ANNEX D

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

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ANNEX D-1

OPENING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, Members of the Panel:

1. On behalf of the United States delegation, I would like to thank you for agreeing to serve on the Panel. We do not intend to offer a lengthy statement, as our first written submission responds thoroughly to the substantive arguments that the European Communities ("EC") raised in its first written submission.

2. As an initial matter, the United States would like to thank the Panel for agreeing to open the Panel's meetings to the public, including opening the third party session for those third parties willing to make their statements public. The Panel properly recognized that under the Dispute Settlement Understanding ("DSU") it has the authority to modify the working procedures and to organize open sessions. Opening this meeting to the public will have a positive impact on the perception of the WTO dispute settlement system, particularly with respect to transparency. This dispute has a substantial public interest. Permitting the public to observe proceedings and be able to see first-hand the professional, impartial, and objective manner in which they are conducted can only further enhance the credibility of the WTO.

3. Today in our statement we would like to focus on a few points concerning the EC's argument. First, we will offer some comments on the applicable standard of review and the EC's argument concerning Article XVI:4 of the WTO Agreement. Second, we will briefly discuss the proper scope of this dispute and the US requests for preliminary rulings. Third, we will refute the EC's claim that the text of the Antidumping Agreement establishes an obligation to provide an offset for non-dumped transactions in assessment proceedings.

Standard of Review

4. Article 11 of the DSU generally defines a panel's task in reviewing the consistency with the covered agreements of measures taken by a Member. In a dispute involving the Antidumping Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) with respect to various permissible interpretations of a provision of the Antidumping Agreement.

5. The question under Article 17.6(ii) is whether an investigating authority's action rests upon a permissible interpretation of the Antidumping Agreement. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation". Where that is the case, and where the investigating authority's action rests upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.[1]

6. Under DSU Article 11, this Panel is charged with making an objective assessment of the matter before it, including an objective assessment of the facts and the conformity of the challenged measures with the relevant covered agreements. However, the EC and certain third parties would like this Panel to neglect its express obligation under Article 11 of the DSU to conduct an objective assessment.

[1] *See Argentina – Poultry*, para. 7.341 and n. 223.

7. Instead, those Members urge the Panel to follow prior Appellate Body findings in order to ensure the "security and predictability" referred to in Article 3.2 of the DSU. However, Article 3.2 does not impose on panels an obligation to create security and predictability. Rather, Article 3.2 explains that the dispute settlement system is a central element in providing security and predictability to the multilateral trading system. That only occurs, however, when panels and the Appellate Body comply with the provisions of Articles 3.2 and 19.2 of the DSU – that is, when they do not create rights and obligations to which the Members did not agree.

8. The EC's approach would result in undermining the very security and predictability to which the EC pays lip service. For the EC, it would be enough for a panel to rely uncritically upon a prior Appellate Body report. The EC, in essence, would like this Panel to rubber-stamp those reports favourable to its position. Fortunately for the dispute settlement system, panels and the Appellate Body have refused to embrace the approach urged by the EC.

9. Two panels have expressly rejected allegations that they were bound by Appellate Body conclusions, most recently in *US – Zeroing (Mexico)*. That panel, like the *US – Zeroing (Japan)* panel, was not convinced. According to the *US – Zeroing (Mexico)* panel, in light of its "obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB", the panel "felt compelled to depart from the Appellate Body's previous approach" to claims against so-called "zeroing" in administrative reviews.[2] Similarly, the panel in the dispute *United States – Anti-dumping Measure on Shrimp from Ecuador* re-affirmed the need for a panel to take seriously its obligations under DSU Article 11 to conduct an objective assessment and to hold a complaining party to its burden of proof even where the responding party did not contest the complaining party's claims. And it is ironic that while the EC urges the Panel to treat past Appellate Body reports as being definitive interpretations of the covered agreements, the EC ignores the very findings of the Appellate Body on the issue of the effect to be given to prior Appellate Body reports. In *Japan – Taxes on Alcoholic Beverages*, the Appellate Body explained:

> We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. . . . Article IX:2 of the *WTO Agreement* provides: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Article IX:2 provides further that such decisions "shall be taken by a three-fourths majority of the Members". The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.[3]

10. This Panel likewise is charged with undertaking an objective assessment of the matter before it, applying the proper customary rules of interpretation, and cannot make findings or recommendations that add to or diminish the rights and obligations in the covered agreements.

Article XVI:4 of the WTO Agreement

11. Turning to Article XVI:4 of the WTO Agreement, the EC's interpretation of that provision, if adopted, would improperly add to or diminish the rights and obligations of Members. The EC argues that "the findings of the Appellate Body as adopted by the DSB in specific disputes create an independent international obligation for the losing party in that dispute to comply".[4] Because the

[2] *US – Zeroing (Mexico)*, para. 7.106.
[3] *Japan – Alcoholic Beverages (AB)*, p. 13.
[4] EC First Written Submission, para. 128.

DSB has adopted Appellate Body reports holding zeroing inconsistent with provisions of the covered agreements, the EC asserts that the United States is under a continuing obligation to comply, has not yet done so, and has therefore acted inconsistently with Article XVI:4.

12. The EC's expansive interpretation of Article XVI:4 should be rejected. The idea of a continuing "independent international obligation" arising from adopted reports cannot be reconciled with the text of the DSU, nor with the fact that Appellate Body and panel reports are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, no report can create any "obligation" independent of the covered agreements – Articles 3.2 and 19.2 of the DSU are explicit on this fact, and the EC approach is directly contrary to the very text to which the EC has agreed. In light of Articles 3.2 and 19.2 of the DSU – which prohibit panels and the Appellate Body from adding to the obligations of Members – and the specific provisions of the DSU on compliance, including Article 21.5, the EC's proposed interpretation of the text of Article XVI:4 is entirely inconsistent with the covered agreements and the rules of treaty interpretation as reflected in the Vienna Convention.

Scope of this Dispute

(a) The EC Requested Establishment of the Panel on Measures not Included in its Request for Consultations

13. The United States has asked the Panel to make preliminary rulings as well on the EC's attempt to expand improperly the scope of this proceeding. Today we will briefly discuss our three preliminary objections and respond to a few points that the EC raised in its submission of October 5.

14. The United States first requests a preliminary ruling that the measures appearing in the EC's panel request, but not in its request for consultations, are outside of the Panel's terms of reference. More specifically, the EC's panel request added 10 sunset reviews and 4 administrative reviews to the 38 specific measures originally listed in its request for consultations. The EC also added a new request concerning the "continued application of, or the application of, the specific antidumping duties" resulting from the antidumping orders in 18 cases, as calculated or maintained in place pursuant to the most recent administrative review, original proceeding, or changed circumstances or sunset review proceeding.

15. Under DSU Article 7.1, a panel's terms of reference are determined by the complaining party's request for the establishment of a panel. In turn, DSU Article 6.2 provides that a panel request must "identify *the specific measures at issue*" in a dispute. Under DSU Article 4.7, however, a Member may not request the establishment of a panel with regard to any measure, but only with respect to a measure that was subject to consultations. Finally, DSU Article 4.4 requires that the request for consultations state the reasons for the request, "including identification of *the measures at issue* and an indication of the legal basis for the complaint". As the United States explained in its first written submission, the Antidumping Agreement contains parallel requirements in Articles 17.3-17.5.

16. The covered agreements thus establish a clear progression from the measures contained in the consultations request to the measures identified in the panel request, upon which a panel's terms of reference are based. As the Appellate Body explained in *Brazil – Aircraft*, "Articles 4 and 6 of the DSU . . . set forth a process by which the complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[5] Under the relevant provisions in the DSU and Antidumping Agreement just discussed, a panel's terms of reference cannot include measures which were outside the request for consultations.

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

17. The EC's panel request contained measures that are not found in its request for consultations. None of the new measures can properly fall within this Panel's terms of reference. Moreover, permitting the EC's panel request with respect to these measures would have a detrimental effect on the WTO dispute settlement system. If a party could simply add new measures after consultations, the very purpose of consultations, and their practical utility, would be severely undermined. The parties would never have had the opportunity through consultations to resolve their differences, contradicting the very notion of "prompt settlement" of disputes under Article 3.3 of the DSU. Such an outcome would also detract from the goal in DSU Article 4.1 "to strengthen and improve the effectiveness of the consultation procedures employed by Members".

18. Responding to the United States' preliminary objections, the EC has created various legal standards in an effort to convince the Panel to accept the new measures contained in its panel request. However, it is irrelevant whether the new measures have a "direct relationship" with the measures in the consultations request.[6] Nor has the Appellate Body articulated a test that new measures involving "essentially the same matter" may be included in the panel's terms of reference when they were not included in the consultation request.[7] Instead, this Panel should be guided by the DSU – a panel's terms of reference cannot include measures that were not the subject of a request for consultations. And, in *US – Certain EC Products*, the Appellate Body agreed that the scope of measures subject to referral to the DSB is delineated by the consultations request, and, absent a request for consultations, a new, legally distinct measure may not be placed before a panel in the request for establishment.[8]

(b) The EC Failed to Meet the Specificity Requirement of DSU Article 6.2

19. The United States also asks that the Panel find that the EC's reference in its panel request to the continued application, or application of antidumping duties in 18 enumerated cases does not meet the specificity requirement of DSU Article 6.2. The EC affirmed the open-ended, indeterminate nature of these alleged measures when it stated in its October 5 response that the EC's panel request pertained to all "subsequent measures" adopted by the United States with respect to the 18 measures included in its panel request.[9] In effect, the EC is asking this Panel to take jurisdiction over determinations that the United States has not yet made.

20. Under DSU Article 6.2, a panel request must "identify the *specific measures* at issue" in the dispute. The specificity requirement is important for two reasons.[10] First, it ensures the clarity of the panel's terms of reference, which, pursuant to DSU Article 7, are typically determined by the panel request. Second, it informs the responding party and other Members of the nature of the complainant's case (i.e., the "measures" challenged and the WTO provisions invoked by the complaining party). For other Members, this could often mean the difference between deciding to participate as a third party or not.

21. The EC's imprecise reference to "most recent" measures, and its admitted inclusion of "subsequent measures", related to 18 separate orders, is anything but specific. Each determination that sets the margin of dumping for a defined period of time (for example, the period of an administrative review) is distinct and separate, and under DSU Article 6.2, the EC must identify specifically each measure in its panel request. Instead, the EC is impermissibly attempting to include determinations beyond those explicitly listed in its panel request. Because of the EC's lack of specificity, the United States is unable to determine when these determinations were or will be made, what calculations they did or will include, what duty rates they have established or will establish, and what individual companies they did or will cover.

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[6] EC Response to Request for Preliminary Rulings, para. 25.
[7] EC Response to Request for Preliminary Ruling, para. 24.
[8] *US – Certain EC Products (AB)*, para. 82.
[9] EC Response to Request for Preliminary Rulings, para. 47.
[10] *Japan – Film (Panel)*, para. 10.9.

22. The EC cites various Appellate Body and panel reports in an effort to convince the Panel that the "subsequent measures" are somehow identified "precisely" in its request for establishment. However, the reports cited by the EC are inapposite. They involve disputes, such as *EC – Bananas III* and *Japan – Film*, where a law of general application was identified in a panel request, and subsequent implementing regulations were considered to fall within a panel's terms of reference. Here, the EC is not challenging a framework law and subsequent implementing regulations. Each original investigation, administrative review, and sunset review results in a distinct final determination which constitutes an action taken by the United States. In other words, a measure which must be identified precisely in the panel request.

(c) The EC's Request Included Measures That were not Final at the Time of its Panel Request

23. Additionally, the United States asks that the Panel exclude from its consideration four "measures" in the EC panel request because they are preliminary determinations. Under Antidumping Agreement Article 17.4, a matter may only be referred to a panel if "final action has been taken by the administrating authority". The EC, however, identifies three on-going sunset reviews, and one on-going administrative review in its request for establishment of a panel. In these four proceedings, the United States has not taken "final action", and therefore, under the Antidumping Agreement, these proceedings have not yet resulted in any measure that can form part of this Panel's terms of reference.

24. The EC asserts that the on-going proceedings are part of their catch-all reference to "subsequent measures" related to the 18 antidumping duty orders and that they therefore are properly included in the Panel's terms of reference. Aside from the flaws related to the EC's "subsequent measure" argument, the EC neglects altogether the plain language of Article 17.4 that governs here. The four on-going proceedings cannot properly be before this Panel**,** and terming them "subsequent measures" does not change this fact.

The Alleged Obligation to Provide Offsets

25. We now turn to the EC's argument that the Antidumping Agreement contains an obligation to provide offsets for instances of non-dumping in the context of certain identified assessment proceedings. The key here is that the text of the Antidumping Agreement does not impose on Members an obligation to provide an offset for non-dumped transactions in assessment proceedings. The starting point must be the text of the Agreement. It is fundamental that in interpreting a treaty, a panel must not impute into that treaty words and obligations that are not contained in the text. In this dispute, the EC asks this Panel to read an obligation into the Antidumping Agreement. In particular, the EC seeks to impose an obligation to reduce antidumping duties to account for instances of non-dumping in assessment proceedings. The EC does so despite the absence of a textual basis for such an obligation and despite the presence of a permissible interpretation of the Antidumping Agreement that does not require such offsets.

26. In fact, 4 panels addressing this exact issue have consistently found that there is no textual basis supporting an obligation to provide offsets outside the context of average-to-average comparisons in investigations.[11] There is a significant reason for this consistency. The only textual basis that panels have identified for an obligation to provide offsets has been the "all comparable export transactions" language in the text of Article 2.4.2 of the Antidumping Agreement, which relates specifically to average-to-average comparisons in investigations, and is not applicable to any other kind of comparison in any other context.[12]

[11] *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.65, 5.66, 5.77; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284; *US – Zeroing (Mexico)*, paras. 7.118, 7.119, 7.143.

[12] *US – Softwood Lumber Dumping (AB)*, paras. 86-90, 104-05.

27. In urging this Panel to find that the Antidumping Agreement prohibits zeroing in the context of assessment proceedings, the EC cannot rely on text, because no such text exists. Instead, the EC seems to rely most heavily on the Appellate Body's report in *US – Zeroing (Japan)*. We respectfully disagree with the reasoning used by the Appellate Body regarding the WTO-inconsistency of what it referred to as "simple zeroing" in periodic reviews. Every panel that has examined the issue has concluded that zeroing is not prohibited by the Antidumping Agreement in such circumstances.

28. The EC argues that margins of dumping calculated in assessment proceedings must relate to the "product as a whole", and cannot be calculated for individual transactions. The term "product as a whole" is not found anywhere in the Antidumping Agreement, nor does it have a defined meaning; moreover, "product as a whole" is not found anywhere in the Appellate Body report in *US – Zeroing (Japan)*.

29. In attempting to find a basis for its legal theory, the EC refers to the definition of dumping contained in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994. Nothing in either provision supports the argument that a margin of dumping must be calculated for the "product as a whole". Instead, these provisions talk about dumping in terms of a product being introduced into the commerce of another country – an action that occurs through *individual transaction*s. Nowhere does GATT Article VI or Article 2.1 of the Antidumping Agreement refer to the total of all transactions relating to that product over a period of time, let alone explain what would be the applicable period of time.

