United States – Continued Existence and Application of Zeroing Methodology

(AB-2008-11 / DS350)

Appellee Submission of the United States of America

December 1, 2008

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SERVICE LIST

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I. Introduction and Executive Summary

1. The United States in this dispute asked the Panel to make preliminary rulings concerning defects in the EC's panel request. The United States first objected to the EC's attempt to include the "the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders" in 18 "cases." As the United States explained, these alleged "measures" were not specifically identified as required by Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and were therefore outside the Panel's terms of reference. The Panel agreed. But now the EC distorts the Panel's legal analysis and questions the Panel's jurisdiction in an attempt to have that finding reversed. As the United States will demonstrate, the EC's appeal is without merit and should be rejected.

2. Second, the United States challenged the EC's attempt to include four preliminary determinations within the scope of the panel proceeding. However, under Article 17.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), a complaining Member may only challenge final action by the administering authority. The Panel agreed with the United States once again, finding all four of these preliminary determinations to be outside its terms of reference. Now the EC seeks a reversal by asking the Appellate Body to ignore the plain text of the AD Agreement and accept its erroneous and conflicting theories as to why non-final action may be challenged. The EC's claim cannot stand, and the Panel's finding should be affirmed.

3. The EC also appeals the Panel's finding that the EC failed to make a *prima facie* case that zeroing was used in seven challenged administrative reviews. The EC's appeal under Article 11 of the DSU is based solely on the EC's disagreement with the Panel's conclusion as to the insufficient evidence submitted by the EC. As demonstrated below, the Panel fully discharged its duty under Article 11 with respect to the seven administrative reviews at issue by considering the full range of evidence that was put before it as to these seven reviews. The Appellate Body should reject the EC's attempt to have the Appellate Body re-weigh the evidence before the Panel.

4. The EC also claims that the Panel improperly declined to make a "suggestion" under Article 19.1 of the DSU. That provision, however, is discretionary, and the Panel had no obligation to make a suggestion, particularly when the EC's request was based on an improper understanding of that provision altogether. The EC finally makes two conditional appeals which have no basis under Article 11, Article 17.6, or any other provision of the DSU. The Appellate Body should reject these conditional appeals accordingly.

5. Overall, the EC bases its appeal on an incorrect interpretation of the covered agreements, conclusory arguments devoid of legal analysis, and a distortion of the Panel's findings. The United States respectfully requests that the Appellate Body affirm the Panel's findings that are subject to the EC's appeal.

6. The United States provides a more detailed summary of its arguments below.

A. The Panel Properly Found that the "18 "Duties" Were Outside its Terms of Reference

1. The U.S. Preliminary Objection

7. The EC mischaracterizes the U.S. preliminary objection under Article 6.2 of the DSU. The United States considers it important to clarify up front the nature of its objection. The EC purported to identify in its Panel request the following "measure at issue," which was subject to the U.S. preliminary objection:

> 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).

8. Under Article 6.2 of the DSU, a panel request must "identify the *specific measures* at issue" in the dispute. The United States objected that under Article 6.2, to the extent the EC's reference to the application or continued application of duties related to unspecified antidumping determinations, those alleged "measures" were outside the Panel's terms of reference. The EC clarified in its response to the U.S. preliminary objection that it was trying to reach duties related to "subsequent" antidumping determinations.

9. The United States explained to the Panel that each determination that sets a margin of dumping for a defined period of time is distinct and separate, and under Article 6.2 of the DSU, the EC had to identify each such measure in its panel request. The EC was improperly trying to include the application or continued application of duties resulting from determinations that had not yet been made. Moreover, a measure that did not even exist at the time of panel establishment could not be within a panel's terms of reference. Nor could the EC have consulted on a measure that did not exist at the time of the consultation request, yet such consultations on a measure are a precondition for requesting a panel with respect to that measure.

10. The EC distorts the U.S. preliminary objection by asserting that the United States was trying to transform the 18 "duties" into the same type of measure as the 52 antidumping determinations identified in the EC's panel request.[1] However, the United States properly understood, and the Panel agreed, that the application or continued application of antidumping

[1] *See* para. 53, *infra* for discussion of the use of the term 18 "duties."

duties had to result from an underlying antidumping determination, such as the determinations identified in the EC's panel request, and that the EC never attempted to tie the future duties that it was seeking to include in the dispute to a specific determination.

2. The Panel Conducted the Proper Analysis of the U.S. Preliminary Objection

11. The EC appeals the Panel's finding that the 18 "duties" were not specifically identified, and therefore outside the Panel's terms of reference. The Panel recognized that the EC's inclusion of 18 "duties" was an attempt to affect the determinations that Commerce might make in future antidumping proceedings. As the Panel stated, "[i]n other words, if granted, the findings sought by the European Communities will have an impact on measures that did not exist at the time of the establishment of the Panel, nor during the panel proceedings." This ground alone justified the Panel's finding that the identification of the 18 "duties" as calculated or maintained during future administrative reviews failed to meet the requirement to identify the "specific measures at issue" under Article 6.2 of the DSU. The Panel also understood that it was not possible to refer to duties detached from the underlying antidumping proceeding that gave rise to them.

