# UNITED STATES – CONTINUED EXISTENCE AND APPLICATION OF ZEROING METHODOLOGY

**WT/DS350**

# FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

**September 12, 2007**

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## I. INTRODUCTION

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

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

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

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

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[1] *India – Patents (AB)*, para. 45.

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

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

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

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

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

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

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

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

## II. FACTUAL BACKGROUND

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

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

### A. The Article 5 Investigation Phase

13. With respect to the investigation phase, U.S. law provides that Commerce will normally use the average-to-average method for comparable transactions during the period of investigation.[4] U.S. law also provides for the use of transaction-to-transaction comparisons[5] and, provided that there is a pattern of prices that differs significantly by region or time period, among other things,[6] for use of the average-to-transaction method.[7]

14. In the investigation phase, Commerce must resolve the threshold question of whether dumping "exists" such that the imposition of an antidumping measure is warranted. Section 771(35)(A) of the Tariff Act defines "dumping margin," for the purposes of U.S. law, as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise."[8] Thus, for purposes of U.S. law, the "dumping margin" is the result of

[4] 19 C.F.R. 351.414(c)(1) (Exhibit EC-3).

[5] 19 U.S.C. 1677f-1(d)(1)(A) (Exhibit EC-2).

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

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

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

a specific comparison between an export price (or constructed export price) and the normal value for comparable transactions. When average-to-average comparisons are used, similar export transactions[9] are grouped together and an average export price is calculated for the comparison group which is compared to a comparable normal value. Some of these comparisons could result in dumping margins while other comparisons might result in no dumping margin.

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

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

17. If the overall weighted average dumping margin for a particular exporter/producer is *de minimis*, the exporter/producer is excluded from any antidumping measure.[14] If the overall weighted average dumping margin for each exporter/producer is *de minimis*, the antidumping

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

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

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

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

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

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

proceeding is terminated.[15] If Commerce and the ITC make final affirmative determinations of dumping and injury, respectively, then Commerce orders the imposition of antidumping duties (an "antidumping duty order" or, simply "order" in U.S. parlance).[16] The issuance of an antidumping duty order completes the investigation phase.

### B. The Assessment Phase

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

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

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

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

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

## III. PROCEDURAL BACKGROUND

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

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

## IV. GENERAL PRINCIPLES

### A. Burden of Proof

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

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

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

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

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

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

[21] *US – Corrosion-Resistant Steel CVD (AB),* paras. 156-157 (footnote omitted).

## B. Standard of Review

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

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

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

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

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

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

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[22] *See EC – Bed Linen (Article 21.5) (AB)*, paras. 108, 114, and 118.

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

[24] *Argentina – Poultry*, para. 7.45 (stating that under Article 17.6(i), panels "may not engage in *de novo* review").

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

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

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

30. The EC erroneously argues that the "WTO inconsistency of . . .[zeroing] has already been established in previous disputes."[27] EC citations to evidence before separate panels and the Appellate Body do not permit the Panel to simply adopt those findings here without an objective assessment of the facts at issue. The panel in *US – Subsidies on Upland Cotton* rejected Brazil's

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

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

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

request that the panel simply accept and apply the reasoning of a prior panel, as modified by the Appellate Body. In declining to do so, the panel stated that there was "no basis in the text of the DSU . . . for such incorporation by reference of claims and arguments made in a previous dispute nor for a quasi-automatic application of findings, recommendations and rulings from a previous dispute."[28]

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

32. Furthermore, while prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members,[30] this Panel is not bound to follow the reasoning set forth in any Appellate Body report. In this instance, the EC urges the Panel to follow prior Appellate Body findings in order to ensure the "security and predictability" referred to in Article 3.2 of the DSU.[31] However, read in its context in Article 3.2, the reference to security and predictability in Article 3.2 supports the opposite conclusion. The rights and obligations of the Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. In this regard, the "security and predictability" referred to in the first sentence of Article 3.2 results from the application of the correct interpretive approach set forth in the second sentence of Article 3.2 - the customary rules of interpretation of public international law - to the provisions of the WTO Agreement. A result which adds to or diminishes the rights or obligations of Members provided in the covered agreements is prohibited by the third sentence of Article 3.2 and is therefore the antithesis of the "security and predictability" referred to in the first sentence of Article 3.2. This conclusion does not change because the result in question had previously been reached by the Appellate Body.

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

[29] EC First Submission, para. 87.

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

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

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

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

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

36. In connection with reports dealing with "zeroing," the panel in *US - Zeroing (Japan)* appreciated that panels are not bound to apply reasoning and findings of the Appellate Body on

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

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

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

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

the subject.[36] The panel, explaining why it departed from the Appellate Body reasoning on certain aspects of the zeroing claim, recognized that although Appellate Body reports should be taken into account when they are relevant to a dispute, "a panel is under an obligation under Article 11 of the DSU to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements...'"[37] Further, as the panel noted, "Article 3.2 of the DSU requires a panel 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' and provides that '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in covered agreements.'"[38]

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

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

38. Lastly, the United States notes that the EC's claim that prior Appellate Body reports "constitute an authoritative interpretation of the law"[41] cannot be reconciled with Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization,* which confers the "exclusive authority to adopt interpretations" of the covered agreements upon the Ministerial Conference and the General Council.[42] Therefore, while the dispute settlement system serves to

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

[37] *US – Zeroing (Japan) (Panel)*, para. 7.99 and n. 733.

[38] *US – Zeroing (Japan) (Panel)*, para. 7.99 and n. 733.

[39] *US – Shrimp AD Measure (Ecuador)*, paras. 7.10-7.11 (*quoting US - Gambling (AB)*, para. 141).

[40] *US – Shrimp AD Measure (Ecuador)*, para. 7.9.

[41] *See* EC First Submission, para. 108.

[42] The Appellate Body recognized this point in one of its earliest reports, when it noted that "Article IX:2 of the WTO Agreement provides: 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements'. Article IX:2

resolve a particular dispute, and to clarify Agreement provisions in the context of doing so, neither panels nor the Appellate Body have the "authority" to adopt interpretations that would be binding with respect to another dispute. The same flaw applies to the EC's novel argument concerning Article XVI:4 of the Marrakesh Agreement as well, as discussed further below.