30. The EC's argument is that injurious dumping that occurs with respect to one transaction is mitigated by another transaction made at a non-dumped price. However, nothing in the Agreement supports that view, nor does commercial reality. To the extent that some transactions introduce merchandise into the market of an importing country at a price above normal value, this is to the benefit of the seller, and does not relieve the domestic industry of the injury caused by other transactions made at less than normal value.

31. Our written submission more fully sets forth the textual and contextual bases, and other evidence that the concepts of dumping and margins of dumping, as defined in the Antidumping Agreement and the GATT 1994, are applicable to individual transactions. It explains that the terms "dumping" and "margins of dumping", as used in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994, do not support the existence of an obligation to provide offsets for instances of non-dumping in assessment proceedings.

32. The EC's arguments concerning Article 9.3 fail for much the same reason. The EC contends that the term "margin of dumping" relates exclusively to the "product as a whole", considered on an exporter-wide basis. Article 9.3 requires that the amount of antidumping duty assessed shall not exceed the margin of dumping. However, the obligation in Article 9.3 may be applied at the level of individual transactions. This understanding of the term "margin of dumping" is particularly appropriate in the context of antidumping duty assessments, where duties are assessed on individual customs entries resulting from individual transactions for which importers are liable for payment. Panels in prior disputes have agreed that there is no reason why a product that is introduced into the commerce of another country cannot refer to a particular export sale.[13]

33. Prior panels have also noted that an obligation to weigh one transaction against another cannot be reconciled with Article 9.4, which recognizes the existence of prospective normal value systems of assessment. Under such systems, liability is determined on the basis of an individual transaction. One import transaction has no effect on the amount of antidumping duty due as a result of other distinct transactions. Reading Article 9.3 as requiring one transaction to offset another would

[13] *US – Zeroing (Japan) (Panel)*, para.7.201; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.53-5.57; *US – Zeroing (EC) (Panel)*, para. 7.204.

require Members that use prospective normal value systems to conduct refund reviews even where every import was properly assessed duties based on a correct comparison of its export price to the appropriate normal value. This would lead to an absurd result: prospective normal value systems would then be indistinguishable from retrospective assessment systems. The United States has been unable to identify a single prospective normal value system that provides for such reviews.

34. It is also important to consider that, if the EC's reading of "margin of dumping" is accepted as the sole permissible interpretation of Article 9.3, the remedy provided under the Antidumping Agreement and the GATT 1994 may be prevented from fully addressing injurious dumping. If authorities have to take into account the export prices paid by all importers importing from the same exporter, the importers with the highest margins would pay less than the true margin of dumping because of the other importers importing at non-dumped prices. Such an approach would favor importers who participate in dumping over other importers (and domestic competitors) that compete fairly.

35. The panel in *US – Zeroing (Mexico)* recognized this dilemma, finding that this "kind of competitive disincentive to engage in fair trade could not have been intended by the drafters", and should not be accepted as consistent with Article 9.3.[14] The fact that some imports are made at non-dumped prices does not change the fact that the domestic industry suffers from dumped imports, and the injury suffered is not mitigated by non-dumped prices. Thus, requiring authorities to use non-dumped imports as an offset to dumped imports precludes the objective of antidumping duties – which is to redress the injurious effects of dumping.

36. Furthermore, adopting the EC's reasoning would cause implications for Article 2.4.2. Any finding that Articles 2.1 and 2.4.2 of the Antidumping Agreement and GATT Article VI contain a general prohibition of zeroing, would render the second sentence of Article 2.4.2, the targeted dumping provision, *inutile*. This is because the targeted dumping methodology provided for in Article 2.4.2 mathematically must yield the same result as the average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. In fact, the EC, a Member that uses the average-to-transaction comparison, addressed this matter before its own tribunal. There, the EC argued that a prohibition of zeroing cannot apply equally to both comparison methodologies because it would lead to the same mathematical result, rendering the average-to-transaction methodology redundant.[15] This fact cannot be ignored or diminished by assuming that the targeted dumping provision permits an authority to ignore any obligation in the Antidumping Agreement other than the obligation to use one of the two symmetrical comparison methods. The panel in *US – Zeroing (Mexico)* agreed that this is a significant concern and one that the Appellate Body in *US – Zeroing (Japan)* had not properly addressed.

37. The EC also contends that zeroing is inconsistent with the "fair comparison" requirement of Article 2.4. However, the EC does not argue that any of the transaction-specific comparisons made by the United States failed to reflect a "fair comparison". Instead, the EC contends that the aggregate amount of antidumping duties assessed exceeded the margin of dumping for the product as a whole. The relevant text of Article 2.4, however, provides only that a "fair comparison shall be made between the export price and the normal value". The text of Article 2.4 does not address whether any particular assessment of antidumping duties exceeds the margin of dumping. This is because the text of Article 2.4 does not address whether "dumping" and "margins of dumping" are concepts that apply to individual transactions. Nor does the text address, for purposes of assessing antidumping duty liability, whether a margin of dumping may be specific to each importer that is liable for payment of

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

[15] US First Written Submission, para. 117, citing Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006, para. 94 (Exhibit US-3).

the antidumping duties. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is "fair" or "unfair".

38. Consequently, resolution of the EC's claim depends not on the text of Article 2.4, but on whether it is permissible to interpret the term "margin of dumping" as used in Article 9.3 as applying to individual transactions. Therefore, if the Panel finds, as the prior panels have found, that it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction, the challenged assessments will not exceed the margin of dumping and there will be no basis for a finding of inconsistency with Article 2.4.

39. The EC, in arguing for a blanket prohibition of zeroing, also relies on an erroneous interpretation of the term "investigation" in Article 2.4.2. It seeks to deny meaning to the phrase "during the investigation phase" by recasting Article 9 assessment proceedings and Article 11 reviews as "investigations". In the EC's view, any proceeding which involves questionnaires, verification, and the possibility of a hearing constitutes an investigation subject to Article 2.4.2.

40. The Antidumping Agreement contains clear distinctions between investigations under Article 5 to determine the existence, degree and effect of dumping and other phases of an antidumping proceeding, such as assessment reviews and sunset reviews. The basic interpretive problem with the EC's analysis is that it reduces language in the Antidumping Agreement to redundancy. Article 2.4.2 provides for the application of certain methodologies to determine the existence of margins of dumping "during the investigation phase". The inclusion of the phrase "during the investigation phase" in Article 2.4.2 was intended to have a limiting effect. Indeed, labeling every dumping calculation exercise to be an investigation would render the phrase "during the investigation phase" without meaning.

41. In summary, the United States respectfully disagrees with the Appellate Body's reasoning that the Antidumping Agreement includes a general prohibition of zeroing, and rejects the EC's assertion that the United States has some type of general obligation under international law to eliminate "zeroing". Instead, the United States agrees with the reasoning of antidumping experts on recent panels, finding that outside the context of average-to-average comparisons in investigations, the Antidumping Agreement does not impose an obligation to provide offsets for non-dumping. At a minimum, we urge this Panel to find that a permissible interpretation of the Antidumping Agreement contains no obligation to provide for an offset to dumping in assessment proceedings.

42. Mr. Chairman, Members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.

ANNEX D-2

OPENING STATEMENT OF THE EUROPEAN COMMUNITIES AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, distinguished Members of the Panel:

1. Thank you for agreeing to serve on this Panel.

2. So here we all are again. Another zeroing case – to be precise 18 further zeroing cases and some 52 further instances of the application of zeroing by the US. No doubt this is not the first time that you may have had occasion to consider the zeroing issue. Certainly it is not the first time that the EC and the US have exchanged arguments on this point – I may say exhaustive – sometimes even exhausting – arguments. So much so that some people have said that there is a certain amount of zeroing fatigue at the WTO – I certainly have the impression that the third party statements are getting shorter – although the real world impact on EC exporters remains as severe as it ever was.

3. But there is one thing about this zeroing hearing that is new. It is *public* – something very much welcomed by the EC – and something that, in a profound sense, goes to the very heart of this case. One could put the question in these terms: who owns the ADA? Who is to tell us what it means? Is its meaning a *private* matter to be settled behind closed doors, according to the will of a few? Or does its meaning rather result from a systematic and objective application – by judges – of the agreed rules of interpretation of *public* international law – that is, the Vienna Convention? To recall, the Vienna Convention refers to: good faith, ordinary meaning, context, object and purpose and (as a supplementary means of interpretation) the preparatory work.

4. Mr. Chairman, I am not sure I have ever seen a WTO Member in such an isolated and entrenched position as that of the US in this case. Leaving aside for a moment the views of those who say this is just belligerent posturing by the US driven by protectionist sentiment, let us ask ourselves the question: what is it that really divides the two sides? After-all, we cannot hope to resolve the dispute if we do not make a supreme effort, with an open mind, to get to the root of this apparent mutual incomprehension.

5. In that spirit, after carefully re-reading many times the US FWS I was finally struck by what is *not* in it: namely any reference to the Vienna Convention. I was further struck by the impression that the US position appears to reflect a strongly held belief that a prohibition on zeroing in assessment proceedings was never "intended" by the US, because of the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 of the ADA. Consequently, in this opening statement, and in a genuine effort to resolve the matter, the EC would (again) like to try and bridge that gap, by bringing the agreed rules of interpretation in the Vienna convention to bear on the phrase in question.

6. Mr. Chairman, as an advocate, I am doomed to advocate. But the story that I would now like to tell you has – I believe – the very great merit of being true – so much so that I think you would be hard pressed to find anyone on either side of the debate who – after cool-headed reflection – would seriously question it.

7. We begin with the observation that the term "zeroing" – which does not appear in the ADA, may be considered something of a misnomer, because it describes only part of the problem: that is, the downward adjustment of the relatively high export transactions; or, in other words, the setting to zero of the negative amounts. The *heart* of the matter, however, is the **selection** of the relatively low

priced export transactions *per se*, as a sub-category, as the only or preponderant basis for the dumping margin calculation. This has nothing to do with "offsets" or "credits".

8. This is not a new problem. It is discussed at length in Jacob Viner's 1923 Memorandum,[1] and was specifically addressed in the Uruguay Round negotiations, during which the Members were fully informed of the issue and knew exactly what they were talking about.[2] After more than 3 years of public negotiations, the problem was nicely summarised by the WTO secretariat:[3] it was generally considered that the practice of comparing a weighted average normal value with individual export transactions was obviously *unfair* to exporters – particularly from *developing* countries – and required amendment of the Tokyo Round AD Code; the US explained that such a method was necessary to reveal *targeted dumping* – that is, successive attacks on different parts of an importing market; the consensus was that the Membership should try to find a solution to accommodate the legitimate concerns of both sides. That *compromise* was the text of Article 2.4.2 of the ADA, as it stands today.

9. Looking at the overall design and architecture of Article 2.4.2, and reading its provisions intelligently, in the light of the underlying *economic* realities that the legal rules are intended to address and respond to – that is, the *real world*, it is clear that *there are only three sub-categories of clustered low priced export transactions that it is permissible to respond to*: those clustered by purchaser, region or time.[4] The Panel will note that these categories broadly correspond to typical market definition parameters: they make *economic* sense.

10. Thus, it is not *permissible*, and it is not *fair*, to pick up low priced export transactions clustered by model. The US has acknowledged as much. This is clear from the term "all" in the first sentence of Article 2.4.2, and the definition of dumping in Article 2.1 of the ADA and Article VI:1 of the GATT 1994 in terms of the product; ***read together with the absence in the targeted dumping provisions of any reference to a sub-category by model***. Thus, the relevant provisions, and particularly the normal rule and the exception, are read *harmoniously*, so as to give meaning – both *legal* and *economic* – to all the treaty terms.

11. In exactly the same way, it is not possible to pick up low priced export transactions *per se* as a sub-category. ***There is no reference to any such sub-category in the provisions on targeted dumping***. To accept such a proposition would be to render the targeted dumping provisions useless; and to negate the compromise, negotiated and agreed by all the WTO Members (in return for other concessions), to which I have just referred. The proof of this is that for some 13 years the US has simply ignored the targeted dumping requirements, content to continue doing exactly what it was doing before, based on its own unilateral interpretation of Article 2.4.2. The further proof of this is that, by its own assertion, the US sought the insertion of the phrase "the existence of margins of dumping during the investigation phase" precisely with the intention of *side-stepping* the compromise and the obligations that I have just outlined. This is an important point – so I hope you will permit me to repeat it. The entire US position is premised on the implied admission that the overall design and architecture of Article 2.4.2 is to be interpreted in the manner advocated by the EC.

12. We turn, therefore, to the phrase "the existence of margins of dumping during the investigation phase", added – *behind closed doors* – after some three and a half years of public

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[1] Jacob Viner, *Memorandum on Dumping*, written for the World Economic Conference of the League of Nations, 1926, Reprinted 1966, discussing dumping in terms of international price discrimination between different markets, and distinguishing between systematic or permanent dumping and sporadic, abnormal or temporary dumping (for example, at paragraphs 2, 5, 6, 9, 11, 12 and 13).

[2] The US agrees (US FWS, paragraph 89). The US is correct that Article VI of the GATT did not change, but ignores the fact that Article 2.4.2 of the ADA was introduced in the Uruguay Round.

[3] MTN.GNG/NG8/15, page 13.

[4] ADA, Article 18.1: "No specific action against dumping … can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement".

negotiations. According to the US, this means that the obligations in Article 2.4.2 do not apply to the re-calculation of dumping margins in assessment proceedings. Rather, the US is to be completely free to choose the methodology to be used for calculating a contemporaneous dumping margin and finally collecting duties. Since the results of the first retrospective assessment proceeding are applied with effect from the date on which duties were first imposed, this would negate *entirely* the compromise enshrined in Article 2.4.2.

13. In the EC's view, assuming Members negotiate in full knowledge of the Vienna Convention, it may reasonably be assumed that they negotiate in good faith, just as they agree that the terms of the ADA are to be interpreted in good faith. In such negotiations, the EC would neither expect nor accept that what is clearly given, after lengthy debate, with one hand (that is, agreement not to use asymmetry absent targeted dumping) would be surreptitiously entirely taken away with the other hand. The US position reflects what might be termed the "last minute" "spanner in the works" theory of international negotiation – a tactic that, in the view of the EC, is hardly suited to a multilateral organisation with 151 Members, including many *developing* countries.

14. However, assuming for the sake of argument, that such negotiation tactics are permissible, ***the EC would like to draw the Panel's very close attention to what a Member forfeits when it adopts such an approach***. First, most obviously, the Member chooses to leave no trace of its intended unilateral interpretation in the *preparatory work*. Second, and in similar vein, the Member chooses not to offer any explanation to its negotiating partners – many of whom are *developing* countries – as to what the *object and purpose* of such a provision might be. This is particularly problematic when the subsequent unilateral interpretation flies in the face of the overall design and architecture of the ADA. Especially when there is no object and purpose capable of explaining why, on the basis of identical data, the mere act of collection should inflate the dumping margin many times over – a proposition that is "manifestly absurd or unreasonable" within the meaning of the Vienna Convention – both in legal terms and in *economic* terms. Third, and in similar vein, the Member chooses to forego any attempt to reconcile conflicting *context* with its intended unilateral interpretation. The Panel will thus note that of the various elements of the interpretive rule in the Vienna Convention, *by the US' own choice*, there is only one that stands between the US and failure: the supposed *ordinary meaning* of the phrase.