12. The EC asks that the Appellate Body consider the Panel's findings as improper, since they allegedly addressed an issue concerning the existence and precise content of the alleged "measures" that was raised *sua sponte*. The EC's assertions have no basis in fact, nor in the DSU, and should be rejected. The United States properly raised a preliminary objection to the 18 "duties" under Article 6.2 of the DSU. And even if the United States had not done so, the Panel was permitted to address on its own motion issues which go to the heart of its jurisdiction.

13. The EC also was required to establish a *prima facie* case by presenting evidence and argument to establish the existence of *measures* being challenged and the basis of the claimed inconsistency with a WTO provision. The Panel understood that "[t]he fact remains, however, that the [EC] has to demonstrate the existence and the precise content of the purported measure." The Panel, following its legal analysis, concluded that the EC did not make a *prima facie* case: "[W]e do not consider [what the EC has described] to represent a measure in and of itself." The EC, however, faults the Panel for making the very inquiry that it was required to make as part of its objective assessment of the matter. Even if the United States had not objected to the existence and precise content of the 18 "duties," the Panel had to satisfy itself that the EC made a *prima facie* case with respect to the alleged measures.

14. The EC asserts that the Panel, in response to the U.S. preliminary objection, confounded the legal analysis under Article 6.2 and Article 3.3 of the DSU. According to the EC, the Panel could not address the issue of whether it had identified a "measure" when considering the U.S. preliminary objection under Article 6.2. As an initial matter, the United States notes that the EC

is advancing a novel argument under Article 3.3 of the DSU, which speaks to the goal of the "prompt settlement" of disputes. However, Article 3.3 does not define a "measure." Nor does this provision relate to the identification of measures in the panel request, nor to the panel's terms of reference.

15. The Panel properly understood that an inquiry under Article 6.2 is related to the issue of whether the thing being challenged is classifiable as a "measure," as that term is used in Article 6.2 and throughout the DSU. In other words, if something is not even a "measure," then it is not, and cannot be, "specifically identified" for the purposes of DSU Article 6.2. Here, the Panel did not agree that the application or continued application of antidumping duties in 18 "cases" were classifiable as measures, nor that they were specifically identified, and therefore concluded that the alleged 18 "duties" were outside its terms of reference. Moreover, the EC's position in this appeal is disingenuous, given that the EC itself asked the Panel to consider the issue of whether the 18 "duties" were measures when ruling on the U.S. preliminary objection under Article 6.2 of the DSU.

16. Lastly, the EC claims that the Panel erred in finding that the EC had not demonstrated the existence and precise content of the 18 "duties." The Panel, however, thoroughly examined the alleged measures described by the EC in its panel request. The Panel properly concluded that the EC's description of the "measure" it was challenging placed the alleged measure in isolation from any proceeding in which antidumping duties were calculated, allegedly through zeroing, and that therefore the EC's description did not represent a measure in and of itself. The Panel also found the EC's argument as to the precise content of such a "measure" was contradictory. The EC maintained that the 18 "duties" contained the same precise content as the so-called zeroing methodology, which had been challenged "as such" in other disputes, but at the same time the EC stated that it was not challenging that methodology "as such" in this dispute. The Panel rejected this illogical argument.

3. The EC's Additional Claims as to the Panel's Specificity Finding are Unfounded and Should be Rejected

17. The EC makes a number of additional claims related to the Panel's ruling on the U.S. preliminary objection with respect to the application or continued application of antidumping duties in 18 "cases." The EC's appeal includes claims under Article 7.2, 11, and 12.7 of the DSU, as well as a request to complete the analysis concerning the consistency with the covered agreements of the application or continued application of antidumping duties.

18. The EC alleges that the Panel Report is inconsistent with Article 7.2 of the DSU insofar as the Panel did not address relevant provisions of the GATT 1994 and the AD Agreement cited by the EC in relation to its arguments concerning the 18 "duties." However, nothing in the DSU requires a panel to address any and all arguments by a party. And Article 7.2 applies to a panel's

discharge of the matters *within its terms of reference*. Where a measure is not within a panel's terms of reference – as in this case – Article 7.2 does not operate to expand the terms of reference and require a panel to discuss provisions of the covered agreements with respect to such measures.

19. The EC's claims that the Panel failed to make an objective assessment under Article 11 of the DSU, and that the Panel did not provide a basic rationale for its finding under Article 12.7 of the DSU are conclusory and demonstrate nothing more than the EC's dissatisfaction that the Panel did not accept its arguments as to the 18 "duties."

20. The EC asks the Appellate Body "to complete the analysis by finding that, because of the use of zeroing, each of the 18 measures is inconsistent with Articles VI:1 and VI:2 of the *GATT 1994*, Articles 2.4, 2.4.2, 9.3, 11.1 and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*." First, should the Appellate Body properly uphold the Panel's conclusions, there would be no basis to complete the analysis. Second, were the Appellate Body to reverse the Panel's conclusions, the United States asks that the Appellate Body exercise judicial economy and not complete the analysis. In any event, should the Appellate Body proceed to complete the analysis, the United States asks the Appellate Body to find that the application or continued application of antidumping duties in 18 "cases" is not inconsistent with the AD Agreement, the GATT 1994, and the WTO Agreement for the reasons stated in the U.S. written submissions to the Panel, and at the Panel's substantive meetings with the parties.

