FR 55574) + amendment (69 FR 62023) Appendix II: Issues and Decision Memorandum Appendix III: Program Log of SKF Italy Appendix IV: Program Log of FAG Italy Appendix V: Table containing calculations with zeroing for FAG Italy Appendix VI: Tables containing calculations without zeroing for FAG Italy Appendix VII: Tables containing calculations with zeroing for SKF Italy Appendix VIII: Tables containing calculations without zeroing for SKF Italy
EC-38	[A-475-801] Ball Bearings and Parts Thereof from Italy (No. 8) Appendix I: Notice of Final Results (68 FR 35623) Appendix II: Issues and Decision Memorandum Appendix III: Program Log for SKF Italy Appendix IV: Program Log for FAG Italy Appendix V: Table containing calculations with zeroing for FAG Italy Appendix VI: Table containing calculations without zeroing for FAG Italy Appendix VII: Tables containing calculations with zeroing for SKF Italy Appendix VIII: Tables containing calculations without zeroing for SKF Italy

EC-39	[A-428-801] Ball Bearings and Parts Thereof from Germany (No. 10) Appendix I: Notice of Final Results (71 FR 40064) Appendix II: Issues and Decision Memorandum Appendix III: Program Log of SKF Germany Appendix IV: Program Logs of FAG Germany Appendix V: Tables containing calculations with zeroing for FAG Appendix VI: Tables containing calculations without zeroing for FAG Appendix VII: Tables containing calculations with zeroing for SKF Appendix VIII: Tables containing calculations without zeroing for SKF
EC-40	[A-428-801] Ball Bearings and Parts Thereof from Germany (No. 11) Appendix I: Notice of Final Results (70 FR 54711) Appendix II: Issues and Decision Memorandum Appendix III: Program Log of FAG Germany Appendix IV: Program Log of SKF Germany Appendix V: Table containing calculations with zeroing for FAG Germany Appendix VI: Tables containing calculations with zeroing for SKF Germany Appendix VII: Table containing calculations without zeroing for FAG Germany Appendix VIII: Tables containing calculations without zeroing for SKF Germany
EC-41	[A-428-801] Ball Bearings and Parts Thereof from Germany (No. 12) Appendix I: Notice of Final Results (69 FR 55574) + amendment (69 FR 63507) Appendix II: Issues and Decision Memorandum Appendix III: Program Log of SKF Germany Appendix IV: Program Log of FAG Germany Appendix V: Table containing calculations with zeroing for SKF Germany Appendix VI: Tables containing calculations without zeroing for SKF Germany Appendix VII: Tables containing calculations with zeroing for FAG Germany Appendix VIII: Tables containing calculations without zeroing for FAG Germany
EC-42	[A-428-801] Ball Bearings and Parts Thereof from Germany (No. 13) Appendix I: Notice of Final Results (68 FR 35623) Appendix II: Issues and Decision Memorandum Appendix III: Program Log of SKF Germany Appendix IV: Program Log of FAG Germany Appendix V: Table containing calculations with zeroing for SKF Germany Appendix VI: Table containing calculations without zeroing for SKF Germany Appendix VII: Table containing calculations with and without zeroing for FAG Germany
EC-43	[A-427-801] Ball Bearings and Parts Thereof from France (No. 15) Appendix I: Notice of Final Results (71 FR 40064) Appendix II: Issues and Decision Memorandum Appendix III: Program Logs of SKF France Appendix IV: Tables containing calculations with zeroing for SKF France

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US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1. It is a fundamental principle of customary rules of interpretation of public international law that any interpretation must address the text of the agreement and may not impute into the agreement words and obligations that are not there.[1] Further, in settling disputes among Members, WTO dispute settlement panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements".[2]

2. The European Communities ("EC"), in asserting its claims for relief, relies heavily on prior Appellate Body reports, asserting that "the Panel should not depart from" prior Appellate Body reports. Although the EC acknowledges that there is no obligation for a panel to follow the reasoning of prior reports, the EC attempts to establish some legal threshold for departure from those prior reports. However, the rights and obligations of the Members flow, not from panels or the Appellate Body, but from the text of the covered agreements. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") plainly requires each panel to make its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements.

3. The EC's challenges, in this dispute, necessarily require that this Panel read an obligation into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), notwithstanding the fact that there is no textual basis for the obligations that the EC proposes. Namely, the EC seeks to read into the agreements an obligation to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same assessment proceedings exceed normal value. The position of the United States is that such an offset or credit need not be granted in the assessment phase of an antidumping proceeding.

4. And the actual situation is far different from the EC's claim that there is a "consistent" line of reasoning in past WTO panel and Appellate Body reports on the issue of offsets. Three WTO panels consisting of trade remedies experts have examined whether there is an obligation to provide offsets beyond the context of average-to-average comparisons in an investigation. In every case, the panel of experts determined that the customary rules of interpretation of public international law do not support a reading of the AD Agreement or the GATT 1994 that extends a zeroing prohibition beyond the use of average-to-average comparisons in an investigation.[3]

5. Nevertheless, the Appellate Body has adopted an interpretation of the AD Agreement that includes a general prohibition of zeroing. Using reasoning that has shifted from dispute to dispute, these Appellate Body reports have found, despite the contrary interpretation offered by the panels, that a general prohibition of zeroing reflects the only permissible interpretation of the AD Agreement. The EC's claims in this dispute rely entirely on that conclusion. The United States respectfully disagrees with the reasoning in these Appellate Body reports that the only permissible interpretation of the AD Agreement includes a general prohibition of zeroing. Accordingly the United States requests that this Panel refrain from adopting the Appellate Body's interpretation. Instead, the United States requests that this Panel remain faithful to the text of the AD Agreement and find that the United States' interpretation outside the context of average-to-average comparisons in investigations is permissible.

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[1] *India – Patents (AB)*, para. 45.

[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article 19.2; *see id*., Article 3.2.

[3] *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.65, 5.66, 5.77; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284.

6. As the United States will demonstrate, in order to accept the EC's arguments, one must suspend disbelief and pretend that assessment proceedings are investigations and that the alternative assessment methods contemplated by Article 9.3 of the AD Agreement do not exist.

7. As the United States will explain below, the provisions of the WTO agreements invoked by the EC do not require that an offset or credit be granted for "negative dumping" in assessment proceedings and do not require the use of the average-to-average or transaction-to-transaction method in assessment proceedings.

8. The EC's claims as to WTO inconsistency of the challenged sunset reviews should be rejected, as the EC has not demonstrated that a calculation done in accordance with the EC's approach would result in zero or *de minimis* dumping margins in the cited cases.

9. The EC's claim with respect to Article XVI:4 of the *Agreement Establishing the World Trade Organization* ("WTO Agreement") depends on a finding of inconsistency with provisions of the AD Agreement and GATT 1994, which the EC has not demonstrated. Consequently, there is no breach of Article XVI:4. The EC has further attempted to interpret Article XVI:4 in a novel manner that would significantly alter the nature of the WTO dispute settlement system and directly contradict the WTO Agreement. The EC's attempt should be rejected.

10. In addition, as set out below, the United States requests a preliminary ruling that the measures that were not subject of consultations but instead appeared for the first time in the EC's panel request fall outside of the scope of the Panel's terms of reference. Contrary to Articles 4.4., 4.7 and 6.2 of the DSU and Articles 17.3, 17.4 and 17.5 of the AD Agreement, the EC seeks to expand the matter in this dispute beyond the measures upon which consultations were requested. Moreover, insofar as the EC has added indeterminate measures, the Panel should find that they are outside of the Panel's terms of reference because they do not comply with the specificity requirement of Article 6.2 of the DSU.

II. FACTUAL BACKGROUND

11. The US antidumping duty law is designed to provide domestic producers with a remedy against injurious dumping. The US statute governing antidumping proceedings is the Tariff Act of 1930, as amended ("the Tariff Act"). The Tariff Act, consistent with the AD Agreement, provides for two distinct phases in antidumping proceedings. The first stage of the antidumping proceeding is the investigation phase. The US Department of Commerce ("Commerce") will determine whether dumping existed during the period of investigation by calculating an overall weighted average dumping margin for each foreign producer/exporter investigated. Separately, the US International Trade Commission ("ITC") determines whether an industry in the United States is materially injured by reason of the dumped imports.

12. If Commerce finds that dumping existed during the period of investigation, and if the ITC determines that a US industry was injured by reason of dumped imports, the investigation phase ends and the second phase of the antidumping proceeding – the assessment phase – begins. In the assessment phase, the focus is on the calculation and assessment of antidumping duties on specific entries by individual importers.

A. THE ARTICLE 5 INVESTIGATION PHASE

13. With respect to the investigation phase, US law provides that Commerce will normally use the average-to-average method for comparable transactions during the period of investigation.[4] US law also provides for the use of transaction-to-transaction comparisons[5] and, provided that there is

[4] 19 C.F.R. 351.414(c)(1) (Exhibit EC-3).
[5] 19 U.S.C. 1677f-1(d)(1)(A) (Exhibit EC-2).

a pattern of prices that differs significantly by region or time period, among other things[6], for use of the average-to-transaction method.[7]

14. In the investigation phase, Commerce must resolve the threshold question of whether dumping "exists" such that the imposition of an antidumping measure is warranted. Section 771(35)(A) of the Tariff Act defines "dumping margin", for the purposes of US law, as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise".[8] Thus, for purposes of US law, the "dumping margin" is the result of a specific comparison between an export price (or constructed export price) and the normal value for comparable transactions. When average-to-average comparisons are used, similar export transactions[9] are grouped together and an average export price is calculated for the comparison group which is compared to a comparable normal value. Some of these comparisons could result in dumping margins while other comparisons might result in no dumping margin.

15. Section 771(35)(B) of the Tariff Act defines "weighted average dumping margin" as the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer".[10] Thus, to calculate a single weighted average dumping margin for each foreign exporter/producer individually examined in an investigation, Commerce has summed the total amount of dumping found for each comparison group for that exporter/producer in the United States during the period of investigation. After 22 February 2007, in making average-to-average comparisons in investigations, Commerce intends to provide offsets for non-dumped comparisons that reduce the total amount of dumping found by the amount by which any comparison reflected an average export price in excess of normal value.[11] For example, Commerce did provide such offsets in the investigation of certain activated carbon from the People's Republic of China.[12]

16. Commerce then divides the aggregate amount from the sum of the comparison groups by the aggregate export prices of *all* US sales by the exporter/producer during the period of investigation to arrive at the "weighted average dumping margin".[13]

17. If the overall weighted average dumping margin for a particular exporter/producer is *de minimis*, the exporter/producer is excluded from any antidumping measure.[14] If the overall weighted average dumping margin for each exporter/producer is *de minimis*, the antidumping proceeding is terminated.[15] If Commerce and the ITC make final affirmative determinations of dumping and injury, respectively, then Commerce orders the imposition of antidumping duties (an "antidumping duty order" or, simply "order" in US parlance).[16] The issuance of an antidumping duty order completes the investigation phase.

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[6] This pattern commonly is referred to as "targeted dumping".

[7] 19 U.S.C. 1677f-1(d)(1)(B) (Exhibit EC-2).

[8] 19 U.S.C. 1677(35)(A) (Exhibit EC-2).

[9] Similarity of export transactions is generally determined on the basis of product characteristics. Therefore, comparison groups are commonly referred to as "models". However, other factors affecting price comparability are taken into account, *e.g.*, level of trade.

[10] 19 U.S.C. 1677(35)(B) (Exhibit EC-2).

[11] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (27 December 2006); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3,783 (26 January 2007) (Exhibit EC-6).

[12] *See Final Determination of Sales for Less Than Fair Value: Certain Activated Carbon from the People's Republic of China*, 72 Fed. Reg. 9,508 (2 March 2007) (Exhibit US-1).

[13] 19 U.S.C. 1677(35)(B) (Exhibit EC-2).

[14] 19 C.F.R. 351.204(e)(1) (Exhibit EC-3).

[15] 19 U.S.C. 1673d(c)(2) (Exhibit EC-2).

[16] 19 U.S.C. 1673e(a) (Exhibit EC-2).

B. THE ASSESSMENT PHASE

18. Unlike investigations, which are subject to a single set of rules, the AD Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment phase. There are two basic types of assessment systems – prospective and retrospective. In a prospective system, normal values or an *ad valorem* duty rate are established and applied to the merchandise subject to the antidumping measure upon importation on an entry-by-entry basis. While *ad valorem* systems apply duties to all subject imports, in prospective normal value systems, those imports for which the export price is greater than or equal to the normal value do not result in duty liability. However, no offset is provided on other transactions where the export price is below normal value.

19. The United States has a retrospective assessment system. Under the US system, an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Rather, the United States collects security in the form of a cash deposit at the time of entry, and determines the amount of duties due on the entry at a later date. Specifically, once a year (during the anniversary month of the orders) interested parties may request a review to determine the amount of duties owed on each entry made during the previous year.[17] Antidumping duties are calculated on a transaction-specific basis and are paid by the importer of the transaction, as in prospective duty systems. If the final antidumping duty liability ends up being less than the cash deposit, the difference is refunded. If no review is requested, the cash deposits made on entries during the previous year are automatically assessed as the final duties. To simplify the collection of duties calculated on a transaction-specific basis, the absolute amount of duties calculated for the transactions of each importer are summed up and divided by the total entered value of that importer's transactions, including those for which no duties were calculated. US customs authorities then apply that rate to the entered value of the imports to collect the correct total amount of duties owed.

III. PROCEDURAL BACKGROUND

20. This dispute began when the EC requested consultations on 2 October 2006.[18] On 9 October 2006, the EC filed a second request for consultations that included two additional administrative reviews.[19] The United States and the EC held consultations on 14 November 2006, and 28 February 2007.

21. On 10 May 2007, the EC requested the establishment of a panel.[20] On 4 June 2007, the Dispute Settlement Body established a panel pursuant to the EC's revised request.

IV. GENERAL PRINCIPLES

A. BURDEN OF PROOF

22. The AD Agreement imposes obligations on the authorities that they must satisfy, but the burden of proving that those obligations have not been satisfied is on the complaining party. In *US – Corrosion-Resistant Steel CVD*, the Appellate Body explained that the complaining party bears the burden of proof:

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

[18] WT/DS350/1 (3 October 2006). The EC had originally filed a request for consultations on 22 September 2006, but discovered that it had omitted a measure. The EC withdrew that request on October 2 in favour of its 2 October 2006 request.

[19] WT/DS350/1 Add. 1 (11 October 2006).

[20] WT/DS350/6 (11 May 2007). As detailed below, the EC added additional measures that were not contained in its consultation request.

> [t]he complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:
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> … it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence*. (emphasis added).[21]

23. Accordingly, the burden is on the EC to prove that US measures exist that are inconsistent with US obligations under the relevant covered agreement. The burden is not on the United States to prove that it acted in a WTO-consistent manner.

B. STANDARD OF REVIEW

1. The Applicable Standard of Review is Whether the Authority's Measure Rests on a Permissible Interpretation of the AD Agreement

24. Article 11 of the DSU defines generally a panel's mandate in reviewing the consistency with the covered agreements of measures taken by a Member. In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) with respect to an investigating authority's interpretation of provisions of the AD Agreement.[22] Article 17.6(ii) states:

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

25. The question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is a permissible interpretation. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation". Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.[23]

26. The explicit confirmation that there are provisions of the AD Agreement that are susceptible to more than one permissible reading provides context for the interpretation of the AD Agreement. This provision reflects the negotiators' recognition that they had left a number of issues unresolved and that customary rules of interpretation would not always yield only one permissible reading of a given provision.

27. One panel recalled that "in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it".[24] Similarly in this case, it is useful to bear in mind that Article 17.6(ii) applies and there may be multiple permissible interpretations of particular provisions in the AD Agreement.

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[21] *US – Corrosion-Resistant Steel CVD (AB)*, paras. 156-157 (footnote omitted).
[22] *See EC – Bed Linen (Article 21.5) (AB)*, paras. 108, 114, and 118.
[23] *See Argentina – Poultry*, para. 7.341 and n. 223.
[24] *Argentina – Poultry*, para. 7.45 (stating that under Article 17.6(i), panels "may not engage in *de novo* review").

2. The Panel Should Make an Objective Assessment of the Matter Before It and Not Add to or Diminish the Rights and Obligations Provided in the Covered Agreements

28. Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. The Appellate Body has explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised.[25] Articles 3.2 and 19.2 of the DSU contain the fundamental principle that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the DSB, cannot add to or diminish the rights and obligations provided in the covered agreements.

29. The EC engages in a long discourse on the EC's particular view of municipal law, other legal systems and fora, and urges that the Panel should not "deviate" from prior Appellate Body reports addressing the issue of zeroing.[26] In essence, the EC is urging the Panel to rubber-stamp those prior reports that are favorable to the EC's position, to disregard those panel reports that demonstrate that the EC's position is contrary to the agreed text of the WTO agreements, and to ignore the Panel's obligations under Article 11 of the DSU to conduct an objective assessment of the matter before it. The EC, in relying so extensively on examples from outside the WTO dispute settlement context, highlights the fact that there is no support for its approach in the DSU, which governs the Panel's review of the consistency of the measures with the WTO Agreement. A panel is bound to make an objective assessment under Article 11 of the DSU, and must not make findings and recommendations that add to or diminish the rights and obligations in the covered agreements.

30. The EC erroneously argues that the "WTO inconsistency of . . . [zeroing] has already been established in previous disputes".[27] EC citations to evidence before separate panels and the Appellate Body do not permit the Panel to simply adopt those findings here without an objective assessment of the facts at issue. The panel in *US – Subsidies on Upland Cotton* rejected Brazil's request that the panel simply accept and apply the reasoning of a prior panel, as modified by the Appellate Body. In declining to do so, the panel stated that there was "no basis in the text of the DSU . . . for such incorporation by reference of claims and arguments made in a previous dispute nor for a quasi-automatic application of findings, recommendations and rulings from a previous dispute".[28]

31. Ironically, while arguing that a panel should follow the reasoning of prior panel and Appellate Body reports, the EC appears to have a starkly divergent view of the WTO dispute settlement system than prior panel and Appellate Body reports. The EC begins from a rather startling premise - it claims that the "main purpose" of the dispute settlement system is to "provide security and predictability to the multilateral trading system."[29] Users of the dispute settlement system could be forgiven for thinking that the main purpose of the dispute settlement system was to resolve disputes.

32. Furthermore, while prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members[30], this Panel is not bound to follow the reasoning set forth in any Appellate Body report. In this instance, the EC urges the Panel to follow prior Appellate Body

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[25] *Guatemala – Cement I (AB)*, para. 73.

[26] *See* EC First Written Submission, paras. 63, 110. The EC appears to advocate that the Panel disregard its duty under Article 11 of the DSU when it asserts that the Panel should not depart from previous Appellate Body findings on zeroing "to the extent that the Appellate Body has already examined the arguments which could be raised by the defendant in this case". EC First Written Submission, para. 106. The Panel is required to make an "objective assessment" of this case, and cannot simply refuse to examine the arguments of the United States because the EC alleges that they are similar to those made in another dispute that was the subject of an adopted Appellate Body report.

[27] *See* EC First Written Submission, paras. 115.