15. We believe we have amply demonstrated that the ordinary meaning of the phrase is not that advocated by the US.

16. We believe that, for the US, the term "investigation" was key in its intended unilateral interpretation. In fact, we have an express admission of this in the US Statement of Administrative Action (SAA), which accompanied the adoption of the US Uruguay Round Agreements Act, and which contains the words ("not reviews").[5] Obviously, the drafter of the SAA well appreciated that these words are not contained in Article 2.4.2 of the ADA, and do not result from a proper interpretation of that provision, which is precisely why they were inserted in the SAA ***in an attempt at ex post rationalisation*** – an attempt doomed to fail, as subsequent WTO litigation has demonstrated.

17. The ordinary meaning of the term "investigation" is simply a systematic examination or careful study of a particular subject.[6] When the US asserts that Article 2.4.2 refers to "an investigation to determine the existence, degree and effect of any alleged dumping", within the meaning of Article 5.1 of the ADA, it is the US – not the EC – that is asking the panel to read words

[5] United States Statement of Administrative Action accompanying the adoption of the Uruguay Round Agreements Act (URAA), and providing authoritative guidance for its interpretation (Appellate Body Report, *US - OCTG from Argentina*, paragraph 207). The SAA also confirms that: "the reluctance to use an average-to-average methodology has been based on a concern that such methodology could conceal "targeted dumping"".

[6] This view is supported by the dictionary meanings set out in *The Shorter Oxford English Dictionary, fifth edition (2002).*

into the text of Article 2.4.2 that are not there, and in a manner that is squarely disrespectful of the existing text. Under the ADA there are five types of proceeding (original, newcomer, changed circumstances, sunset and assessment), each of which involves an investigation into something. This is exactly how the term is used in US municipal law.[7] It is also exactly how it has generally been understood in the WTO.[8]

18. Thus, in these proceedings, the US is arguing for the term "investigation" to have a limited[9] or *special meaning*. Under the terms of the Vienna Convention, that is only possible if the US establishes that *all* the *Members* of the WTO so intended.[10] And that is where the US stumbles, precisely because, in pursuing its "last minute" theory of negotiation, the US itself chose to forego any attempt to get its intended special meaning agreed by the other WTO Members – who have since confirmed that they intended no such thing.[11]

19. Although the cause is lost, the US struggles on. It turns first to the term "existence" as somehow unique to original investigations – but this term simply relates to any dumping margin calculation.[12] Next, the US turns to the term "during … phase" – but this simply indicates "a distinct period" in the passage of time[13] – as the EC submits, an investigation period – and the US is simply wrong to assert that there is only one type of "proceeding" with five phases, when there are in fact five types of proceeding, each of which may involve an investigation into something.

20. The discussion could stop here. But there are a *multitude* of other interpretative points against the US. First, the grammatical structure of the phrase, in which the term "during … phase" is grammatically linked to a period of time in which margins exist (an investigation period) as opposed to one in which they are established (as the US would have it). This both confirms the EC interpretation and *precludes* the US interpretation. Second, the defined term "margin of dumping" has the same meaning throughout the ADA, and must inform the meaning of the phrase – there being no support in the text for the view that the definition should change at the moment of final collection. Third, the overall design and architecture of Article 2.4.2, as outlined above. It is particularly

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[7] The US Rules of Practice and Procedure of the International Trade Commission effective 6 July 1998 (63 FR 30599) contain the following provision:

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

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

The US International Trade Commission systematically refers to "Changed Circumstances Investigations" and to "Five-Year Review (Sunset) Investigations".

[8] *World Trade Organization, A Handbook on Anti-Dumping Investigations, Judith Czako, Johann Human and Jorge Miranda, Cambridge University Press, 2003*, page 93, with respect to retrospective assessment proceedings: "The margin would be recalculated by means of an **investigation** much like the original investigation, addressing normal value, export price, and comparing the two, using the data for the POR. This **investigation** could take up to 12 months". (emphasis added).

[9] US FWS, paragraphs 99 and 101.

[10] Vienna Convention, Article 31(4): "A special meaning shall be given to a term if it is established that the parties so intended".

[11] A review of all notifications by WTO Members of their anti-dumping laws implementing the ADA reveals that none has adopted the US interpretation. Furthermore, when questioned on this issue, other WTO Members have confirmed that they did not intend Article 2.4.2 to have the meaning advocated by the US (Appellate Body Report, *US – Zeroing*, paragraph 22).

[12] See particularly the title to Article 2 in the French language version of the ADA.

[13] This view is supported by the dictionary meanings set out in *The Shorter Oxford English Dictionary, fifth edition (2002).* It was advanced by the US itself in DS294.

significant in this respect that the EC position reads the normal rule referring to the *investigation period* in counterpoint to the exceptional rule permitting a response to *time* based targeted dumping. Thus, once again, the EC advances a *harmonious* reading of all the treaty terms, that makes legal and *economic* sense of all of them. Fourth, the numerous references in Article 2 to "investigations", which are considered, even in US municipal law, to refer to all types of investigations, including assessment proceedings. Fifth, the rule in Article 9.3 that the amount assessed cannot exceed the dumping margin – with an express cross-reference to *all* of Article 2. Sixth, the absence of any object and purpose argument capable of supporting the US position. Seventh, the preparatory work, as outlined above … And the list goes on.

21. Finally, the US turns to some other general arguments, equally without merit. First, the so-called "mathematical equivalence" argument,[14] which is obviously vitiated by a simple intellectual error: something can perfectly well be fair as a response to targeted dumping, but unfair absent targeted dumping. Second, the argument derived from Article 9(4)(ii) and the so-called "variable duty" or prospective normal value.[15] This provision concerns sampling, and insofar as it implies the possibility that one of the measures that could be imposed pursuant to Article 9.2 ADA could be a variable duty, it equally implies that any such duty is ultimately subject to final assessment or refund under Article 9.3, with dumping margins re-calculated in accordance with all of the provisions of Article 2. This is completely logical. It plugs the gap that would otherwise arise in the *refund* system under Article 9.3.2, in which final liability cannot, by definition, increase. The only option for Members operating such systems who are fearful of targeted dumping is a variable duty, with refund in the event that the feared targeted dumping does not materialise. The proposition that Article 9(4)(ii) in any way contradicts any of the interpretative points that we have already outlined is thus without merit. Third, the proposition that because, in the US, assessment proceedings are importer driven, this should change the analysis.[16] This practical assertion is without merit. The ADA responds to international price discrimination by *exporters*; and it is a matter of *elementary accounting* to calculate final liabilities for importers, whilst respecting the ceiling fixed by the amount of dumping practiced by an exporter.

22. Mr. Chairman, distinguished Members of the Panel, if *all* of the interpretative elements in the Vienna Convention support the position of the EC, and disprove the position of the US, the US interpretation cannot be said to be "permissible" within the meaning of Article 17.6 of the ADA.

23. Some people say that zeroing poses a "constitutional" challenge for the WTO. Certainly, these Panel proceedings place you at the centre of a lively debate. The EC is confident, however, that ultimately the still quiet voice of legal reason will prevail. What determines the matter is the systematic application of the agreed rules of interpretation of public international law in the Vienna Convention. Not *ex post* expressions of personal will. Human nature being what it is, it is not always easy for people to acknowledge their own error. Your task under Article 11 DSU to reach an objective and independent assessment is, however, clear – and however difficult it may prove to be – the EC is confident you will rise to the challenge.

Thank you for your attention.

[14] US FWS, paragraphs 112 to 118 and 145.
[15] US FWS, paragraph 93, 111 and 125.
[16] US FWS, paragraphs 129 and following.

ANNEX D-3

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, Members of the Panel:

1. On behalf of the United States' delegation, I would once again like to thank you and the members of the Secretariat for your work on this dispute. We appreciated the opportunity to provide you with preliminary thoughts on your questions and look forward to providing you with additional comments in our written responses and our second submission.

2. The United States would like to thank the Panel again for opening this hearing to the public. We note that three third parties took the opportunity to make public statements. WTO Members and the public have had an opportunity to see the Panel's professionalism and impartiality, which can only strengthen the credibility of the WTO dispute settlement system.

3. The issue of the role of Appellate Body reports in WTO dispute settlement has been raised several times over the last two days. To be clear, the United States is not asking the Panel blindly to follow the four panel reports that have not found a general prohibition on zeroing in the Antidumping Agreement, nor have we asked you to ignore Appellate Body reports finding zeroing to be WTO-inconsistent in certain circumstances. What we have asked you to do, and are confident you will do, is to fulfil your function to make an objective assessment of the matter before you and not to add to or diminish the rights and obligations of Members. As part of that, we have asked you to consider whether previous panel reports on this issue are persuasive; we believe they are. We have also asked you to consider whether previous Appellate Body reports on this issue are persuasive; we have explained they are not. The Panel will have to make its own consideration and decision on the relevance of these reports as previous panels confronted with claims against so-called zeroing have done.

4. The United States would like to address one set of the alleged measures that the EC has asked the Panel to consider, and that was the basis for considerable discussion at yesterday's panel meeting – the so-called "application or continued application" of specific antidumping duties in 18 cases as identified in the EC's panel request. The EC's attempt to clarify that set of supposed "measures" has caused even further confusion; the United States would like to shed light on how it believes the Panel should approach the question of whether such "measures" exist and, to the extent they do, whether they fall within the Panel's terms of reference.

5. As we discussed yesterday, the EC's panel request dropped the reference to the so-called "zeroing" methodology that was contained in its consultation request, but added the alleged "measure" of "the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders" in 18 cases listed in its Annex. Moreover, the EC listed the 38 investigation and administrative review final determinations from its consultations request plus an additional 14 administrative reviews and sunset reviews.

6. By virtue of DSU Articles 4 and 6, the additional "measures" contained in the EC's panel request are not properly before the Panel. Under those provisions, a Member must first request consultations on a measure before requesting a panel. It cannot identify the measure for the first time in its panel request. Significantly, in this dispute, the EC's panel request did not "narrow" its consultations request as the EC suggested to us yesterday. Instead, it broadened its panel request inconsistent with the DSU.

7. The "application or continued application" of antidumping duties has been the subject of considerable confusion for the United States. Under Article 6.2 of the DSU, the EC was obligated to identify the specific measures at issue, and the Panel's terms of reference under Article 7.1 of the DSU are limited to those specific measures. Therefore, the only specific measures identified by the EC's panel request must be those applications of duties actually contained in the EC's consultation request. As an initial matter, the EC's request appears to ask the Panel to decide whether it is the "continued application" or the "application" that is at issue. The EC as the complaining party is the one that must decide this in identifying the "measures" that it is challenging.

8. Furthermore, the application or continued application of duties resulting from 18 separate orders maintained in place or calculated pursuant to the "most recent" measure refers to the "most recent" determination identified in the Annex to the panel request for each of the 18 orders and otherwise properly before the Panel. In other words, the "application" of the duties under the 18 orders would be at least 18 different measures, although in referring to the various administrative and sunset reviews and original investigations the EC appears to refer to a large multiple of 18. The "continuing application" is unclear – to the extent that the EC intends to refer to unspecified determinations or the application of duties under an order after the date of the panel request, then the EC panel request fails to conform to Article 6.2 of the DSU. The panel request cannot identify "specific" measures if they are not specified or if they do not exist at the time of identification.

9. Perhaps in recognition of the failings of its panel request, the EC has again tried to rewrite these measures. In its Response to the US Request for Preliminary Rulings, the EC noted that the "most recent" determination also included "any subsequent measure".[1] Under the DSU, "any subsequent measure" could not be a measure subject to dispute settlement if it did not exist as of the time of the Panel's establishment.

10. The reference in the EC's request to unspecified "most recent" proceedings would also appear to reach unspecified past antidumping determinations. To illustrate, with respect to *Ball Bearings from Germany*, which is case III in the EC's Annex to its panel request, the EC identified a number of administrative reviews and a number of particular companies. However, there is also at least one other rate currently in effect – known as the all others rate. It is unclear whether the EC's reference to the "application or continued application" of antidumping duties would include that rate. This is relevant for the US defence and for the Panel's analysis because it would raise distinct legal and factual issues related to this rate that have not otherwise been discussed. At a minimum, the Panel should be aware that the all others rate currently in effect in this case, among others, is the result of the original investigation determination. In this specific case, that determination was made in 1989. There are clearly certain additional legal issues that must be considered if the EC is asserting that the obligations in the Antidumping Agreement apply to dumping margins calculated more than five years before the Agreement's conclusion. Similar or additional issues might arise with respect to the other cases identified by the EC depending on the full breadth of what the EC means by the phrase "application or continued application".

11. Unfortunately, the problems with the EC's approach do not end here. Yesterday, the EC seemed to be saying that the "application and continued application" of antidumping duties resulting from 18 orders was intended to encompass the application of zeroing in the 18 cases listed in the Annex. The EC also claimed that the "application and continued application" was possibly part of some sort of combined "as applied/as such" measure – what Japan recognized this morning to be "a new kind of measure".[2]

[1] EC Response to Request for Preliminary Rulings, para. 47.
[2] Japan Oral Statement, para. 3.

12. The EC's attempted redefinition of this alleged measure cannot be reconciled with its panel request. That document refers to "the continued application of, or the application of the specific anti-dumping duties" in 18 cases. The United States fails to see how that phrase could be interpreted to refer to the application or continued application of "zeroing". This description also lacks specificity. The EC would like to assert now that it included a generalized reference to the application of "zeroing" in 18 broadly-defined cases without identifying the exact determination where it was actually applied, indeed explicitly trying to sweep in determinations that the United States has not even made.

13. The United States asks the Panel to ponder how such a purported measure could in any way be part of an "as such" claim, when it refers to the "application" of something. The EC has stated explicitly that it "has decided not to ask this Panel to rule again on the inconsistency of the United States' zeroing methodology in original investigations and in review investigations 'as such.'"[3] It is unclear whether the EC has again changed its mind.

14. It would appear that what the EC really would like is to have this Panel impose some sort of continuing obligation on the United States to eliminate "zeroing" based on non-binding Appellate Body reports in disputes other than the current dispute. As the United States explained, an obligation to provide offsets in administrative reviews is found nowhere in the covered agreements, and the EC cannot play games with the identification of measures in an effort to accomplish what the WTO agreements have not established.

15. This Panel should reject the "application or continued application" set of measures as outside its terms of reference. The supposed measures were not identified in the consultations request and the EC's request also fails for lack of specificity.

16. Mr. Chairman, members of the Panel, we appreciate this opportunity to present these closing comments and look forward to continuing to work with you on these issues.

[3] EC First Written Submission, para. 2.

ANNEX D-4

CLOSING STATEMENT OF THE EUROPEAN COMMUNITIES AT THE FIRST MEETING OF THE PANEL

1. Mr. Chairman, distinguished Members of the Panel:

2. In this closing statement the EC would briefly like to recall some of the things that have been discussed at this hearing – some of them quite remarkable.

3. In general terms, we have heard the US assert that you do not need to consider the economic aspects of the real world that the legal rules in the ADA were designed to regulate. Nor do you need to consider the overall internal economic logic and consistency of the ADA, and particularly the overall design and architecture of Article 2.4.2. In the words of the US, the ADA is a "flying pig". We disagree. We offer the Panel an interpretation that not only fully respects – indeed we believe is dictated by – the legal rules of interpretation (good faith, ordinary meaning, context, object and purpose and the preparatory work), but which also makes economic sense of all the relevant treaty terms, and respects the overall design and architecture of the provisions in question and the ADA as a whole.