21. The EC also uses its appellant submission to make an irrelevant attack on the WTO Secretariat's circulation of communications from the United States to the DSB as "WT/DS" documents. The EC focuses in particular on the U.S. communication to the DSB concerning the Appellate Body report in *US – Stainless Steel (Mexico)*, but notes other such communications from the United States. The Appellate Body should reject the EC's appeal concerning these U.S. communications. As an initial matter, Article 20(2)(d) of the Working Procedures for Appellate Review requires that the appellant's notice of appeal contain a brief statement of the nature of the appeal, including the allegations of legal error. Here, the EC did not raise its claim regarding the U.S. communications in its notice of appeal, and the United States had no notice that the EC would raise this issue. The EC's claim is therefore outside the scope of this appeal, and should be rejected for that reason alone. Moreover, even had the EC provided notice of an appeal on the issue of the U.S. communications, the EC makes no showing of how the designation of U.S. communications as WT/DS documents is related to a finding of law, or a legal interpretation, in the Panel Report that can be appealed under Article 17.6 of the DSU. Lastly, the United States recalls that it submitted the DSB communication on the report in *US – Stainless Steel (Mexico)* to the Panel. The EC had an opportunity to make the arguments it is now making with respect to this document, and the others mentioned in the U.S. communication, but did not do so.

B. The Panel Properly Excluded the Four Preliminary Determinations from its Terms of Reference

22. The United States asked the Panel for a preliminary ruling that three sunset review preliminary determinations and one administrative review preliminary determination were outside the Panel's terms of reference because they did not constitute "final action" within the meaning of Article 17.4 of the AD Agreement. The Panel agreed with the United States, and found that all four of these on-going proceedings were outside its terms of reference.

23. Under Article 17.4 of the AD Agreement, a matter may only be referred to a panel if "final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties." There is only one exception: a "provisional measure" may 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 17.4. Here, the four on-going proceedings challenged by the EC were not "final action" within the meaning of Article 17.4. To the contrary, at the time of the panel request, the United States had not yet made a decision to levy definitive duties. Indeed, it was entirely possible that once the final results of the sunset reviews or administrative review were issued, no definitive antidumping duties would be levied, or would continue to be levied, at all. And the measures did not fall into the "provisional measures" exception.

24. The EC erroneously asserts that the Panel rejected the EC's claims "on the *assumption* that the European Communities had argued that the four preliminary determinations were 'provisional measures.'" However, the Panel made no such assumption. Rather, the Panel understood that the only way a non-final agency action could be challenged under the AD Agreement would be if it were a provisional measure fitting into the exception in the second sentence of Article 17.4, and the Panel found that the four preliminary determinations did not. This is not the same thing as assuming that the four measures were "provisional measures."

25. The EC reasons that the four preliminary determinations fit within the 18 "duties" identified in EC's panel request and that they were therefore "subsequent" measures that fell within the Panel's terms of reference. The EC cannot avoid the finality requirement of Article 17.4 of the AD Agreement based on such a flawed argument. Aside from the fundamental problem with the EC's attempt to include "subsequent measures" in its panel request, the United States fails to see how preliminary measures in existence at the time of the EC's panel request, and included in that request, are measures *subsequent* to that request.

26. Most importantly, the EC's argument ignores the plain text of Article 17.4, which is clear: the investigating authority must take *final action* by the time of the panel request; otherwise, the antidumping measure cannot fall within the panel's terms of reference. Here, as the EC readily admits, the four preliminary determinations were not final. Moreover, the dispute

settlement reports cited by the EC do not support its argument – in fact, they affirm that only final action may be challenged in dispute settlement proceedings.

27. According to the Panel, the EC's argument as to the ongoing proceedings was "internally inconsistent." As the Panel observed, the EC asserted that the four preliminary determinations were within the Panel's terms of reference as "subsequent measures" at the same time it urged the Panel to consider so-called "special circumstances" so that the Panel would have a basis to examine preliminary determinations that were outside of its terms of reference under Article 17.4. The Panel properly found that both of these arguments "lack a legal basis in the Agreement" and could not justify a departure from the finality requirement of Article 17.4.

C. The EC Did Not Make a *Prima Facie* Showing that the Zeroing Methodology Was Actually Employed in Seven of the Challenged Administrative Reviews

28. Before the Panel, the EC challenged 37 separate administrative reviews, alleging that the United States failed to comply with its obligations under the AD Agreement and the *General Agreement on Tariffs and Trade* ("GATT 1994") when it applied "zeroing" in each of those administrative reviews. Because the EC failed to meet its burden with respect to seven administrative reviews, the Panel properly excluded those reviews from its terms of reference.

1. Proceedings Before The Panel

29. To support the factual component of its claims, the EC submitted documentation purporting to show that zeroing was employed in each of the enumerated administrative reviews. At both substantive meetings with the parties, the Panel inquired as to the factual evidence submitted by the EC in support of its claims concerning the 37 challenged administrative reviews.