[28] *US – Cotton Subsidies (Panel)*, paras. 735 - 739.

[29] EC First Submission, para. 87.

[30] *Japan – Alcohol Taxes (AB)*, para. 14.

findings in order to ensure the "security and predictability" referred to in Article 3.2 of the DSU.[31] However, read in its context in Article 3.2, the reference to security and predictability in Article 3.2 supports the opposite conclusion. The rights and obligations of the Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. In this regard, the "security and predictability" referred to in the first sentence of Article 3.2 results from the application of the correct interpretive approach set forth in the second sentence of Article 3.2 - the customary rules of interpretation of public international law - to the provisions of the WTO Agreement. A result which adds to or diminishes the rights or obligations of Members provided in the covered agreements is prohibited by the third sentence of Article 3.2 and is therefore the antithesis of the "security and predictability" referred to in the first sentence of Article 3.2. This conclusion does not change because the result in question had previously been reached by the Appellate Body.

33. Appellate Body reports should be taken into account only to the extent that the reasoning is persuasive. The Appellate Body itself has stated that its reports are not binding on panels.[32] While the reasoning in such reports may be taken into account, Members are free to explain why any reasoning or findings should *not* be taken into account.[33] Therefore, although the dispute settlement system serves to resolve a particular dispute, and to clarify agreement provisions in the context of doing so, neither panels nor the Appellate Body can issue authoritative interpretations that are binding with respect to another dispute.

34. The EC argues that the Appellate Body in *US – OCTG Sunset Reviews (AB)* "clearly stated that panels are bound by the legal analysis of the Appellate Body".[34] The Appellate Body in that case, however, merely said that it would expect panels to follow earlier conclusions where issues are the same, not that panels are legally bound by prior Appellate Body reports. The Appellate Body's statement does not represent the incorporation of the doctrine of *stare decisis* into the WTO dispute settlement system, nor could it.

35. The EC further asserts that "the Panel should not depart" from prior Appellate Body reports on zeroing because the Appellate Body occupies a "superior position" in the WTO hierarchy, is a "permanent body", and "provides for the correct interpretation of the relevant rules".[35] None of this is provided for in the DSU. Although the Appellate Body undeniably has an important role in the WTO dispute settlement system, panels also possess fundamental responsibilities under Articles 3.2, 11, and 19.2 of the DSU, and are not free to ignore them because one party refers to Appellate Body findings on a similar issue in another dispute. Panels must make an objective assessment of the matter, and must correctly apply the customary rules of interpretation of public international law, even when this requires a conclusion different from that reached in an earlier report.

36. In connection with reports dealing with "zeroing", the panel in *US – Zeroing (Japan)* appreciated that panels are not bound to apply reasoning and findings of the Appellate Body on the subject.[36] The panel, explaining why it departed from the Appellate Body reasoning on certain aspects of the zeroing claim, recognized that although Appellate Body reports should be taken into account when they are relevant to a dispute, "a panel is under an obligation under Article 11 of the

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[31] *See* EC First Written Submission, paras. 94, 99.

[32] *See US – Softwood Lumber Dumping (AB),* para. 111 (*citing Japan – Alcohol Taxes (AB) and US – Shrimp (Article 21.5) (AB)*). As the Appellate Body noted in *US – Softwood Lumber*, adopted reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute". *US – Softwood Lumber (AB),* para. 111 (quoting *Japan – Alcohol Taxes (AB)*). Panels also have recognized that they are not bound by previous WTO panel reports. *See Argentina – Poultry*, para. 7.41 ("We note that we are not bound to follow rulings contained in adopted WTO panel reports.").

[33] *US – Softwood Lumber Dumping (AB),* n. 175.

[34] EC First Written Submission, para. 99.

[35] EC First Written Submission, paras. 90, 93, 106.

[36] The United States provides below specific analysis as to why previous Appellate Body reports are inapposite to this case.

DSU to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements...'".[37] Further, as the panel noted, "Article 3.2 of the DSU requires a panel 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' and provides that '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in covered agreements.'"[38]

37. Likewise, recently in *US- Shrimp AD Measure (Ecuador)*, the panel correctly stated that in accordance with its obligations under Article 11 of the DSU, it had to satisfy itself that Ecuador had established a *prima facie* case by presenting evidence and arguments to identify the measure being challenged and explaining the basis for the claimed inconsistency of zeroing with a WTO provision, despite the fact that the responding party did not contest the claims made by Ecuador.[39] The panel stated that:

> [T]he fact that the United States does not contest Ecuador's claims is not sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case.[40]

38. Lastly, the United States notes that the EC's claim that prior Appellate Body reports "constitute an authoritative interpretation of the law"[41] cannot be reconciled with Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization*, which confers the "exclusive authority to adopt interpretations" of the covered agreements upon the Ministerial Conference and the General Council.[42] Therefore, while the dispute settlement system serves to resolve a particular dispute, and to clarify Agreement provisions in the context of doing so, neither panels nor the Appellate Body have the "authority" to adopt interpretations that would be binding with respect to another dispute. The same flaw applies to the EC's novel argument concerning Article XVI:4 of the Marrakesh Agreement as well, as discussed further below.

V. ARGUMENT

39. The US argument is structured in the following manner. First, in Section A, the United States requests that the Panel make preliminary rulings regarding the scope of its terms of reference. As we demonstrate, the Panel should limit its terms of reference to those *final* measures that were first identified in the consultation request, and subsequently in the panel request. Moreover, the EC's additional measures, to the extent that they are deemed indeterminate, also are outside of the panel's terms of reference because they do not comply with the specificity requirement of Article 6.2 of the DSU.

40. In Section B, the United States responds to the EC's claims concerning assessment proceedings. The United States will demonstrate that for purposes of an assessment proceeding, there is no WTO requirement to offset "negative dumping" or use the average-to-average method or

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[37] *US – Zeroing (Japan) (Panel)*, para. 7.99 and n. 733.
[38] *US – Zeroing (Japan) (Panel)*, para. 7.99 and n. 733.
[39] *US – Shrimp AD Measure (Ecuador)*, paras. 7.10-7.11 (*quoting US – Gambling (AB)*, para. 141).
[40] *US – Shrimp AD Measure (Ecuador)*, para. 7.9.
[41] *See* EC First Submission, para. 108.
[42] The Appellate Body recognized this point in one of its earliest reports, when it noted that "Article IX:2 of the WTO Agreement provides: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Article IX:2 provides further that such decisions "shall be taken by a three-fourths majority of the Members". The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere". *Japan – Alcohol Taxes (AB)*, p. 13.

transaction-to-transaction method.[43] Therefore, the Panel should reject the EC's claims as to assessment proceedings.

41. In Section C, the United States refutes the EC's argument that Commerce's determinations in the challenged sunset reviews are inconsistent with AD Agreement Articles 11.1, 11.3, 2.1, 2.4 and 2.4.2. In Section D, the United States addresses the EC's "as applied" claim with respect to four original investigations. Finally, in Section E, the United States responds to the EC's claim with respect to Article XVI:4 of the WTO Agreement. Because the EC has not demonstrated inconsistency with provisions of the AD Agreement and GATT 1994, there can be no breach of Article XVI:4. The United States also will demonstrate that the EC's broad interpretation of Article XVI:4 would lead to a distortion of the WTO dispute settlement system, and should be rejected.

A. REQUEST FOR PRELIMINARY RULINGS

42. The United States requests a preliminary ruling that the measures appearing for the first time in the EC's panel request are not within the Panel's terms of reference. Contrary to Articles 4.4, 4.7, 6.2 and 7.1 of the DSU, and Articles 17.3, 17.4 and 17.5 of the AD Agreement, the EC seeks to expand the matter in this dispute beyond the measures upon which consultations were requested.[44]

43. First, among the 52 alleged measures (called "proceedings" by the EC) the EC specifically identifies in the Annex to its panel request, 14 are not within the Panel's terms of reference. These 14 specific alleged measures were not identified in the EC's consultation request and were not the subject of consultations; they therefore fall outside of the Panel's terms of reference.

44. Second, the EC adds in its panel request a claim against "[t]he continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders ... calculated or maintained in place pursuant to the most recent administrative review, or, as the case may be, original proceeding or changed circumstances or sunset review proceeding" in 18 enumerated cases.[45] The United States assumes that this request refers to the most recent measure included for each of the 18 cases listed in the Annex. To the extent that the EC's request does not refer to the most recent identified measure, but to any most recent measure, it refers to an indeterminate number of alleged measures. Indeterminate measures that are no where specifically identified would not fall within the Panel's terms of reference. Like the 14 alleged measures mentioned above, the EC did not identify the continued application of, or the application of the anti-dumping duties resulting from the 18 listed cases – either specifically or generally – in its consultation request.

45. Insofar as the EC's added measure concerning the application and continued application of antidumping duties is deemed indeterminate, the Panel should find that it is outside of the Panel's terms of reference because it does not comply with the specificity requirement of Article 6.2 of the DSU.

46. Finally, four of the newly alleged measures were preliminary results from on-going proceedings in which no final determination had been made at the time of the panel request. For this additional reason, the Panel should rule that these four on-going proceedings are not within its terms of reference.

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[43] Or, put differently, that it is permissible under the WTO agreements to use the average-to-transaction method in assessment proceedings with respect to situations other than those involving "targeted dumping".

[44] *US – Shrimp (Article 21.5) (Panel)*, para. 5.6 ("We note that, as confirmed by the Appellate Body, a panel has the responsibility to determine its jurisdiction and that assessing the scope of its terms of reference is an essential part of this determination" (Citing *US – 1916 Act (AB)*, para. 54)).

[45] *See* WT/DS350/6 (11 May 2007) at para. 2; *see also* EC's First Submission, para. 111.

1. The EC Requested Establishment of the Panel on Measures Not Included in its Request for Consultations

(a) The Measures Contained in the EC's Original Consultation Request

47. The EC's consultation request of 2 October 2006, was explicitly limited to 38 specific measures.[46] Paragraph 2(b) of the consultation request refers to "*[t]he specific antidumping administrative reviews listed in Annex I* to the present request, and any assessment instructions issued pursuant to them..." (emphasis added). Annex I lists 33 specific administrative reviews, one of which was an on-going proceeding at the time of the consultation request.[47] Similarly, paragraph 2(c) of the consultation request describes the investigations covered by the consultation request as "[t]*he specific dumping determination in the original investigations listed in Annex III* to the present request, and any automatic assessment instructions issued pursuant to them..." (emphasis added). Annex III lists four specific final determinations of antidumping original investigations. Finally, paragraph 2(d) of the consultation request describes the single sunset review covered by the consultation request as "*[t]he specific Sunset review determination in the case listed in Annex II* to the present request" (emphasis added). Annex II lists one specific sunset review determination.

48. The EC's additional consultation request of 9 October 2006, to its initial consultation request added two administrative reviews to the annex of the original consultation request, one of which was an ongoing proceeding at the time of the addendum.[48] Accordingly, the EC identified a total of 38 specific measures and 2 on-going proceedings in its consultation request.

(b) The EC's Panel Request Explicitly Identifies Additional Alleged Measures that were not Identified in its Request for Consultations

49. In contrast to the consultation request, the EC's panel request identified 52 specific measures: the original 38 measures plus 14 additional alleged measures, including 7 final and 3 on-going additional sunset reviews[49], and 3 final and 1 on-going additional administrative reviews.[50] None of

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[46] *See* WT/DS350/1 (3 October 2006). Paragraph 2(a) of the consultation request of 2 October 2006 specifies as the subject of consultations: "The United States regulations, zeroing methodology, practice, administrative procedures and measures for determining the dumping margin in reviews mentioned under point 1(a) above and which the EC considers are inconsistent with several provisions of the *AD Agreement*, GATT 1994 and the Marrakech Agreement establishing the World Trade Organization". Paragraph 2 of the EC's panel request does not identify these same alleged measures.

[47] *See* WT/DS350/1 (3 October 2006) (identifying *Steel Concrete Reinforcing Bars from Latvia*, 71 Fed. Reg. 45,031 (Aug. 8, 2006) (preliminary results)).

[48] WT/DS350/1/Add. 1 (11 October 2006) (identifying *Stainless Steel Sheet and Strip in Coils from Germany*, 71 Fed. Reg. 45,024 (Aug. 8, 2004) (preliminary results)) (Exhibit EC-49).

[49] *Compare* WT/DS350/6 (11 May 2007), Annex, *with* WT/DS350/1 (3 October 2006), Annex; WT/DS350/1/Add.1 (11 October 2006), Annex. The additional sunset reviews include the final sunset review determinations: *Ball Bearings and Parts Thereof from Italy*, 71 Fed. Reg. 54,469 (Sept. 15, 2006) (Exhibit EC-71); *Ball Bearings and Parts Thereof from Germany*, 71 Fed. Reg. 54,469 (Sept. 15, 2006) (Exhibit EC-72); *Ball Bearings and Parts Thereof from France*, 71 Fed. Reg. 54,469 (Sept. 2006) (Exhibit EC-73); *Stainless Steel Sheet and Strip in Coils from Germany*, 70 Fed. Reg. 44,886 (Aug. 4, 2005) (Exhibit EC-74); *Stainless Steel Plate in Coils from Belgium*, 70 Fed. Reg. 41,202 (July 18, 2005) (Exhibit EC-75); *Ball Bearings and Parts Thereof from the United Kingdom*, 71 Fed. Reg. 54,469 (Sept. 15, 2006) (Exhibit EC-76); *Stainless Steel Sheet and Strip in Coils from Italy*, 70 Fed. Reg. 44,886 (Aug. 4, 2005) (Exhibit EC-69). The panel request also includes on-going sunset review determinations *Steel Concrete Reinforcing Bars from Latvia*, 72 Fed. Reg. 16,767 (April 5, 2007) (USITC had not yet determined injury at time of panel request) (Exhibit EC-70); *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 72 Fed. Reg. 7604 (16 Feb. 2007) (preliminary results) (Exhibit EC-77); and *Certain Pasta from Italy*, 72 Fed. Reg. 5266 (5 Feb. 2007) (USITC had not yet determined injury at time of panel request) (Exhibit EC-78).

[50] *Compare* WT/DS350/6 (11 May 2007), Annex, *with* WT/DS350/1 (3 October 2006), Annex; WT/DS350/1/Add.1 (11 October 2006), Annex. The additional final administrative review results are: *Steel*

these 14 alleged measures were referenced in the consultation request, and none were formally included in consultations.

50. The EC's panel request also added a new request that the panel review:

> The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure).[51]

51. The United States assumes that this additional request refers to the continued application of, or the application of, the specific anti-dumping duties for the most recent of the measures specifically listed for each of the 18 cases in the Annex. To the extent that the EC's request does not refer to the most recent identified measure, it refers to an indeterminate number of alleged measures in connection with the 18 cases. In this event, the EC would be challenging zeroing "as applied" in the calculation of antidumping duties under original investigations, and an indeterminate number of past administrative reviews, past changed circumstances reviews, and past sunset reviews. The new claim also would challenge the calculation of antidumping duties in an indeterminate number of current and/or future reviews that Commerce allegedly is concluding or will conclude at some point in the future.

52. With this additional request, the EC would be suggesting that there is some measure or are some measures, with respect to the orders, separate and apart from the particular determinations identified in its Annexes, that contain calculations of antidumping duties. The EC does not specifically identify any of these alleged measures. These alleged past and future measures to which the EC appears to allude were not formally a part of its consultation request, and were not included in request for consultations.

2. The EC May Not Expand the Panel's Terms of Reference by Including in its Request for Establishment of a Panel Specific Measures Not Included in its Request for Consultations

(a) Consultations Must be held Regarding a Specific Measure Before a Member may Refer that Measure to the DSB

53. A panel's terms of reference are determined by the complaining party's request for the establishment of a panel, which pursuant to Article 6.2 of the DSU, must "identify *the specific measures at issue*" (emphasis added). However, a Member may not request the establishment of a panel with regard to *any* measure; rather, it may only file a panel request with respect to a measure upon which the consultations process has run its course. Specifically, Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute".

Concrete Reinforcing Bars from Latvia, 71 Fed. Reg. 45,031 (Aug. 8, 2006) (identified as preliminary results in consultation request) (Exhibit EC-65); *Stainless Steel Sheet and Strip in Coils from Germany*, 71 Fed. Reg. 45,024 (Aug. 8, 2006) (identified as preliminary results in consultation request) (Exhibit EC-49); and *Certain Pasta from Italy*, 72 Fed. Reg. 7011 (14 Feb. 2007) (Exhibit EC-65). The additional on-going administrative review result is *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 70 Fed. Reg. 71,523 (11 December 2006) (preliminary results) (Exhibit EC-59).

[51] WT/DS350/6 (11 May 2007).

54. In turn, Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request "including identification of *the measures at issue* and an indication of the legal basis for the complaint" (emphasis added).

55. Thus, there is a clear progression between the measures discussed in consultations conducted pursuant to Article 4 of the DSU and the measures identified in the request to establish a panel which in turn, form the basis of the panel's terms of reference. Indeed, the Appellate Body in *Brazil – Aircraft* stated that:

> Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.[52]

Moreover, the Appellate Body has found that "as a general matter, consultations are a prerequisite to panel proceedings".[53]

56. These rules apply with equal force to disputes brought under the AD Agreement, and the AD Agreement itself clarifies further the relationship between consultations and panel requests.[54] Article 17.4 of the AD Agreement states that a Member may only refer "the matter" to the DSB following a failure of consultations to achieve a mutually agreeable solution, and final action by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings. In *Guatemala - Cement (AB)*, the Appellate Body explained that what constitutes the "matter" is the "key concept in defining the scope of a dispute that may be referred to the DSB under the *Anti-Dumping Agreement* and, therefore, in identifying the parameters of a panel's terms of reference in an anti-dumping dispute".[55] The Appellate Body analyzed the "matter" referenced in Articles 17.3 through 17.6 of the AD Agreement and found that the specific requirements in Article 6.2 of the DSU – identification of the specific measure at issue and the legal basis for the claim – define the "matter" and, accordingly, the panel's terms of reference.[56] The Appellate Body also found that the term "matter", has this same meaning in Article 17.3, relating to the request for consultations, and Articles 17.4 and 17.5, relating to the referral of a matter to the DSB and the request for the formation of a panel to examine the matter.[57]

57. Article 17.3 states that the consultations are to be held with the view of "reaching a mutually satisfactory resolution of *the matter*". Moreover, Article 17.4 provides that when "consultations pursuant to [Article17.3 of the AD Agreement] have failed to achieve a mutually agreed solution" and "final action has been taken", by the administering authorities, a Member "may refer *the matter* to the Dispute Settlement Body ("DSB")". And, under Article 17.5, the DSB "shall, at the request of the complaining party, establish a panel to examine *the matter*" (emphasis added). In all cases, *the matter* encompasses the specific measure or measures identified by the complaining party, and the legal basis for the complaint.

58. Articles 17.3, 17.4, and 17.5, along with Articles 4 and 6 of the DSU, therefore set forth a process by which a complaining party must request consultations on a specific matter before that

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[52] *Brazil – Aircraft (AB)*, para. 131.

[53] *Mexico – HFCS (Article 21.5) (AB)*, para. 58.