4. We have also heard the US assert that the essential disciplines of the ADA are voluntary when it comes to investigating and re-calculating dumping margins in assessment proceedings – both the substantive disciplines of Article 2 and the procedural disciplines of Article 6. We have further heard the US assert that it is not bound by any methodology at all – but free to do as it wishes when comparing normal value and export price in assessment proceedings – as well as newcomer proceedings. Again, we disagree. The ADA imposes mandatory obligations. The WTO is a single undertaking, and Members are not permitted to enter reservations to any of the obligations established in the covered agreements.

5. We have further heard the US confirm that the only real defence it offers to the EC claims is the meaning of the phrase "the existence of margins of dumping during the investigation phase" – the US does not otherwise seriously question the meaning of the overall design and architecture of Article 2.4.2. And yet, in the same breath, and in an extraordinary U turn, we have heard the US admit that the ordinary meaning of the term "investigation" is not synonymous with the term "an investigation to determine the existence, degree and effect of any alleged dumping". We have also explained why the term "during … phase" does not assist the US. The US has agreed that this term has a temporal connotation, and therefore refers to a "distinct period" – in other words the US has agreed that the terms "during … phase" and "during … period" are, in this context, synonymous. The observation that the term "during … phase" refers to a distinct period of time does not advance in any way the US claim that the term refers to the 18 month period in Article 5.10. On the contrary, the ordinary meaning of the grammatical structure of the phrase compels the conclusion that it refers to a period of time in which margins exist, that is, a data period – an original investigation or review investigation period; and precludes the proposition that it refers to a period of time in which margins are "established" as the US would have it. There is no rule of interpretation of public international law that supports the view that a term should be given a special meaning just because it is "unique" – there are many unique terms in the ADA and their meaning is to be determined by applying the agreed rules of interpretation in the Vienna Convention. Nor is there any rule of interpretation that precludes synonyms – the AB has said this many times, and there are many such synonyms in the ADA. In the EC reading, the normal rule (investigation period) complements the exception (time based targeted dumping), and thus fits with the overall design and architecture of Article 2.4.2 and the ADA as a whole.

6. Mr. Chairman, whatever the intent of the US might or might not have been, is irrelevant. Under the terms of the Vienna Convention, for the US to establish the special meaning it argues for, the US would have to demonstrate that all the Members intended such special meaning – which is manifestly not the case. The US made a mistake. We are sorry about that. But the consequences are for the US to bear, not the rest of the WTO Membership. If the US had taken the trouble to discuss its intentions with the other WTO Members, many things might have been different. The US cannot rely on its own failings in order to unilaterally acquire additional rights under the WTO.

7. Some might say that the US has already achieved everything it desired – on the basis of its unilateral interpretation the US has for some 13 years collected hundreds of millions of dollars in excess anti-dumping duties – not to mention the far greater economic harm that such measures will have caused in terms of lost trade and development, particularly for developing countries. 13 years is a long time – long enough even for a new round of WTO negotiations. Not one cent of this money has ever been repaid and there is no prospect that the US will ever agree to repayment, or remedy the other harm it has inflicted on its fellow Members. All the WTO Members now agree: enough is enough. It is time for the US to stop.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF BRAZIL AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, Distinguished Members of the Panel:

1. Brazil welcomes this opportunity to present its views on some of the issues in this dispute. Brazil is part of the overwhelming majority of the Membership that has been year after year standing for the condemnation of the so-called "zeroing" methodology.

The reiterated condemnation of "zeroing"

2. Almost a decade has passed since "zeroing" was first condemned in *EC – Bed Linen*. From 2000, the year of the first condemnation, to now, 2008, such a methodology was challenged at least seven other times, and "zeroing" *as applied* and *as such* was found to be inconsistent with the Antidumping Agreement. The list of cases is long: *US – Hot Rolled Steel*; *US – Corrosion-Resistant Steel Sunset Review*; *US – Softwood Lumber V; US – OCTG Sunset Review*; *US – Zeroing (EC)*; *US – Antidumping Measure on Shrimp from Ecuador*, and most recently, *US – Zeroing (Japan)*.

3. You may have noticed that in those seven disputes – not to mention the on-going cases – the complained party has been always the same. The number of cases brought against the United States on this issue tells us that, unfortunately and despite the successive rulings against it, the United States continues to resort to the "zeroing" methodology.

4. The language of those rulings is crystal clear, reaffirming the illegality of "zeroing" in all types of investigation. Considering the US reiterated use of "zeroing", one can only conclude that what the United States intends to do is to prolong the life of "zeroing", keeping it in place, until the Membership challenges all the possible forms, use and application of zeroing in all kinds of comparison (W-W, T-T, W-T), in all types of investigation (original, periodic and sunset reviews).

5. The consequences of such a tactic have been disastrous. Deliberately misrepresenting the Agreement on Antidumping, as well as ignoring the findings and conclusions of panels' and Appellate Body's reports, the United States has in practice refused to eliminate the "zeroing" methodology in its investigations, in breach of its WTO obligations.

6. In every new dispute on the issue – and they have been numerous – as listed before, the United States tries to reargue its previous cases, attempting to defend what is undefendable and what has been condemned many times. This dispute is no different.

7. Most of the arguments the United States put forward in the present case were tested before and rejected by panels and the Appellate Body. The United States seems to refuse to recognize this fact.

8. In the following sections I will explain why Brazil considers this panel should not concede the US arguments and why it should reiterate the illegality of the zeroing methodology.

The United States continued refusal to abide by the Agreement on Antidumping and the DSB determinations

9. In a vain attempt to support its particular view of the AD Agreement, the United States rehashes in the present dispute a "pot-pourri" of its best arguments in almost ten years of WTO litigation on "zeroing". It resorts to objections of different nature, from burden of proof to procedural and substantive issues. While Brazil will focus its statement on some of the substantive objections raised by the United States, this approach should not be seen as endorsing the remainder of the US claims.

10. It is undisputed between the parties that zeroing is not permitted under certain circumstances. Even the United States recognizes it.[1] Nonetheless, the central argument of the US defence is that the obligations of Articles 2.1 and 2.4 of the Agreement on Antidumping refer solely to original investigations. According to the United States, for having purposes different from the ones of the original investigation, the periodic and sunset reviews would not be subject to those obligations.[2]

11. For this reason, it seems to be the US argument that the definitions of "product", "margins of dumping" and the obligation of "fair comparison", as provided for in Article 2, would not apply to periodic and sunset reviews.

12. Then, it would follow; the Department of Commerce would be entitled to resort to the "zeroing" methodology in all circumstances other than the original investigation. Brazil strongly disagrees with the United States. This line of argumentation is flawed and should not be accepted by the Panel in the present dispute. In Brazil's opinion, the standards set forth by Article 2, namely, "product", "margins of dumping" and "fair comparison", are at the core of any investigation, be it original, periodic or sunset reviews. This is the very spirit of the Antidumping Agreement, expressly reflected under Article 18.3: "the provisions of this agreement shall apply to investigations and reviews".

13. Let me comment on each of them, beginning with "product". When it comes to the existence of dumping, the Agreement establishes a direct relationship between "dumping and product", rather than "dumping and transaction", as alleged by the United States.[3] Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 clearly set out that "for the purpose of this Agreement, a *product* is considered as being dumped […] if the export price of the *product* […] is less than the comparable price for the like *product* when destined for consumption in the exporting country".

14. One would note *first* that there is no single reference to transaction. Additionally, dumping is characterized in relation to the *product as a whole*. Second, a such definition is applicable to the entire Agreement. This interpretation was confirmed by the Appellate Body in *EC – Bed Linen*, *US – Corrosion-Resistant Steel Sunset Review*; *US – Softwood Lumber V*, *US – Zeroing (EC)*, and, most recently, in *US – Zeroing (Japan)*.

15. Let us take now the second standard, "margin of dumping". Similarly to the concept of dumping, margins of dumping are also defined in relation to the product, rather than transaction. Article VI:2 of the GATT 1994 leaves no doubt about this. The Appellate Body itself failed to see "how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the results of the multiple comparisons for *all*

[1] See United States First Written Submission, paras. 77 and 155.
[2] See United States First Written Submission, para. 108.
[3] See United States First Written Submission, para. 85.

product types".[4] It also affirmed that "the amount of the assessed antidumping duties shall not exceed the margin of dumping as established for the product as a *whole*".[5]

16. As we can see by these decisions and statements, the concept of "margin of dumping" not only encompasses the notion of *product as whole*, but also operates as a *ceiling* to the duties to be imposed.

17. It should be clear for the United States, by now, that the concepts of dumping, margins of dumping and product (considered as a whole) are intertwined. If not, let me recall the Appellate Body's view on this: "it is evident from the design and architecture of the Antidumping Agreement that: (a) the concepts of 'dumping' and 'margins of dumping' pertain to a 'product' […] and (b) 'dumping' and 'dumping margins' must be determined in respect of each known exporter or foreign producer examined. These concepts are interlinked. They do not vary with the methodologies followed for a determination made under the various provisions of the Antidumping Agreement".[6]

18. Now I turn to the third standard, the obligation of "fair comparison" also provided for in Article 2. This is an overarching principle that applies throughout the Agreement, as established by Articles 2.4, 9.3, 18.3 and interpreted by the Appellate Body in *EC – Bed Linen* and subsequently reiterated in *US – Zeroing (EC)*. The Appellate Body explained that 'fair comparison' "is a general obligation that [...] informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'".[7] It also affirmed that "the 'fair comparison' language in the first sentence of Article 2.4 creates an independent obligation, and, secondly, that the scope of this obligation is not exhausted by the general subject matter expressly addressed by paragraph 4 (that is to say, the price comparability)".[8]

19. In zeroing some transactions, the US Department of Commerce is not taking account of the product as a whole; neither is it respecting the ceiling established by the margins of dumping because zeroing results in artificial, higher margins of dumping and makes a positive determination of dumping more likely.[9] It is clear, then, that – by resorting to the zeroing methodology – an investigating authority cannot conduct an unbiased and fair determination of dumping, as required by Article 17.6 (i).

The US arguments

20. Let us address *first* the argument concerning the alleged authorization to apply zeroing in investigations related to targeted dumping. The United States tries to convince this panel that the second sentence in Article 2.4.2 would allow for the application of "zeroing" methodology. It resorts to that second sentence in order to legitimate its zeroing practice in the "average-to-transaction" method in periodic reviews. This cannot be accepted.

21. Neither the second sentence of Article 2.4.2 nor the AD Agreement as a whole endorses "zeroing". We all know that (i) "zeroing" conflicts with the architecture and design of the AD Agreement; (ii) the second sentence of Article 2.4.2 foresees an *exceptional circumstance*. It does not constitute an *exception to the principles* governing the AD Agreement and (iii) a corollary of the precedent, since it is not an exception to the fundamental principles of the Agreement, the

[4] See Appellate Body Report in *US – Softwood Lumber V*, para. 98.
[5] See Appellate Body Report in *US – Zeroing (EC)*, para. 127.
[6] See Appellate Body Report in *US – Zeroing (Japan)*, para. 114.
[7] See Appellate Body Report in *EC – Bed Linen*, para.59.
[8] See Appellate Body Report in *US – Zeroing (EC)*, para.146.
[9] See Appellate Body Report in *US – Softwood Lumber V (Art.21.5 – Canada)*, para.142.

situation described in the second sentence of Article 2.4.2 is still subject to the tenets set out by the AD Agreement.[10]

22. *Second*, the United States also claims that dumping may occur in a single transaction.[11] This does not hold true. While conceding that the investigating authority has discretion to define the product under investigation, the Appellate Body laid down that "dumping" and "margins of dumping" can be found to exist only in relation to a product. They cannot be found to exist at the level of a type, model, or category of a product under consideration; nor can they be found to exist at the level of an individual transaction.[12]

23. *Third*, the United States argues that – because they have different purposes – the three types of investigation (original, assessment and sunset) are not subject to the same obligations under the AD Agreement. In Brazil's opinion, such an argument is misleading because it changes the focus of the analysis from the existence and amount of dumping to *purposes*.

24. Let us assume that those three investigations have indeed different objectives; namely, i) to establish whether a remedy against dumping should be provided; ii) to precise the amount of that remedy[13] and, finally, iii) to determine the likely continuation or recurrence of dumping.[14]

25. All of us know that, in order to meet any of those three objectives, the investigating authority has necessarily to assess the existence and/or the margins of dumping. This assessment cannot be made without applying the concepts of "product", "margins of dumping" and "fair comparison", as defined by the Agreement and the Appellate Body. In applying those standards, one can reasonably conclude that what really matters in those investigations – whether original, periodic or sunset – is *how* the margin of dumping is calculated, irrespective of the objective of the investigation. Therefore, no matter the purpose, the three types of investigation are all about "product", "margin of dumping" and "fair comparison".

26. *Four*, turning now to the United States suggestion that original investigation and assessment reviews would also be *independent* proceedings.[15] Brazil strongly disagrees with this creative, but totally illogical suggestion. Independence of proceedings is not at stake. This is about the use of zeroing as a methodology for dumping calculation. Even if we concede that those investigations may be independent, one cannot allege independence of proceedings to refuse to apply the principles and guidelines set out in Articles 2.1 and 2.4, namely, again, the concepts of "product", "margins of dumping" and "fair comparison". Zeroing itself is inconsistent with the Antidumping Agreement, no matter the proceeding it is applied to[16].

27. Moreover, investigations may be independent, but they are not dissociated from each other. This is so because the flawed margins or the mere existence of dumping found in any phase – by means of applying zeroing – will irreparably taint the subsequent investigation, to the extent that the subsequent investigation relies on a legally flawed existence or margin of dumping.

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[10] See Appellate Body Report in *US – Softwood Lumber V* (Art. 21.5 – Canada), para.97. See also notes 7 and 8.

[11] See United States First Written Submission, para. 85.

[12] See Appellate Body Report in *US – Zeroing (Japan)*, paras.115 and 151.

[13] See United States First Written Submission, para. 108.

[14] See United States First Written Submission, para. 153.

[15] See United States First Written Submission, para. 71.

[16] See Appellate Body Reports in *US – Corrosion- Resistant Steel Sunset Review*, para.127; and *US – Zeroing (Japan)*, paras.183-185.

Mr. Chair,

28. All those arguments put forward by the United States in this case were already tested in previous opportunities. The numerous quotations made by the EC and third parties to the Appellate Body and panels' reports show us a consistent pattern: the failure of the United States to convince the dispute settlement mechanism that zeroing can meet the standards of Article 2: "product", "margin of dumping" and "fair comparison", and of the Antidumping Agreement as a whole.

29. The US tries to dismiss the EC's arguments regarding the Appellate Body's conclusions on the grounds that they are not "persuasive".[17] Given the United States record on non-compliance with multilateral rulings, especially when it comes to "zeroing", one can only conclude that arguments may *never* be persuasive enough for the United States, notwithstanding the consistent condemnations of the practice by the WTO dispute settlement mechanism. The continued existence and application of zeroing by the United States, regardless of what the Antidumping Agreement, the panels' and the Appellate Body reports had to say about it during the course of almost ten years of litigation, seems to suggest that the United States will continue to disregard DSB rulings. It also indicates that the United States will persist on implementing them in a very specific and limited way, as it did in the "Hot Rolled Steel" and "Shrimp" cases brought by Japan and Ecuador, respectively.

30. Persuasiveness, however, is not the issue. This is about abiding by the successive rulings of the DSB on the illegality of zeroing and eliminating once and for all this biased and non-compliant practice.