## V. ARGUMENT

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

40. In Section B, the United States responds to the EC's claims concerning assessment proceedings. The United States will demonstrate that for purposes of an assessment proceeding, there is no WTO requirement to offset "negative dumping" or use the average-to-average method or transaction-to-transaction method.[43] Therefore, the Panel should reject the EC's claims as to assessment proceedings.

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

### A. Request for Preliminary Rulings

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provides further that such decisions 'shall be taken by a three-fourths majority of the Members'. The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere." *Japan – Alcohol Taxes (AB),* p. 13.

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

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

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

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

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

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

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

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

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

#### a. The Measures Contained in the EC's Original Consultation Request

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

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

#### b. The EC's Panel Request Explicitly Identifies Additional Alleged Measures That Were Not Identified in Its Request for Consultations

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

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

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

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

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

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

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

[50] *Compare* WT/DS350/6 (11 May 2007), Annex, *with* WT/DS350/1 (3 October 2006), Annex; WT/DS350/1/Add.1 (11 October 2006), Annex. The additional final administrative review results are: *Steel Concrete Reinforcing Bars from Latvia*, 71 Fed. Reg. 45,031 (Aug. 8, 2006) (identified as preliminary results in consultation request) (Exhibit EC-65); *Stainless Steel Sheet and Strip in Coils from Germany*, 71 Fed. Reg. 45,024 (Aug. 8, 2006) (identified as preliminary results in consultation request) (Exhibit EC-49); and *Certain Pasta from Italy*, 72 Fed. Reg. 7011 (Feb. 14, 2007) (Exhibit EC-65). The additional on-going administrative review result is *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 70 Fed. Reg. 71,523 (December 11, 2006) (preliminary results) (Exhibit EC-59).

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

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

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

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

#### a. Consultations Must Be Held Regarding a Specific Measure Before a Member May Refer that Measure to the DSB

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

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

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

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

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

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

57. Article 17.3 states that the consultations are to be held with the view of "reaching a mutually satisfactory resolution of *the matter*." Moreover, Article 17.4 provides that when "consultations pursuant to [Article17.3 of the AD Agreement] have failed to achieve a mutually

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

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

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

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

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

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

agreed solution" and "final action has been taken," by the administering authorities, a Member "may refer *the matter* to the Dispute Settlement Body ("DSB")." And, under Article 17.5, the DSB "shall, at the request of the complaining party, establish a panel to examine *the matter*" (emphasis added). In all cases, *the matter* encompasses the specific measure or measures identified by the complaining party, and the legal basis for the complaint.

58. Articles 17.3, 17.4, and 17.5, along with Articles 4 and 6 of the DSU, therefore set forth a process by which a complaining party must request consultations on a specific matter before that matter may be referred to the DSB for the establishment of a panel. Moreover, pursuant to these provisions, a panel's terms of reference cannot include measures which were outside of the request for consultations.

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

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

**b. Because the EC's Panel Request Contained Measures That Were Not the Subject of Its Request for Consultations, These Additional Measures Do Not Fall Within the Panel's Terms of Reference**

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

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

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

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

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

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

64. Permitting the EC to request a panel with respect to measures on which consultations have not been held would also have dangerous systemic consequences for the WTO dispute settlement system. The very purpose of consultations and any practical utility that they provide would be completely undermined if a complainant could add completely new measures upon which no consultations had been held, to a request for the establishment of a panel. To allow a complaining party to have recourse to panel proceedings without having consulted on a measure would deny both parties the opportunity to attempt to settle their differences and resolve the dispute, contradicting the role stated in Article 3.3 of the DSU of the dispute settlement system in providing the "prompt settlement" of situations where one Member considers that its benefits under the covered agreements are being nullified or impaired by measures taken by another Member. It is also unclear how such an outcome would advance the purpose of consultations; we note in this connection that Article 4.1 of the DSU calls on Members "to strengthen and improve the effectiveness of the consultation procedures employed by Members."

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

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

66. The EC in its panel request identified as additional "measures" "the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders

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

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

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

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

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

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[62] *See* WT/DS350/6 (11 May 2007).

[63] *See US – Certain EC Products (AB)*, para. 76.

[64] *See US – Certain EC Products (AB)*, para. 70.

70. Moreover, in addition to lacking in clarity, any attempt by the EC to assert a broad, all encompassing challenge to "18 cases," and suggest that its claim covers any and all individual proceedings which flow from these cases is untenable. By failing to identify specific measures at issue, the EC has failed to establish a *prima facie* case as to the orders in general, or to any proceeding that it has not specifically named. Original investigations and assessment reviews, even when pertaining to the same subject merchandise, are different processes which serve distinct purposes. The purpose of an investigation is to determine the existence, degree, and effect of any alleged dumping, while the purpose of an assessment review is to determine the amount of the duty to be assessed on previous imports of subject merchandise and the estimated dumping duty to be applied to future imports. A challenge and finding by a panel with respect to one administrative proceeding does not necessitate the same type of finding as to all proceedings that encompass the same subject merchandise.

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

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

72. As mentioned above, four of the alleged measures identified in the panel request were preliminary results of assessment reviews.[68] They do not constitute "final action" within the

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

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

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

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

meaning of Article 17.4 of the AD Agreement, and thus cannot serve as the basis for requesting establishment of a panel.

73. A matter may only be referred to a panel if "final action has been taken by the administering authority."[69] The EC, however, alerts the Panel that some of the matters it has referred to the DSB relate to proceedings that are not final by prominently disclosing in its panel request that the measures it challenges are "Final Results (*unless otherwise specified*)," and by identifying the one on-going administrative review and one of the on-going sunset reviews as "Preliminary results."[70] The EC also omits from its panel request reference to the final ITC decisions and final orders in two of the sunset reviews because these proceedings also were on-going at the time the EC submitted its panel request. These four on-going proceedings challenged by the EC are not "final action[s] . . . taken by the administering authority of the importing Member to levy definitive anti-dumping duties."[71] To the contrary, at the time of the panel request, no decision had been made to levy definitive duties.[72] Indeed, it was entirely possible that no definitive anti-dumping duty would be levied, or would continue to be levied at all.