[54] Pursuant to DSU Article 1.2 and Appendix 2, in disputes arising under the AD Agreement, the provisions of the DSU "apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2", that is, Articles 17.4 through 17.7 of the AD Agreement. To the extent of any differences, which do not exist here, between the rules of the DSU and the AD Agreement, the special rules and procedures in Articles 17.4 to 17.7 would apply. *See* DSU, Article 1.2.

[55] *Guatemala – Cement I (AB)*, para. 70.

[56] *Guatemala – Cement I (AB)*, paras. 71-73.

[57] *Guatemala – Cement I (AB)*, para. 76.

matter may be referred to the DSB for the establishment of a panel. Moreover, pursuant to these provisions, a panel's terms of reference cannot include measures which were outside of the request for consultations.

59. Similar issues have arisen in a previous dispute. In *US – Import Measures on Certain EC Products*, the Appellate Body upheld the panel's finding that a particular action taken by the United States was not part of the panel's terms of reference, because the EC, while referring to that action in its panel request, had failed to request consultations upon it. In particular, the EC's request for consultations made reference to the increased bonding requirements levied by the United States as of 3 March 1999, on EC listed products in connection with the *EC Bananas* dispute, but *not* to US action taken on 19 April 1999, to impose 100 percent duties on certain designated EC products.[58] When the EC sought findings with respect to both the March 3rd measure *and* the April 19th action, the panel found that the March 3rd measure and April 19th action were legally distinct, and that the April 19th action did not fall within the panel's terms of reference.[59]

60. The Appellate Body upheld the Panel's finding. The Appellate Body found that because the consultation request did not refer to the April 19th action, and as the EC admitted at the oral hearing that the April 19th action "was not *formally* the subject of the consultations", it was not a measure in that dispute and fell outside the panel's terms of reference.[60]

(b) Because the EC's Panel Request Contained Measures That were not the Subject of Its Request for Consultations, these Additional Measures do not fall within the Panel's Terms of Reference

61. The EC's panel request explicitly introduced to the dispute 14 new administrative review and sunset review determinations. None of these alleged measures were a subject of the EC's consultation request.

62. The EC also requested establishment of a panel as to "the continued application of, or the application of the specific antidumping duties resulting" from the determinations in the 18 cases identified in the Annex to its panel request. The EC's request for consultations did not contain either a specific or general reference to these alleged measures.

63. The situation in this dispute resembles that in *US Import Measures*. As in that or any other dispute, the scope of the measures subject to referral to the DSB is delineated by the consultation request and, absent a request for consultations, a measure may not be placed before a panel. The EC's consultation request made no mention of any of the additional measures, and accordingly, these "measures" do "not fall within the Panel's terms of reference".[61]

64. Permitting the EC to request a panel with respect to measures on which consultations have not been held would also have dangerous systemic consequences for the WTO dispute settlement system. The very purpose of consultations and any practical utility that they provide would be completely undermined if a complainant could add completely new measures upon which no consultations had been held, to a request for the establishment of a panel. To allow a complaining party to have recourse to panel proceedings without having consulted on a measure would deny both parties the opportunity to attempt to settle their differences and resolve the dispute, contradicting the role stated in Article 3.3 of the DSU of the dispute settlement system in providing the "prompt settlement" of situations where one Member considers that its benefits under the covered agreements are being nullified or impaired by measures taken by another Member. It is also unclear how such an outcome

[58] *US – Certain EC Products (AB)*, para. 70.
[59] *US – Certain EC Products (AB)*, para. 82.
[60] *US – Certain EC Products (AB)*, para. 70.
[61] *US – Certain EC Products (AB)*, para. 70.

would advance the purpose of consultations; we note in this connection that Article 4.1 of the DSU calls on Members "to strengthen and improve the effectiveness of the consultation procedures employed by Members".

65. For these reasons, the United States respectfully requests the Panel to find that the 14 new alleged measures specifically identified in the EC's panel request, along with the "application and continued application of duties" relating to the 18 cases referenced in the EC's panel request, are not within this Panel's terms of reference.

(c) The EC's Reference to "18 Cases" Do Not Comport with the Specificity Requirements of Article 6.2

66. The EC in its panel request identified as additional "measures" "the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding".[62] The United States assumes that this request refers to the most recent of the measures specifically listed for each of the proceedings for each of 18 cases in the Annex. However, to the extent that the EC's request does not refer to the most recent identified measure, it refers to an indeterminate number of alleged measures.

67. A general reference to an indeterminate number of measures does not satisfy the requirement of Article 6.2 of the DSU that a panel request "identify the *specific measures* at issue" (emphasis added). Each measure that calculates and sets margins of dumping is a legally distinct measure. To challenge legally distinct measures, a Member must identify specifically each measure in its consultation and panel requests.[63] The EC did not comply with this requirement. Accordingly, neither these 18 cases nor any additional proceedings that flow from these 18 cases, beyond the measures specifically identified in both the consultation and panel requests, can be included within this Panel's terms of reference.[64]

68. Permitting the EC to expand the terms of reference to include the indeterminate measures not specifically identified would cause severe prejudice to the United States. Individual assessment proceedings relate only to certain named companies covered by the review proceeding. The EC, inasmuch as its challenge relates to certain enumerated proceedings, limits the application of its challenge to certain companies named in the Annex of its panel request. It is, however, conceivable that (1) companies other than those named in the EC's Panel Request, might have been reviewed in one or more of the particular segments being challenged, and (2) that the orders the EC identifies cover companies in addition to those the EC has identified. Thus, this raises the question of not only which proceedings the EC is challenging, but also whether the EC is limiting its challenge to only the companies named in the Annex of its panel request.

69. Because the United States has had no opportunity to consult with the EC with respect to these indeterminate number of alleged measures, it was unable to seek further clarity regarding the scope and effect of the measures the EC is challenging. Without prior consultations on specific measures, a Member cannot adequately respond to allegations brought by another Member. This inability causes prejudice to the United States when making its arguments before the Panel, and deprives the Panel of a full argument on the matter.

70. Moreover, in addition to lacking in clarity, any attempt by the EC to assert a broad, all encompassing challenge to "18 cases", and suggest that its claim covers any and all individual

[62] *See* WT/DS350/6 (11 May 2007).
[63] *See US – Certain EC Products (AB)*, para. 76.
[64] *See US – Certain EC Products (AB)*, para. 70.

proceedings which flow from these cases is untenable. By failing to identify specific measures at issue, the EC has failed to establish a *prima facie* case as to the orders in general, or to any proceeding that it has not specifically named. Original investigations and assessment reviews, even when pertaining to the same subject merchandise, are different processes which serve distinct purposes. The purpose of an investigation is to determine the existence, degree, and effect of any alleged dumping, while the purpose of an assessment review is to determine the amount of the duty to be assessed on previous imports of subject merchandise and the estimated dumping duty to be applied to future imports. A challenge and finding by a panel with respect to one administrative proceeding does not necessitate the same type of finding as to all proceedings that encompass the same subject merchandise.

71. The Appellate Body recognized in *US – Softwood Lumber CVD (21.5)(AB)* separate proceedings to be independent of each other and that they operate under their own timelines and procedures.[65] In that instance, the Appellate Body found the Section 129 determination and the first assessment review decision with respect to pass through to be linked because the administrative review referenced the WTO proceedings and findings.[66] However, by tailoring its finding to the narrow facts of that case, and by indicating that it did not intend its finding to be broadly applicable, the Appellate Body effectively conveyed that unless the particular facts dictate otherwise, each proceeding should be treated as its own measure.[67]

3. The EC Requested Establishment of the Panel on Measures That Were Not Final at the Time of its Panel Request

72. As mentioned above, four of the alleged measures identified in the panel request were preliminary results of assessment reviews.[68] They do not constitute "final action" within the meaning of Article 17.4 of the AD Agreement, and thus cannot serve as the basis for requesting establishment of a panel.

73. A matter may only be referred to a panel if "final action has been taken by the administering authority".[69] The EC, however, alerts the Panel that some of the matters it has referred to the DSB relate to proceedings that are not final by prominently disclosing in its panel request that the measures it challenges are "Final Results (*unless otherwise specified*)", and by identifying the one on-going administrative review and one of the on-going sunset reviews as "Preliminary results".[70] The EC also

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[65] *US – Softwood Lumber CVD Final (21.5) (AB)*, para. 88.

[66] *See US – Softwood Lumber CVD Final (Article 21.5) (AB)*, paras. 90-92.

[67] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 93.

[68] *See* WT/DS350/6, Annex: List of Cases (*identifying Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 70 Fed. Reg. 71,523 (December 11, 2006) (preliminary results) (*see* Exhibit EC-59); *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 72 Fed. Reg. 7604 (16 Feb. 2007) (preliminary results) (*see* Exhibit EC-77); *Steel Concrete Reinforcing Bars from Latvia*, 72 Fed. Reg. 16,767 (April 5, 2007) (USITC has not yet determined injury) (Exhibit EC-70); *Certain Pasta from Italy*, 72 Fed. Reg. 5266 (5 Feb. 2007) (USITC has not yet determined injury) (Exhibit EC-78). *See* WT/DS350/1 (3 October 2006) (*identifying Steel Concrete Reinforcing Bars from Latvia*, 71 Fed. Reg. 45,031 (8 Aug. 2006) (preliminary results) (Exhibit EC-33). *See* WT/DS350/1/Add. 1 (11 October 2006) (*identifying Stainless Steel Sheet and Strip in Coils from Germany*, 71 Fed. Reg. 45,024 (8 Aug. 2006) (preliminary results) (Exhibit EC-49).

[69] AD Agreement, Art. 17.4. A provisional measure may only be challenged when it " has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7". The EC has neither alleged nor demonstrated that these criteria have been met with respect to the preliminary results identified.

[70] WT/DS350/6, Annex: List of Cases (p.11) (emphasis added); *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 72 Fed. Reg. 7604 (16 Feb. 2007) (preliminary results) (*see* Exhibit EC-77); *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 70 Fed. Reg. 71,523 (11 Dec. 2006) (preliminary results) (*see* Exhibit EC-59).

omits from its panel request reference to the final ITC decisions and final orders in two of the sunset reviews because these proceedings also were on-going at the time the EC submitted its panel request. These four on-going proceedings challenged by the EC are not "final action[s] . . . taken by the administering authority of the importing Member to levy definitive anti-dumping duties".[71] To the contrary, at the time of the panel request, no decision had been made to levy definitive duties.[72] Indeed, it was entirely possible that no definitive anti-dumping duty would be levied, or would continue to be levied at all.

74. Submitting a request for establishment of a panel to review proceedings that are not final is not permitted by Article 17.4 of the AD Agreement. Nor are measures that are not yet in existence at the time of panel establishment within a panel's terms of reference under the DSU.[73] We respectfully request that the Panel find that the four on-going proceedings are not within its terms of reference.

B. THE UNITED STATES METHODOLOGY FOR ASSESSING ANTIDUMPING DUTIES IS CONSISTENT WITH THE OBLIGATIONS IN THE AD AGREEMENT

75. To the extent the EC challenges the WTO-consistency of the zeroing methodology as applied in assessment proceedings, as we demonstrate below, the EC's claims directly contradict the text of the AD Agreement. The methodology used by the United States to calculating antidumping duties in the assessment proceedings in question is WTO-consistent.

76. The AD Agreement provides no general obligation to consider transactions for which the export price exceeds normal value as an offset to the amount of dumping found in relation to other transactions at less than normal value. The exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation found in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a *weighted average normal value with a weighted average of prices of all comparable export transactions* . . . ".[74] This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation phase when using the average-to-average comparison methodology in Article 2.4.2.[75] There is no textual basis for the additional obligations that the EC would have this Panel impose.

77. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body specifically recognized that the issue before it was whether zeroing was prohibited under the average-to-average comparison methodology found in Article 2.4.2.[76] Thus, the report found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology".[77] The Appellate Body reached this conclusion by interpreting the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2 in an "integrated manner".[78] In other words, the term "all comparable export transactions" was integral to the interpretation that the multiple comparisons of average normal value and average export price for

[71] AD Agreement, Art. 17.4.

[72] *Steel Concrete Reinforcing Bars from Latvia*, 72 Fed. Reg. 16,767 (5 April 2007) (USITC has not yet determined injury) (Exhibit EC-70); *Certain Pasta from Italy*, 72 Fed. Reg. 5266 (5 Feb. 2007) (USITC has not yet determined injury) (Exhibit EC-78).

[73] *See, e.g, US – Subsidies on Upland Cotton (Panel)*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry (Panel)*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of the panel was not within the panels terms of reference).

[74] Emphasis added. *See US – Softwood Lumber Dumping (AB)*, paras. 82, 86, and 98.

[75] *US – Zeroing (Japan) (Panel)*, para. 7.213; *US – Zeroing (EC) (Panel)*, para. 7.197; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.65-5.66 and 5.77.

[76] *US – Softwood Lumber Dumping (AB)*, paras. 104, 105, and 108.

[77] *US – Softwood Lumber Dumping (AB)*, para. 108.

[78] *US – Softwood Lumber Dumping (AB)*, paras. 86 - 103.

averaging groups did not constitute an average-to-average comparison of all comparable export transactions unless the results of all such comparisons were aggregated. The obligation to provide offsets, therefore, was tied to the text of the provision addressing the use of the average-to-average comparison methodology in an investigation, and did not arise out of any independent obligation to offset prices.

78. The EC's argument that there is either a general prohibition of "zeroing", or one specifically applicable to the more particular context of assessment proceedings, cannot be reconciled with the interpretation articulated in *US – Softwood Lumber Dumping (AB)*, wherein the phrase "all comparable export transactions" in Article 2.4.2 meant that zeroing was prohibited in the context of average-to-average comparisons in investigations. If, as the EC seems to argue, there is a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the meaning ascribed to "all comparable export transactions" by the Appellate Body in that dispute would be redundant of the general prohibition of zeroing and therefore "inutile".

79. The need to avoid such redundancy was recognized in *US – Zeroing (Japan) (AB)* when the Appellate Body changed its interpretation of this phrase. In *US – Softwood Lumber Dumping (AB)*, "margins of dumping" and "all comparable export transactions" were interpreted in an integrated manner. The Appellate Body found that in aggregating the results of the model-specific comparisons, "all" comparable export transactions must be accounted for. Thus, the phrase necessarily referred to all transactions across all models of the product under investigation, *i.e.*, the product "as a whole". The textual reference "all comparable export transactions" was the basis for the Appellate Body to conclude that "product" must mean "product as whole" and margins of dumping may not be based on individual averaging group comparisons. The Appellate Body subsequently relied on this "product as a whole" concept, although in a manner detached from its underlying textual basis, in concluding that margins of dumping cannot be calculated for individual transactions.[79]

80. However, in *US – Zeroing (Japan) (AB)*, the Appellate Body reinterpreted "all comparable export transactions" to relate solely to all transactions within a model, and not across models of the product under investigation.[80] In doing so, the Appellate Body abandoned the only textual basis for its reasoning in *US – Softwood Lumber Dumping (AB)*.[81]

81. In making its own "objective assessment", however, this Panel must give particular consideration to the special standard of review for matters arising under the AD Agreement – that a Member's measure may not be found inconsistent with the obligations set forth in the AD Agreement if the measure is based on a permissible interpretation of the AD Agreement. Accordingly, for the reasons set forth below, the Panel should not adopt reasoning and conclusions from Appellate Body reports that reject a permissible interpretation of the AD Agreement.

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[79] *US – Zeroing (EC) (AB)*, paras. 126, 127; *US – Softwood Lumber Dumping (21.5) (AB)*, paras. 89, 114; *US – Zeroing (Japan) (AB)*, paras. 121, 122, 151.

[80] *US – Zeroing (Japan) (AB)*, para. 124 ("[T]he phrase 'all comparable export transactions' requires that each group include only transactions that are comparable and that no other transaction may be left out when determining margins of dumping under [the average-to-average comparison] methodology").

[81] The United States raised these points in its DSB statement and communication of 20 February 2007 (Exhibit US-2). *See also*, Communication from the United States, WT/DS294/16, and Communication from the United States, WT/DS294/18.

1. Article 2.1 of the AD Agreement and Article VI of the GATT 1994[82]

82. As an initial matter, Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 are definitional provisions that, "read in isolation, do not impose independent obligations".[83] Nevertheless, these definitions are important to the interpretation of other provisions of the AD Agreement at issue in this dispute. In particular, it is most significant that Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define "dumping" and "margins of dumping" so as to require that export transactions be examined at an aggregate level. The definition of "dumping" in these provisions references "product . . . introduced into the commerce of another country at less than its normal value". This definition describes the real-world commercial conduct by which a product is imported into a country, *i.e.*, transaction by transaction.[84] Thus, dumping is defined as occurring in the course of a commercial transaction in which the product, which is the object of the transaction, is "introduced into the commerce" of the importing country at an export price that is "less than normal value".

83. In addition, the term "less than normal value" is defined as when the "price of the product exported . . . is less than the comparable price . . . ".[85] Again, this definition describes the real-world commercial conduct of pricing such that one price is less than another price. The ordinary meaning of "price" as used in the definition of dumping is the "payment in purchase of something".[86] This definition "can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level".[87]

84. The "dumping" definition's description of the conduct that antidumping duties are intended to remedy provides strong contextual support for the interpretation of these provisions that permits an authority to examine dumping in relation to the particular conduct described, *i.e.*, individual import transactions. Thus, in the *US – Zeroing (Japan)* dispute, the panel correctly concluded that the definition of dumping itself "undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions".[88]

85. In other words, dumping – as defined under these provisions – may occur in a single transaction. There is nothing in the GATT 1994 or the AD Agreement that suggests that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. Indeed, the commercial reality is that the foreign producer or exporter itself exclusively enjoys the benefit of the extent to which the price of a non-dumped export transaction exceeds normal value.

86. In *US – Zeroing (Japan)*, the panel noted that "the record of past discussions in the framework of GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions".[89] Well before the recent debate about "zeroing" or "offsets", a Group of Experts convened to consider numerous issues with respect to the

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[82] Because Articles 2.1 and 2.4 of the AD Agreement do not impose independent obligations, to the extent the EC is claiming that the challenged measures are inconsistent with "obligations" found in either 2.1 or 2.4, the EC fails to establish the existence of any obligations pursuant to these definitional provisions, and therefore, the EC's claims must necessarily depend on Article 2.4.2. If, however, the Panel elects not to follow the reasoning employed in prior Appellate Body findings (*see e.g., US – Zeroing (Japan) (AB)*, para. 140), and finds the application of zeroing in reviews inconsistent with Articles 2.1 and 2.4, then the Panel may exercise judicial economy and need not reach the EC's argument as to Article 2.4.2.

[83] *US – Zeroing (Japan) (AB)*, para. 140.

[84] *See US – Zeroing (EC) (Panel)*, para. 7.285.

[85] Article VI:1 of the GATT 1994, Article 2.1 of the AD Agreement.

[86] *New Shorter Oxford English Dictionary (1993)*, p. 2349.

[87] *US – Zeroing (Japan) (Panel)*, para. 7.106.

[88] *US – Zeroing (Japan) (Panel)*, para. 7.106.