31. In its crusade to safeguard the use of the US DoC antidumping practices, the United States resorts to negotiating history, to the Tokyo Round Antidumping Code and to the work of the experts in the GATT 1947. After repeated rulings on the illegality of zeroing, unearthing the past seems at this point an argument of last resort, completely unpersuasive, where all others have failed. The Appellate Body confirmed that they are of limited relevance and provide no additional guidance on the issue.[18] Nonetheless, while the United States may interpret that zeroing was permitted at that time, the reality today under the Antidumping Agreement and the Appellate Body's decisions leaves no margin for accepting zeroing. The zeroing methodology is the embodiment of one of the capital sins in the multilateral trading system: protectionism.

Mr. Chair, Distinguished Members of the panel,

32. Brazil is confident that your conclusions will add to the list of successive condemnations of zeroing in all types of investigation, regardless of the methodology employed, be it prospective or retrospective. For the sake of multilateralism and compliance, we genuinely hope that, in the light of another condemnation, the United States this time will abide by your decisions, whether or not it is persuaded by your arguments.

Thank you very much.

[17] See United States First Written Submission, paras. 98 and 115.
[18] See Appellate Body Report in *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 121.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF INDIA AT THE FIRST MEETING OF THE PANEL

Mr. Chairman and Distinguished Members of the Panel:

1. India thanks you for having provided us an opportunity to present our views as a third party in this dispute.

2. The issue of zeroing is of extreme systemic importance to the multilateral trading system. It is regrettable that the United States continues to apply the "zeroing" methodology for determining anti-dumping margins despite the clear conclusion reached in several reports of Panels and the Appellate Body that use of this zeroing methodology is inconsistent with Articles 2.4.2, 9.3, 11.2 and 11.3 of the Anti-Dumping Agreement.

3. Mr. Chairman, India notes that, on 26 December 2006, the United States announced that it had partly implemented the DSB rulings and recommendations in DS294 *United States – Laws, Regulations and Methodology for calculating dumping Margins (US – zeroing (EC))* by changing its methodology of model zeroing, so as to abandon the use of zeroing. However, several measures imposed by US have not been corrected, and remain tainted by the use of zeroing. In this respect, we would specifically draw attention to the Appellate Body report in *United States – Measures related to zeroing and Sunset reviews – Japan* (DS322). At the DSB meeting of 20 February 2007, the US confirmed its intention to implement the recommendations and rulings of the DSB in the Dispute and stated that it would require a reasonable period of time to do so as per Article 21.3 of DSU. Sufficient time has elapsed since then and India notes that, except abolishing zeroing regarding Weighted average -to-Weighted average comparisons in the original investigations, the US continues to practice zeroing in other comparison methodologies via transaction to transaction (T-to-T) and weighted average to transaction (W-to-T) in the original investigations as such. Further, the US continues to practice zeroing in every comparison methodology at the stage of administrative reviews as such, and sunset reviews as such and is yet to take steps to amend its laws and administrative practices in the matter.

4. Mr. Chairman, it is therefore important that this Panel reiterates and reinforces the conclusion that practice of Zeroing as stated above is "as such" inconsistent with the obligations under GATT, 1994, Anti-Dumping Agreement and the Agreement for Establishing the WTO as held by the Appellate Body. Any other conclusion would result in continuance by the United States of the zeroing practice, which not only inflates dumping margins, but also detracts from the obligation to undertake an objective examination of the impact of dumped imports and finally ascribes dumping even in cases where no dumping may exist.

5. Mr. Chairman, we are convinced that the US will eventually be forced to realize the futility of pursuing the use of "zeroing". However, we remain deeply concerned at the impact of their prolonged use of this methodology on the credibility and predictability of the multilateral dispute settlement system. In view of the settled jurisprudence by the Appellate Body, we believe that the panel will reiterate that practice of "zeroing" by any WTO Member in every comparison methodology during the original investigation, periodic or administrative reviews and sunset reviews is inconsistent with Members' WTO obligations under the Anti-Dumping Agreement.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF JAPAN AT THE FIRST MEETING OF THE PANEL

Introduction

1. Mr. Chairman and Members of the Panel, we are pleased to appear before you today to present the views of Japan as a third party in this dispute. Today, Japan would like to briefly address two issues before the Panel: (1) measures at issue; and (2) role of the precedent.

Measures at Issue

2. There are two sets of measures which the European Communities ("EC") challenges in the present dispute. First one is "the application or continued application of specific anti-dumping duties resulting from the 18 anti-dumping orders in the Annex to the Panel request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding".[1] Second one is "the application of zeroing (*i.e.*, either using the model or simple zeroing technique) as applied in 52 anti-dumping proceedings, including original proceedings, administrative review proceedings and sunset review proceedings listed in the Annex to the Panel request".[2]

3. The first measure above-mentioned is a new kind of measure we have seen in a series of zeroing cases in WTO Dispute Settlement System. However, Japan considers this is admissible as a measure at issue based on the following reasons.

4. Japan considers that the first measure is specific enough so as to suffice the specificity required by Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"). The anti-dumping orders on which the duties are based are identified in the Annex to the Panel request. The applied duties are calculated or maintained by using zeroing practice. It is a well known custom that the zeroing practice is continued to be done in the subsequent administrative reviews, or, as the case may be, original proceeding or changed circumstances or sunset review proceeding. Therefore, "the application or continued application of specific anti-dumping duties resulting from the 18 anti-dumping orders" can be seen as a measure at issue.

5. With respect to the periodic reviews which were found to be inconsistent with AD Agreement and the GATT 1994, in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) (DS294)* and *United States – Measures relating to Zeroing and Sunset Reviews (DS322)*, the United States argues that the results were superseded by subsequent reviews in each case, and that, therefore, no further action is necessary for the United States to bring these challenged measures into compliance with the recommendations and rulings of the Dispute Settlement Body ("DSB").[3] Japan finds this logic hard to be understood. This logic undermines the results of the WTO dispute settlement system.

6. EC's theory in this case is one of the reasonable approaches to block such kind of argument which deteriorates the effectiveness of the WTO dispute settlement system.

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[1] EC First Submission, para. 34.
[2] *Id.* para. 35.
[3] WT/DS322/22/Add.2.

Role of the precedent

7. Japan agrees with the EC's argument that "[r]eliance on previous case-law actually flows from the necessity to ensure in any legal system security, consistency and predictability"[4] and that, thus, "even where previous decisions are not binding *per se*, reliance on previous case-law is necessary to ensure consistency of such case-law, in particular where case-law comes from higher courts or tribunals".[5]

8. In *US – Zeroing (Japan)*, the Appellate Body, after deliberating thoroughly, manifested that zeroing procedures are prohibited in any anti-dumping proceedings regardless of methodology of calculation of dumping margin. Japan requests the Panel would respect the above-mentioned Appellate Body decision and maintain a consistent line of findings on the legal issues of zeroing. The followings are the grounds of Japan's argument.

9. As the EC argues, (i) findings of the Appellate Body is hierarchically superior and only dealing with issues of law, (ii) findings have been repeated in several cases so that there is now a consistent line of interpretation[6].

10. Article 3.2 of the DSU sets forth the purpose of the dispute settlement system of the WTO. This Article provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system" (underline added.) A consistent application of the WTO Agreement to the Members shall be secured within the dispute settlement system. In other words, if the situation that the legal findings adopted by decision of the DSB varies on a case by case basis with regard to the same legal issues, it would lead to unfair or unequal treatment among Members, which would undermine "security and predictability" of the WTO dispute settlement system. If unfair or unequal treatment of Members persists, the dispute settlement system can not maintain its consistency and it must lose its credibility.

11. On the other hand, Japan also recognizes that the panel does not have to rely on the precedent in exceptional circumstances. Nevertheless, we can find no exceptional circumstances in this dispute at all. It appears that the United States has merely reopened the argument by showing that the Appellate Body's decisions concerning zeroing are not persuasive. Under current circumstances, Japan requests the panel to do an "objective assessment of the matter" relying on the precedents. In this sense, Japan understands the decision by the panel in *Mexico – Stainless*, dated 20 December 2007 is deviated from the above-mentioned standards.

12. Accordingly, Japan strongly requests that the Panel in this dispute respects the above-mentioned Appellate Body decision and maintain a consistent line of findings in the dispute settlement system.

13. Japan would like to thank the Panel for this opportunity to raise these issues. We would welcome any questions.

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[4] EC First Written Submission, para. 68.
[5] *Id*.
[6] EC First Written Submission (20 August, 2007), para.106.

ANNEX D-8

THIRD PARTY ORAL STATEMENT OF KOREA AT THE FIRST MEETING OF THE PANEL

Mr. Chairman and Members of the Panel:

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party in this important dispute. Through this statement, Korea provides an overview of the key issues included in Korea's third party submission dated 19 September 2007.

A. AS THE APPELLATE BODY HAS CONSISTENTLY FOUND, "ZEROING" MUST BE PROHIBITED IN *ALL* ANTI-DUMPING PROCEEDINGS INCLUDING ORIGINAL INVESTIGATIONS, ADMINISTRATIVE REVIEWS, AND SUNSET REVIEWS

2. First of all, Korea notes that in *US – Zeroing (Japan)*, the most recent Appellate Body decision relating to zeroing, the Appellate Body unequivocally held that zeroing in *all* respects violates relevant provisions of the Anti-dumping Agreement ("AD Agreement").[1] Korea requests the Panel to conform to this unambiguous and clear precedent directly on point and reiterate in this dispute that the USDOC's "zeroing" must be prohibited in *all* anti-dumping proceedings.

3. Korea submits that a panel's deference to the Appellate Body jurisprudence is critical and essential to maintain the integrity of the WTO dispute settlement procedure. Disregarding clear precedents of the Appellate Body, in the absence of particular reasons distinguishing the case at hand, would erode the cherished trust of Members in the dispute settlement system and undermine the stability of the international trading regime. We also note that even the United States keep referring to prior panel and Appellate Body precedents to make its own arguments. We find it puzzling how the United States would justify its position that each panel is encouraged to depart from the prior precedents while it itself devotes significant portion of its own submission to cite these precedents. Korea calls upon the Panel to discharge its obligation under Article 11 of the DSU by applying relevant precedents reasonably.

B. "ZEROING" AS USED IN ORIGINAL INVESTIGATIONS, VIOLATES ARTICLES 2.4 AND 2.4.2 OF THE AD AGREEMENT

4. There is an ample body of precedents, where panels and the Appellate Body found that the zeroing practice used in an average-to-average comparison in an original investigation violates Articles 2.4 and 2.4.2 of the AD Agreement. Korea also understands that even the United States does not contest this issue any more. In Korea's view, therefore, the Panel could easily render its determination on this issue in the present dispute.

C. THE PERIODIC REVIEW UNDER ARTICLE 9.3 IS ALSO GOVERNED BY THE PRINCIPLES OF ARTICLES 2.4 AND 2.4.2 AND THUS ZEROING IN THE PERIODIC REVIEWS VIOLATES ARTICLES 2.4, 2.4.2 AND 9.3

5. The basic requirement provided for in Articles 2.4 and 2.4.2 is an overarching obligation, which applies to *all* dumping calculations. To the extent that a dumping margin is effectively

[1] *See United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (adopted 23 January 2007) ("*US – Zeroing (Japan)*"), at paras. 137-138, 147, 166, 167-169, 177, 186-187.

calculated, such obligation must equally apply to administrative reviews. Korea notes that dumping margin calculation indeed takes place in an administrative review conducted by the USDOC. By adopting the zeroing methodology in administrative reviews, and by failing to abide by the requirements of Articles 2.4 and 2.4.2 in those proceedings, the USDOC therefore violated not only Articles 2.4 and 2.4.2 but also subsequently Article 9.3 with respect to its various administrative reviews identified in the EC's first written submission. The United States makes effort to show why administrative reviews are different from original investigations, but as long as artificially manipulated calculations are conducted, there is no reason to distinguish the two.

6. Korea submits that administrative reviews as conducted by the USDOC should not and cannot be separated from the original investigations, and almost identical calculations and evaluation occur in both proceedings. Korea does not find any reason to treat administrative reviews any differently. The use of zeroing by the United States in the administrative reviews at issue here, therefore, is inconsistent with the AD Agreement in *both* the calculation of a revised margin of dumping for cash deposit purposes and in the calculation of the amount of duty retrospectively assessed.

D. UTILIZATION OF ZEROING IN SUNSET REVIEWS ALSO CONSTITUTES VIOLATION AF ARTICLES 2.4, 2.4.2, 11.1 AND 11.3 OF THE AD AGREEMENT

7. The same rule should also apply to the sunset reviews. In light of the above reasoning, to the extent the USDOC conducts sunset reviews based on margins of dumping calculated in previous proceedings using the zeroing methodology, it inevitably constitutes violations of Articles 2.4, 2.4.2, 11.1 and 11.3 of the AD Agreement.

8. Logically and practically, the sunset reviews of the USDOC cannot be separated from previous anti-dumping proceedings. Rather, the sunset reviews are simply an extension of previous findings to the extent the USDOC relies on dumping margins calculated in a prior original investigation or an administrative review as the basis for the sunset review's likelihood determination. Therefore, Korea believes that the violation of these provisions is also unavoidable.

Again, Korea extends its appreciation to the Panel for this opportunity to present its views in this important dispute. Thank you.

ANNEX D-9

THIRD PARTY ORAL STATEMENT OF MEXICO AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, members of the Panel:

1. It is a pleasure to appear before you to present the views of Mexico concerning certain issues in this dispute. Although there are many points raised by the United States with which Mexico disagrees, I would today like to restrict my remarks to a few points that are of specific concern to Mexico regarding the use by the United States of zeroing in periodic reviews.

2. In particular, I would like to address: (1) the importance to this Panel of following the prior adopted Appellate Body decisions in this area; (2) the United States' mischaracterization of the Appellate Body decisions as having "shifted" its reasoning over time, when in fact the Appellate Body's reasoning has remained consistent; and (3) the United States' continuing confusion between the procedural rules that govern the conduct of review proceedings under Article 9.3 and the overarching substantive obligation under Article 9.3 that duty collections under such systems may not exceed the margin of dumping determined in accordance with Article 2.

The Significance of Prior Appellate Body Decisions

3. Mexico agrees with the reasons set out in the first written submission of the European Communities why this Panel should follow the findings and conclusions contained in previous adopted Appellate Body reports on zeroing.

4. Mexico also agrees with paragraph 2 of the European Communities' first written submission where it is stated that the "as such" WTO inconsistency of the methodology has already been successfully established in *US – Zeroing (EC)* and in *US – Zeroing (Japan)* and that, pursuant to Article 17.14 of the DSU, the United States must be considered to have unconditionally accepted the Appellate Body's findings on "as such" zeroing. Mexico would like to add that by allowing the "as such" claims, the reports of the Appellate Body serve the purpose of "preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated".[1] The actions and submissions of the United States in this dispute not only frustrate this purpose as they contradict clear findings of the Appellate Body, but also go counter to the objective of providing security and predictability to the multilateral trading system as provided for in Article 3.2 of the DSU.

5. In this dispute, not only are the *identical* measures and issues raised the subject of findings and conclusions in adopted Appellate Body reports, the responding party in those previous disputes is the *same* as the responding party in this dispute – i.e., the United States. Clearly in these circumstances the previous findings and conclusions of the Appellate Body should be followed.