30. Before the Panel, the United States did not contest the accuracy of any documents submitted by the EC that were generated by Commerce itself, namely, the Issues and Decision Memoranda pertaining to several of the challenged administrative reviews. However, the United States said that it could not confirm the accuracy of any other submitted documentation that was *not* Commerce-generated. The EC submitted additional documentation to support its claim, as well as supplemental argument to support its claim that zeroing was used in each of the 37 challenged administrative reviews, which the Panel considered and addressed. However, at no point during the Panel proceedings did the EC identify whether its submitted documentation was Commerce-generated, or otherwise inform the Panel as to its source.

31. In determining whether the EC made a *prima facie* case with respect to zeroing in the administrative reviews at issue, the Panel first considered that 30 of the Issues and Decision Memoranda for 30 of the challenged administrative reviews made references to the application of

zeroing in the administrative reviews to which they refer. On this basis, the Panel found the EC's claims of zeroing in 30 of the challenged reviews to be supported.

32. For the remaining seven administrative reviews however, the Panel, concluded that the EC's submitted evidence did not support that zeroing was employed. Specifically, the Panel ruled that (1) the applicable Issues and Decision Memoranda and Final Results pertaining to these reviews did not demonstrate that zeroing was employed; (2) it was not readily discernable from the additional documentation that zeroing was employed; and (3) that additional documents supporting the EC's claims were not generated by Commerce during the conduct of the reviews.

33. Having found that the EC had not established a *prima facie* showing that zeroing was employed in seven of the challenged reviews, the Panel concluded that its findings regarding the use of simple zeroing in periodic reviews shall not affect such reviews.

2. The Panel Correctly Concluded that No *Prima Facie* Case Was Established That The "Zeroing" Methodology Was Employed in Seven of the Challenged Administrative Reviews

34. Pursuant to Article 17.6 of the DSU, appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel. In weighing the evidence before it, the Panel's duty, pursuant to Article 11 of the DSU, was to make an objective assessment of the matter before it, including an objective assessment of the facts of the case. While the deliberate disregard of, or refusal to consider, the evidence submitted is incompatible with a panel's duty to make an objective assessment of the facts, the Appellate Body has taken care to emphasize that a panel's appreciation of the evidence falls, in principle, within the *scope of the panel's discretion as the trier of facts.*

35. The EC argues that the totality of facts contained in the record of this case demonstrated that "zeroing" was used in the seven administrative reviews concerned, and in this regard, the Panel exceeded its margin of discretion as a trier of fact and thus committed an egregious error by misunderstanding, ignoring or misinterpreting the evidence provided.

36. In assessing a panel's appreciation of the evidence, the Appellate Body will not base a finding of inconsistency under Article 11 simply on the conclusion that it might have reached a different factual finding from that of a panel. Rather, the Appellate Body will not interfere lightly with the panel's exercise of its discretion, and must be satisfied that the panel exceeded the bounds as the trier of facts, in its appreciation of the evidence.

37. The Panel fully discharged its duty under Article 11 with respect to the seven administrative reviews at issue by considering the *full range of evidence* that was put before it as to these seven reviews. The Panel's thoughtful and deliberate consideration of the evidence is

demonstrated by its numerous additional inquiries of both parties about the submitted evidence, its request and acceptance of late additional documentary submissions by the EC in support of its assertion that the "zeroing" methodology was employed in these seven reviews, and by further considering *additional* argument from the EC as to its documentation, that was submitted as late as its interim comments. The Panel's conclusion that the EC failed to establish a *prima facie* showing that "zeroing" was employed is supported by the Panel's evaluation and consideration of the evidence before it, and the EC has presented no bases upon which it may be reconsidered by the Appellate Body.

a. The EC Failed to Establish That The Relevant Documentation Was Generated By Commerce

38. The EC's argument, which largely consists of a re-explanation of evidence and reiteration of argument that the Panel already considered, disregards the applicable standard of review as set forth in Article 17.6 of the DSU. The EC further dismisses the Panel's pivotal finding that the EC *never* established that the submitted documents were generated by Commerce, and therefore the factual component of its claim that the U.S. had employed the "zeroing" methodology was never established for seven of the challenged administrative reviews, as "*incorrect* and *irrelevant*."

39. First, the Panel's finding as to whether the submitted documents were Commerce-generated, is not "irrelevant" to the question of whether the EC satisfied its burden of establishing its claims that the United States used "zeroing" in the challenged reviews. At a minimum, the EC was required to supply the Panel with *Commerce-generated* documentation showing that "zeroing" was in fact employed by Commerce in the administrative reviews challenged. Second, contrary to the EC's assertion, the Panel correctly found that the EC never established that its submitted documentation was actually generated by Commerce.

40. Newly formed explanations of evidence and much belated attempts to authenticate its evidence before the Appellate Body have no place in the context of review by the Appellate Body, given the prescribed limits of Article 17.6 of the DSU, and place the Appellate Body in the untenable position of weighing evidence never before considered by the Panel. The EC now attempts to establish for the *very first time*, that its documentation was Commerce-generated, by now asserting an origin for its submitted documentation. Because these relevant explanations as to the sources of the EC's evidence were *never* before the Panel, they are, by definition, not evidence considered by the Panel. As such, the EC's contention that the Panel committed egregious error by misunderstanding, ignoring, or misinterpreting the evidence, necessarily fails. Additionally, even the EC's much belated attempts at authentication of its evidence fail to establish that its evidence was generated by Commerce, and thus do not demonstrate that "zeroing" was used in the seven administrative reviews.

b. The Panel Applied the Correct Standard of Proof

41. The EC contends that the Panel applied an unreasonable burden of proof when it required the EC to provide evidence that zeroing was actually used in the seven administrative reviews. The EC claims that it was "*impossible* (rather than *more difficult*)" to provide the requisite documents.