[89] *US – Zeroing (Japan) (Panel)*, para. 7.107 and n.743.

application of Article VI of the GATT 1947. In this report, the Group of Experts considered that the "ideal method" for applying antidumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product concerned".[90]

87. Taking the same view, the panel in *US – Softwood Lumber Dumping (Article 21.5)* reasoned:

> In referring to a "determination . . . of . . . dumping . . . in respect of each single importation of the product concerned", the Group of Experts clearly envisaged the calculation of transaction-specific margins of dumping. This would suggest that the Group of Experts did not consider that there was anything in the definition of dumping set forth in Article VI of the GATT that would preclude the calculation of such transaction-specific margins.[91]

88. Thus, as the panel in *US – Zeroing (Japan)* found, "historically the concept of dumping has been understood to be applicable at the level of individual export transactions".[92]

89. It bears recalling that the AD Agreement was negotiated against the background of the Antidumping Code and the antidumping investigation methodologies of individual Contracting Parties under the Code. The methodology of not offsetting dumping based on comparisons where the export price was greater than normal value was examined by two GATT panels and was found to be consistent with the Antidumping Code.[93] In view of these findings, the Uruguay Round negotiators actively discussed whether the use of "zeroing" should be restricted.[94] The text of Article VI of the GATT 1947, however, did not change as a result of the Uruguay Round agreements.[95] The normal inference one draws from the absence of a change in language is that the drafters intended no change in meaning.[96]

90. The EC's claims in this dispute depend on a contrary interpretation of these provisions holding that "dumping" and "margins of dumping" apply to the product under investigation "as a whole" and do not apply to sub-group levels.[97] The EC claim depends on the reasoning set forth in the Appellate Body reports in *US – Zeroing (EC)* and *US – Zeroing (Japan)*[98], which rejected the notion that dumping may occur with respect to an individual transaction in the absence of the textual basis that was present in *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*. This interpretation relies on the term "product" as being solely and exclusively synonymous with the

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[90] *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, L/1141, adopted on 27 May 1960, BISD 9S/194, para. 7.

[91] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.64.

[92] *US – Zeroing (Japan) (Panel)*, para. 7.107.

[93] *See, e.g.*, *EC – Audiocassettes*, para. 360; *EC – Cotton Yarn*, para. 502.

[94] *See, e.g.*, *Communication from Japan*, MTN.GNG/NG8/W/30 (20 June 1988), item I.4(3), in which Japan expressed concern about a methodology wherein "negative dumping margins, i.e., the amount be which export price exceeds normal value, are ignored"; *Proposed Elements for a Framework for Negotiations: Principles and Objectives for Anti-dumping Rules, Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (Oct. 13, 1989), at item II.E.(d) (proposing that in calculating dumping margins "'negative' dumping should be taken into account, i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value"); *Communication from the Delegation of Hong Kong*, MTN.GNG/NG8/W46 (July 3, 1989), at 7.

[95] Similarly, the text of Article 2.1 of the AD Agreement mirrors the text of the Tokyo Round Antidumping Code.

[96] Instructive in this regard is *US – Underwear (AB)*, p. 17, in which the Appellate Body found that the disappearance in the *Agreement on Textiles and Clothing* of the earlier *Multi-Fibre Agreement* provision for backdating the operative effect of a restraint measure, "strongly reinforced the presumption that such retroactive application is no longer permissible". The corollary, however, is that when a provision is not changed, there is a presumption that behaviour that previously was permissible remains permissible.

[97] *See* EC First Submission, para. 194.

[98] EC First Submission, para. 195, fn. 141 and para. 197, fn. 142.

concept of "product as a whole". In particular, it denies that the ordinary meaning of the word "product" or "products" used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. However, as the panel report in *US – Zeroing (Japan)* explained, "[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis . . . ".[99]

91. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body reasoned that zeroing was not permitted in the context of "multiple averaging", on the basis of the phrase "all comparable export transactions", but did not explain how zeroing could be prohibited in the context of "multiple comparisons" generally. In contrast to *US – Softwood Lumber Dumping (AB)*, in *US – Zeroing (EC) (AB)* a new interpretation was embraced, such that the "product as a whole" concept led to the conclusion that zeroing is prohibited whenever "multiple comparisons" are made. The phrases "product as a whole" and "multiple comparisons" do not appear in the AD Agreement, but were derived from interpretations based on the phrase "all comparable export transactions", which appears only in connection with average-to-average comparisons in investigations. In considering this, the Panel in *US – Zeroing (Japan)* found:

> no explanation of this shift from the use of the "product as a whole" concept as context to interpret the term "margins of dumping" in the first sentence of Article 2.4.2 of the AD Agreement in connection with multiple averaging, on the one hand, to the use of this concept as an autonomous legal basis for a general prohibition of zeroing, on the other. In this regard, we note, in particular, that the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms "dumping" and "margins of dumping" cannot apply to a *sub-group* of a product logically leads to the broader conclusion that Members may not distinguish between *transactions* in which export prices are less than normal value and *transactions* in which export prices exceed normal value.[100]

Thus, the "product as a whole" concept as adopted does not support a claim that the challenged measures are inconsistent because of some general prohibition of zeroing present in all proceedings and under all comparison methods.

92. Examination of the term "product" as used throughout the AD Agreement and the GATT 1994 demonstrates that the term "product" in these provisions does not exclusively refer to "product as a whole". Instead, "product" can have either a collective meaning or an individual meaning. For example, Article 2.6 of the AD Agreement – which defines the term "like product" in relation to "the product under consideration" – plainly uses the term "product" in the collective sense. By contrast, Article VII:3 of the GATT 1994 – which refers to "[t]he value for customs purposes of any imported product" – plainly uses the term "product" in the individual sense of the object of a particular transaction (*i.e.*, a sale involving a specific quantity of merchandise that matches the criteria for the "product" at a particular price). Therefore, it cannot be presumed that the same term has such an exclusive meaning when used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994.

93. As the panel in *US – Softwood Lumber Dumping (Article 21.5)* explained, "an analysis of the use of the words product and products throughout the GATT 1994, indicates that there is no basis to equate product with "product as a whole". . . Thus, for example, when Article VII:3 of the GATT refers to "the value for customs purposes of any imported product", this can only be interpreted to

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[99] *US – Zeroing (Japan) (Panel)*, para. 7.105 (*quoting US – Softwood Lumber Dumping (Article 21.5) (Panel)*, n.32).

[100] *US – Zeroing (Japan) (Panel)*, para. 7.101.

refer to the value of a product in a particular import transaction."[101] The panel detailed numerous additional instances where the term "product", as used in the AD Agreement and GATT 1994 do not support a meaning that is solely, and exclusively, synonymous with "product as a whole":

> To extend the Appellate Body's reference to the concept of "product as a whole" in the sense that Canada proposes to the T-T methodology would entail accepting that it applies throughout Article VI of GATT 1994, and the AD Agreement, wherever the term "product" or "products" appears. A review of the use of these terms does not support the proposition that "product" must always mean the entire universe of exported product subject to an anti-dumping investigation. For instance, Article VI:2 states that a contracting party "may levy on any dumped product" an anti-dumping duty. Article VI:3 provides that "no countervailing duty shall be levied on any product". Article VI:6(a) provides that no contracting party shall levy any anti-dumping or countervailing duty on the importation of any product...". Similarly, Article VI:6(b) provides that a contracting party may be authorized "to levy an anti-dumping or countervailing duty on the importation of any product". Taken together, these provisions suggest that "to levy a duty on a product" has the same meaning as "to levy a duty on the importation of that product". Canada's position, if applied to these provisions, would mean that the phrase "importation of a product" cannot refer to a single import transaction. In many places where the words product and products are used in Article VI of the GATT 1994, an interpretation of these words as necessarily referring to the entire universe of investigated export transactions is not compelling.[102]

Indeed, in a prospective normal value system, a duty is necessarily levied on an import basis, and not on a product as a whole basis.

94. In sum, the terms "product" and "products" cannot be interpreted in such an exclusive manner so as to deprive them of one of their ordinary meanings, in particular the "product" or "products" that are the subject of individual transactions. Therefore, the words "product" and "products" as they appear in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 cannot be understood to provide a textual basis for an interpretation that requires margins of dumping established in relation to the "product" must necessarily be established on an aggregate basis for the "product as a whole".

95. Likewise, examination of the term "margins of dumping" itself provides no support for the EC's interpretation of the term as solely, and exclusively, relating to the "product as a whole".[103] As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed:

> Article VI:2 of the GATT 1994 provides that, for the purposes of Article VI, "the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1" of Article VI. Paragraph 1 of Article VI defines dumping as a practice "by which products of one country are introduced into the commerce of another country at less than the normal value of the products" (emphasis supplied). ... Article VI:1 provides that "a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product in the exporting country" (emphasis supplied). In other words, there is dumping when the export "price" is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase "price difference", it would be

[101] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23, n. 36.
[102] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23.
[103] *See* EC First Submission, paras. 196.

> permissible for a Member to interpret the "price difference" referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that "price difference" as the "margin of dumping".[104]

Thus, the panel saw "no reason why a Member may not . . . establish the "margin of dumping" on the basis of the total amount by which transaction-specific export prices are less than the transaction-specific normal values".[105] Although the panel was examining margins of dumping in the context of the transaction-to-transaction comparison method in investigations under Article 2.4.2, its reasoning is equally applicable to margins of dumping established on a transaction-specific basis in an assessment proceeding under Article 9.3.

96. Additionally, the term "margin of dumping", as used elsewhere in the GATT 1994 and the AD Agreement, does not refer exclusively to the aggregated results of comparisons for the "product as a whole." As used in the Note Ad Article VI:1, which provides for importer-specific price comparison, the term "margin of dumping" cannot relate to aggregated results of all comparisons for the "product as a whole" because an exporter or foreign producer may make export transactions using multiple importers.

97. Similarly, the term "margin of dumping" as used in Article 2.2 of the AD Agreement would require the use of constructed value for the "product as a whole", even if the condition precedent for using constructed value under Article 2.2 relates only to a portion of the comparisons. The panel in *US – Softwood Lumber Dumping (21.5)* observed that this "would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2. . . . We are not convinced that the Appellate Body could have intended its *US – Softwood Lumber Dumping* findings to be applied in this manner.[106]

98. Nevertheless, the EC asserts that it is "only on the basis of aggregating . . . "intermediate values" . . . that an investigating authority can establish margins of dumping for the product under investigation as a whole".[107] In this regard, the reasoning of the Appellate Body reports relied upon by the EC is unpersuasive because it is contrary to the great weight of evidence indicating that the concepts of dumping and margin of dumping have long been understood as relating to individual transactions, as evidenced by the report of the Group of Experts, the reports of the GATT panels, the well-established practice of Members utilizing antidumping regimes, the negotiating history of the AD Agreement, as well as the ordinary meaning of the text the relevant provisions of the AD Agreement, the Antidumping Code, the GATT 1947 and the GATT 1994. Accordingly, Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define the terms "dumping" and "margin of dumping" such that export transactions must necessarily be examined at an aggregate level.

2. Article 2.4.2

99. The text and context of the relevant provisions of the AD Agreement, interpreted in accordance with customary rules of interpretation of public international law, do not support a general prohibition against zeroing that would apply in the context of assessment proceedings. The express terms of Article 2.4.2 limit its application to the "investigation phase" of a proceeding. To require the application of Article 2.4.2 to Article 9 assessment proceedings would read out of the AD Agreement

[104] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.27.
[105] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.28.
[106] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.62.
[107] EC First Submission, para. 195.

Article 2.4.2's express limitation to investigations. Such a result would be inconsistent with the principle of effectiveness, under which all the terms of an agreement should be given meaning.[108]

100. Article 2.4.2 provides as follows:

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

101. Other provisions of the AD Agreement also expressly limit their application to the investigation phase of an antidumping proceeding, and do not apply elsewhere. For instance, Article 5.1 refers to "an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated by or on behalf of a domestic industry". Similarly, Article 5.7 provides that evidence of dumping and injury must be considered simultaneously "in the decision whether or not to initiate an investigation" and "during the course of the investigation". Panels have consistently found that the references to "investigation" in Article 5 only refer to the original investigation and not to subsequent phases of an antidumping proceeding.[109] As the panel found in *US – Corrosion-Resistant Steel AD Sunset Review*:

> [T]he text of paragraph 8 of Article 5 refers expressly to the termination of an investigation in the event of *de minimis* dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews.[110]

102. The limited applicability of Article 2.4.2 could not be plainer. Article 2.4.2, by its very terms, is limited to the "investigation phase". Thus, the text leaves no doubt that the Members did not intend to extend these obligations to any phase beyond the investigation phase. Accordingly, a panel has already recognized that the application of Article 2.4.2 is expressly limited to the investigation phase of an antidumping proceeding. As the panel in *Argentina – Poultry* found:

> Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping "during the investigation phase".[111]

Thus, the ordinary meaning of the term "investigation phase," as it is used in the AD Agreement, does not include subsequent phases, such as assessment reviews.

103. Similarly, the panel in *US – Zeroing (EC)* conducted a thorough analysis of the text of the AD Agreement, finding that ""during the investigation phase" constitutes a unique limitation of scope of Article 2.4.2", which serves to contradict arguments that "during the investigation phase" has general meaning applicable to other parts of the AD Agreement.[112] In summation, the panel found:

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[108] *See, e.g., Japan – Alcohol Taxes (AB)*, sections G & H (discussing fundamental principle of effectiveness in treaty interpretation); *see also US – 1916 Act (AB)*, para. 123.

[109] *US – DRAMS AD*, para. 521, at footnote 519 ("investigation" means the investigation phase leading up to the final determination of the investigating authority); *EC – Bed Linen (Article 21.5) (Panel)*, para. 6.114 (Article 5.7 applies to investigations).

[110] *US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.70.

[111] *Argentina – Poultry*, para. 7.357.

[112] *US – Zeroing (EC) (Panel)*, para. 7.188; *see also id.*, paras. 7.146-7.188.

> First, the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 read in its ordinary meaning in the context of the *AD Agreement* as a whole means that Article 2.4.2 applies to the phase of the "original investigation" i.e. the investigation within the meaning of Article 5 of the *AD Agreement* as opposed to subsequent phases of duty assessment and review. Second, our interpretation of the meaning of this phrase as limiting the applicability of Article 2.4.2 to investigations within the meaning of Article 5 is also consistent with the distinction made between investigations and subsequent proceedings in various Appellate Body decisions. Third, alternative meanings suggested by the European Communities are implausible at best and deny this phrase any real function, in contradiction with principles of interpretation. Fourth, this interpretation is entirely consistent with different functions played by "original investigations" and duty assessment proceedings. . . .[113]

The panel in *US – Zeroing (EC)*, when making is own objective assessment of the facts before it, in accordance with the customary principles of international law, provided a thorough and solid review of the text and context of Article 2.4.2.[114] In this regard, we request that this Panel find persuasive the reasoning put forth by the panel in *US – Zeroing (EC)*.

104. The EC further argues that the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 is not limited to original investigations because all of the antidumping proceedings employed by Commerce "generally involve an investigation into something".[115] The text of the AD Agreement and prior panel and Appellate Body reports, however, do not support this argument.

105. Article 18.3 of the AD Agreement explicitly recognizes the difference between investigations, which may lead to the imposition of a measure, and "reviews" of existing measures. In *Brazil – Desiccated Coconut (AB)*, the Appellate Body, analyzing an identical distinction in Article 32.3 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), noted that the imposition of "definitive" duties (an "order" in US parlance) ends the investigative phase.[116] This distinction is also present in the substantive provisions of the AD Agreement.

106. The Appellate Body and prior panels have also consistently found that the provisions in the AD Agreement with express limitations to investigations are, in fact, limited to the investigation phase of a proceeding. In evaluating whether restrictions on cumulation in investigations were equally applicable to sunset reviews, the Appellate Body noted that Article 3.3 of the AD Agreement – like Article 2.4.2 – "plainly speaks to anti-dumping investigations . . . . It makes no mention of injury analyses undertaken in any proceeding other than original investigations . . . . [T]he text of Article 3.3 plainly limits its applicability to original investigations".[117] The Appellate Body's finding confirms the approach taken by prior panels. For example, the panel in *US – DRAMS AD* found that the term "investigation" means "the investigative phase leading up to the final determination of the investigating authority".[118]

107. The EC, citing the dictionary definition of "investigation", argues that Article 2.4.2 is applicable in all phases of antidumping proceedings because all proceedings necessarily involve a

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[113] *US – Zeroing (EC) (Panel)*, para. 7.220.
[114] *See US – Zeroing (EC) (Panel)*, paras. 7.220 and 7.6-7.7.
[115] EC First Submission, paras. 223-224.
[116] *Brazil – Desiccated Coconut (AB)*, p. 9. See, also, *US – Hot-Rolled Steel (AB)*, paras. 53, 61 (distinguishing between Article 21.2 reviews and the original determination in an investigation).
[117] *US – OCTG from Argentina (AB)*, paras. 294, 301.
[118] *US – DRAMS AD*, para. 6.87, footnote 519, discussing Article 5 of the AD Agreement.

"systemic examination or inquiry or a careful study of or research into a particular subject.[119] The panel in *US – Zeroing (EC)*, however, squarely rejected "that the decisive element regarding the interpretation of the scope of Article 2.4.2 is the word 'investigation' which has not been defined in the AD Agreement and which must therefore be interpreted strictly by reference to a dictionary definition".[120]

108. The consistency with which the Appellate Body and panels have recognized the distinctions between investigations and other segments of an antidumping proceeding is consistent with the distinct purpose of the investigation phase, which is to establish as a threshold matter whether the imposition of an antidumping measure is warranted. Other phases (such as Article 9 assessment proceedings or Article 11 sunset reviews) have different purposes. Whereas the purpose of an investigation is to determine whether a remedy against dumping should be provided, the purpose of an assessment proceeding is to determine the precise amount of that remedy.

109. It is further not accurate, as the EC infers in its submission, that a margin is "established" when Commerce performs a periodic review.[121] It would be more accurate to describe the three principal calculations performed in a periodic review as: (1) the calculation of margins of dumping for each export transaction; (2) the calculation of an assessment rate for each importer on the basis of the margins of dumping of the importer's transactions from each exporter/producer during the period examined; and (3) the calculation of a cash deposit rate for future entries of each exporter/producer on the basis of the margins of dumping of the exporter/producer's transactions during the period examined. In this regard, the provisions of US law relating to each calculation are: 19 U.S.C. 1675(a)(2)(A) (providing that Commerce shall determine the margin of dumping for each entry of the subject merchandise), and 19 U.S.C. 1675(a)(2)(C) (providing that the determination of the margin of dumping for each entry shall be the basis for the assessment of antidumping duties and for deposits of estimated duties (*i.e.*, the cash deposit)).