6. At paragraph 29 of its first written submission, the United States incorrectly characterizes the European Communities' position as follows:

> "In essence, the EC is urging the Panel to rubber-stamp those prior reports that are favourable to the EC's position, to disregard those panel reports that demonstrate that the EC's position is contrary to the agreed text of the WTO agreements, and to

[1] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

> ignore the Panel's obligations under Article 11 of the DSU to conduct an objective assessment of the matter before it."

7. Relying on this characterization, the United States invokes Article 11 of the DSU as support for its position that this Panel must ignore prior, directly applicable, adopted Appellate Body rulings and, instead, follow a series of panel decisions that were never adopted by the DSB and were in fact specifically reversed by the Appellate Body.

8. Contrary to the argument of the United States, following prior Appellate Body reports in the circumstances of this dispute is entirely consistent with Article 11 of the DSU. The Appellate Body has made this clear in its report in *US – Oil Country Tubular Goods Sunset Reviews*, where it stated that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[2]

9. The United States refuses to acknowledge that its arguments regarding zeroing have been fully and fairly considered by the Appellate Body and, following such full and fair consideration, those arguments have been rejected. The rejection of those arguments is supported by detailed reasons given by the Appellate Body in its reports. Those reports have been adopted. There is absolutely no basis for the United States to continue to pursue its arguments and for its continued refusal to eliminate its WTO-inconsistent zeroing practices.

10. Herein lays the inconsistency with Article 3.2 of the DSU which sets out the central element of the WTO dispute settlement system - the security and predictability of the multilateral trading system. If WTO Members and panels refuse to acknowledge adopted Appellate Body reports which are directly on point as they are in this dispute, there is no security or predictability. As in this dispute, WTO Members will be caught up in a seemingly endless dispute settlement process over the same measure. There is an additional problem. In such circumstances, the creation of a series of panel reports that diverge in findings and conclusions from those in adopted Appellate Body reports interferes with the prompt settlement of disputes which, as recognized in Article 3.3 of the DSU, is essential to the effective functioning of the WTO. WTO Members will be forced to unnecessarily appeal findings and reasons that have already been overturned.

11. Mexico respectfully requests that this Panel put an end to this unnecessary process and follow the adopted Appellate Body reports on zeroing. At its heart, the United States problem is not with the adopted interpretations of the applicable WTO provisions but with the provisions themselves. If the United States has a concern regarding the provisions of the WTO Agreements, that concern is not a proper subject of the dispute settlement process.

Mischaracterization of the Appellate Body Findings

12. In an effort to persuade this Panel to ignore the prior, directly applicable adopted Appellate Body reports regarding simple zeroing, the United States at several points asserts that the reasoning applied by the Appellate Body with respect to zeroing "has shifted from dispute to dispute".[3] The apparent intention is to undermine the credibility of the Appellate Body's reasoning by suggesting that it has been inconsistent, or perhaps even contradictory.

13. For example, the United States claims in its First Written Submission that the "exclusive textual basis" identified by the Appellate Body for the principle that anti-dumping margins must be calculated for the product under investigation taken "as a whole" is the reference in the first sentence of Article 2.4.2 to the calculation of a weighted average of prices of "*all comparable export*

[2] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.
[3] *See, e.g.*, First Written Submission of the United States, para. 5.

transactions".[4] The United States asserts that while the "all comparable export transactions" phrase provided the textual basis for that finding in *US – Softwood Lumber Dumping (AB)* that margins of dumping relate to the product as a whole, the Appellate Body later "changed its interpretation of that phrase" in *US – Zeroing (Japan)* and found that the phrase relates solely to transactions within a model, and not across models of the product under investigation.

14. Mexico strongly rejects the United States' revisionist characterization of the Appellate Body's reasoning. Mexico submits that the reasoning applied by the Appellate Body has been consistent in all of the disputes brought before it involving zeroing, starting from the Appellate Body's first decision in *EC – Bed Linen*. In that case, and all subsequent cases, the key textual provisions and principles that have guided the Appellate Body's decisions have been the same. First, is the text of Articles VI and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* which define "dumping" and "margins of dumping" for all purposes under the agreement by reference to the "product" under investigation. The Appellate Body has consistently found in every dispute before it that while it may be permissible, or even necessary in certain circumstances, to conduct multiple comparisons at the level of individual transactions or models, "dumping" and "margins of dumping" can exist only with respect to the product under investigation, as defined by the investigating authorities, taken as a whole. Second, the Appellate Body has consistently found that the text of the agreements, for example Article 6.10 of the *Anti-Dumping Agreement*, define "dumping" of the product under investigation in reference to individual exporters or producers, not importers or individual transactions. Exporters or producers dump. Importers do not dump. Lastly, the Appellate Body has emphasized the need for consistency in the definitions of dumping used throughout the agreements. In particular, the Appellate Body has found that the same imports cannot be found to be "dumped" for purposes of injury, but not dumped for purposes of margin calculations, as is implied by the United States' position.

15. While these key principles, all of them textually based, have been further explained, amplified, and documented in successive disputes as the Appellate Body has responded to the ever-shifting arguments presented by the United States, the identification of the principles themselves and their textual basis has not shifted. They are the same principles identified in *EC – Bed Linen*, in *US – Softwood Lumber*, in *US – Zeroing (EC)*, and, most recently, in *US – Zeroing (Japan)*. They do not hinge upon application of Article 2.4.2 or the existence of the phrase "all comparable export transactions". The United States' claims to the contrary are simply incorrect.

The Difference Between Duty Collection Systems and "Margins of Dumping"

16. The last point I would like to raise today concerns the apparent confusion on the part of the United States between duty collection systems and margins of dumping. The United States argues that "[u]nlike investigations, which are subject to a single set of rules, the AD Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment phase".[5] The United States argues further that since, for example, Article 9.4(ii) provides for the collection of antidumping duties on a transaction-specific basis, the Agreement must likewise contemplate and support determinations of "margins of dumping" on a transaction-specific basis.[6] The United States also emphasizes the purported differences in the "functions of investigations and other proceedings under the AD Agreement", asserting that original investigations are concerned with the "existential question" of whether margins of dumping exist, whereas review proceedings under Article 9 are focused on "the amount of duty to be assessed on particular entries, an exercise that is separate and

[4] *Ibid*., para. 76.
[5] *Ibid.*, at para, 18.
[6] *Ibid*., paras. 125-126.

apart from the calculation of an overall dumping margin during the threshold investigation phase of an antidumping proceeding".[7]

17. However, the United States is simply wrong to suggest that the AD Agreement imposes a set of rules on investigations, but leaves anti-dumping duty assessments to the unfettered discretion of members. Certainly the agreement does provide "flexibility" to members to choose collection systems that suit their policy interests – whether they be administered on a retrospective or prospective basis. However – and this is the part that is ignored by the United States – regardless of the collection system chosen by a member, any duty assessments made are subject to the obligation imposed by the text of Article 9.3 limiting the amount of such antidumping duty assessment to "the margin of dumping as established under Article 2". This limitation on the amount of duties applies, without exception, to all possible duty collection systems permitted under the Agreements.

18. Properly understood, therefore, the AD Agreement does provide member countries with the flexibility to choose the system used to collect anti-dumping duties and impose liability. That flexibility extends to imposing such liability on an importer-specific or even a transaction-specific basis. However, the assessment of duties under all systems remains subject to the assessment cap imposed under Article 9.3, a cap that is determined by the exporter or producers' margin of dumping as determined under Article 2. As the Appellate Body in *US – Zeroing (Japan)* noted "[i]t is open to an importer to request a refund if the duties collected exceed the exporter's margin of dumping. Whether a refund is due or not will depend on the margin of dumping established for that exporter".[8]

Conclusion

19. Mexico again thanks this Panel for its service in this matter. The zeroing issue is of significant importance not only to Mexico, but quite obviously to the many other WTO members who are participating in this proceeding as Third Parties or merely observing. The issues are not new and the arguments have been heard several times before. Simple zeroing as applied by the United States is inconsistent with Article VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the AD Agreement. We urge the Panel to follow the reasoning of the Appellate Body in this regard and to rule accordingly in favor of the European Communities.

Thank you.

[7] *Ibid.*, para. 110.
[8] Appellate Body Report, *US – Zeroing (Japan)*, para 160.

ANNEX D-10

THIRD PARTY ORAL STATEMENT OF NORWAY AT THE FIRST MEETING OF THE PANEL

1. Norway would like to thank the Members of the Panel for the opportunity to make a statement at this meeting, and for opening up this part of the third party session to a public viewing.

Mr. Chairman, Members of the Panel,

2. Panels and the Appellate Body have dealt with the question of zeroing several times. The Appellate Body has in its previous cases ruled that all forms of zeroing in all forms of proceedings under the *Anti-dumping Agreement* are prohibited. This conclusion is founded on two premises: *Firstly*, that dumping shall be established for the "product as a whole" – which is not the case where zeroing is employed. And *secondly*, that zeroing is contrary to the "fair comparison" requirement of Article 2.4 of the *Anti-dumping Agreement*. The Appellate Body has made clear that these arguments also apply to reviews, including sunset reviews.

3. Norway firmly supports the Appellate Body's interpretation and careful reasoning with regard to zeroing. The detailed legal arguments are set out in our written submission, and will therefore not be repeated here.

Mr. Chairman,

4. There seems to be no real disagreement as to what the Appellate Body has ruled on the issue of zeroing. However, the United States disagrees with the content of the rulings, and sets forward alternative arguments that it asks the Panel to adopt – even if the Appellate Body has already rejected these arguments on many occasions. The question, thus, seems to be to what degree the Panel may depart from the former rulings of the Appellate Body.

5. The Panels and the Appellate Body do not operate under the legal doctrine of *stare decisis*, and the Panel is therefore not formally bound to follow previous rulings. However, in the interest of legal certainty, foreseeability and equality before the law, panels and the Appellate Body should not depart from precedents laid down in previous cases without very good reasons for doing so.

6. The United States suggests that the Panel should only take into account the legal interpretations set out in Appellate Body reports "to the extent that the reasoning is persuasive".[1]

7. I would like to make three comments to this: *First*, the Appellate Body's interpretation and underlying reasoning are, in our view, far more persuasive than the allegations advanced by the United States. *Second*, applying a subjective standard of "persuasiveness" does not sit well with a system of "lower courts" and "appeal courts" as we have in the WTO with Panels and the Appellate Body. A basic premise of a system with an appeal court is that lower judicial bodies defer to the judgments of the appeal court. *Third*, "persuasiveness" is a very subjective term, which leaves a lot to the "eye of the beholder".

8. Rather, if one is to accept that earlier precedents may in certain cases be overturned, then a far more exacting standard must be applied. In our view there must be "a manifest error of legal

[1] United States' First Written Submission para. 33.

interpretation" before a panel may depart from the legal interpretation of the Appellate Body regarding the same legal issue.

9. The panels that have departed from previous Appellate Body reports on zeroing have thereafter been overturned by the Appellate Body. It is thus eminently clear that those panels – and not the Appellate Body – committed serious errors of legal interpretation.

Mr. Chairman,

10. The United States has referred to two previous panels (*US – Zeroing (Japan) and US – Stainless Steel from Mexico)* in support of its argument that zeroing should be permitted in assessment reviews – and that there should be no methodological constraints on how the US calculate dumping margins and impose and collect duties.

11. The Panels in those two cases made a number of legal errors, two of which I would like to highlight here. Needless to say we trust that this Panel will not commit the mistakes of the two aforementioned Panels.

12. *First*, those Panels did not interpret the terms "product" or "margin of dumping" in the *Anti-dumping Agreement* in accordance with the Vienna Convention on the Law of Treaties. This is clear from the treatment in those reports.

13. Not only did they misunderstand the very purpose of treaty interpretation, they also ignored the elements of Articles 31 and 32 of the Vienna Convention. Rather than going through the elements of these articles they simply jumped at their own interpretation, and thereafter they declared their interpretation to be a permissible one.

14. Such an analysis completely misunderstands the purpose of treaty interpretation. The purpose of treaty interpretation is to arrive at the one and only interpretation of a term, in its context, and in light of its object and purpose. To do so, there are a number of elements that the treaty interpreter can rely upon, as specified in the various sub-paragraphs of Article 31 and Article 32. The tests in the Vienna Convention are designed to assist the treaty interpreter to arrive at *one single interpretation* of the term in question. A correct application of those tests should not allow more than one interpretation of a term except in the rarest of cases.

15. Should there still, *after* the application of the Vienna Convention, be unclear which of two interpretations is the correct one, then the principle of "in dubio mitius" – widely recognized in international law as "a supplementary means of interpretation" – would direct a treaty interpreter to prefer the meaning, which is less onerous to the party assuming an obligation.

16. By stating that there are two permissible interpretations up-front, those panels committed a legal error of treaty interpretation. By interpreting "product" and "margin of dumping" as they did, they made yet more mistakes.

17. The *second* legal error I want to highlight in those panel reports relate to the Standard of Review set out in Article 17.6 (ii) of the *Anti-dumping Agreement.*

18. What is important to always bear in mind is that the first sentence of Article 17.6(ii) requires a Panel to apply the rules of treaty interpretation of customary international law. This means to apply the rules of the Vienna Convention. Had the two aforementioned panels applied the Vienna Convention correctly, only one interpretation should remain (that of the Appellate Body) – not two permissible ones.

19. The second sentence of Article 17.6(ii) only kicks in *after* all the principles of treaty interpretation of public international law have been exhausted, and functions in those rare cases as would the application of the principle of "*in dubio mitius*".

20. Applying the second sentence up-front, before applying correctly the Vienna Convention, is a grave legal error.

21. We are, of course, confident that this Panel will not commit the errors of the two panels mentioned by the United States.

Mr. Chairman, Members of the Panel,

22. The Appellate Body has rightly pointed out that adopted reports create legitimate expectations among WTO Members, and therefore should be taken into account where they are relevant to any subsequent dispute.[2] Furthermore, the Appellate Body has underscored that it would be expected from panels that they follow the Appellate Body's conclusions in earlier disputes, especially where the issues are the same.[3]

23. It cannot be doubted that the case we are discussing today involves the same factual basis, the same methodologies and the same provisions as the Appellate Body's earlier rulings on zeroing. Hence, it would be expected that this Panel follow the legal interpretations set out by the Appellate Body in the mentioned decisions.

24. Based on this, Norway respectfully requests the Panel to examine this case in accordance with previous Appellate Body rulings in order to secure a legally correct, cohesive and predictable outcome.

Thank you for your attention.

[2] Appellate Body Report, *Japan – Alcoholic Beverages II*, at 108 (as regards adopted panel reports) and Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 107-109 (as regards adopted Appellate Body reports).

[3] Appellate Body Report, *United States – OCTG Sunset Reviews*, para. 188.

ANNEX D-11

THIRD PARTY ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, Members of the Panel:

The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, (or TPKM), would like to thank the Panel for this opportunity to present our views in this third party session.

TPKM stands by its written submission of 19 September, 2007. Because the mechanisms of zeroing have already been fully described by the parties to the dispute, we are not going to repeat them here. We believe there is common understanding of how zeroing affects the calculation of dumping margins. Today, we would like to draw the Panel's attention to the illegitimacy of measures as a consequence of their reliance on zeroing.