42. The United States reiterates that the burden is on the EC to make a *prima facie* case. Given the failure of the EC to give the Panel any reason to believe that its evidence concerning the seven administrative reviews in question actually reflected calculations that Commerce made in those reviews, the Panel's applied standard or proof was not unreasonable. Additionally, it is simply not the case that it was "impossible" for the EC to have obtained documents generated by Commerce with respect to the reviews it sought to challenge. All documents generated during an individual case are kept on file in Commerce's Central Records Unit, and are available to the public, and proprietary information may be obtained by the interested parties and their representatives pursuant Commerce procedures. The EC never indicated to the Panel or to the United States that it had attempted, but was unable, to obtain the requisite documentation from Commerce's records office.

c. The Panel Committed No Error Pursuant to Article 13 of the DSU

43. Pursuant to Article 13 of the DSU, a panel has the right to seek information from any individual or body which it deems appropriate. The EC contends the Panel erred pursuant to Article 13 by not treating the EC's sole suggestion that the panel obtain its requested documentation from the United States, as a request to the Panel to seek information from the United States. The EC also disagrees with the Panel's decision not to seek information even though the Panel stated that it needed no further elucidation of the facts before it.

44. A panel's right to seek information pursuant to Article 13 of the DSU is *discretionary* and not mandatory. In this instance, because the Panel's comprehension of the evidence was not lacking, it acted within its discretion by declining to seek information of the United States. Nor did the Panel have reason to treat the EC's blanket suggestion that the documentation requested of it, should instead be obtained from the United States, as a request because the Panel correctly recognized that it was the EC's burden to demonstrate "zeroing" was employed in the administrative reviews it challenged.

D. The Panel Properly Declined the EC's Request for a Suggestion Under Article 19.1 of the DSU

45. The Panel denied the EC's request for a suggestion under Article 19.1 of the DSU on how the United States could implement the Panel's recommendations in the event that the Panel found that the United States acted inconsistently with its obligations under the AD Agreement and the GATT 1994. The EC's appeal of the Panel's denial is without merit. The decision on whether to make a suggestion under Article 19.1 was fully within the Panel's discretion. In fact, the Panel was not even required to give a reason why it chose to refuse the EC's request. And no provision of the DSU prohibited the Panel from rejecting the EC's request for a suggestion on the grounds that the Panel did not want to assume the United States would act inconsistently with its WTO obligations when implementing the DSB's recommendations and rulings.

E. The EC's Conditional Appeals Should be Rejected

1. The EC's Attempted Conditional Appeal Regarding the Relevance of Prior AB Reports

46. The EC apparently attempts to make a conditional appeal that if the Panel Report is "correctly construed as inconsistent" with certain prior statements by the Appellate Body in *US – Stainless Steel (Mexico)*, then "the European Communities appeals those findings, for all the reasons set out by the Appellate Body in its report in *US - Stainless Steel (Mexico)*." The EC would then apparently ask the Appellate Body to complete the analysis accordingly. However, the EC first states that if the Panel Report is "correctly construed as consistent" with those same prior statements, "then the EC makes no appeal on this point." The Appellate Body should reject the EC's conditional appeal as baseless.

47. First, the EC's "condition" is not a condition at all. It is up to the EC in the first instance to explain and provide argumentation as to whether the Panel Report contains an erroneous finding of law or legal interpretation – if not, there would be no "appeal" from the Panel Report. By setting out two readings of the Panel Report, each of which it describes as "correct[]" and one of which, in the EC's view, would be "consistent" with a prior Appellate Body statement, the EC has not even attempted to assert there is an erroneous finding of law or legal interpretation, much less explain it. Therefore, on this basis alone, the EC's attempted "conditional" appeal fails.

48. The EC also has not alleged a violation of DSU Article 11 in this connection. Indeed, the EC's "conditional" appeal is very odd in that unlike ordinary conditional appeals, the condition that the EC sets requires the Appellate Body to review and assess panel statements. The EC does not itself take a view of the construction of the Panel statements in question. It does not seem appropriate for the Appellate Body to undertake such an exercise as a precondition to considering an appeal.

49. The EC here is essentially asking the Appellate Body to assess the consistency of the Panel Report with the Appellate Body's dicta in *US – Stainless Steel (Mexico)*. However, the

Panel, in undertaking an objective assessment under Article 11 of the DSU, was bound neither by the findings, nor the dicta in a prior, unrelated dispute. The WTO dispute settlement system is not a common law system. As the Appellate Body has explained, adopted dispute settlement reports are not binding, except with respect to resolving the particular dispute between the parties to that dispute. Only the Ministerial Conference and the General Council have the exclusive authority to adopt binding interpretations of the covered agreements. And treating prior reports as binding outside the scope of the original dispute would add to the obligations of the United States and other Members, inconsistent with Articles 3.2 and 19.1 of the DSU.