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

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

[70] WT/DS350/6, Annex: List of Cases (p.11) (emphasis added); *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 72 Fed. Reg. 7604 (Feb. 16, 2007) (preliminary results) (*see* Exhibit EC-77); *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 70 Fed. Reg. 71,523 (Dec. 11, 206) (preliminary results) (*see* Exhibit EC-59).

[71] AD Agreement, Art. 17.4.

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

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

### B. The United States Methodology for Assessing Antidumping Duties is Consistent with the Obligations in the AD Agreement

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

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

77. In *US – Softwood Lumber Dumping (AB),* the Appellate Body specifically recognized that the issue before it was whether zeroing was prohibited under the average-to-average comparison methodology found in Article 2.4.2.[76] Thus, the report found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology."[77] The Appellate Body reached this conclusion by interpreting the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2 in an "integrated manner."[78] In other words, the term "all comparable export transactions" was integral to the interpretation that the multiple comparisons of average normal value and average export price for averaging groups did not constitute an average-to-average comparison of all comparable export transactions unless the results of all such comparisons were aggregated. The obligation to provide offsets, therefore, was tied to the text of the provision addressing the use of

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

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

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

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

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

the average-to-average comparison methodology in an investigation, and did not arise out of any independent obligation to offset prices.

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

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

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

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

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

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

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

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

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

83. In addition, the term "less than normal value" is defined as when the "price of the product exported . . . is less than the comparable price . . . "[85] Again, this definition describes the real-world commercial conduct of pricing such that one price is less than another price. The ordinary meaning of "price" as used in the definition of dumping is the "payment in purchase of

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

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

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

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

something."[86] This definition "can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level."[87]

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

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

86. In *US – Zeroing (Japan)*, the panel noted that "the record of past discussions in the framework of GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions."[89] Well before the recent debate about "zeroing" or "offsets," a Group of Experts convened to consider numerous issues with respect to the application of Article VI of the GATT 1947. In this report, the Group of Experts considered that the "ideal method" for applying antidumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product concerned."[90]

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

> In referring to a "determination . . . of . . . dumping . . . in respect of each single importation of the product concerned", the Group of Experts clearly envisaged the calculation of transaction-specific margins of dumping. This would suggest that the

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

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

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

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

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

> Group of Experts did not consider that there was anything in the definition of dumping set forth in Article VI of the GATT that would preclude the calculation of such transaction-specific margins.[91]

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

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

90. The EC's claims in this dispute depend on a contrary interpretation of these provisions holding that "dumping" and "margins of dumping" apply to the product under investigation "as a

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

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

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

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

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

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

whole" and do not apply to sub-group levels.[97] The EC claim depends on the reasoning set forth in the Appellate Body reports in *US – Zeroing (EC)* and *US – Zeroing (Japan),*[98] which rejected the notion that dumping may occur with respect to an individual transaction in the absence of the textual basis that was present in *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*. This interpretation relies on the term "product" as being solely and exclusively synonymous with the concept of "product as a whole." In particular, it denies that the ordinary meaning of the word "product" or "products" used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. However, as the panel report in *US – Zeroing (Japan)* explained, "[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis . . . ."[99]

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

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

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

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

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

> may not distinguish between *transactions* in which export prices are less than normal value and *transactions* in which export prices exceed normal value.[100]

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

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

93. As the panel in *US - Softwood Lumber Dumping (Article 21.5)* explained, "an analysis of the use of the words product and products throughout the GATT 1994, indicates that there is no basis to equate product with 'product as a whole'. . . Thus, for example, when Article VII:3 of the GATT refers to 'the value for customs purposes of any imported product', this can only be interpreted to refer to the value of a product in a particular import transaction."[101] The panel detailed numerous additional instances where the term "product", as used in the AD Agreement and GATT 1994 do not support a meaning that is solely, and exclusively, synonymous with "product as a whole":

> To extend the Appellate Body's reference to the concept of "product as a whole" in the sense that Canada proposes to the T-T methodology would entail accepting that it applies throughout Article VI of GATT 1994, and the AD Agreement, wherever the term "product" or "products" appears. A review of the use of these terms does not support the proposition that "product" must always mean the entire universe of exported product subject to an anti-dumping investigation. For instance, Article VI:2 states that a contracting party "may levy on any dumped product" an anti-dumping duty. Article VI:3 provides that "no countervailing duty shall be levied on any product". Article VI:6(a) provides that no contracting party

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

[101] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23, n. 36.

> shall levy any anti-dumping or countervailing duty on the importation of any product...". Similarly, Article VI:6(b) provides that a contracting party may be authorized "to levy an anti-dumping or countervailing duty on the importation of any product". Taken together, these provisions suggest that "to levy a duty on a product" has the same meaning as "to levy a duty on the importation of that product". Canada's position, if applied to these provisions, would mean that the phrase "importation of a product" cannot refer to a single import transaction. In many places where the words product and products are used in Article VI of the GATT 1994, an interpretation of these words as necessarily referring to the entire universe of investigated export transactions is not compelling.[102]

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

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

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

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

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[102] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23.

[103] *See* EC First Submission, paras. 196.

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

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

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

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

98. Nevertheless, the EC asserts that it is "only on the basis of aggregating . . . 'intermediate values'. . . that an investigating authority can establish margins of dumping for the product under investigation as a whole."[107] In this regard, the reasoning of the Appellate Body reports relied upon by the EC is unpersuasive because it is contrary to the great weight of evidence indicating that the concepts of dumping and margin of dumping have long been understood as relating to individual transactions, as evidenced by the report of the Group of Experts, the reports of the GATT panels, the well-established practice of Members utilizing antidumping

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[104] *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.27.

[105] *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.28.

[106] *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.62.

[107] EC First Submission, para. 195.

regimes, the negotiating history of the AD Agreement, as well as the ordinary meaning of the text the relevant provisions of the AD Agreement, the Antidumping Code, the GATT 1947 and the GATT 1994. Accordingly, Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define the terms "dumping" and "margin of dumping" such that export transactions must necessarily be examined at an aggregate level.