At the start, may we respectfully remind the Panel that the multilateral trading system under the WTO aims at the reduction of trade barriers on a non-discriminatory basis. While Article VI of GATT 1994, which recognizes the legitimacy of anti-dumping measures, is a departure from this basic principle, its purpose is clearly stipulated as to "offset" injurious dumping. For this reason, the duty imposed may not be excessive than the margin of dumping with respect to that specific product.

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 states at the outset that Members agree that "*An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994*". In other words, no anti-dumping measure shall be applied that is beyond the mandate of Article VI of GATT 1994.

However, the use of the zeroing method creates the potential for overcorrecting the injury caused by dumping, which places it beyond the mandate of Article VI of GATT 1994.

Under the zeroing methodology, the prices of certain export transactions are not taken fully into account. As the Appellate Body has noted in previous disputes, there is an "inherent bias in a zeroing methodology". Such bias could, in some instances, turn a negative dumping margin into a positive one, and may systematically inflate the magnitude of dumping margins. It is evident that a margin calculated by the zeroing method can never be a legitimate foundation for either the determination of dumping or the assessment of dumping duty.

If, for example, an affirmative determination of dumping were made on a product that was not being dumped, or a dumping duty was applied at an inflated rate, these measures would inevitably be deemed beyond the mandate of Article VI of GATT 1994.

It follows that any measure relying on a dumping margin calculated by the zeroing method, whether in investigations or reviews and regardless of the type of comparison employed, would necessarily result in an inaccurate determination of dumping or the excessive imposition of dumping duty, and as such would be deemed inconsistent with the WTO anti-dumping disciplines.

Mr. Chairman, Members of the Panel:

The objectives of anti-dumping duty are not to curb the imports of a product that is not being

dumped, but to stop a product being imported at dumped prices and to remedy the injury. To tolerate the use of the zeroing method in the calculation of a dumping margin is to deny the very basis and spirit of the anti-dumping mechanism.

TPKM respectfully requests the Panel to take into account its observations and comments. In the interests of ensuring security and predictability in the multilateral trading system, we would expect the Panel to make findings and proper interpretations consistent with the previous findings of the Appellate Body.

Thank you for listening to our views.

ANNEX D-12

OPENING STATEMENT OF THE EUROPEAN COMMUNITIES AT THE SECOND MEETING OF THE PANEL

Mr. Chairman, distinguished Members of the Panel:

The EC does not have an opening oral statement.

We believe that we have made our case, as it was made in DS294, in DS322 and most recently in DS344.

I have two documents in front of me: the text of the ADA and the text of the Vienna Convention, which speak for themselves. We do not believe that the submissions we hear coming back from the United States – such as the assertion that the ADA is a hotch potch of obscurity, are legal arguments. And we are anxious to get to any questions the panel might have. For this reason, we have no opening oral statement.

Thank you, Mr Chairman.

ANNEX D-13

OPENING STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

Mr. Chairman, Members of the Panel:

1. The United States welcomes this opportunity to meet with the Panel again to discuss the issues raised in this dispute. In particular, we will respond to some of the arguments made by the European Communities ("EC") in response to the Panel's questions and in its second written submission. And we wish to thank you once again for opening this panel meeting to WTO Members and the public.

2. Today we will first explain why determining the margin of dumping in reviews makes sense on a transaction-specific basis. We will then comment on the relevant standard of review, discuss the proper role of adopted Appellate Body reports in the WTO dispute settlement system, and respond to the EC's continued attempt to have imposed on the United States an independent international obligation to eliminate so-called "zeroing". Second, we will briefly address our objection that the "application or continued application" of duties in 18 separate cases is not properly within the scope of this proceeding because the EC's identification of "duty as a measure" does not identify the specific measures at issue as required by Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Third, we will respond to the EC's argument that Article 2.4.2 of the Antidumping Agreement applies to periodic reviews, refute the erroneous concept of "product as a whole", and demonstrate how a the EC's reading of Article 2.4.2 would render the targeted dumping provision *inutile*. Lastly, we offer a few words on the negotiating history of the Antidumping Agreement, which shows that no common understanding to prohibit zeroing could be reached in the Uruguay Round and that multiple attempts to include a prohibition on zeroing failed.

The US Retrospective Duty System

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

Standard of Review

4. As the parties agree, the task of this Panel is set not only by Article 11 of the DSU, but also by the special standard of review found in Article 17.6(ii) of the Antidumping Agreement. Under Article 17.6(ii), when a panel, in applying the customary rules of interpretation of public international law, "finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations".

5. The existence of such a provision in the Antidumping Agreement confirms that WTO Members were aware that the antidumping text would pose particular challenges. In many instances, the antidumping text permits more than one interpretation because it was drafted to cover multiple antidumping systems around the world and long-standing differences regarding methodology. Thus, the negotiators indicated that panels and the Appellate Body should respect a permissible interpretation of the Antidumping Agreement, even if that interpretation would not be the one favoured by the panel or Appellate Body.

6. Here, the EC asserts that in applying the customary rules of interpretation to the provisions at issue, there is no question that the only permissible interpretation is one which finds a blanket requirement to average together in all types of proceedings the price margins for all import transactions of a particular product.[1] The United States has demonstrated that there is no text, nor any necessary implication in the text, that establishes any such general requirement in the Agreement. As the United States has demonstrated, the correct interpretation, applying the rules in the Vienna Convention, is one which does not lead to such a general requirement. But even were the interpretation proposed by the EC permissible, the interpretation advanced by the United States would be equally permissible for purposes of Article 17.6(ii).

The Role of Adopted Appellate Body Reports

7. The EC would like this Panel to believe that *stare decisis* exists in the WTO dispute settlement system, at the very least on a *de facto* basis. In its second written submission, the EC claims that it "is not arguing that the DSU contains an express rule providing that panels are legally bound" by prior Appellate Body reports, but then asserts that "panels ... should follow the findings of the Appellate Body in prior cases".[2] The EC even appears to argue that the WTO is a common law system by referring to the "substantial and consistent case-law of the Appellate Body".[3]

8. The Appellate Body has stated that its reports are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[4] To the extent that the reasoning in prior Appellate Body reports is persuasive, those reports may be taken into account, but they have no *stare decisis* effect. The Ministerial Conference and the General Council have *exclusive authority* to adopt binding interpretations of the covered agreements under Article IX:2 of the WTO Agreement.

9. Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the covered agreements. And under Articles 3.2 and 19.2 of the DSU, the findings and recommendations of a panel or the Appellate Body, or the rulings and recommendations of the DSB, cannot add to or diminish the rights and obligations provided in the covered agreements. A panel cannot simply adopt prior findings on an issue without undertaking its own objective assessment of the matter before it. Nor can a panel follow prior findings if the panel considers that those prior findings would add to or diminish the rights or obligations of the parties to the dispute before the panel.

10. The panels in *US – Zeroing (Japan)* and more recently *US – Zeroing (Mexico)* have rejected the rationale of prior Appellate Body reports finding zeroing in reviews inconsistent with the Antidumping Agreement and GATT 1994.[5] Both panels recognized their obligation to carry out an objective assessment under Article 11 of the DSU. As the panel concluded in *US – Zeroing (Mexico)*, "[i]n light of our obligation under Article 11 of the DSU ... we have felt compelled to depart from the

[1] EC Second Written Submission, para. 19.
[2] EC Second Written Submission, paras. 39-40.
[3] EC Second Written Submission, para. 19.
[4] *US – Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan – Alcohol Taxes (AB)* and *US – Shrimp (Art. 21.5)(AB)*).
[5] *US – Zeroing (Japan) (Panel)*, para. 7.99 and n. 733; *US – Zeroing (Mexico) (Panel)*, para. 7.106.

Appellate Body's approach".[6] This Panel likewise is charged under Article 11 with undertaking an objective assessment of the matter before it and cannot make findings or recommendations that add to or diminish the rights and obligations in the covered agreements.

11. Attempting to respond to the US argument that adopted Appellate Body reports may be taken into account to the extent that they are persuasive, the EC asserts that "[e]ither findings in prior cases are legally relevant, or they are not".[7] The EC believes that once reports have been adopted by the Dispute Settlement Body ("DSB"), they are "legally relevant" to the disposition of a dispute, and no other interpretation of the covered agreements is allowed. The EC has invented its notion of "legally relevant" out of whole cloth: as just explained, if a prior report's reasoning is persuasive or helpful, it should be taken into account, but that does not mean that a panel is bound by it.

12. The EC tries to find support in the text of Article 11 of the DSU for its view on the binding nature of prior Appellate Body reports.[8] An interpretation under the customary rules of treaty interpretation supports no such reading. It is difficult to see how Article 11, which calls for an "objective assessment", means that panels should blindly follow adopted Appellate Body reports, particularly in light of Article IX:2 of the WTO Agreement by which only the Ministerial Conference and General Council may adopt authoritative interpretations.

13. The EC relies on the first sentence of Article 11, which states that "the function of panels is to assist the DSB in discharging its responsibilities under this understanding and the covered agreements".[9] To the EC, this sentence means that by following adopted Appellate Body reports, panels will somehow assist the DSB in meeting its responsibilities. The DSB's role, however, is to help Members resolve individual disputes, and not to adopt binding interpretations of the covered agreements outside the context of a specific dispute, which would run counter to the prohibition in DSU Article 3.2 on adding to Members' obligations. It is by adopting working procedures, hearing the parties, and making findings and recommendations on claims that panels help the DSB "administer these rules and procedures and ... the consultation and dispute settlement provisions of the covered agreements".[10] The first sentence in Article 11 does not say or imply anything about a need or requirement to follow past Appellate Body reports, nor does any other provision of the DSU.

14. The EC, in interpreting Article 11, also relies for contextual support on the reference to "security and predictability" in Article 3.2 of the DSU. However, the reference to "security and predictability" in Article 3.2 does not support the EC's mis-reading of Article 11. Rather, Article 3.2 explains that the dispute settlement system is a central element in providing security and predictability to the *multilateral trading system*. The dispute settlement system serves that function by following both the procedural and substantive rules to which WTO Members have agreed. That is, the system serves that objective when panels make the "objective assessment" with which Members have tasked them (as opposed to the rote acceptance of prior reports that the EC urges), and when panels do not add to or diminish the rights or obligations of Members. By contrast, the security and predictability of the multilateral trading system is not preserved when a panel or the Appellate Body creates rights or obligations to which the Members did not agree. When the Appellate Body has departed from the proper interpretation of the covered agreements, as in disputes on zeroing, panels should be mindful of the obligation under DSU Articles 3.2 and 19.2 to preserve the rights and obligations of Members when interpreting and applying the covered agreements. Article 3.2 of the DSU therefore does not assist the EC's argument with respect to the meaning of Article 11.

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[6] *US – Zeroing (Mexico) (Panel)*, para. 7.106.
[7] EC Second Written Submission, para. 20.
[8] EC Second Written Submission, para. 26.
[9] EC Second Written Submission, para. 29.
[10] DSU Article 2.1.

Article XVI:4 of the WTO Agreement

15. The EC once again repeats its expansive and erroneous argument that under Article XVI:4 of the WTO Agreement, the adopted Appellate Body reports on zeroing impose an "independent international obligation" on the United States to eliminate zeroing.[11] We will not repeat all of our arguments in this regard today[12], but emphasize a few key points. Most importantly, there is no support for the EC's interpretation in the DSU or elsewhere in the covered agreements. The EC's proposed interpretation is also inconsistent with the well-established proposition that Appellate Body and panel reports "'are not binding, except with respect to resolving the particular dispute between the parties to that dispute"'.[13] The Appellate Body cannot adopt authoritative interpretations of the covered agreements, nor can its reports create an obligation independent of the covered agreements. Treating prior Appellate Body reports as binding outside the scope of the original dispute would add to the obligations of the United States and other Members, inconsistent with Articles 3.2 and 19.2 of the DSU.

16. The EC would like the Panel to believe that Articles 3.2, 3.4, 3.8, and 17.14 of the DSU actually support its reading of Article XVI:4.[14] The EC's argument distorts the plain text of the DSU. As we have just explained, Article 3.2 cannot justify a reading of Article XVI:4 that adds to a Member's obligations under the covered agreements. In addition, Article 3.4 only relates to the "matter" under consideration in a specific dispute, and requires that the DSB's "settlement of the matter" shall be "in accordance with the rights and obligations under this Understanding and under the covered agreements". In other words, a finding under Article XVI:4 that adds to a Member's obligations under the covered agreements cannot be reconciled with Article 3.4. Article 3.8 is concerned with the rebuttal of the presumption of nullification and impairment by the responding Member in cases where there is an infringement of the covered agreements. The EC is wrong to assert that under Article 3.8, "any WTO Member can invoke nullification and impairment when an infringement has been found and adopted by the DSB".[15] Lastly, Article 17.14 only states that an adopted Appellate Body report shall be "unconditionally accepted by the parties to the dispute", which means acceptance of the findings and recommendations in the context of that specific dispute, and not in any and all future disputes that appear to be, or are asserted to be, similar. No other reading is possible. And in making its argument, the EC has blatantly ignored prior Appellate Body language on this issue while arguing that Appellate Body findings are binding.

17. The EC argues that "treating [Article XVI:4] as a purely consequential claim when a violation of another measure has been found would render this provision inutile".[16] As panels have recognized, there is no "independent" basis for a claim under Article XVI:4.[17] Instead, a finding of inconsistency with a provision of the covered agreements automatically gives rise to a finding of inconsistency with Article XVI:4. Neither panels nor the Appellate Body have ever treated Article XVI:4 differently.

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[11] EC Second Written Submission, para. 63.
[12] *See, e.g.*, US First Written Submission, paras. 157-64.
[13] *US – Softwood Lumber Dumping (AB)*, para. 111 (*quoting Japan – Alcohol Taxes (AB)*).
[14] EC Second Written Submission, para. 64.
[15] EC Second Written Submission, para. 64.
[16] EC Second Written Submission, para. 66.
[17] *US – OCTG from Mexico (Panel)*, para. 7.189; *US – Antidumping Act of 1916 (EC) (Panel)*, para. 6.223; *US – Antidumping Act of 1916 (Japan) (Panel)*, para. 6.287.

Scope of this Dispute

18. The United States will not repeat today its three preliminary objections to the scope of the EC's claims. Instead, we will focus on one set of alleged "measures" that are the subject of the US objection that under Article 6.2 of the DSU, the EC has failed to identify the specific measures at issue. Those alleged "measures" are the so-called "application or continued application" of antidumping duties pursuant to the antidumping duty orders in 18 cases as identified in the EC's panel request.

19. The EC has introduced the concept of "duty as a measure".[18] It now would like the Panel to treat any application or continued application of duties – at whatever level and whenever and however determined – in the 18 identified cases as some type of free-standing measure that has a life of its own beyond the 52 particular determinations identified in its panel request.[19] The EC ignores the fact that, for any given importation, the antidumping duty imposed or assessed depends on a particular administrative determination, whether that be an original investigation, assessment review, new shipper review, or changed circumstances review. Separately, the continued existence of an antidumping duty order depends on an underlying sunset review.[20] In other words, individual determinations are the focus of dispute settlement because the duty assessed, or the decision to continue imposing that duty pursuant to an antidumping order, is dependent on the actions of the administering authority in the relevant proceeding.