2. The EC's Conditional Appeal Concerning the Use of Zeroing in Administrative Reviews

50. The EC posits that should the Appellate Body reverse the Panel's conclusion that the United States acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement by applying simple zeroing in the 29 periodic reviews at issue in this dispute, the Appellate Body should complete the analysis, including with respect to provisions never addressed by the Panel.

51. While the EC's notice of appeal makes a claim of error relating to "false judicial economy," the EC in its appellant submission does not explain why the Panel's exercise of judicial economy was false, or legally erroneous. Therefore, the EC has failed to provide a basis for the Appellate Body to rule on that claim on appeal. Even aside from the fact that the EC has provided no basis to support its claim of error, because the Panel made no legal interpretations other than as to Article VI:2 of the GATT 1994 and 9.3 of the AD Agreement, should the Appellate Body reverse the Panel's decision below, it should not complete the analysis by making legal interpretations for the first time as to issues the Panel never reached. However, should the Appellate Body decide to complete the analysis with respect to the remaining challenged provisions, as the United States has fully demonstrated in its written submissions and at the Panel's substantive meetings with the parties, the provisions of the WTO agreements invoked by the EC do not *require* that an offset or credit be granted for "negative dumping" in administrative reviews.

II. The Panel Properly Found that the "18 "Duties" Were Outside its Terms of Reference

52. The United States asked for a preliminary ruling that the EC's reference in its panel request to the "continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders" in 18 separate "cases" did not meet the specificity

requirement of DSU Article 6.2.[2] The Panel agreed and found that these alleged 18 "duties" were outside its terms of reference.[3] The EC now appeals the Panel's finding.[4] For the reasons detailed in this section, the United States respectfully requests that the Appellate Body reject the EC's appeal and affirm the Panel's preliminary ruling with respect to this issue.

53. At the outset, the United States would like to note that it refers to the EC's alleged measures by the term 18 "duties." This term was used by the Panel in its report, although the United States had asked in interim comments that a more accurate description be used to refer to these alleged measures.[5] The United States uses the term 18 "duties" without prejudice to the U.S. view that this term is not an accurate or appropriate way to describe what the United States challenged in its preliminary ruling request. We merely have decided to use this term because it is the short-hand form that the Panel itself adopted to describe the alleged measures.

A. The Panel Properly Concluded that the 18 "Duties" did not Meet the Requirements of Article 6.2 of the DSU

54. In this section, the United States first details its preliminary objection to the 18 "duties" under Article 6.2 of the DSU. The United States then explains why the Appellate Body should reject the EC's appeal of the Panel's ruling on this issue. More specifically, we demonstrate that the Panel's analysis as to the lack of specificity in the EC's panel request is correct as a matter of law; that the Panel properly considered issues within its jurisdiction; that the EC's claim that the Panel undertook a confounded legal analysis is erroneous; and that the Panel's analysis as to the existence and precise content of the 18 "duties" is proper.

1. The U.S. Preliminary Objection Under Article 6.2 of the DSU

55. As an initial matter, the United States would like to explain its preliminary objection under Article 6.2 of the DSU. The EC's appellant submission is marked by numerous mischaracterizations of the U.S. request for a preliminary ruling which require clarification. Moreover, a discussion of the confusion caused by the EC's reference to the application or continued application of antidumping duties in 18 "cases" and an explanation of the U.S.

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[2]*See, e.g.*, U.S. First Written Submission, paras. 66-71; U.S. Rebuttal Submission, paras. 18-28; U.S. Opening Statement at the First Substantive Meeting, paras. 19-22; U.S. Closing Statement at the First Substantive Meeting, paras. 7-15.

[3]Panel Report, paras. 7.61, 8.1(b).

[4]EC Appellant Submission, paras. 12-80.

[5]U.S. Interim Comments, paras. 3-7.

response to the EC's arguments will provide important background for understanding why the Panel was correct in its finding that the alleged 18 "duties" were outside its terms of reference.

56. Under Article 6.2, a panel request must "identify the *specific measures* at issue" in the dispute.[6] According to the Appellate Body:

> [T]he need for precision in panel requests flows from the two essential purposes of the terms of reference, namely, to define the 'scope of the dispute' and to serve the 'due process objective of notifying the parties and third parties of the nature of a complainant's case.' In our view, the clear identification of the specific measures at the outset is central to define the scope of the dispute to be addressed by a panel.[7]

57. The EC identified in its panel request the following "measures at issue," which were the subject of the U.S. preliminary objection under Article 6.2:

> 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).[8]

58. This reference in the EC's panel request is unclear in numerous respects. For example:

> – it is unclear what is meant by "most recent" – as of what point in time? Presumably the EC knew precisely to which determinations it was referring, which would mean the EC left this reference deliberately vague for the Panel and the United States to puzzle over;
>
> – what is the difference between the "application" and the "continued application" – again, as of what point in time? Does this distinguish between an application that was in the past and thus expired compared to an application that began at some point in time prior to the panel request and remained in existence as of the time of the panel request?;

[6]Emphasis added.

[7]*EC – Chicken Cuts (AB)*, para. 155.