### 2. Article 2.4.2

99. The text and context of the relevant provisions of the AD Agreement, interpreted in accordance with customary rules of interpretation of public international law, do not support a general prohibition against zeroing that would apply in the context of assessment proceedings. The express terms of Article 2.4.2 limit its application to the "investigation phase" of a proceeding. To require the application of Article 2.4.2 to Article 9 assessment proceedings would read out of the AD Agreement Article 2.4.2's express limitation to investigations. Such a result would be inconsistent with the principle of effectiveness, under which all the terms of an agreement should be given meaning.[108]

100. Article 2.4.2 provides as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

> Fourth, this interpretation is entirely consistent with different functions played by 'original investigations' and duty assessment proceedings. . . .[113]

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

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

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

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

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[113] *US – Zeroing (EC) (Panel)*, para. 7.220.

[114] *See US – Zeroing (EC) (Panel)*, paras. 7.220 and 7.6-7.7.

[115] EC First Submission, paras. 223-224.

[116] *Brazil – Desiccated Coconut (AB)*, p. 9. See, also, *US – Hot-Rolled Steel (AB)*, paras. 53, 61 (distinguishing between Article 21.2 reviews and the original determination in an investigation).

[117] *US – OCTG from Argentina (AB)*, paras. 294, 301.

For example, the panel in *US – DRAMS AD* found that the term "investigation" means "the investigative phase leading up to the final determination of the investigating authority."[118]

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

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

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

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[118] *US – DRAMS AD*, para. 6.87, footnote 519, discussing Article 5 of the AD Agreement.

[119] EC First Submission, para. 213.

[120] *US – Zeroing (EC) (Panel)*, para. 7.151.

[121] EC First Submission, para. 222.

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

111. The express limitation in Article 2.4.2 to the investigation phase is also consistent with the fact that the antidumping systems of Members are different for purposes of the assessment phase. The different methods used by Members include the use of prospective normal values, retrospective normal values, and prospective *ad valorem* assessment. If the requirements of Article 2.4.2 regarding comparison methods applied to the assessment of antidumping duties, this divergence of assessment systems would not be possible. For example, it is not possible to reconcile the prospective normal value system used by some Members with a requirement to use either the average-to-average or transaction-to-transaction method, because such systems compare weighted average normal values to individual export prices to assess dumping duties on individual transactions. Thus, to retain the flexibility in assessment systems reflected in Article 9, it is not only appropriate, but necessary, to limit the requirements of Article 2.4.2 to the investigation phase

### 3. Article 2.4.2, Second Sentence

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

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[122] *See, e.g.*, *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 87.

[123] *See* EC First Submission, para. 222. ("This confirms that, in the context of Article 9.3, a 'margin of dumping' is to be established by reference to the whole of Article 2 . . .").

account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison," it may then use the asymmetrical average-to-transaction comparison to establish the existence of margins of dumping during the investigation phase.

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

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

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

[125] *US – Gasoline (AB)*, p. 23.

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

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

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

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

116. In its most recent report to address this issue, the Appellate Body dismissed the redundancy caused by mathematical equivalence by concluding that it may be permissible to apply the targeted dumping methodology to a subset of export transactions.[135] The United States is unaware of any Member ever having done this, nor has any Member ever suggested it would administer its antidumping regime in this manner. The language of the AD Agreement says nothing about selecting a subset of transactions when conducting a targeted dumping analysis. The Appellate Body has drawn its conclusions about "zeroing" from its interpretation of "dumping" as relating to a "product," *i.e.*, a "product as a whole." The targeted dumping

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*(Japan) (Panel),* para. 7.127 n. 763 ("Mathematically, if zeroing is prohibited under the average-to-transaction method, the sum total of amount by which export prices are above normal value will offset the sum total of the amounts by which export prices are less than normal value.").

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

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

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

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

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

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

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

provision provides that when certain conditions are met, Members are permitted to compare average normal values to transaction-specific export prices. If the Appellate Body is correct that dumping may only be determined for the product as a whole (which the United States does not concede), there is no textual basis for inferring that the targeted dumping comparison methodology is an exception to that provision (which, as Article 2.1 provides, applies throughout the AD Agreement). The targeted dumping provision simply provides an exception to the average-to-average or transaction-to-transaction comparison requirement of the first sentence of Article 2.4.2. Consequently, the use of a subset of export transactions as a means of avoiding mathematical equivalency would also appear to be inconsistent with the AD Agreement.

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

> the asymmetrical method, as compared with the first symmetrical method, makes sense only if the zeroing technique is applied. Without that mechanism, that method would mathematically lead to the same result as the first symmetrical method and it would be impossible to prevent the non-dumped exports from disguising the dumping of the dumped exports.[136]

The Court agreed, finding that

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

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

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

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

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

### 4. Article 9

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

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

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

121. The reference in Article 9.3 to Article 2 means that the amount of antidumping duty assessed may not exceed the amount of antidumping duty calculated in accordance with the

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[138] *US – Gasoline (AB)*, p. 23.

[139] EC First Submission, para. 224.

general requirements of Article 2, such as making the various adjustments set forth in Article 2.4 necessary to provide a fair comparison. As the panel found in *Argentina – Poultry*:

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

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

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

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

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

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

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

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

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

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

[143] EC First Submission, para. 211.

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

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

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

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

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

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[144] *Argentina – Poultry*, paras. 7.345-7.367.

[145] *Argentina – Poultry*, Annex C-2, para. 33.

Likewise, antidumping duties are assessed on individual entries resulting from those individual transactions. Therefore, the obligation set forth in Article 9.3 to assess no more in antidumping duties than the margin of dumping, is similarly applicable at the level of individual transactions.

128. The EC's apparent claim under Article 9.3 of the AD Agreement is that the amount of the antidumping duty has exceeded the margin of dumping established under Article 2[146]. This claim however necessarily depends upon whether the EC's preferred interpretation of the "margin of dumping," which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the AD Agreement. Under such a view, a Member breaches Article 9.3 by failing to provide offsets, because Members are required to calculate margins of dumping on an exporter-specific basis for the product *"as a whole"* and, consequently, a Member is required to aggregate the results of *"all" "intermediate comparisons,"* including those for which the export price exceeds the normal value. The United States notes that the terms upon which such an interpretation rests are conspicuously absent from the text of both Articles 2.1 and 9.3, and thus such an interpretation is not mandated by the definition of dumping contained in Article 2.1, as described in detail above.