110. Finally, the limited application of Article 2.4.2 to the investigation phase is consistent with the divergent functions of investigations and other proceedings under the AD Agreement. The Appellate Body has already recognized that investigations and other proceedings under the AD Agreement serve different purposes and have different functions, and therefore are subject to different obligations under the Agreement.[122] Thus, contrary to the EC's apparent contention, the AD Agreement does not require Members to examine whether margins of dumping exist in the assessment phase.[123] Article 9 assessment proceedings are not concerned with the existential question of whether injurious dumping exists above a *de minimis* level such that the imposition of antidumping measures is warranted. That inquiry would have already been resolved in the affirmative in the investigation phase. Instead, Article 9, by its terms, focuses on the amount of duty to be assessed on particular entries, an exercise that is separate and apart from the calculation of an overall dumping margin during the threshold investigation phase of an antidumping proceeding.

111. The express limitation in Article 2.4.2 to the investigation phase is also consistent with the fact that the antidumping systems of Members are different for purposes of the assessment phase. The different methods used by Members include the use of prospective normal values, retrospective normal values, and prospective *ad valorem* assessment. If the requirements of Article 2.4.2 regarding comparison methods applied to the assessment of antidumping duties, this divergence of assessment systems would not be possible. For example, it is not possible to reconcile the prospective normal value system used by some Members with a requirement to use either the average-to-average or

[119] EC First Submission, para. 213.
[120] *US – Zeroing (EC) (Panel)*, para. 7.151.
[121] EC First Submission, para. 222.
[122] *See, e.g., US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 87.
[123] *See* EC First Submission, para. 222. ("This confirms that, in the context of Article 9.3, a 'margin of dumping' is to be established by reference to the whole of Article 2 . . .").

transaction-to-transaction method, because such systems compare weighted average normal values to individual export prices to assess dumping duties on individual transactions. Thus, to retain the flexibility in assessment systems reflected in Article 9, it is not only appropriate, but necessary, to limit the requirements of Article 2.4.2 to the investigation phase.

3. Article 2.4.2, Second Sentence

112. In addition, such a general prohibition of zeroing that applies beyond the context of average-to-average comparisons in investigations, would be inconsistent with the remaining text of Article 2.4.2, which provides for an alternative "targeted dumping" methodology that may be utilized in certain circumstances. The "targeted dumping" methodology was drafted as an exception to the obligation to engage in symmetrical comparisons in an investigation. By the terms of Article 2.4.2, it may be used "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods . . . ". When the investigating authority provides an explanation as to why these "differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison", it may then use the asymmetrical average-to-transaction comparison to establish the existence of margins of dumping during the investigation phase.

113. The mathematical implication of a general prohibition of zeroing, however, is that the targeted dumping clause would be reduced to inutility. That is because the targeted dumping methodology, provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons.[124] In this respect, a general zeroing prohibition would render the targeted dumping exception in Article 2.4.2 a complete nullity. Such an interpretation would be disfavoured under a key tenet of customary rules of treaty interpretation, namely that an "interpretation must give meaning and effect to all the terms of a treaty".[125]

114. In US – *Zeroing (EC)*, *US – Softwood Lumber Dumping (Article 21.5)* and *US – Zeroing (Japan)*, each of the panels recognized that the customary rules of interpretation of public international law precluded an interpretation that rendered the targeted dumping provision of Article 2.4.2 redundant.[126] The panel in *US – Zeroing (EC)* found that a general prohibition of zeroing that applied to the targeted dumping methodology "would deny the second sentence [of Article 2.4.2] the very function for which it was created".[127] The fact that, under a general zeroing prohibition, the average-to-average comparison method and the average-to-transaction comparison method would yield identical results was recognized by each of the panels.[128]

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[124] The reason for this is that, if offsetting is required, then all non-dumped sales (*i.e.*, negative values) will offset the margins on all of the dumped sales (*i.e.*, positive values). It makes no difference mathematically whether the calculation of the final overall dumping margin is based on comparing weighted-average export prices to weighted-average normal values or on comparing transaction-specific export prices to weighted-average normal values. In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.

[125] *US – Gasoline (AB)*, p. 23.

[126] *US – Zeroing (EC) (Panel)*, para. 7.266, *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.52, *US – Zeroing (Japan) (Panel)*, para. 7.127.

[127] *US – Zeroing (EC) (Panel)*, para. 7.266, *see also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.52 ("[A] general prohibition of zeroing . . . would deprive the second sentence of Article 2.4.2 of effect"); *US – Zeroing (Japan) (Panel)*, para. 7.127 ("If zeroing is prohibited in the case of the average-to-transaction comparison, the use of this method will necessarily always yield a result identical to that of an average-to-average comparison").

[128] *US – Zeroing (EC) (Panel)*, para. 7.266 ("In fact, under such an interpretation the alternative asymmetrical comparison methodology would as a matter of mathematics produce a result that was identical to that of the first average-to-average methodology"); *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.76 ("[A] prohibition of zeroing under the targeted dumping comparison methodology . . . would result in

115. Despite the findings *of fact* of the panels that the results of the targeted dumping methodology "will necessarily always yield a result identical to that of an average-to-average comparison",[129] under a general prohibition of zeroing, the Appellate Body has found this concern to be "overstated".[130] The Appellate Body has asserted that mathematical equivalence will occur only in "certain situations"[131] and represents "a non-tested hypothesis"[132] because "[the United States] has never applied the [targeted dumping] methodology, nor provided examples of how other WTO Members have applied this methodology".[133] These objections, however, are not persuasive. First, the panels have specifically addressed all of the situations under which it was argued that mathematical equivalence would not obtain and found these situations did not represent methodologies consistent with the AD Agreement.[134] The targeted dumping provision is rendered inutile if the only alternative methodologies that do not result in mathematical equivalence are, themselves, not consistent with the AD Agreement. Second, mathematical equivalence is not a "non-tested hypothesis" because the EC, a Member that actively utilizes this methodology is actually faced with this problem in administering its antidumping duty regime, as described in detail below.

116. In its most recent report to address this issue, the Appellate Body dismissed the redundancy caused by mathematical equivalence by concluding that it may be permissible to apply the targeted dumping methodology to a subset of export transactions.[135] The United States is unaware of any Member ever having done this, nor has any Member ever suggested it would administer its antidumping regime in this manner. The language of the AD Agreement says nothing about selecting a subset of transactions when conducting a targeted dumping analysis. The Appellate Body has drawn its conclusions about "zeroing" from its interpretation of "dumping" as relating to a "product", *i.e.*, a "product as a whole". The targeted dumping provision provides that when certain conditions are met, Members are permitted to compare average normal values to transaction-specific export prices. If the Appellate Body is correct that dumping may only be determined for the product as a whole (which the United States does not concede), there is no textual basis for inferring that the targeted dumping comparison methodology is an exception to that provision (which, as Article 2.1 provides, applies throughout the AD Agreement). The targeted dumping provision simply provides an exception to the average-to-average or transaction-to-transaction comparison requirement of the first sentence of Article 2.4.2. Consequently, the use of a subset of export transactions as a means of avoiding mathematical equivalency would also appear to be inconsistent with the AD Agreement.

117. This mathematical equivalency problem with the Appellate Body's recent interpretation of Article 2.4.2 cannot be ignored, particularly when Members such as the EC, are actively involved in administering antidumping duty regimes that apply the targeted dumping provision. Indeed, the redundancy that results from this mathematical equivalence appears to have already led the EC, attempting to reconcile the issue before its municipal tribunals, to advance an interpretation of the AD Agreement that is contrary to the interpretation the EC necessarily relies on in this dispute. Specifically, the Council of the European Union argued before the Court of First Instance that:

> the asymmetrical method, as compared with the first symmetrical method, makes sense only if the zeroing technique is applied. Without that mechanism, that method

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a margin of dumping mathematically equivalent to that established under W-W comparison methodology"); *US – Zeroing (Japan) (Panel)*, para. 7.127 n. 763 ("Mathematically, if zeroing is prohibited under the average-to-transaction method, the sum total of amount by which export prices are above normal value will offset the sum total of the amounts by which export prices are less than normal value").

[129] *US – Zeroing (Japan) (Panel)*, para. 7.127.

[130] *US – Softwood Lumber Dumping (Article 21.5) (AB)*, para. 100.

[131] *US – Zeroing (Japan) (AB)*, para. 133.

[132] *US – Softwood Lumber Dumping (Article 21.5) (AB)*, para. 97.

[133] *US – Softwood Lumber Dumping (Article 21.5) (AB)*, para. 97.

[134] *See, US – Zeroing (Japan) (Panel)*, paras. 7.127-7.137; *US – Zeroing (EC) (Panel)*, para. 7.266; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.33-5.52.

[135] *US – Zeroing (Japan) (AB)*, para. 135.

> would mathematically lead to the same result as the first symmetrical method and it would be impossible to prevent the non-dumped exports from disguising the dumping of the dumped exports.[136]

The Court agreed, finding that:

> as the Council pointed out in its written proceedings, the zeroing technique has proved to be mathematically necessary in order to distinguish, in terms of its results, the asymmetrical method from the first symmetrical method. In the absence of that reduction, the asymmetrical method will always yield the same result as the first symmetrical method . . . .[137]

Thus, in effect, the EC itself, a Member that has used the average-to-transaction comparison in investigations, when addressing this issue before domestic tribunals, agrees with the United States and the panel reports cited above, that a general prohibition of zeroing applied equally to both assessment proceedings and original investigations, would render the average-to-transaction comparison inutile.

118. The redundancy of the targeted dumping provision of Article 2.4.2 occurs as a consequence of any interpretation that results in a general prohibition of zeroing, whether derived from the definitional language of Article 2.1 of the AD Agreement and Article VI of the GATT 1994 or from the "fair comparison" requirement of Article 2.4 of the AD Agreement, or otherwise. Accordingly, the Panel should summarily reject any contention that zeroing is necessarily prohibited in all contexts under all comparison methodologies, including with respect to assessment proceedings. "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[138]

4. Article 9

119. For the reasons discussed above, an analysis of the text of Article 2.4.2 demonstrates that Article 2.4.2 does not apply to assessment proceedings. The EC, however, argues that Article 2.4.2 is nonetheless applicable to assessment proceedings by virtue of the cross reference in Article 9.3 to Article 2 of the AD Agreement.[139] Article 9.3 provides:

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

120. However, the general reference to Article 2 in Article 9.3 necessarily includes any limitations found in the text of Article 2. As discussed above, Article 2.4.2 by its own terms is explicitly limited to the investigation phase. The text of Article 9.3, therefore, does not support the EC's argument that the requirements of Article 2.4.2 apply in assessment proceedings.

121. The reference in Article 9.3 to Article 2 means that the amount of antidumping duty assessed may not exceed the amount of antidumping duty calculated in accordance with the general requirements of Article 2, such as making the various adjustments set forth in Article 2.4 necessary to provide a fair comparison. As the panel found in *Argentina – Poultry*:

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[136] Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006, para. 94 (Exhibit US-3). Notwithstanding making this argument before its municipal tribunals, the EC has taken a contrary position in WTO dispute proceedings. *See, e.g. Softwood Lumber Dumping (Article 21.5) (AB)*, para. 49 ("The European Communities rejects the 'mathematical equivalence' argument. . .").

[137] Ritek Corp., para. 109 (Exhibit US-3).

[138] *US – Gasoline (AB)*, p. 23.

[139] EC First Submission, para. 224.

> Article 9.3 does not refer to the margin of dumping established "under Article 2.4.2," but to the margin of dumping established "under Article 2". In our view, this means simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2. This is entirely consistent with the introductory clause of Article 2, which sets forth a definition of dumping "for the purpose of this Agreement . . . ". In fact, it would not be possible to establish a margin of dumping without reference to the various elements of Article 2. For example, it would not be possible to establish a margin of dumping without determining normal value, as provided in Article 2.2, or without making relevant adjustments to ensure a fair comparison, as provided in Article 2.4.[140]

122. The context of Article 9 also demonstrates that there is no basis in Article 9 to overcome the explicit language in Article 2.4.2, limiting its reach to investigations. As the panel found in *Argentina – Poultry*:

> [N]othing in the AD Agreement explicitly identifies the form that anti-dumping duties must take . . . . As the title of Article 9 of the AD Agreement suggests, Article 9.3 is a provision concerning the imposition and collection of anti-dumping duties. Article 9.3 provides that a duty may not be collected in excess of the margin of dumping as established under Article 2. The modalities for ensuring compliance with this obligation are set forth in sub-paragraphs 1, 2 and 3 of Article 9.3, each of which addresses duty assessment and the reimbursement of excess duties. The primary focus of Article 9.3, read together with sub-paragraphs 1-3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected.[141]

123. In other words, Article 9 contains certain procedural obligations applicable in assessment reviews. However, Article 9 does not prescribe methodologies for assessment proceedings such as those established in Article 2.4.2 for the investigation phase. Instead, Article 9 establishes time limits for conducting assessment proceedings, ensuring that respondent companies may obtain timely refund of any excess antidumping duties collected by a Member.[142]

124. Relying on its extension of Article 2.4.2 to assessment proceedings, the EC seems to suggest that the United States may only make "asymmetrical" comparisons in such proceedings when it finds that the prerequisites of Article 2.4.2 for "targeted dumping" have been met (*i.e.*, "a pattern of export prices which differ significantly among different purchases, regions, or time periods").[143] The EC's argument is without merit. Not only are the Article 2.4.2 restrictions on the investigation phase irrelevant in assessment proceedings, but Article 9 expressly provides for comparisons between weighted average normal values and individual export transactions in assessment proceedings, notwithstanding the EC's description of such comparisons as "asymmetrical". The EC is thus arguing that the Panel ignore the text of not just one, but two provisions of the AD Agreement.

125. Article 9.4(ii) explicitly provides for the calculation of antidumping duties, in the assessment phase, on the basis of a comparison of weighted average normal values and individual export prices, stating that the amount of duty shall not exceed:

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[140] *Argentina – Poultry*, para. 7.357.

[141] *Argentina – Poultry*, para. 7.355.

[142] Article 9.3.1 and Article 9.3.2, respectively, establish for retrospective and prospective assessment systems timetables with respect to the amount of time within which final liability for payment of antidumping duties is to be determined or refunds of any duty paid in excess of the margin of dumping are to made.

[143] EC First Submission, para. 211.

> where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers and the export prices of exporters or producers not individually examined.

This provision plainly indicates that there is nothing exceptional about assessing antidumping duties on the basis of comparisons of weighted average normal values with individual export prices.

126. In fact, the calculation of transaction-specific antidumping duties in assessment reviews has been found to be entirely consistent with the AD Agreement. In *Argentina – Poultry*, the panel found the Argentine prospective normal value assessment system to be fully consistent with the AD Agreement.[144] Under that assessment system, the authorities imposed duties on a transaction-by-transaction basis when particular export prices were below the weighted average normal value. The United States agrees with the EC's position in that case that:

> Article 9.3.1 envisages the possibility to collect duties on a retrospective basis, which, by definition, presupposes the possibility to calculate the dumping margins on the basis of data for individual shipments or for time-periods outside the investigation period.[145]

As the EC acknowledged in *Argentina – Poultry*, the AD Agreement does not specify the form which duties must take in assessment reviews. Moreover, the reference in Article 9.3 to Article 2 does not overcome the limiting language in Article 2.4.2 which, by its own terms, limits its obligations to "the investigation phase".

127. There is simply no textual basis in the AD Agreement for the EC's assertion that Article 9.3 requires the application of Article 2.4.2 in assessment proceedings. Article 9 of the AD Agreement relates, as its title indicates, to the imposition and collection of antidumping duties. In particular, Article 9.3 states that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". For the reasons set forth in detail above, the term "margin of dumping", as defined in Article 2.1 of the AD Agreement and Article VI of the GATT 1994, may be applied to individual transactions. This understanding of the term "margin of dumping" is particularly appropriate in the context of antidumping duty assessment. In the real world of administering antidumping regimes, the individual transactions are both the means by which less than fair value prices are established and the mechanism by which the object of the transaction (*i.e.*, the "product") is "introduced into the commerce of the importing country". Likewise, antidumping duties are assessed on individual entries resulting from those individual transactions. Therefore, the obligation set forth in Article 9.3 to assess no more in antidumping duties than the margin of dumping, is similarly applicable at the level of individual transactions.

128. The EC's apparent claim under Article 9.3 of the AD Agreement is that the amount of the antidumping duty has exceeded the margin of dumping established under Article 2.[146] This claim however necessarily depends upon whether the EC's preferred interpretation of the "margin of dumping", which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the AD Agreement. Under such a view, a Member breaches Article 9.3 by failing to provide offsets, because Members are required to calculate margins of dumping on an exporter-specific basis for the product "*as a whole*" and, consequently, a Member is required to aggregate the results of "*all*" "*intermediate comparisons*", including those for which the export price exceeds the normal value. The United States notes that the terms upon which such an interpretation rests are conspicuously absent from the text of both

[144] *Argentina – Poultry*, paras. 7.345-7.367.
[145] *Argentina – Poultry*, Annex C-2, para. 33.
[146] EC First Submission, para. 224.

Articles 2.1 and 9.3, and thus such an interpretation is not mandated by the definition of dumping contained in Article 2.1, as described in detail above.

129. As the panel in *US – Zeroing(EC)* correctly concluded, there is "no textual support in Article 9.3 for the view that the AD Agreement requires an exporter-oriented assessment of antidumping duties, whereby, if an average normal value is calculated for a particular review period, the amount of anti-dumping duty payable on a particular transaction is determined by whether the overall average of the export prices of all sales made by an exporter during that period is below the average normal value".[147] The Panel in *US – Zeroing (Japan)* similarly rejected the conclusion that the "margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value ...".[148]

130. In *US – Zeroing (Japan)*, the panel found that "there are important considerations specific to Article 9 of the AD Agreement that lend further support to the view that it is permissible . . . to interpret Article VI of the GATT 1994 and relevant provisions of the AD Agreement to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing".[149] In particular, the panel explained that such a requirement is inconsistent with the importer-and import-specific obligation to pay an antidumping duty:

> In the context of Article 9.3, a margin of dumping is calculated for the purpose of determining the *final liability for payment of anti-dumping duties* under Article 9.3.1 or for the purpose of determining *the amount of anti-dumping duty* that must be *refunded* under Article 9.3.2. An anti-dumping duty is paid by an importer in respect of a particular import of the product on which an anti-dumping duty has been imposed. An importer does not incur liability for payment of an anti-dumping duty in respect of the totality of sales of a product made by an exporter to the country in question but only in respect of sales made by that exporter to that particular importer. Thus, the obligation to pay an anti-dumping duty is incurred on an *importer*-and *import*-specific basis. Since the calculation of a margin of dumping in the context of Article 9.3 is part of a process of assessing the amount of duty that must be paid or that must be refunded, this importer- and import-specific character of the payment of anti-dumping duties must be taken into account in interpreting the meaning of "margin of dumping."[150]

131. Similarly, the panel in *US – Zeroing (EC)* explained:

> In our view, the fact that in an assessment proceeding in Article 9.3 the margin of dumping must be related to the liability incurred in respect of particular import transactions is an important element that distinguishes Article 9.3 proceedings from investigations within the meaning of Article 5. ... [I]n an Article 9.3 context the extent of dumping found with respect to a particular exporter must be translated into

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[147] *US – Zeroing (EC) (Panel)*, para. 7.204 ("In our view, if the drafters of the AD Agreement had wanted to impose a uniform requirement to adopt an exporter oriented-method of duty assessment, which would have entailed a significant change to the practice and legislation of some participants in the negotiations, they might have been expected to have indicated this more clearly.").