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

– an "application" of a duty would seem to refer to the duty applied to a particular entry of goods, but the EC's panel request did not refer to any particular shipment or entry of goods, and so the EC appears to be using it in some broader, undefined sense, most likely intended to be synonymous with "determination" in light of the later reference to "calculated or maintained in place pursuant to" an "administrative review," "original proceeding," "changed circumstances proceeding," or "sunset review proceeding";

– the reference to "at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement" appears to call first for a legal determination before the measure could be identified, so that the reference in the panel request could not be understood until the DSB adopted its recommendations and rulings (if the DSB concluded that any of the duties were applied consistent with the AD Agreement, then the EC's panel request would not be referring to that duty, making the reference circular and impossible of being specific until the end of the dispute);

– the reference to "whether duties or cash deposit rates or other form of measure" at the end of this item causes confusion in light of the reference to "duties" at the beginning of the item. Is it "duties" or something other than "duties"? And what is the universe of "other form of measure"? In theory this could be any measure possible under the covered agreements, which is far from "specific."

59. In particular, with respect to the first example cited, at the time of its first written submission, the United States was uncertain as to what the EC meant by the "most recent" antidumping proceeding, as the wording used in the EC's panel request was ambiguous. The United States started from the premise that this request related to the continued application or the application of duties arising from the "most recent" of the determinations specifically listed for each of the 18 "cases" in the annex to the EC's request.[9] However, to the extent that the EC's request did not refer to the most recent identified determination, the United States considered that the reference to the application or continued application of antidumping duties in 18 "cases" included an indefinite number of measures resulting from current, past, and future antidumping determinations, and that these alleged 18 "duties" were therefore not specifically identified, as required by Article 6.2 of the DSU.[10]

60. In its October 5, 2007 response to the U.S. request for preliminary rulings, the EC admitted the broad, indeterminate nature of the 18 "duties" when it noted that its panel request pertained to all "subsequent measures" adopted by the United States with respect to the 18

[9]U.S. First Written Submission, para. 66.

[10]U.S. First Written Submission, paras. 51, 66.

"duties," and to "any subsequent modification of the measures (*i.e.,* the duty levels)."[11] In its response to the Panel's first set of questions, the EC also asserted that the term "continued application" reaches "subsequent proceedings."[12]

61. Provided with this partial clarification, the United States noted to the Panel that under the DSU, such "subsequent measures," "subsequent proceedings," and "subsequent modifications" could not be subject to dispute settlement – among other things, they were not in existence at the time of the Panel's establishment.[13] Each determination that sets a margin of dumping for a defined period of time is distinct and separate, and under Article 6.2 of the DSU, the EC had to identify each such measure in its panel request. The EC was improperly trying to include the application or continued application of duties resulting from determinations that have not yet been made – the EC even admitted that these "measures" had "a life stretching an indeterminate time into the future."[14] The United States could not determine when these determinations were or will be made, what calculations they did or will include, what duty rates they have established or will establish, and what individual companies they did or will cover.[15]

62. In response to the Panel's questions, the EC also introduced the concept of "duty as a measure,"[16] which it relies on in this appeal.[17] By calling the duty a measure, the EC was essentially asking the Panel to treat any application or continued application of duties – at whatever level and whenever and however determined – in the 18 identified "cases" as some type of free-standing measure that had a life of its own beyond the 52 particular determinations identified in its panel request.[18] Although the EC's panel request itself expressly linked the

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[11]EC Response to U.S. Preliminary Objections, paras. 47-48.

[12]EC Answer to Panel Question 1(b), Feb. 22, 2008, para. 10.

[13]U.S. Rebuttal Submission, para. 20; *US – Upland Cotton (Panel)*, para. 7.158-7.160.

[14]EC Answer to Panel Question 3, Feb. 22, 2008, para. 20.

[15]U.S. Opening Statement at the First Substantive Meeting, para. 21.

[16]EC Answer to Panel Question 1(a), Feb. 22, 2008, para. 7; *see also* EC Second Written Submission, paras. 54, 57. It is curious that the EC itself did not advance this argument in its October 5 response to the United States, or even as part of its first written submission. Rather, the EC waited until the first substantive meeting to showcase its flawed concept of "duty as a measure."

[17]*See, e.g.*, EC Appellant Submission, paras. 35-41.

[18]EC Answer to Panel Question 2, Feb. 22, 2008, para. 17; *see also* EC Answer to Panel Question 2, Feb. 22, 2008, para. 13; EC Answer to Panel Question 3, Feb. 22, 2008, para. 20; EC Answer to Panel Question 5(b), Feb. 22, 2008, para. 28.

"application" (whether "continued" or otherwise) of each "duty" to a specific determination, in its response to the Panel's questions the EC attempted to re-cast its panel request. Rather, the EC now chose to ignore, and continues to ignore, the fact that, for any given importation, the antidumping duty imposed or assessed depends on a particular administrative determination, whether that be an original investigation, assessment review, new shipper review, or changed circumstances review. Separately, the EC overlooked the fact that the continued existence of an antidumping duty order depends on an underlying sunset review.[19] In other words, individual determinations are the focus of dispute settlement under the AD Agreement because the duty assessed, or the decision to continue imposing that duty pursuant to an antidumping order, is dependent on the actions of the administering authority in the relevant proceeding.