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

[146] EC First Submission, para. 224.

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

prices above the normal value carry the same weight as export prices below the normal value ...."[148]

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

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

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

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

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

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

> In our view, the fact that in an assessment proceeding in Article 9.3 the margin of dumping must be related to the liability incurred in respect of particular import transactions is an important element that distinguishes Article 9.3 proceedings from investigations within the meaning of Article 5. ... [I]n an Article 9.3 context the extent of dumping found with respect to a particular exporter must be translated into an amount of liability for payment of antidumping duties by importers in respect of specific import transactions.[151]

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

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

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[151] *US – Zeroing (EC) (Panel),* para. 7.201.

[152] *US – Zeroing (Japan) (AB)*, para. 156.

under the AD Agreement and the GATT 1994 will be prevented from addressing injurious dumping.

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

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

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

> [An] obligation to take all (including non-dumped) comparisons into account in determining the margin of dumping for the product as a whole ... is illogical, as it would provide importers clearing dumped transactions with a double competitive advantage vis-à-vis other importers: first, they would benefit from the lower price inherent in a dumped transaction; second, they would benefit from offsets, or credits, "financed" by the higher prices paid by other importers clearing non-dumped, or even less-dumped, transactions.

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[153] *US – Zeroing (Japan) (Panel)*, para. 7.199.

> ...
> Again, this makes no sense in the context of a prospective normal value duty assessment system, because (as even Canada acknowledges) the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. And if other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers. We are unable to accept that the Appellate Body could have intended such absurd results to follow from its interpretation of the phrase "margins of dumping" in US - Softwood Lumber V.[154]

137. Further, the EC's interpretation of Article 9.3, requiring that antidumping duty liability be determined for the product "as a whole," is inconsistent with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment.[155] Article 9.4(ii) of the AD Agreement "expressly refers to the calculation of the liability for payment of antidumping duties on the basis of a prospective normal value system."[156] Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value.[157] For example, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payments of antidumping duties. The converse is also true. A liability for a dumped sale would be determined by comparing the price of individual export transaction with prospective normal value and the prices of other transactions have no relevance to this determination.[158] As the

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

[155] *See* EC First Submission, para. 194-195.

[156] *US – Zeroing (Japan) (Panel)*, para. 7.201.

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

[158] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53 ("Under a prospective normal value duty assessment system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a prospective normal value. . . . In the context of such transaction-specific duty assessment, it makes no sense to talk of a margin of dumping being established for the product as whole, by

panel in *US – Zeroing (Japan)* found, "there is no textual support in Article 9 for the proposition that export prices in other transactions are of any relevance."[159]

138. Because in a prospective normal value system, liability for antidumping duties is incurred only to the extent that prices of individual export transaction are below the normal value, the panel in *US – Zeroing (Japan)* concluded, "the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transaction below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value."[160]

139. If in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, there is no reason why liability for payment of antidumping duties may not be similarly assessed on the basis of export prices less than normal value in the retrospective systems applied by the United States.[161]

140. Further, accepting the EC's interpretation that a Member must aggregate the results of *"all"* comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value systems, in order to take into account "*all*" of the exporters' transactions. The results of the retrospective review would be to determine antidumping duty liability on a retrospective basis. This result, however, is contrary to the very concept of the prospective normal value system. As the panel in *US – Zeroing (Japan)* explained, the "liability for payment of anti-dumping duties is final in prospective normal value

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aggregating the results of all comparisons, since there is only one comparison at issue.")

[159] *US – Zeroing (Japan) (Panel)*, para. 7.201.

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

[161] *US – Zeroing (Japan) (Panel)*, para. 7.208 ("We see no textual basis in Articles 9.3 and 9.4 for the view that if an authority assesses the amount of the anti-dumping duty on a retrospective basis by examining export transaction that have occurred during a certain period, it is obligated to take into account export prices above the normal value that it would not have been required to take into account if it had applied a prospective normal value system.").

system at the time of importation of a product."[162] In effect, prospective normal value systems will become retrospective, a conclusion also reached in a Canadian parliamentary report on potential changes to its prospective normal value system.[163] In that report and at its trade policy review, Canada expressed its view that in a prospective normal value system, each entry provides a margin of dumping.[164] If, in fact, Members had intended prospective normal value systems to have such reviews, one would have expected Members to have provided for this in explicit agreement language.

### 5. Article 2.4

141. The text of Article 2.4 requires that a "fair comparison shall be made between the export price and the normal value." The text of Article 2.4, however, does not resolve whether any particular assessment of antidumping duties exceeds the margin of dumping because the text of Article 2.4 does not resolve whether "dumping" and "margins of dumping" are concepts that apply to individual transactions. Nor does the text resolve whether, for purposes of assessing antidumping duty liability, a margin of dumping may be specific to each importer that is liable for payment of the antidumping duties. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is "fair" or "unfair." As the panel in *US – Zeroing (Japan)* noted, the "precise meaning of" the 'fair comparison' requirement "must be understood in light of the nature of the activity at issue."[165] The panel concluded that "the 'fair comparison' requirement

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[162] *US – Zeroing (Japan) (Panel)*, para. 7.205.

[163] Report on the Special Import Measures Act, House of Commons Canada, December 1996, http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/chap4e.html (Exhibit US-4) (hereinafter "SIMA Report"). *See also* Special Import Measures Act Self-Assessment Guide ("Normal Value - Export Price = Antidumping Duty (or Margin of Dumping"), http://www.cbsa-asfc.gc.ca/sima/self-e.html#12 (Exhibit US-5).

[164] *Id.*

[165] *US – Zeroing (Japan) (Panel),* para. 7.155; *see also US – Zeroing (EC) (Panel)*, para. 7.260 ("[C]aution ... is especially warranted where as in the case of the first sentence of Article 2.4, a legal rule is expressed in terms of a standard that by its very nature is more abstract and less determinate than most other rules in the AD Agreement. The meaning of 'fair' in a legal rule must necessarily be determined having regard to the particular context within which the rule operates."); *see also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para.5.74 ("[W]e believe that a claim based on a highly general and subjective test such as 'fair comparison' should be approached with caution by treaty interpreters. For this reason, any concept of 'fairness' should be solidly rooted in the context provided by the *AD Agreement,* and perhaps the *WTO Agreement* more generally. As such there must be a discernible standard within the *AD Agreement,* and perhaps the *WTO Agreement*, by which to assess whether or not a

cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context."[166]

142. Assessment of antidumping duties in the amount by which the normal value exceeded the export price on a transaction-specific basis, without providing an offset for non-dumped transactions does reflect a "fair comparison" made for each export transaction. The EC's assertion that the United States has assessed antidumping duties "in excess of the actual margin of dumping for the product" is predicated on the assumption that zeroing is prohibited – otherwise, the challenged assessments would reflect the correct magnitude of the margins of dumping.