[148] *US – Zeroing (Japan) (Panel)*, para. 7.199. The panel in *US – Zeroing (EC)* expressed essentially the same view. *US – Zeroing (EC) (Panel)*, paras. 7.204 - 7.207 and 7.220-7.223.

[149] *US – Zeroing (Japan) (Panel)*, para. 7.196.

[150] *US – Zeroing (Japan) (Panel)*, para. 7.198 - 7199 (emphasis in the original).

> an amount of liability for payment of antidumping duties by importers in respect of specific import transactions.[151]

132. The panel's understanding of Article 9.3 is, at a minimum, a permissible interpretation of the provision. Indeed, the EC's interpretation of "margin of dumping" as used in Article 9.3, if applied, would fundamentally alter the antidumping practices of numerous Members using this remedy and render many of these systems difficult, if not impossible, to administer. In particular, under the EC's interpretation of Article 9.3, antidumping duties would be prevented from fulfilling their intended purpose under Article VI:2 of the GATT 1994, because importers that contribute the most to injurious dumping would be favoured over other importers (and domestic competitors) that price fairly, and prospective normal value systems would be rendered retrospective, as described further below.

133. Although, as stated by the Appellate Body in *US – Zeroing (Japan)*, dumping involves differential pricing behaviour of exporters or producers between its export market and its normal value[152], dumping nevertheless occurs at the level of individual transactions. Moreover, the remedy for dumping provided for in Article VI:2 of GATT 1994, *i.e.*, antidumping duties, are applied at the level of individual entries for which importers incur the liability. In this way, the importer may be induced to raise resale prices to cover the amount of the antidumping duty, thereby preventing the dumping from having further injurious effect. If instead, the amount of the antidumping duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer, then the antidumping duty will be insufficient to have the intended effect. The importer of the dumped product would remain in a position to profitably resell the product at a price that continues to be injuriously dumped. For this reason, if the EC's interpretation of the margin of dumping is adopted as the sole permissible interpretation of Article 9.3, the remedy provided under the AD Agreement and the GATT 1994 will be prevented from addressing injurious dumping.

134. These concerns led the panel in *US – Zeroing (Japan)* to reject the same interpretation that the EC offers in this dispute. The panel observed that the implication of this interpretation was that Members with retrospective assessment systems "may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value".[153] The panel found that this result was not supported by the text of Article 9.3, which "contains no language requiring such an aggregate examination of export transactions in determining final liability for payments of antidumping duties . . . ".

135. It also follows that if a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the amount of dumping is greatest will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports. Indeed, even if one were not to impose duties on importers whose entries were not responsible for the finding of dumping, the importers buying at non-dumped prices would still be significantly disadvantaged because the importers buying at the dumped prices would still have a cost advantage, since the duties they pay on the dumped merchandise would be reduced by the amount by which the non-dumped merchandise exceeded normal value.

136. As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed, the perverse incentives created by providing offsets also arise in the context of prospective assessment systems:

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[151] *US – Zeroing (EC) (Panel)*, para. 7.201.
[152] *US – Zeroing (Japan) (AB)*, para. 156.
[153] *US – Zeroing (Japan) (Panel)*, para. 7.199.

> [An] obligation to take all (including non-dumped) comparisons into account in determining the margin of dumping for the product as a whole ... is illogical, as it would provide importers clearing dumped transactions with a double competitive advantage vis-à-vis other importers: first, they would benefit from the lower price inherent in a dumped transaction; second, they would benefit from offsets, or credits, "financed" by the higher prices paid by other importers clearing non-dumped, or even less-dumped, transactions.
> ...
> Again, this makes no sense in the context of a prospective normal value duty assessment system, because (as even Canada acknowledges) the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. And if other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers. We are unable to accept that the Appellate Body could have intended such absurd results to follow from its interpretation of the phrase "margins of dumping" in US - Softwood Lumber V.[154]

137. Further, the EC's interpretation of Article 9.3, requiring that antidumping duty liability be determined for the product "as a whole", is inconsistent with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment.[155] Article 9.4(ii) of the AD Agreement "expressly refers to the calculation of the liability for payment of antidumping duties on the basis of a prospective normal value system".[156] Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value.[157] For example, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payments of antidumping duties. The converse is also true. A liability for a dumped sale would be determined by comparing the price of individual export transaction with prospective normal value and the prices of other transactions have no relevance to this determination.[158] As the panel in *US – Zeroing (Japan)* found, "there is no textual support in Article 9 for the proposition that export prices in other transactions are of any relevance".[159]

138. Because in a prospective normal value system, liability for antidumping duties is incurred only to the extent that prices of individual export transaction are below the normal value, the panel in *US – Zeroing (Japan)* concluded, "the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transaction below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value".[160]

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

[155] *See* EC First Submission, para. 194-195.

[156] *US – Zeroing (Japan) (Panel)*, para. 7.201.

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

[158] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53 ("Under a prospective normal value duty assessment system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a prospective normal value . . . . In the context of such transaction-specific duty assessment, it makes no sense to talk of a margin of dumping being established for the product as whole, by aggregating the results of all comparisons, since there is only one comparison at issue.").

[159] *US – Zeroing (Japan) (Panel)*, para. 7.201.

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

139. If in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, there is no reason why liability for payment of antidumping duties may not be similarly assessed on the basis of export prices less than normal value in the retrospective systems applied by the United States.[161]

140. Further, accepting the EC's interpretation that a Member must aggregate the results of *"all"* comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value systems, in order to take into account "*all*" of the exporters' transactions. The results of the retrospective review would be to determine antidumping duty liability on a retrospective basis. This result, however, is contrary to the very concept of the prospective normal value system. As the panel in *US – Zeroing (Japan)* explained, the "liability for payment of anti-dumping duties is final in prospective normal value system at the time of importation of a product".[162] In effect, prospective normal value systems will become retrospective, a conclusion also reached in a Canadian parliamentary report on potential changes to its prospective normal value system.[163] In that report and at its trade policy review, Canada expressed its view that in a prospective normal value system, each entry provides a margin of dumping.[164] If, in fact, Members had intended prospective normal value systems to have such reviews, one would have expected Members to have provided for this in explicit agreement language.

5. Article 2.4

141. The text of Article 2.4 requires that a "fair comparison shall be made between the export price and the normal value". The text of Article 2.4, however, does not resolve whether any particular assessment of antidumping duties exceeds the margin of dumping because the text of Article 2.4 does not resolve whether "dumping" and "margins of dumping" are concepts that apply to individual transactions. Nor does the text resolve whether, for purposes of assessing antidumping duty liability, a margin of dumping may be specific to each importer that is liable for payment of the antidumping duties. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is "fair" or "unfair". As the panel in *US – Zeroing (Japan)* noted, the "precise meaning of" the "fair comparison" requirement "must be understood in light of the nature of the activity at issue".[165] The panel

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[161] *US – Zeroing (Japan) (Panel)*, para. 7.208 ("We see no textual basis in Articles 9.3 and 9.4 for the view that if an authority assesses the amount of the anti-dumping duty on a retrospective basis by examining export transaction that have occurred during a certain period, it is obligated to take into account export prices above the normal value that it would not have been required to take into account if it had applied a prospective normal value system.").

[162] *US – Zeroing (Japan) (Panel)*, para. 7.205.

[163] Report on the Special Import Measures Act, House of Commons Canada, December 1996, http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/chap4e.html (Exhibit US-4) (hereinafter "SIMA Report"). *See also* Special Import Measures Act Self-Assessment Guide ("Normal Value - Export Price = Antidumping Duty (or Margin of Dumping"), http://www.cbsa-asfc.gc.ca/sima/self-e.html#12 (Exhibit US-5).

[164] *Id.*

[165] *US – Zeroing (Japan) (Panel)*, para. 7.155; *see also US – Zeroing (EC) (Panel)*, para. 7.260 ("[C]aution ... is especially warranted where as in the case of the first sentence of Article 2.4, a legal rule is expressed in terms of a standard that by its very nature is more abstract and less determinate than most other rules in the AD Agreement. The meaning of 'fair' in a legal rule must necessarily be determined having regard to the particular context within which the rule operates."); *see also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para.5.74 ("[W]e believe that a claim based on a highly general and subjective test such as "fair comparison" should be approached with caution by treaty interpreters. For this reason, any concept of "fairness" should be solidly rooted in the context provided by the *AD Agreement*, and perhaps the *WTO Agreement* more generally. As such there must be a discernible standard within the *AD Agreement*, and perhaps the *WTO Agreement*, by which to assess whether or not a comparison has been "fair" or "unfair". Thus, the fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison methodology A unfair if comparison methodology B were the applicable standard.

concluded that "the "fair comparison" requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context".[166]

142. Assessment of antidumping duties in the amount by which the normal value exceeded the export price on a transaction-specific basis, without providing an offset for non-dumped transactions does reflect a "fair comparison" made for each export transaction. The EC's assertion that the United States has assessed antidumping duties "in excess of the actual margin of dumping for the product" is predicated on the assumption that zeroing is prohibited – otherwise, the challenged assessments would reflect the correct magnitude of the margins of dumping.

143. The EC's claim of inconsistency with Article 2.4 adopts the reasoning set forth in the Appellate Body report in *US – Zeroing (Japan)*, finding that a methodology cannot be viewed as involving a "fair comparison" under Article 2.4 if the resulting assessments exceed the "margin of dumping established in accordance with Article 2".[167] The reasoning upon which the EC relies, however, is entirely consequential of the Appellate Body report's previous analysis of the term "margin of dumping". Indeed, the passage quoted by the EC makes plain that the rationale followed in the Appellate Body report was based on the *results* of the comparison methodology in relation to the previously interpreted "margin of dumping", rather than on any inherently unfair aspect of the comparison methodology itself. Therefore, this claim of "unfairness" depends not on the text of Article 2.4, but on whether it is permissible to interpret the term "margin of dumping" as used in Article 9.3 as applying to transactions.

144. As the panels in *US – Zeroing (EC)* and *US – Zeroing (Japan)* have concluded, it is permissible to interpret "margin of dumping" as used in Article 9.3 as applying to an individual transaction.[168] As a consequence, there is no obligation to aggregate transactions in calculating margins of dumping in an assessment proceeding, and there can be no obligation to offset the antidumping duty liability for a transaction to reflect the extent to which other transactions were not dumped. Therefore, if the Panel finds, as the prior panels have found, that it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction, then the challenged assessment will not exceed the margin of dumping and there will be no basis, according to the rationale adopted by the EC, for a finding of inconsistency with Article 2.4.

145. In addition, as mentioned above, an interpretation of Article 2.4 that gives rise to a general prohibition of zeroing also renders the second sentence of Article 2.4.2, the "targeted dumping provision", inutile.[169] The targeted dumping provision is an exception to the symmetrical comparison methodologies generally required by Article 2.4.2. It is not an exception to the fair comparison requirement of Article 2.4. Thus, an interpretation of Article 2.4 that generally prohibits zeroing in all contexts would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 without meaning.[170] A panel should not interpret provisions of the AD Agreement in such a way that its express provisions are rendered meaningless or superfluous.[171] As the Appellate Body has consistently found, "interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole

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If however, the *AD Agreement* were to permit either comparison methodology A or B, this would not be the case.").

[166] *US – Zeroing (Japan) (Panel)*, para. 7.158 (*quoting US – Zeroing (EC) (Panel)*, para. 7.261).
[167] EC First Submission, para. 206 (*quoting US – Zeroing (Japan) (AB)*, para. 168).
[168] *US – Zeroing (EC) (Panel)*, para. 7.201- 7.206; *US – Zeroing (Japan) (Panel)*, para. 7.194 - 7.199.
[169] *US – Zeroing (EC) (Panel)*, para. 7.266; *US – Zeroing (Japan) (Panel)*, para. 7.159.
[170] *Id*.
[171] *See US – Gasoline (AB)*, p. 23; *Japan – Alcohol Taxes (AB)*, p. 12; *Egypt – Rebar*, para. 7.277.

clauses or paragraphs of a treaty to redundancy or inutility".[172] An interpretation of Article 2.4 of the AD Agreement to require that dumping margins be offset by non-dumped transactions is therefore impermissible and must be rejected.

146. The EC also argues that the US assessment methodology is inconsistent with US obligations under Article 2.4 because it is "inherently biased" as opposed to the EC's preferred methodology.[173] But the EC can point to nothing in the text of the Agreement to support its contention that a methodology can be designated as "fair" or "unfair" within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down.

147. Moreover, the EC's claim that the US assessment methodology necessarily results in higher antidumping duties than would a so-called "symmetrical" comparison is incorrect. A simple example illustrates this point. Assume that the export price for a particular transaction is 9, and that there are two corresponding home market transactions, one at 8 and one at 10. Assume also that both home market transactions are comparable to the export transaction, but that the transaction at 10 is the most comparable. Under a transaction-to-transaction method, the transaction at 10 would be used for normal value, resulting in a dumping amount of 1 (10-9 = 1). However, under the so-called "asymmetrical" average-to-transaction method, the two home market transactions would be averaged, resulting in a normal value of 9 and, in turn, a dumping amount of zero (9-9 = 0).

148. Under the average-to-transaction comparison method used by the United States, no antidumping duties would be assessed in this situation, because the export price – 9 – is not less than the weighted average normal value – 9. However, under a transaction-to-transaction comparison method – a "symmetrical" comparison method explicitly permitted in investigations pursuant to Article 2.4.2 – the United States would be permitted to assess $1 in antidumping duties for this transaction. Consequently, there is no inherent bias associated with the US assessment method.

149. Moreover, the EC has not offered any argument as to how an offset to antidumping duties assessable on one entry as a result of a distinct entry having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under the rubric of Article 2.4. The focus of Article 2.4 is on the selection of comparable transactions and the making of appropriate adjustments to those transactions so as to render them comparable. Even as described by the EC, an offset requirement would be applied to the *results* of comparisons, and would not pertain to the comparisons themselves.[174] Consequently, it falls clearly outside the scope of Article 2.4.

150. Finally, the EC's attempt to use the "fair comparison" reference in Article 2.4 to nullify the express limitation in Article 2.4.2 is inconsistent with principles of treaty interpretation and, for that reason, should be rejected by the Panel.

6. Article 11.2 Is Not Applicable to Article 9.3 Assessment Proceedings

151. The determination of such a rate in an assessment proceeding conducted pursuant to Article 9.3 of the AD Agreement does not constitute a review of the continued necessity of the antidumping duty and, thus, is not subject to the obligations of Article 11.2. The EC's argument that reviews pursuant to Article 11.2 of the AD Agreement and the reassessment of deposit rates for future entries in future reviews are "the same"[175] is not supported by the plain language of Article 11.2 of the AD Agreement.

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[172] *US – Gasoline (AB)*, p. 23; *see also Japan – Alcohol Taxes (AB).* p. 12; *US – Underwear (AB)*, p. 16.

[173] EC First Submission, para. 200.

[174] EC First Submission, para. 207.

[175] EC First Submission, para. 235.

152. Article 11.2 allows interested parties to request a review to determine "whether the injury would be likely to continue or recur if the duty were removed or varied". Therefore, an Article 11.2 review is focused on the continuation or recurrence of injury if the duty were varied, rather than on a determination of a varying duty rate. The EC cites footnote 21 in support of its position; however, footnote 21 simply states that a determination of liability for payment of antidumping duties made pursuant to Article 9.3 does not, by itself, constitute a review under Article 11.2. This statement supports the position that assessment proceedings conducted under Article 9.3 of the AD Agreement are not subject to the obligations of Article 11.2. Furthermore, footnote 22 to the AD Agreement, provides that in a retrospective system, a finding in a proceeding conducted pursuant to Article 9.3 that no duty is to be levied does not by itself require termination of the duty. Neither of these provisions supports the EC's view that a determination of the amount of antidumping duty to be assessed on specific import transactions determined in assessment proceedings relates to the inquiry called for by Article 11.2 as to whether injury would likely continue or recur if the duty were removed or varied.

C. THE EC'S CLAIMS WITH RESPECT TO SUNSET REVIEWS

153. The EC argues that the United States' determinations in the challenged sunset reviews are inconsistent with Articles 11.1 and 11.3 of the AD Agreement because when making its determinations that removal of the antidumping duty would likely lead to a continuation or recurrence of dumping, the United States relied on margins that were calculated in "proceedings using model zeroing", and therefore "did not comply with its obligations pursuant to Articles 2.1, 2.4 and 2.4.2 because these margins were not based on a fair comparison and not calculated for the product as a whole".[176]

154. The EC's argument, however, should be rejected. The EC has not demonstrated that a calculation done in accordance with the EC's approach would result in zero or *de minimis* dumping margins in the cited cases, leading to a revocation of the order.

D. THE EC'S CLAIMS WITH RESPECT TO INVESTIGATIONS

155. With respect to the four investigations properly before the Panel, upon which the EC did request consultations, and continues to challenge[177], the United States acknowledges that Commerce did not provide offsets for non-dumped transactions when calculating the margins of dumping using the average-to-average comparison methodology during the investigation phase. The United States recognizes that in *US – Softwood Lumber Dumping* the Appellate Body found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with Article 2.4.2, by interpreting the terms "margins of dumping" and "all comparable export transactions" as used in Article 2.4.2 in an integrated manner. (*See US – Softwood Lumber Dumping (AB)*, paras. 62-117). The United States acknowledges that this reasoning is equally applicable with respect to the claims for these four investigations.

156. The United States, however, continues to contest the EC's challenges that extend beyond Article 2.4.2 with respect to these four investigations. Specifically, the United States contests any claims of WTO inconsistency as to Articles 2.1 and 2.4 of the AD Agreement, and hereby incorporates arguments contained in Section B.[178] Because Articles 2.1 and 2.4 of the AD Agreement do not impose independent obligations, to the extent the EC is claiming that the challenged investigations are inconsistent with Articles 2.1 or 2.4, the EC has failed to establish the existence of

[176] EC First Submission, para. 259.

[177] Cases XV, XVI, XVII and XVIII of the EC's Panel Request.

[178] Paragraph 177 of the EC's First Submission allege that the four, named investigations in its Annex only violate Articles 2.4 and Articles 2.4.2, however, the EC also cites Article 2.1 in support of its argument. *See* EC First Submission, paras 149, 155, 160.

any obligations pursuant to these definitional provisions, and thus, the EC's challenge must depend on Article 2.4.2. Therefore, a finding by the Panel on the narrow issue of Article 2.4.2 is sufficient to resolve this matter.

E. WTO AGREEMENT ARTICLE XVI:4

157. The EC's first claim with respect to Article XVI:4 of the WTO Agreement depends on a finding of inconsistency with provisions of the AD Agreement and GATT 1994.[179] As one panel recognized, there is no "independent" basis for a claim under Article XVI:4.[180] For the reasons set out above demonstrating that the United States has not acted inconsistently with the provisions of either the AD Agreement or the GATT 1994, the EC's claim with respect to Article XVI:4 should be rejected.