20. The EC's panel request, to fulfil the requirements of DSU Article 6.2, must identify the specific determination leading to the particular application or continued application of an antidumping duty, and cannot merely refer to the application or continued application of a duty in a general and detached way. The EC did not identify such determinations, nor could it have, because, by its own admission, the EC is trying to sweep in any subsequent and not-yet-taken determinations related to the application or continued application of duties in 18 cases.[21] As prior panels have recognized, a measure that did not even exist at the time of panel establishment cannot be within a panel's terms of reference.[22] Nor can the EC have consulted on a measure that does not exist at the time of the consultation request, yet such consultations on a measure are a precondition for requesting a panel with respect to that measure.[23] This Panel should reject the EC's attempt to include in the scope of this proceeding indefinite subsequent measures that did not exist at the time of panel establishment.

21. My colleague will now discuss issues related to the EC's claims under the Antidumping Agreement and the GATT 1994.

Article 2.4.2 of the Antidumping Agreement

22. The EC has focused much attention on the alleged proper reading of Article 2.4.2 of the Antidumping Agreement under the Vienna Convention. It is the EC's position that any time a Member makes "a systemic examination or inquiry" as to dumping, that Member is conducting an investigation subject to the disciplines of Article 2.4.2. Such an approach fails to appreciate the fundamental distinctions between investigations that determine the *existence* of dumping, and assessment reviews in which *final liability* is determined, even though such distinctions are recognized in the Antidumping Agreement.

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[18] EC Answer to Panel Question 1(a), para. 7; EC Second Written Submission, paras. 54, 57.

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

[20] AD Agreement, Articles 1, 5, 7, 9, 11.

[21] EC Response to Request for Preliminary Rulings, para. 47.

[22] *US – Upland Cotton (Panel)*, paras. 7.158-7.160.

[23] DSU Art. 4.7.

23. The requirements of Article 2.4.2 of the Antidumping Agreement do not extend beyond Article 5 investigations. It is only "during" an Article 5 "investigation phase", that a Member establishes "the existence of margins of dumping".[24] The US interpretation, applying the rules of interpretation as reflected in Article 31 of the Vienna Convention, is supported by the text of the Antidumping Agreement. Articles 1, 2.4.2 and 5, read together, establish that a unique determination as to the "existence" of dumping is made in Article 5 investigations. Outside of the Article 5 investigation phase, the task of an authority is not to determine whether dumping "exists". Instead, the Antidumping Agreement provides that in Article 9.3.1 assessment proceedings challenged by the EC, the task of the United States is to determine "the amount of the anti-dumping duty" and the "final liability for payment of anti-dumping duties".

24. To read, as the EC would have it, "during the investigation phase" as synonymous with "period of investigation", denies meaning to the unique "investigation phase" terminology in Article 2.4.2. Although numerous provisions in the Antidumping Agreement refer, for example, to the "period of investigation", the term "investigation phase" appears only in Article 2.4.2. The word "phase" in the context of the Antidumping Agreement recognizes that authorities will determine dumping margins in distinct contexts. Specifically, the "investigation phase" refers to the distinct phase in which the existence of dumping sufficient to justify the imposition of an antidumping duty is determined. The relationship between the term "investigation phase" and "the existence of margins of dumping" must be given meaning and may not be read out of the Agreement.

25. Because Article 2.4.2 is, by its terms, limited to establishing the existence of margins of dumping "during the investigation phase", it has no bearing on any segment of an antidumping proceeding other than the original investigation phase. Under Article 9.3, the collection and assessment of antidumping duties on specific entries has a separate and distinct purpose that necessarily occurs after the imposition of an antidumping duty order in the original investigation.

26. To force the requirements of Article 2.4.2 with respect to the *existence* of margins of dumping during the investigation phase, into Article 9.3, the EC seeks to impose an obligation whereby dumping liability would be determined on an exporter-wide basis in assessment reviews.[25] This approach divorces the amount of antidumping duty assessed on an import from the dumping margin associated with that import transaction. Nothing in the text of Article 9.3 supports such a result.

27. Interpreting Article 9.3.1 to require that final liability be assessed based on the totality of the exporter's transactions ignores a key commercial reality. In the real world, it is the *importers* to whom the sales at less than normal value are made, and it is the importers who actually pay the antidumping duties. This commercial reality is recognized explicitly in Article 9.3.2, and implicitly throughout Article 9.3. This cannot be ignored if the antidumping duties are to be an effective remedy to "offset or prevent" dumping.

The Erroneous Concept of "Product as a Whole"

28. The EC's erroneous argument that zeroing is prohibited depends on margins of dumping calculated in periodic reviews relating solely and exclusively to the "product as a whole" – and that margins of dumping *not* be calculated based on individual transactions. The concept of "product as a whole", however, was originally derived from the phrase "all comparable export transactions" in the first sentence of Article 2.4.2. The Appellate Body in *US – Softwood Lumber Dumping* based its finding on the phrase "all comparable export transactions" by interpreting the term "margins of dumping" and the "all comparable export transactions" language in an "integrated manner".[26] By asserting that the "obligation not to zero primarily derives from the requirements in Article VI of the

[24] AD Agreement, Article 2.4.2.
[25] EC Second Written Submission, paras. 117,119; EC Answer to Panel Question 8, para. 45.
[26] *US – Softwood Lumber Dumping (AB)*, paras. 85-93.

GATT 1994 and in Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*", but *not* Article 2.4.2[27], the EC applies "product as a whole" in a manner that is detached from the underlying textual basis in the first sentence of Article 2.4.2 of the Antidumping Agreement.

29. Furthermore, the EC's own arguments prove too much. The EC states: "Thus, it is only on the basis of aggregating all these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole".[28] And the EC further states: "The European Community fails to see how margins of dumping can properly be established for the product as a whole without aggregating all of the 'results' of the multiple comparisons".[29] If that were true, then a margin of dumping could never be determined for there could always be another import to average into the margin. If anything less than all transactions is not a proper margin of dumping, then when would an administering authority have all the transactions? The Antidumping Agreement does not specify a particular time period that may be used to define the universe of transactions to be averaged. If it is necessary to average "all" the transactions, then first, the margin would always be changing as new transactions were averaged together with all transactions since the beginning of the antidumping duty order. And second, the margin would never be final as there could always be new import transactions occurring that would need to be averaged in. Similarly, in considering Article 9.3.1 and 9.3.2, how could an importer ever know whether to ask for a refund when the margin of dumping is continually changing? And for imports during what period of time would the importer make such a request? In order to determine the margin of dumping, all the exporter's transactions would need to be averaged, not just with respect to that importer, and the list of transactions would never close.

30. Because of this problem, we should note that if negotiators had intended to use the "product as a whole" approach advocated by the EC, then they would have had to have specified the time period to consider. The simple fact that the negotiators did not deal with this time period issue is itself sufficient to show that the EC's approach is not provided for in the text.

31. Another fundamental problem with the EC's proposed "product as a whole" approach is that it is contrary to the way in which "product" is used in discussing antidumping duties. Other panels have correctly rejected the "product as a whole" approach by looking at the way in which "product" is used in Article VII of the GATT 1994. Perhaps even more directly relevant is the use of the term "product" in Article II:2 of the GATT 1994. There, it provides that:

> Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:
>
> ...
>
> (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI.

Here, the term "the importation of any product" must mean a particular transaction. A Member would not impose a duty on "the importation of any product as a whole". A duty imposed on "the importation" refers to the particular transaction. And we would note that this is the same manner in which product is used in Article II:1. Under the EC's reading that "product" means "product as a whole", a Member could impose higher ordinary customs duties on some transactions and lower duties on others and not breach the Member's tariff binding as long as the average of the ordinary customs duties applied to all transactions was less than the bound rate.

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[27] EC Second Written Submission, paras. 117-18.
[28] EC Second Written Submission, para. 80.
[29] EC Second Written Submission, para. 81.

Targeted Dumping

32. While the targeted dumping provision might be an exception to the normal rules for establishing the existence of margins of dumping in Article 2.4.2, it is not an exception to the fair comparison requirement of Article 2.4. If zeroing is found to violate the fair comparison requirement of Article 2.4, as the EC advocates, then such a prohibition would also apply to the methodology listed in the second sentence in Article 2.4.2. Under the EC's interpretation, which would require the averaging of all transactions for any calculation of the dumping margin, the result under the targeted dumping provision is mathematically equivalent to the result under the first sentence of Article 2.4.2, thus rendering the targeted dumping provision a nullity. This outcome is to be avoided under the customary rules of treaty interpretation.

33. The EC does not deny the result of mathematical equivalence if zeroing is prohibited in both symmetrical and asymmetrical comparisons. Rather, the EC suggests that in a targeted dumping scenario, a Member might remedy the mathematical equivalency problem by "re-set[ting] the parameters of the investigation"[30] and only calculating a margin for transactions falling within the pattern. There is no textual support for this proposed interpretation, and it is flatly inconsistent with the EC's insistence that a margin of dumping may only be calculated for the totality of the exporter's sales, i.e., "the product as a whole". The language of Article 2.4.2 says nothing about selecting a subset of transactions when conducting a targeted dumping analysis. In other words, to the extent that there is any obligation to calculate a margin of dumping for the "product as a whole", or on an exporter-wide basis, as the Appellate Body has found, nothing in the text of the second sentence of Article 2.4.2 creates an exception to that obligation. Instead, the second sentence is only an exception to the first sentence's obligation to normally make symmetrical comparisons in an investigation.

Uruguay Round Negotiating History

34. During this dispute, the EC, in support of its argument that zeroing must be prohibited, has relied on a revisionist version of the negotiating history.[31] The key terms that have been cited by the Appellate Body in its zeroing reports for the most part date back to the GATT 1947, the Kennedy Round Antidumping Agreement, and the Tokyo Round Antidumping Code. The only new language is the phrase "all comparable export transactions" in Article 2.4.2, which is limited to investigations and thus should not be at issue here. The rest were part of long-standing antidumping terminology, which the negotiators turned to when developing the WTO Antidumping Agreement. As the negotiating history makes clear, these terms did not acquire a new meaning during the Uruguay Round.

35. During the Uruguay Round, the negotiators were well aware of zeroing, or as it was referred to at the time – "negative dumping". While the negotiations were underway, Japan and Brazil challenged the EC's zeroing practices in two disputes under the Tokyo Round Antidumping Code. In both cases, panels found that the Code did not prohibit zeroing. Several Members submitted proposals during the Uruguay Round, including detailed textual changes, designed to require WTO Members to consider "negative dumping" or "non-dumped transactions". None of their textual proposals appeared in the final Uruguay Round Antidumping Agreement. Instead, the provisions of the Antidumping Agreement that are at issue here reflect standard language from prior agreements that were interpreted by Tokyo Round Code dispute settlement panels as not requiring consideration of "negative dumping" or aggregation of individual transactions.

36. The lack of any explicit textual reference in the Antidumping Agreement to zeroing or "negative dumping" speaks for itself. No common understanding was reached on prohibiting zeroing in the Uruguay Round. No common understanding could be reached because, despite extensive efforts by some Members, their proposals were firmly opposed by the United States, Canada – and

[30] EC Second Written Submission, paras. 116, 246.
[31] *See, e.g.*, EC Second Written Submission, paras. 221-24.

even the EC – Members who continue to use zeroing today, either by assessing antidumping duties on an import-specific basis, or, in the case of the EC, pursuant to the application of the "targeted dumping" provision in Article 2.4.2.

Conclusion

37. Mr. Chairman, Members of the Panel, the EC has asked this Panel to read an obligation into the Antidumping Agreement and GATT Article VI, notwithstanding the lack of any textual basis for the obligation the EC proposes. The United States respectfully urges the Panel to reject the EC's claims. Dispute settlement plays a major role in the WTO system, but it cannot, and should not, seek to substitute for the WTO Members, who ultimately must bear the final responsibility for negotiating agreements to further open markets and strengthen the global trading system. If WTO Members left out certain provisions for lack of consensus, Article 3.2 of the DSU makes it plain that it is *not* the job of panels or the Appellate Body to write them into the Agreement. Indeed, interpretations that go beyond the existing text of the WTO agreements – whatever the good intentions of those advancing the interpretations – fundamentally undermine the willingness of Members to agree to further market-opening commitments as some Members will simply refuse to negotiate mutually beneficial commitments and instead seek unilateral gain through the dispute settlement system.

38. This concludes our opening statement. We would be pleased to respond to any questions you may have.

ANNEX D-14

CLOSING STATEMENT OF THE EUROPEAN COMMUNITIES AT THE SECOND MEETING OF THE PANEL

Mr. Chairman, distinguished Members of the Panel:

The EC requests the panel to make a suggestion under the second sentence of Article 19(1) of the DSU, not, as is typically done, in order to make a substantive proposal to the defending Member as to how to implement – such as withdrawing the measure. But rather to avoid unnecessary discussions about what might or might not fall within the scope of a compliance panel. In particular, we would like the panel to suggest to the US that, when implementing, the US should take all necessary steps of a general or particular nature to ensure that any further specific action against dumping by the US in relation to the same products from the EC as referenced in the present dispute, be WTO consistent, and specifically with reference to the question of zeroing. We believe that such suggestion might considerably reduce the need for protracted and unnecessary discussions about the scope of any compliance panel, and thus facilitate the further work of the panel.

Thank you, Mr Chairman.

ANNEX D-15

CLOSING STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

Mr. Chairman, Members of the Panel:

1. The United States would like to thank the Panel for its hard work and for its questions today. We also would like to thank the Panel again for opening the meeting to WTO Members and to the public. The United States appreciates these steps towards greater transparency at the WTO.

2. The United States will be brief but would like to emphasize a few points in closing.

3. The United States strongly objects to the EC's attempt to have the Panel consider as measures at issue the "application or continued application" of antidumping duties in 18 separate cases. The EC never included these alleged measures as part of its consultation request, and the United States was denied the opportunity to consult with the EC on them. The EC appears to have used the time after its consultation request to devise a theory on how to get at antidumping determinations not yet taken by the United States, and it then introduced the so-called "18 measures" in its panel request.

4. These alleged measures cannot properly be before the Panel under Article 6.2 of the DSU. The EC would like the Panel to treat the duties as some sort of organism, with a life of its own, stretching into the indefinite future. However, the EC ignores the fact that the duty imposed or assessed depends on the underlying administrative determination, whether an original investigation, an administrative review, a changed circumstances review, or a new shipper review. The EC had to identify the specific determination in its panel request that resulted in a given application or continued application but could not do so because these determinations were not even in existence at the time of panel establishment. The "application or continued application" of antidumping duties cannot fall within the Panel's terms of reference and should be rejected.

5. We would now like to say a few words about the EC's substantive zeroing claims. The EC has repeatedly emphasized its arguments on the application of the Vienna Convention. It has accused the United States of neglecting the customary rules of interpretation of public international law, just because we have not always said the words "Vienna Convention". However, as demonstrated in our written submissions, at the first panel meeting, and before you today, we have applied the customary rules of interpretation to the covered agreements. The ordinary meaning of the text of the Antidumping Agreement and GATT 1994 makes clear that there is no general prohibition on zeroing. To find such a prohibition where there is none would add to the US obligations under the covered agreements, inconsistent with Articles 3.2 and 19.2 of the DSU.

6. The United States would like to remind the Panel of its obligation to make an objective assessment under Article 11 of the DSU. Other panels, in doing so, have found that there is no prohibition on zeroing in periodic reviews. We hope that this Panel will find the same, as a proper interpretation of the covered agreements would lead it to do.

7. Thank you again, Mr. Chairman, and members of the Panel.