143. The EC's claim of inconsistency with Article 2.4 adopts the reasoning set forth in the Appellate Body report in *US – Zeroing (Japan)*, finding that a methodology cannot be viewed as involving a "fair comparison" under Article 2.4 if the resulting assessments exceed the "margin of dumping established in accordance with Article 2."[167] The reasoning upon which the EC relies, however, is entirely consequential of the Appellate Body report's previous analysis of the term "margin of dumping." Indeed, the passage quoted by the EC makes plain that the rationale followed in the Appellate Body report was based on the *results* of the comparison methodology in relation to the previously interpreted "margin of dumping," rather than on any inherently unfair aspect of the comparison methodology itself. Therefore, this claim of "unfairness" depends not on the text of Article 2.4, but on whether it is permissible to interpret the term "margin of dumping" as used in Article 9.3 as applying to transactions.

144. As the panels in *US – Zeroing (EC)* and *US – Zeroing (Japan)* have concluded, it is permissible to interpret "margin of dumping" as used in Article 9.3 as applying to an individual

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comparison has been 'fair' or 'unfair.' Thus, the fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison methodology A unfair if comparison methodology B were the applicable standard. If however, the *AD Agreement* were to permit either comparison methodology A or B, this would not be the case.").

[166] *US – Zeroing (Japan) (Panel)*, para. 7.158 (*quoting US – Zeroing (EC) (Panel)*, para. 7.261).

[167] EC First Submission, para. 206 (*quoting US – Zeroing (Japan) (AB)*, para. 168).

transaction.[168] As a consequence, there is no obligation to aggregate transactions in calculating margins of dumping in an assessment proceeding, and there can be no obligation to offset the antidumping duty liability for a transaction to reflect the extent to which other transactions were not dumped. Therefore, if the Panel finds, as the prior panels have found, that it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction, then the challenged assessment will not exceed the margin of dumping and there will be no basis, according to the rationale adopted by the EC, for a finding of inconsistency with Article 2.4.

145. In addition, as mentioned above, an interpretation of Article 2.4 that gives rise to a general prohibition of zeroing also renders the second sentence of Article 2.4.2, the "targeted dumping provision," inutile.[169] The targeted dumping provision is an exception to the symmetrical comparison methodologies generally required by Article 2.4.2. It is not an exception to the fair comparison requirement of Article 2.4. Thus, an interpretation of Article 2.4 that generally prohibits zeroing in all contexts would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 without meaning.[170] A panel should not interpret provisions of the AD Agreement in such a way that its express provisions are rendered meaningless or superfluous.[171] As the Appellate Body has consistently found, "interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[172] An interpretation of Article 2.4 of the AD Agreement to require that dumping margins be offset by non-dumped transactions is therefore impermissible and must be rejected.

146. The EC also argues that the U.S. assessment methodology is inconsistent with U.S. obligations under Article 2.4 because it is "inherently biased" as opposed to the EC's preferred

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[168] *US – Zeroing (EC) (Panel)*, para. 7.201- 7.206; *US – Zeroing (Japan) (Panel)*, para. 7.194 - 7.199.

[169] *US – Zeroing (EC) (Panel)*, para. 7.266; *US – Zeroing (Japan) (Panel)*, para. 7.159.

[170] *Id*.

[171] *See US – Gasoline (AB)*, p. 23; *Japan – Alcohol Taxes (AB)*, p. 12; *Egypt – Rebar*, para. 7.277.

[172] *US – Gasoline (AB),* p. 23; *see also Japan – Alcohol Taxes (AB).* p. 12; *US – Underwear (AB)*, p. 16.

methodology.[173] But the EC can point to nothing in the text of the Agreement to support its contention that a methodology can be designated as "fair" or "unfair" within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down.

147. Moreover, the EC's claim that the U.S. assessment methodology necessarily results in higher antidumping duties than would a so-called "symmetrical" comparison is incorrect. A simple example illustrates this point. Assume that the export price for a particular transaction is 9, and that there are two corresponding home market transactions, one at 8 and one at 10. Assume also that both home market transactions are comparable to the export transaction, but that the transaction at 10 is the most comparable. Under a transaction-to-transaction method, the transaction at 10 would be used for normal value, resulting in a dumping amount of 1 (10-9 = 1). However, under the so-called "asymmetrical" average-to-transaction method, the two home market transactions would be averaged, resulting in a normal value of 9 and, in turn, a dumping amount of zero (9-9 = 0).

148. Under the average-to-transaction comparison method used by the United States, no antidumping duties would be assessed in this situation, because the export price – 9 – is not less than the weighted average normal value – 9. However, under a transaction-to-transaction comparison method – a "symmetrical" comparison method explicitly permitted in investigations pursuant to Article 2.4.2 – the United States would be permitted to assess $1 in antidumping duties for this transaction. Consequently, there is no inherent bias associated with the U.S. assessment method.

149. Moreover, the EC has not offered any argument as to how an offset to antidumping duties assessable on one entry as a result of a distinct entry having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under the rubric of Article 2.4. The focus of Article 2.4 is on the selection of comparable transactions and the making of appropriate adjustments to those transactions so as to render them comparable. Even as described by the EC, an offset requirement would be applied to the *results* of comparisons, and would not pertain to the comparisons themselves.[174] Consequently, it falls clearly outside the scope of Article 2.4.

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[173] EC First Submission, para. 200.

[174] EC First Submission, para. 207.

150. Finally, the EC's attempt to use the "fair comparison" reference in Article 2.4 to nullify the express limitation in Article 2.4.2 is inconsistent with principles of treaty interpretation and, for that reason, should be rejected by the Panel.