158. The EC also attempts to demonstrate a breach of Article XVI:4 by relying on a novel, expansive and erroneous interpretation of that provision.[181] It argues that "the findings of the Appellate Body as adopted by the DSB in specific disputes create an independent international obligation for the losing party in that dispute to comply".[182] Because the DSB has adopted Appellate Body reports holding zeroing inconsistent with provisions of the covered agreements, the EC asserts that the United States is under a continuing obligation to comply, and has not done so for certain determinations that were issued after the adoption of at least the first report finding zeroing to be inconsistent with the Antidumping Agreement.[183] In fact, the EC overlooks the fact that the determinations listed in the Annex to its panel request were issued before the expiration of the "reasonable period of time to comply" in both *US – Zeroing (EC)* and *US – Zeroing (Japan)*. It is unanswered why the EC would like the Panel to impose a greater obligation on the United States than the DSU itself imposed.

159. The EC's expansive interpretation of Article XVI:4 should be rejected. The idea of a continuing "independent international obligation" arising from adopted reports cannot be reconciled with the long-standing rule that Appellate Body and panel reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[184] (Again, there is a certain irony in the EC's position – asserting that findings in prior disputes are binding on this Panel while at the same time ignoring findings from prior disputes when they conflict with the EC's position in this dispute.) The EC's interpretation finds no support in the text of the covered agreements. For each individual dispute, the DSU provides the mechanism to determine compliance by the Member concerned with the DSB's adopted recommendations and rulings, and, in cases of non-compliance, to authorize the suspension of concessions in the absence of an agreement on compensation.[185]

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[179] As the EC acknowledges, the determination of a breach of a provision of any covered agreement gives rise to a breach of Article XVI:4 of the WTO Agreement. *See* EC First Written Submission, paras. 123-25 (*citing US – 1916 Act (Japan) (Panel)* and *US – 1916 Act (EC) (Panel)*).

[180] *See US – OCTG from Mexico (Panel)*, para. 7.189. The panel in that dispute also found that there can be no independent breach of Article 18.4 of the AD Agreement, which requires that "[e]ach Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question".

[181] *See* EC First Written Submission, para. 128.

[182] EC First Written Submission, para. 128. The EC references an international law journal article in support of its interpretation of Article XVI:4. *See* EC First Written Submission, paras. 128. The rights and obligations of Members, however, are found in the text of the covered agreements, and not in articles written by a private individual.

[183] *See* EC First Written Submission, paras. 131-132. It is ambiguous which report the EC considers first in time, but it cites just *US – Zeroing (EC)* and *US – Zeroing (Japan)* in paragraph 131, making *US – Zeroing (EC)* the first report to be adopted of the two.

[184] *US – Softwood Lumber Dumping (AB)*, para. 111 (*quoting Japan – Alcohol Taxes (AB)*).

[185] *See* DSU, Arts. 21, 22.

160. The EC is advocating that the Panel adopt an approach which would distort the WTO's dispute settlement system to the detriment of the "security and predictability" of the multilateral trading system referred to in Article 3.2.[186] Under the EC's reading of Article XVI:4, a complaining party could identify a Member's measures that are allegedly similar to those that already have been found inconsistent in adopted Appellate Body reports, and claim non-compliance with the findings in the adopted reports. Allowing such a claim would completely flout the DSU's provisions on compliance and on not adding to or diminishing rights of Members, and would make adopted reports binding on all Members, despite their non-binding status outside of the original dispute.

161. The rationales offered by the EC do not justify its reading of Article XVI:4. The EC asserts that allowing claims based on the enforcement of adopted panel reports would serve to eliminate a "multiplicity of endless litigation".[187] Policy arguments based on speculative concerns about the number of future cases, however, cannot trump the language of the DSU, which establishes the rules for adjudicating individual disputes and dealing with issues of non-compliance in each separate dispute. The EC is free to raise its arguments in the context of the ongoing efforts of Members to amend the DSU, but this Panel must apply the DSU as it currently is written.

162. Furthermore, the EC's argument would transform panel and Appellate Body findings into authoritative interpretations of the covered agreements with effect beyond the particular parties to a particular dispute. But Article IX of the Marrakesh Agreement is explicit - neither a panel nor the Appellate Body has the authority to render interpretations of the covered agreements. Members conferred that authority exclusively upon the Ministerial Conference and the General Council. Accordingly, the EC's proposed interpretation of Article XVI:4 fails on this basis alone.

163. The EC also appears to argue for an expansive reading of Article XVI:4 as a means to deter or sanction breaches of "the duty of *good faith*".[188] However, panels are not tasked with determining, nor are they authorized to determine, whether Members have complied with a public international law principle of "good faith"; rather they must determine whether a Member's measure is consistent with the covered agreements. The covered agreements do not provide for an obligation of "good faith" to be considered in connection with the substantive obligations set forth therein, nor would it be constructive for panels to engage in examining whether a Member's breach resulted from a good faith reading or otherwise.[189] Indeed, the Appellate Body has noted that "[n]othing . . . in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it therefore has not acted in good faith".[190] It is worth noting that the Appellate Body made this statement in the context of *reversing* the panel finding cited by the EC for the proposition that panels may in fact find that a Member has acted in bad faith.

164. Panels are subject to clear and unequivocal limits on their mandate: they may clarify "existing provisions" of covered WTO agreements and may examine the measures at issue in light of

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[186] "Security and predictability" results from the application of the correct interpretive approach set forth in the second sentence of Article 3.2 of the DSU – the "customary rules of interpretation of public international law" – to the provisions of the WTO Agreement. The proper interpretation ensures that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the DSB, do not "add to or diminish the rights and obligations provided in the covered agreements". The EC's reading of Article XVI:4 would be antithetical to the "security and predictability" that a proper interpretation of the covered agreements brings to the world trading system.

[187] EC First Written Submission, para. 129.

[188] EC First Written Submission, para. 130.

[189] The EC later in its submission asserts that Article 3 of the DSU contains an "obligation for WTO Members to engage in procedures in good faith in an effort to resolve dispute [sic]." EC First Written Submission, para. 265. However, the EC is not alleging a breach of this provision of the DSU, nor would there be any basis for it to do so.

[190] *US – Offset Act (Byrd Amendment) (AB)*, para. 298.

the relevant provisions of the covered WTO agreements.[191] The Appellate Body is confined to review "issues of law covered in the panel report and legal interpretations developed by the panel".[192] Nowhere in Appendix 1 to the DSU, which defines the covered agreements for purposes of the DSU, is there listed an international law principle of good faith. Nor does the WTO Agreement distinguish between a breach of an agreement in good faith and a breach in bad faith – in either case it would be a breach of the Agreement and would have the consequences provided in the Agreement. The EC's invocation of the "duty of good faith" cannot justify its expansive reading of Article XVI:4.

VI. CONCLUSION

165. As set forth above, the United States respectfully requests that the Panel grant the US preliminary objections and reject the EC's "as applied" claims regarding assessment proceedings, sunset reviews, and investigations.

[191] *See* DSU, Arts. 3.2, 7.1.
[192] DSU, Art. 17.6.

LIST OF EXHIBITS

US-1 Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 Fed. Reg. 9508 (2 March 2007).

US-2 Communication by the United States of 20 February 2007 (WT/DS322/16).

US-3 Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006.

US-4 Report on the Special Import Measures Act, House of Commons Canada, December 1996, http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/chap4e.html.

US-5 Special Import Measures Act Self-Assessment Guide ("Normal Value - Export Price = Antidumping Duty (or Margin of Dumping"), http://www.cbsa-asfc.gc.ca/sima/self-e.html#12.

ANNEX A-3

RESPONSE TO THE UNITED STATES' REQUEST FOR PRELIMINARY RULINGS BY THE EUROPEAN COMMUNITIES

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TABLE OF CASES

Short Title	Full Case Title and Citation
Argentina – Footwear	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS46/AB/R
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997
Canada - Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS70/AB/R
Canada – Wheat	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
Chile – Agricultural Products (Price Band)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207/AB/R
EC – Bananas III	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification Of Certain Computer Equipment*, WT/DS62,67,68/AB/R/, adopted 22 June 1998
Korea – Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998
Mexico – Definitive Anti-Dumping Measures on Beef and Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, adopted 20 December 2005
Measures – HFCS	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1. Following your fax dated 17 September 2007, the European Communities provides below its reply to the request for preliminary rulings made by the United States. As will be explained below, the European Communities considers that (1) it does not seek to expand the matter in this dispute beyond the measures upon which consultations were held; (2) the matter subject to review by this Panel has been determined precisely in the request for establishment of the Panel; and (3) all measures contained in the Panel request fall within the Panel's terms of reference.

2. In particular, the European Communities submits that the consultations and the request for establishment of the Panel gave the United States adequate notice of the scope of the matters and claims asserted by the European Communities in conformity with Articles 4.4, 4.7, 6.2 and 7.1 of the Dispute Settlement Understanding and Articles 17.3, 17.4 and 17.5 of the *Anti-Dumping Agreement*. Moreover, the measures subject to this dispute were precisely identified in the Panel request in accordance with the requirements of Article 6.2 of the Dispute Settlement Understanding. Finally, all the challenged measures fall within the Panel's terms of reference. Therefore, the European Communities requests the Panel to reject the United States' request for preliminary ruling entirely.

II. ALL MEASURES DESCRIBED IN THE PANEL REQUEST WERE ALREADY IDENTIFIED IN THE CONSULTATION REQUEST

3. The United States argues that the measures contained in the request for consultations relate to 38 specific measures and 2 on-going original proceedings, whereas the Panel request refers to 52 specific measures, *i.e.*, the original 38 measures plus 14 additional allegedly new measures, including 7 final and 3 on-going additional sunset review proceedings, and 3 final and 1 on-going additional administrative review proceedings.[1] The United States reached this conclusion by referring to the anti-dumping proceedings mentioned in the Annexes of the request for consultations and Panel request respectively. In light of this, the United States considers that, since consultations did not take place on these additional 14 specific measures, they should be excluded from the terms of reference of this Panel.

4. As explained below, the European Communities considers that all measures described in the Panel request were already identified in the request for consultations.

A. CONTINUED EXISTENCE AND APPLICATION OF ZEROING AS THE MATTER CONCERNED

5. The European Communities submits that the matter subject to this dispute was clearly stated since the very beginning in the request for consultations. Indeed, the title of this case showed to the United States that the European Communities wanted to consult on the "*continued existence and application of the zeroing methodology*" as the matter concerned.

6. Moreover, the first paragraph of the request for consultations also clearly refers to the application of zeroing as the matter concerned, and then identifies specific anti-dumping proceedings where the United States used this methodology when calculating dumping margins on products imported from the European Communities. In particular, the request for consultations states that:

> "The European Communities request consultations with the United States (…) with regard to the practice and methodologies for calculating dumping margins involving the use of zeroing, and the application of zeroing in certain specified anti-dumping measures."

[1] First Written Submission by the United States, para. 49.

7. Then, the request for consultations describes how the United States applies zeroing in original investigation, administrative review and sunset review proceedings and includes references to anti-dumping proceedings where this methodology was used, resulting in higher duties being in place.

8. Following this logic, section 2 of the request for consultations refers to several matters as subject to discussion:

> "(a) The United States regulations, zeroing methodology, practice, administrative procedures and measures for determining the dumping margin (…)"; (b) The specific anti-dumping administrative reviews listed in Annex I to the present request, and any assessment instructions issued pursuant to them in which the United States applied the regulations, zeroing methodology, practice, administrative procedures and measures described under point 1(a) above (…); (c) The specific dumping determination in the original investigations listed in Annex III to the present request, and any automatic assessment instructions issued pursuant to them, in which the United States applied the zeroing methodology described under point 1(b) above (…); (d) The specific Sunset review determination in the case listed in Annex II to the present request. The United States relied in its determination on dumping margins that were calculated in the original investigation and in administrative reviews using the methodology described under point 1(a) above."

9. The Annexes to the request for consultations identify precisely the measures where the United States applied the contested methodology by providing information on the specific anti-dumping proceedings concerned. In particular, the Annexes mention, *inter alia*, the product and country subject to anti-dumping duties in the United States.

10. The request for establishment of the Panel follows a similar structure as the one described above and, thus, does not expand the scope of the matter subject to consultations. The title still refers to the "continued existence and application of zeroing methodology". Likewise, the scope of the Panel request states that:

> "The European Communities hereby requests that a panel be established by DSB (…) with regard to an "as such" measure or measures providing for the practice or methodologies for calculating dumping margins involving the use of zeroing, and the application of zeroing in certain specified anti-dumping measures maintained by the United States."

11. Since the WTO inconsistency of the zeroing methodology had already been established in previous cases, the Panel request notes that "*the European Communities does not ask the Panel to rule on the WTO inconsistency of this practice*". However, the European Communities described the matter as follows:

> "The United States uses this practice or methodology in calculating dumping amounts or dumping margins, and in setting and collecting anti-dumping duties. The level of such anti-dumping duties is set in original proceedings, revised in administrative review proceedings or changed circumstances proceedings, and the need for the continued application of anti-dumping duties is decided in sunset review proceedings. In the latter DOC may determine that dumping is likely to continue or recur if the anti-dumping order were revoked, notably because dumping has continued at levels above *de minimis* after the issuance of the order. To find that dumping has continued after the issuance of the order, DOC relies on dumping margins calculated in the original proceeding and in administrative review proceedings using zeroing. The EC has identified in the annex to this request a

> number of anti-dumping orders where duties are set and/or maintained on the basis of the above-mentioned zeroing practice or methodology with the result that duties are paid by importers either in excess of the dumping margin which would have been calculated using a WTO consistent methodology or are paid when no such duty would have resulted from the use of a WTO-consistent methodology."

12. In other words, as it was the case in the request for consultations, the European Communities still refers to the use of zeroing by the United States in several anti-dumping proceedings as the subject matter of this dispute. Then, when describing the measures at issue, the Panel request refers to:

> "The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure).
>
> In addition to these measures, the administrative reviews, or, as the case may be, original proceedings or changed circumstances or sunset review proceedings listed in the Annex (numbered 1 to 52) with the specific anti-dumping orders and are also considered by the EC to be measures subject to the current request for establishment of the panel in addition to the anti-dumping orders.
>
> This includes the determinations in relation to all companies and includes any assessment instructions, whether automatic or otherwise, issued at any time pursuant to any of the measures listed in the Annex."

13. Again, the Panel request mentions the continued application of anti-dumping duties at a level in excess of the anti-dumping margin which would result from the correct application of the *Anti-Dumping Agreement*, *i.e.*, without zeroing. Then, the Panel request includes in its Annex 18 measures, derived from 18 original anti-dumping orders, including 52 anti-dumping proceedings, *i.e.*, 4 original proceedings, 37 administrative review proceedings and 11 sunset review proceedings. As was the case in the request for consultations, those 18 measures are described by reference to the product concerned originating from a particular country.

14. As can be seen, both the request for consultations and the Panel request describe the matter concerned in a similar manner. Therefore, due process has been respected since the United States obtained adequate notice of the scope of the matter and claims asserted by the European Communities.[2]

B. SPECIFIC MEASURES NOT INCLUDED IN THE REQUEST FOR CONSULTATIONS ARE ALSO COVERED

15. The United States points out in its First Written Submission that the Panel request contains 14 additional measures which were not raised during consultations, including 10 sunset review proceedings and 4 administrative review proceedings.[3]

16. Even if some of the specific anti-dumping proceedings which were listed in the request for the establishment of a Panel were not included expressly in the Annexes to the request for consultations,

[2] Panel Report, *Canada – Aircraft*, (WT/DS70/R), paras 9.12-9.31; Panel Report, *Korea – Vessels* (WT/DS273/R), at para. 9; and Appellate Body Report, *US – Zeroing (Japan)* (WT/DS322/AB/R), paras 89-95.

[3] First Written Submission by the United States, para. 61.

the European Communities submits that those measures were also covered and that the United States had enough notice of the matter subject to dispute.

17. The European Communities argues that, according to the relevant case-law on Articles 4 and 6 of the Dispute Settlement Understanding, there is no need that the specific measures that are the subject of the request for consultations and those which are the subject of the Panel request be identical, as long as they involve essentially the same matter, *i.e.*, the application of zeroing methodologies when calculating the dumping margins in the specific anti-dumping proceedings with respect to a particular product originating from one specific country.

18. In *Brazil – Aircraft*, on appeal, Brazil argued that the Panel erred in finding that certain regulatory instruments relating to PROEX referred to in the Panel request were properly before the Panel. Specifically, Brazil claimed that because those instruments came into effect in 1997 and 1998, after consultations were held between Canada and Brazil, they had not been the subject of consultations and, therefore, could not properly be before the Panel. The Panel had ruled as follows on this issue:[4]

> "(…) [W]e recall that Brazil and Canada consulted 'regarding certain export subsidies granted under the Brazilian *Programa de Financiamento ás Exportações* (PROEX) to foreign purchasers of Brazil's EMBRAER aircraft', and that the request for establishment of a Panel relates to 'export subsidies under PROEX'. ***We consider that the consultations and request for establishment relate to what is fundamentally the same 'dispute', because they involve essentially the same practice***, *i.e.*, the payment of export subsidies under PROEX. Under these circumstances, and notwithstanding the fact that both the authorizing legal instrument and certain other legal instruments relating to the administration of the PROEX interest equalization regime changed or were only introduced subsequent to the last consultations, we cannot say that Canada has failed to comply with the requirements of Article 4.7 of the DSU" (*emphasis added*).

19. The Appellate Body upheld the Panel's finding. In doing so, the Appellate Body said that:[5]

> "We note that Brazil and Canada consulted about 'certain export subsidies granted under the Brazilian *Programa de Financiamento às Exportações* (PROEX) to foreign purchasers of Brazil's Embraer aircraft', and that the request for the establishment of a Panel also relates to 'the payment of export subsidies through interest rate equalization and export financing programmes under PROEX'. We have been advised by Brazil that the regulatory instruments that came into effect in 1997 and 1998, after the consultations had taken place, and that relate to the administration of PROEX, did not change the essence of that regime.
>
> In our view, Articles 4 and 6 of the DSU, as well as paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a Panel. Under Article 4.3 of the *SCM Agreement*, moreover, the purpose of consultations is 'to clarify the facts of the situation and to arrive at a mutually agreed solution'.
>
> ***We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific***

[4] Panel Report, *Brazil – Aircraft* (WT/DS46/R), para. 7.11.
[5] Appellate Body Report, *Brazil – Aircraft* (WT/DS46/AB/R), paras 130-132.

> ***measures identified in the request for the establishment of a Panel***. As stated by the Panel, '[o]ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a Panel'. We are confident that the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that were referred to the DSB for the establishment of a Panel. We emphasize that the regulatory instruments that came into effect in 1997 and 1998 did not change the essence of the export subsidies for regional aircraft under PROEX" (*emphasis added*).