### 6. Article 11.2 Is Not Applicable to Article 9.3 Assessment Proceedings

151. The determination of such a rate in an assessment proceeding conducted pursuant to Article 9.3 of the AD Agreement does not constitute a review of the continued necessity of the antidumping duty and, thus, is not subject to the obligations of Article 11.2. The EC's argument that reviews pursuant to Article 11.2 of the AD Agreement and the reassessment of deposit rates for future entries in future reviews are "the same"[175] is not supported by the plain language of Article 11.2 of the AD Agreement.

152. Article 11.2 allows interested parties to request a review to determine "whether the injury would be likely to continue or recur if the duty were removed or varied." Therefore, an Article 11.2 review is focused on the continuation or recurrence of injury if the duty were varied, rather than on a determination of a varying duty rate. The EC cites footnote 21 in support of its position; however, footnote 21 simply states that a determination of liability for payment of antidumping duties made pursuant to Article 9.3 does not, by itself, constitute a review under Article 11.2. This statement supports the position that assessment proceedings conducted under Article 9.3 of the AD Agreement are not subject to the obligations of Article 11.2. Furthermore, footnote 22 to the AD Agreement, provides that in a retrospective system, a finding in a proceeding conducted pursuant to Article 9.3 that no duty is to be levied does not by itself require termination of the duty. Neither of these provisions supports the EC's view that a determination of the amount of antidumping duty to be assessed on specific import transactions determined in assessment proceedings relates to the inquiry called for by Article 11.2 as to whether injury would likely continue or recur if the duty were removed or varied.

## C. The EC's Claims With Respect To Sunset Reviews

153. The EC argues that the United States' determinations in the challenged sunset reviews are inconsistent with Articles 11.1 and 11.3 of the AD Agreement because when making its determinations that removal of the antidumping duty would likely lead to a continuation or recurrence of dumping, the United States relied on margins that were calculated in "proceedings

[175] EC First Submission, para. 235.

using model zeroing," and therefore "did not comply with its obligations pursuant to Articles 2.1, 2.4 and 2.4.2 because these margins were not based on a fair comparison and not calculated for the product as a whole."[176]

154. The EC's argument, however, should be rejected. The EC has not demonstrated that a calculation done in accordance with the EC's approach would result in zero or *de minimis* dumping margins in the cited cases, leading to a revocation of the order.

### D. The EC's Claims With Respect to Investigations

155. With respect to the four investigations properly before the Panel, upon which the EC did request consultations, and continues to challenge,[177] the United States acknowledges that Commerce did not provide offsets for non-dumped transactions when calculating the margins of dumping using the average-to-average comparison methodology during the investigation phase. The United States recognizes that in *US-Softwood Lumber Dumping* the Appellate Body found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with Article 2.4.2, by interpreting the terms "margins of dumping" and "all comparable export transactions" as used in Article 2.4.2 in an integrated manner. (*See US-Softwood Lumber Dupmping (AB)*, paras. 62-117. ) The United States acknowledges that this reasoning is equally applicable with respect to the claims for these four investigations.

156. The United States, however, continues to contest the EC's challenges that extend beyond Article 2.4.2 with respect to these four investigations. Specifically, the United States contests any claims of WTO inconsistency as to Articles 2.1 and 2.4 of the AD Agreement, and hereby incorporates arguments contained in Section B.[178] Because Articles 2.1 and 2.4 of the AD Agreement do not impose independent obligations, to the extent the EC is claiming that the challenged investigations are inconsistent with Articles 2.1 or 2.4, the EC has failed to establish the existence of any obligations pursuant to these definitional provisions, and thus, the EC's

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[176] EC First Submission, para. 259.

[177] Cases XV, XVI, XVII and XVIII of the EC's Panel Request.

[178] Paragraph 177 of the EC's First Submission allege that the four, named investigations in its Annex only violate Articles 2.4 and Articles 2.4.2, however, the EC also cites Article 2.1 in support of its argument. *See* EC First Submission, paras 149, 155, 160.

challenge must depend on Article 2.4.2. Therefore, a finding by the Panel on the narrow issue of Article 2.4.2 is sufficient to resolve this matter.

### E. WTO Agreement Article XVI:4

157. The EC's first claim with respect to Article XVI:4 of the WTO Agreement depends on a finding of inconsistency with provisions of the AD Agreement and GATT 1994.[179] As one panel recognized, there is no "independent" basis for a claim under Article XVI:4.[180] For the reasons set out above demonstrating that the United States has not acted inconsistently with the provisions of either the AD Agreement or the GATT 1994, the EC's claim with respect to Article XVI:4 should be rejected.

158. The EC also attempts to demonstrate a breach of Article XVI:4 by relying on a novel, expansive and erroneous interpretation of that provision.[181] It argues that "the findings of the Appellate Body as adopted by the DSB in specific disputes create an independent international obligation for the losing party in that dispute to comply."[182] Because the DSB has adopted Appellate Body reports holding zeroing inconsistent with provisions of the covered agreements, the EC asserts that the United States is under a continuing obligation to comply, and has not done so for certain determinations that were issued after the adoption of at least the first report

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[179] As the EC acknowledges, the determination of a breach of a provision of any covered agreement gives rise to a breach of Article XVI:4 of the WTO Agreement. *See* EC First Written Submission, paras. 123-25 (*citing US – 1916 Act (Japan) (Panel)* and *US – 1916 Act (EC) (Panel)*).

[180] *See US – OCTG from Mexico (Panel)*, para. 7.189. The panel in that dispute also found that there can be no independent breach of Article 18.4 of the AD Agreement, which requires that "[e]ach Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question."

[181] *See* EC First Written Submission, para. 128.

[182] EC First Written Submission, para. 128. The EC references an international law journal article in support of its interpretation of Article XVI:4. *See* EC First Written Submission, paras. 128. The rights and obligations of Members, however, are found in the text of the covered agreements, and not in articles written by a private individual.

finding zeroing to be inconsistent with the Antidumping Agreement.[183] In fact, the EC overlooks the fact that the determinations listed in the Annex to its panel request were issued before the expiration of the "reasonable period of time to comply" in both *US–Zeroing (EC)* and *US–Zeroing (Japan)*. It is unanswered why the EC would like the Panel to impose a greater obligation on the United States than the DSU itself imposed.