20. Similarly, in *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, the Appellate Body emphasised the purpose of consultations in finding that, with respect to the measures at issue, Articles 4 and 6 of the Dispute Settlement Understanding do not "require a precise and exact identity" between the request for consultations and the Panel request, provided that the "essence" of the challenged measures has not changed.[6] Previously, the Panel in the same case had confirmed that:[7]

> "In our view, ***[Articles 4.5 and 4.7 of the DSU and Article 17.4 of the Anti-Dumping Agreement] do not in any way require a complete identity between the scope of the request for consultations and the request for establishment, nor do they, in our view, limit the scope of the request for establishment to the exact scope of the request for consultations***. While we read these provisions to require that Members should attempt to find a mutually agreed solution on the 'matter' in dispute through consultations, this, in our view, only requires that request for consultations relate to the same subject matter as the request for establishment of a panel. In sum, and provided the request for establishment concerns a dispute on which consultations have been requested, there is no need for the matter (*i.e.* the specific measures at issue and the legal basis of the complaint) as identified in the request for establishment to be identical to the matter on which consultations were requested."

21. Therefore, in light of the above case-law, it can be concluded that there is no need for identity between the specific measures that were the subject of the request for consultations and those subject of the Panel request provided that they involve essentially the same matter.

22. In the present case, the 14 allegedly new measures included in the Panel request refer to the same matter raised during consultations, *i.e.*, the use of zeroing when calculating the dumping margins in the specific anti-dumping proceedings with respect to the same products originating from the specific countries listed therein. Consequently, the specific measures not mentioned by the United States would also fall within the matter of this dispute.

23. In any event, it should be added that the inclusion of new measures which amount to an extension or a modification of measures previously mentioned in the request for consultations do not affect the consistency of the panel request with the consultations carried out between the parties. In *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (DS 207)*, in the context of the extension of a safeguard measure not foreseen in the request for consultations, the Panel dealt with this issue as follows:[8]

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[6] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice* (WT/DS295/AB/R), para. 138; and Panel Report, *Canada – Aircraft* (WT/DS70/R), para 9.12.

[7] Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice* (WT/DS295/AB/R), para. 7.41.

[8] Panel Report, *Chile – Agricultural Products (Price Band)* (WT/DS207/R), para. 7.119.

> "[T]he 'extensions' are not distinct measures, but merely continuations in time of the definitive safeguard measures. As a result, we consider that the definitive safeguard measures were not terminated before the request for establishment, but, rather, that their duration was simply extended at that time. Thus, we need not further consider Chile's argument that we lack the authority to make findings in respect of the definitive measures on the grounds that they have expired. ***For the same reason, we also consider the fact that the extension was not mentioned in the request for consultations irrelevant for the determination of our jurisdiction: pursuant to Article 4.4 of the DSU, Argentina had to, and did, identify the definitive safeguard measures in its request for consultations***. The fact that the duration of the identified measures was extended by Chile after the request for consultations cannot affect Argentina's compliance with Article 4.4 of the DSU."

24. In line with this case-law, the European Communities argues that the requirement of consistency between the request for consultations and the Panel request, as established by Articles 4.4 and 6.2 of the Dispute Settlement Understanding, is still met in case where there is no identity between the specific measures that were the subject of the request for consultations and those which are the subject of the Panel request as long as they involve essentially the same matter. In this sense, the extension or modification of the measures mentioned in the Panel request are also covered by the request for consultations.

25. The 14 additional measures mentioned by the United States have a direct relationship with the measures listed in the request for consultations. As mentioned before, the Annexes to the request for consultations identified the measures, *inter alia*, by reference to the product and exporting country subject to anti-dumping duties as a result of the most recent proceeding (*i.e.*, original proceeding, administrative or sunset reviews). The additional measures contained in the Panel request refer to modifications or implementations of the original anti-dumping orders with respect to the same products and countries already discussed in the context of consultations.

26. The request for establishment of the Panel contains some measures which were adopted or initiated after consultations were requested[9], but they refer to the identical products and countries already mentioned in the Annex to the request for consultations.

27. The request for establishment of the Panel also refers to sunset review measures not included in the request for consultation[10] which were very close to the date of request for consultations (they are dated 15 September 2006, where the request was filed on 2 October 2006), or relate to the continuation of measures which were covered by an administrative review mentioned in the request for consultations.

28. Finally, two proceedings[11] listed in the Annex to the request for the establishment of a panel which the United States pretend to be new measures were in fact already listed in the Annex to the request for consultations even if the request for consultations only referred to the preliminary results of these proceedings.

29. Therefore, in light of the above, the European Communities submits that the 14 allegedly new measures mentioned by the United States were covered by the request for consultations since they relate to the same matter, i.e., the use of zeroing when calculating the dumping margins in the specific anti-dumping proceedings with respect to a particular product from a specific country, and have a

[9] Three sunset review proceedings (proceedings No 4, 38 and 47) and four administrative review proceedings (proceedings No 1, 22, 35 and 43).

[10] Proceedings No 9, 14, 19, 26, 29, 32 and 42.

[11] Proceedings No 1 and 22.

direct relationship with the measures mentioned in the Annexes to the request for consultations, since they imply extensions (in the case of sunset reviews), modifications (in administrative reviews) or implementations (*i.e.*, definitive collection in the case of administrative reviews) of the anti-dumping duties consulted upon.

C. CONCLUSIONS

30. From the foregoing, the European Communities submits that both the request for consultations and the Panel request describe the matter concerned in a similar manner. To the extent that the measures covered in the Panel request were based on the same zeroing methodology already targeted in the consultations request and the same anti-dumping proceedings (described by reference to products and countries concerned), this is sufficient to comply with the requirements of Articles 4 and 6 of the Dispute Settlement Understanding and their mirroring provision in Article 17 of the *Anti-Dumping Agreement*. Moreover, since the 14 allegedly new measures had a direct relationship with the measures identified in the Annexes to the request for consultations (by reference to the same products and countries subject to anti-dumping duties), the European Communities consider that all the measures fall within the matter of this dispute.

III. THE PANEL REQUEST IDENTIFIES A CONCRETE NUMBER OF MEASURES

31. The United States argues that the Panel request refers to an indeterminate number of measures that were not specifically identified and, thus, would not fall within the Panel's terms of reference pursuant to Article 6.2 of the Dispute Settlement Understanding.

32. In particular, the United States points out that the Panel request identified as "measures" the following:

> "[T]he continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding."

33. The United States then assumes that this request refers to the most recent of the measures specifically listed for each of the 18 anti-dumping cases in the Annex. However, to the extent that the request does not refer to the most recent identified measure, but to any most recent measure, the United States argues that it refers to an indeterminate number of alleged measures.

34. Finally, the United States notes that, because it did not have opportunity to consult with the European Communities with respect to this indeterminate number of alleged measures, it was unable to seek further clarity regarding the scope and effect of the challenged measures.

35. The European Communities submits that this claim is unfounded. As stated in *Canada – Aircraft*[12], the consistency of a party's request for the establishment of a panel in accordance with Article 6.2 of the Dispute Settlement Understanding should be judged exclusively in light of the specificity of the request for establishment, and not in light of the specificity of the party's earlier request for consultations. The European Communities submits that the Panel request precisely identifies the measures subject to this dispute.

[12] Panel Report, *Canada – Aircraft*, (WT/DS70/R), para. 9.32.

A. THE PANEL REQUEST IDENTIFIES 18 ANTI-DUMPING PROCEEDINGS AS MEASURES

36. The European Communities considers that the Panel request contains a clear list of the measures which fall within the Panel's terms of reference. In particular, its Annex identifies 18 anti-dumping proceedings, by product and country concerned, mentioning the relevant places where the measures were published in the United States, and the duty rates imposed. The identification of the original anti-dumping order imposing duties on the product from the country concerned is thus followed by all instances where the measures at hand, *i.e.*, the duties imposed on the basis of zeroing methodologies, have been modified. In this respect, when the Panel request refers to the continued application of duties determined using zeroing methodologies as a result of the original anti-dumping orders in the 18 cases contained in the Annex, the measures subject to the Panel's terms of reference are properly defined.

37. The fact that the Panel request does not enumerate the last modification of the duties with respect to the 18 anti-dumping proceedings as published in the United States is irrelevant insofar as the measures have been determined by reference to the products, countries concerned, and duty levels. In this sense, the Panel in *Argentina – Footwear* found that it is the identification of the measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for the purposes of Article 6.2 of the Dispute Settlement Understanding:[13]

> "[W]e consider that the EC's request primarily and unambiguously identifies the provisional and definitive measures (rather than only the cited resolutions and promulgations as such). In our view, it is the identification of these measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for purposes of Article 6.2 of the DSU. Therefore, we consider that it is ***the provisional and definitive measures in their substance rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference***. In our view, this is consistent with the Appellate Body's findings in the *Guatemala - Cement* case" (*emphasis added*).

38. Likewise, in *Canada – Wheat*[14] the Panel noted that, by its terms, Article 6.2 of the Dispute Settlement Understanding does not require that panel requests explicitly specify measures of general application (*i.e.*, laws and regulations) by name, date of adoption, etc. The Panel found that the fact that the United States had not specified the relevant laws or regulations by name, date of adoption, etc, did not necessarily render the panel request inconsistent with Article 6.2 of the Dispute Settlement Understanding.

39. Thus, the European Communities submits that the measures falling within the Panel's terms of reference were sufficiently identified in the Annex to the Panel request.

B. THE PANEL REQUEST ADEQUATELY INFORMS THE UNITED STATES OF THE CHALLENGED MEASURES

40. Moreover, it cannot be argued that the wording used in the Panel request leaves the United States unaware of the measures which are subject to this dispute. Indeed, the purpose of the specificity requirement in Article 6.2 of the Dispute Settlement Understanding is to guarantee the

[13] Panel Report, *Argentina – Footwear*, (WT/DS121/R), para. 8.40.
[14] Panel Report, *Canada – Wheat*, (WT/DS276/R), para. 19.

rights of the parties to a due process. In this sense, the Appellate Body in *EC – Computer Equipment*[15] noted that:

> "We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities in the course of the panel proceedings. ***As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel***" (*emphasis added*).

41. Similarly, the Panel in *Canada – Wheat*[16] found that:

> "whether sufficient information is provided on the face of the panel request will depend, as noted above, on whether the information provided serves the purposes of Article 6.2, and in particular its due process objective, as well as the specific circumstances of each case, including the type of measure that is at issue."

42. In this respect, the European Communities argues that the United States has failed to show that the Panel request is so flawed that the defending party's rights of defence are prejudiced, and maintains that the United States cannot demonstrate that any imperfections in the Panel's request for establishment rise to this level.

C. SUBSEQUENT MEASURES ADOPTED BY THE UNITED STATES WITH RESPECT TO THE 18 MEASURES INCLUDED IN THE PANEL REQUEST ALSO FALL WITHIN THE PANEL'S TERMS OF REFERENCE

43. Finally, the European Communities notes that subsequent measures, subsidiary or closely related to the specified measures, have been accepted as proper identification of the measures falling within the Panel's terms of reference in accordance with Article 6.2 of the Dispute Settlement Understanding.

44. The Panel in *EC – Bananas III* found that the object and purpose of the specificity requirement of Article 6.2 of the Dispute Settlement Understanding is to ensure the clarity of panels' terms of reference, which pursuant to Article 7 of the Dispute Settlement Understanding are typically determined by the panel request, and to inform the respondent and potential third parties of the scope of the complaining party's claims (*i.e.*, the "measures" challenged and the WTO provisions invoked by the complaining party).[17] As long as Article 6.2 is interpreted to require any measure challenged to be specified in the panel request or to be subsidiary or closely related to the specified measures, the object and purpose of Article 6.2 are satisfied.[18]

45. In *EC – Bananas III*, the "basic EC regulation at issue" was identified in the request for establishment of the Panel. In addition, the request referred in general terms to "subsequent EC legislation, regulations and administrative measures (...) which implement, supplement and amend [the EC banana] regime". The Panel found that for purposes of Article 6.2 this reference was sufficient to cover all European Communities legislation dealing with the importation, sale and

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[15] Appellate Body Report, *EC – Computer Equipment* (WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R), para. 70.

[16] Panel Report, *Canada – Wheat*, (WT/DS276/R), para. 20.

[17] Panel Report, *EC –Bananas III*, (WT/DS27/R), para. 7.35; Appellate Body Report, *EC – Bananas III*, (WT/DS27/AB/R), para. 142; Appellate Body Report, *Brazil – Desiccated Coconut* (WT/DS22/AB/R), para. 22.

[18] Panel Report, *Japan – Film* (WT/DS44/R), para. 10.9.

distribution of bananas because the measures that the complainants were contesting were "adequately identified", even though they were not explicitly listed.[19] The Appellate Body agreed that the panel request contained sufficient identification of the measures at issue to fulfil the requirements of Article 6.2 of the Dispute Settlement Understanding.[20]

46. Implementing measures which are not expressly mentioned in the Panel request also fall within the Panel's terms of reference. In *Argentina – Footwear*, the Panel noted that:[21]

> "We further recall that the *Japan – Film* Panel considered certain measures which had not been listed in the Panel request to be within its terms of reference because they were 'implementing measures' based on a basic framework law, specifically identified in the Panel request, which specified the form and circumscribed the possible content and scope of such implementing measures. ***From this we infer that a legal act not explicitly listed in a Panel request but which has a direct relationship to a measure that is specifically described therein, can be said to be sufficiently identified to satisfy the requirements of Article 6.2***. In this respect, we agree with the *Japan – Film* Panel's statement that the requirements of Article 6.2 could be met in the case of a legal act that is subsidiary to or so closely related to a measure specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party" (*emphasis added*).

47. Therefore, any subsequent measure, in other words, any anti-dumping proceeding, modifying the duty levels established in the Panel request with respect to the original anti-dumping orders mentioned in the Annex would be closely related to the measures identified therein and, thus, would fall under the Panel's terms of reference in accordance with Article 6.2 of the Dispute Settlement Understanding. In this respect, the European Communities considers that the Panel request identifies precisely the measures which are covered in this dispute.

D. CONCLUSIONS

48. From the foregoing, the European Communities submits that the United States' claim is unfounded since the Panel request identifies the specific measures subject to this dispute, including any subsequent modification of the measures (*i.e.*, the duty levels) described therein with respect to the products and countries concerned.

IV. THE PRELIMINARY DETERMINATIONS INCLUDED IN THE PANEL REQUEST FALL WITHIN THE TERMS OF REFERENCE

49. The United States argues that four of the 14 allegedly new measures were preliminary results from on-going proceedings in which no final determination had been made at the time of the Panel request. For this additional reason, the United States considers that these four on-going proceedings are not within the Panel's terms of reference, since Article 17.4 of the *Anti-Dumping Agreement* does not permit for the establishment of a Panel to review proceedings that are not final.[22]

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[19] Panel Report, *EC – Bananas III*, (WT/DS27/R), para. 7.27.
[20] Appellate Body Report, *EC – Bananas III*, para. 140.
[21] Panel Report, *Argentina – Footwear*, para. 8.35.
[22] First Written Submission by the United States, para. 72.

A. PRELIMINARY DETERMINATIONS ARE SUBSEQUENT MEASURES INCLUDED IN THE PANEL REQUEST

50. The European Communities submits that this argument should be rejected. As explained before, the Panel request describes as the matter concerned the continued application of specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in its Annex "as calculated or maintained in place pursuant to the most recent [anti-dumping proceedings]". In other words, it comprises any subsequent measure adopted by the United States, including preliminary determinations setting out the duty levels (wrongly calculated by applying zeroing) and insofar as those duties are still in place.

51. As mentioned before, subsequent measures adopted by the United States with respect to the anti-dumping proceedings contained in the Annex to the Panel request fall within the Panel's terms of reference. In order to avoid repetition, the European Communities refer this Panel to the arguments mentioned in Section II.C above.

52. Therefore, the European Communities considers that any act or decision taken by the United States with respect to the duties in place, even if it is not final, is covered by the Panel's terms of reference.

B. THE PRELIMINARY DETERMINATIONS ARE RELATED TO THE ANTI-DUMPING PROCEEDINGS FALLING WITHIN THE TERMS OF REFERENCE

53. In addition, the European Communities note that challenges to administrative decisions in anti-dumping proceedings (even if they are not final in the sense that duties have not been imposed), which are related to the imposition of duties have been admitted in previous cases. For instance, in *Mexico – HCFS*,[23] the Panel noted the following:

> "A claim regarding the period for which a provisional measure was applied does not, at first glance, constitute a challenge to the definitive anti-dumping duty in this dispute. However, we consider that the United States' claim under Article 7.4 of the AD Agreement is nevertheless ***related to*** Mexico's definitive anti-dumping duty. In this regard, we recall that, under Article 10 of the AD Agreement, a provisional measure represents a basis under which a Member may, if the requisite conditions are met, levy anti-dumping duties retroactively. At the same time, a Member may not, except in the circumstances provided for in Article 10.6 of the AD Agreement, retroactively levy a definitive anti-dumping duty for a period during which provisional measures were not applied. Consequently, because the period of time for which a provisional measure is applied is generally determinative of the period for which a definitive anti-dumping duty may be levied retroactively, we consider that a claim regarding the duration of a provisional measure relates to the definitive anti-dumping duty.
>
> (…) In our view, it would be incorrect to interpret Article 17.4 of the AD Agreement in a manner which would leave Members without any possibility to pursue dispute settlement in respect of a claim alleging a violation of a requirement of the AD Agreement" (*emphasis added*).

54. The four on-going proceedings contained in the Panel request refer to one administrative review[24] and three sunset reviews.[25] In all cases, as shown in the European Communities' First

[23] Panel Report, *Mexico – HCFS*, (WT/DS132/R), paras 7.53-7.54.
[24] Proceeding No. 35.
[25] Proceedings No. 4, 38 and 47.

Written Submission, a final determination by the USDOC has been issued where dumping margins have been calculated by applying zeroing. In this respect, the European Communities is challenging the duties already in place with respect to three cases[26] and any administrative step leading to the modification or collection of the duty level with respect to the measures identified in the Panel request. The preliminary determinations carried out by the USDOC have an impact in the final duty level which may result from the latest proceeding and, thus, fall within the Panel's terms of reference.

C. CONCLUSIONS

55. From the foregoing, the European Communities submits that the United States' claim is unfounded since the preliminary determinations identified in the Panel request are related to the anti-dumping proceedings enumerated in its Annex and, therefore, fall within the Panel's terms of reference.

V. FINAL REMARKS

56. In light of the above, the European Communities submits that the United States' request for a preliminary ruling should be rejected entirely.

57. Firstly, the European Communities considers that the request for consultations and the request for establishment of the Panel gave the United States adequate notice of the scope of the matters asserted by the European Communities in conformity with Articles 4.4, 4.7, 6.2 and 7.1 of the Dispute Settlement Understanding and Articles 17.3, 17.4 and 17.5 of the *Anti-Dumping Agreement*. In any event, the United States has not proven how the description of the measures contained therein has affected its rights to a due process.

58. Secondly, the measures subject to this dispute were precisely identified in the Panel request in accordance with the requirements of Article 6.2 of the Dispute Settlement Understanding. Contrary to what the United States argues, the Panel request clearly identifies 18 anti-dumping proceedings, by reference to products and countries concerned, where duties are in place at a level higher than it should be, since the United States applied zeroing when calculating the dumping margins.

59. Finally, all the challenged measures, including the preliminary determinations by the USDOC fall within the Panel's terms of reference.

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[26] Proceedings No. 35 and 38 relate to anti-dumping proceedings with respect to the same product and country concerned.