159. The EC's expansive interpretation of Article XVI:4 should be rejected. The idea of a continuing "independent international obligation" arising from adopted reports cannot be reconciled with the long-standing rule that Appellate Body and panel reports "'are not binding, except with respect to resolving the particular dispute between the parties to that dispute.'"[184] (Again, there is a certain irony in the EC's position – asserting that findings in prior disputes are binding on this Panel while at the same time ignoring findings from prior disputes when they conflict with the EC's position in this dispute.) The EC's interpretation finds no support in the text of the covered agreements. For each individual dispute, the DSU provides the mechanism to determine compliance by the Member concerned with the DSB's adopted recommendations and rulings, and, in cases of non-compliance, to authorize the suspension of concessions in the absence of an agreement on compensation.[185]

160. The EC is advocating that the Panel adopt an approach which would distort the WTO's dispute settlement system to the detriment of the "security and predictability" of the multilateral trading system referred to in Article 3.2.[186] Under the EC's reading of Article XVI:4, a complaining party could identify a Member's measures that are allegedly similar to those that

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[183] *See* EC First Written Submission, paras. 131-132. It is ambiguous which report the EC considers first in time, but it cites just *US – Zeroing (EC)* and *US – Zeroing (Japan)* in paragraph 131, making *US – Zeroing (EC)* the first report to be adopted of the two.

[184] *US – Softwood Lumber Dumping (AB)*, para. 111 (*quoting Japan – Alcohol Taxes (AB)*).

[185] *See* DSU, Arts. 21, 22.

[186] "Security and predictability" results from the application of the correct interpretive approach set forth in the second sentence of Article 3.2 of the DSU – the "customary rules of interpretation of public international law" – to the provisions of the WTO Agreement. The proper interpretation ensures that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the DSB, do not "add to or diminish the rights and obligations provided in the covered agreements." The EC's reading of Article XVI:4 would be antithetical to the "security and predictability" that a proper interpretation of the covered agreements brings to the world trading system.

already have been found inconsistent in adopted Appellate Body reports, and claim non-compliance with the findings in the adopted reports. Allowing such a claim would completely flout the DSU's provisions on compliance and on not adding to or diminishing rights of Members, and would make adopted reports binding on all Members, despite their non-binding status outside of the original dispute.

161. The rationales offered by the EC do not justify its reading of Article XVI:4. The EC asserts that allowing claims based on the enforcement of adopted panel reports would serve to eliminate a "multiplicity of endless litigation."[187] Policy arguments based on speculative concerns about the number of future cases, however, cannot trump the language of the DSU, which establishes the rules for adjudicating individual disputes and dealing with issues of non-compliance in each separate dispute. The EC is free to raise its arguments in the context of the ongoing efforts of Members to amend the DSU, but this Panel must apply the DSU as it currently is written.

162. Furthermore, the EC's argument would transform panel and Appellate Body findings into authoritative interpretations of the covered agreements with effect beyond the particular parties to a particular dispute. But Article IX of the Marrakesh Agreement is explicit - neither a panel nor the Appellate Body has the authority to render interpretations of the covered agreements. Members conferred that authority exclusively upon the Ministerial Conference and the General Council. Accordingly, the EC's proposed interpretation of Article XVI:4 fails on this basis alone.

163. The EC also appears to argue for an expansive reading of Article XVI:4 as a means to deter or sanction breaches of "the duty of *good faith.*"[188] However, panels are not tasked with determining, nor are they authorized to determine, whether Members have complied with a public international law principle of "good faith;" rather they must determine whether a Member's measure is consistent with the covered agreements. The covered agreements do not provide for an obligation of "good faith" to be considered in connection with the substantive obligations set forth therein, nor would it be constructive for panels to engage in examining

[187] EC First Written Submission, para. 129.

[188] EC First Written Submission, para. 130.

whether a Member's breach resulted from a good faith reading or otherwise.[189] Indeed, the Appellate Body has noted that "[n]othing. . . in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it therefore has not acted in good faith."[190] It is worth noting that the Appellate Body made this statement in the context of *reversing* the panel finding cited by the EC for the proposition that panels may in fact find that a Member has acted in bad faith.

164. Panels are subject to clear and unequivocal limits on their mandate: they may clarify "existing provisions" of covered WTO agreements and may examine the measures at issue in light of the relevant provisions of the covered WTO agreements.[191] The Appellate Body is confined to review "issues of law covered in the panel report and legal interpretations developed by the panel."[192] Nowhere in Appendix 1 to the DSU, which defines the covered agreements for purposes of the DSU, is there listed an international law principle of good faith. Nor does the WTO Agreement distinguish between a breach of an agreement in good faith and a breach in bad faith – in either case it would be a breach of the Agreement and would have the consequences provided in the Agreement. The EC's invocation of the "duty of good faith" cannot justify its expansive reading of Article XVI:4.

## VI. CONCLUSION

165. As set forth above, the United States respectfully requests that the Panel grant the U.S. preliminary objections and reject the EC's "as applied" claims regarding assessment proceedings, sunset reviews, and investigations.

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[189] The EC later in its submission asserts that Article 3 of the DSU contains an "obligation for WTO Members to engage in procedures in good faith in an effort to resolve dispute [sic]." EC First Written Submission, para. 265. However, the EC is not alleging a breach of this provision of the DSU, nor would there be any basis for it to do so.

[190] *US – Offset Act (Byrd Amendment) (AB)*, para. 298.

[191] *See* DSU, Arts. 3.2, 7.1.

[192] DSU, Art. 17.6.

## List of Exhibits

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| US-1 | Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 Fed. Reg. 9508 (March 2, 2007). |
| US-2 | Communication by the United States of February 20, 2007 (WT/DS322/16) |
| US-3 | Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006. |
| US-4 | Report on the Special Import Measures Act, House of Commons Canada, December 1996, http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/chap4e.html. |
| US-5 | Special Import Measures Act Self-Assessment Guide ("Normal Value - Export Price = Antidumping Duty (or Margin of Dumping"), http://www.cbsa-asfc.gc.ca/sima/self-e.html#12. |