63. The EC's panel request could not fulfill the requirements of DSU Article 6.2 unless it identified the specific determination related to the particular antidumping duty; the EC's panel request could not be consistent with Article 6.2 if it merely referred to the application or continued application of a duty in a general and detached way. However, the EC did not identify such determinations, nor could it have, because, by its own admission, the EC was trying to sweep in any subsequent and not-yet-taken determinations related to the duties in 18 "cases."[20] As panels, including the Panel in this dispute, have recognized, a measure that did not even exist at the time of panel establishment cannot be within a panel's terms of reference.[21] Nor can the EC have consulted on a measure that does not exist at the time of the consultation request, yet such consultations on a measure are a precondition for requesting a panel with respect to that measure.[22]

64. The EC now accuses the United States of making a preliminary objection "based on an assumption or condition unilaterally introduced by the United States."[23] According to the EC, "the United States 'assumed' that the European Communities was referring to the type of measure that would fall into the same category as the 52 measures, and made the preliminary request 'to the extent' that the European Communities was not referring to the most recent of such measures." The EC even goes so far as to assert that "the US 'defence' is based on a false premise"[24] and that the United States intentionally "sought to side-step the case against it by

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

[20]EC Response to U.S. Preliminary Objections, para. 47.

[21]Panel Report, para. 7.59; *US – Upland Cotton (Panel)*, paras. 7.158-7.160;

[22]DSU Art. 4.7; *see also* U.S. Other Appellant Submission, paras. 27-33.

[23]EC Appellant Submission, para. 23.

[24]EC Appellant Submission, para. 25.

unilaterally reformulating the case and requesting a preliminary ruling with respect to that re-formulated case."[25]

65. The EC's assertions are unwarranted, as are its attempts to attribute some sort of subversive motive to the U.S. request for a preliminary ruling. The United States was not trying to place the application or continued application of antidumping duties in 18 "cases" in the same category as the 52 determinations identified in the EC's panel request. Rather, the United States properly understood, and the Panel agreed,[26] that the application or continued application of antidumping duties had to result from an underlying antidumping determination, such as the determinations identified in the EC's panel request, and that the EC never attempted to tie the future duties that it was seeking to include in the dispute to a specific determination. The EC itself apparently agreed with the United States that the underlying determination was relevant, as it directly linked the 18 "duties" to "any subsequent measure, in other words, any anti-dumping proceeding, modifying the duty levels established in the Panel request. . . ."[27] By not identifying the determination giving rise to the particular duty in the 18 "cases," the EC failed to identify the *specific* measure at issue.

66. The EC misrepresents the U.S. objection in other ways as well. According to the EC, it would have been "manifestly absurd and unreasonable [for the United States] to assert that the 18 anti-dumping duties in question do not exist or that they do not involve zeroing."[28] Of course, in the quoted statement the EC conveniently overlooks that not even the EC takes the position that there is a fixed set of "18 antidumping duties" at issue, but that rather the EC was seeking to have the panel proceeding encompass a range of determinations that the EC was unwilling or unable to identify specifically. It is no surprise, therefore, that the Panel found that this reference in the EC's panel request lacked the requisite specificity.

67. However, the United States has not accepted that antidumping duties related to the 18 "cases" will be applied in all future instances, nor that zeroing will be used in the determinations

[25]EC Appellant Submission, para. 52.

[26]Panel Report, para. 7.56.

[27]EC Response to U.S. Preliminary Objections, para. 47. The EC actually alleges that "the United States persisted with its tactic of ignoring the case actually made against it in its oral statements at the first hearing, misquoting from part of the EC response to the US request for preliminary rulings that relates to a different issue." EC Appellant Submission, para. 25. The portions of the EC response relied on by the United States, however, came directly from the EC arguments related to the U.S. objection to the 18 "duties". *See* EC Response to U.S. Preliminary Objections, Part III.C ("Subsequent Measures Adopted by the United States with Respect to the 18 Measures Included in the Panel Request Also Fall Within the Panel's Terms of Reference").

[28]EC Appellant Submission, para. 22.

potentially giving rise to such duties. It is entirely possible that in future, subsequent antidumping determinations, the duty assessed, or the cash deposit rate imposed, will be zero or *de minimis*. A future sunset review could lead to the revocation of an order altogether. Moreover, the EC cannot say with any certainty that the United States will use so-called zeroing in each and every future determination giving rise to the application or continued application of duties in the 18 "cases." It is not even certain that in some periods there will be sales above normal value, so there would not even be the possibility of applying so-called zeroing. In other words, the EC has no basis to make a generalization that a "part of the measure. . . does not change over time, namely the zeroing methodology as used in the final order and programmed to continue to be used until such time as the United States eliminates zeroing from the particular anti-dumping duty under consideration."[29] The EC's mis-statements demonstrate precisely the problem with the EC's panel request – the EC did not identify specific measures, and therefore cannot say with certainty what duties will be applied, or continued to be applied, and how they will be calculated, in each of the 18 "cases."

68. The EC's approach would also have a detrimental approach on the dispute settlement system. As the Appellate Body has noted, the need for specificity flows in part from "the 'due process objective of notifying . . .third parties of the nature of a complainant's case.'"[30] Apparently the EC is not concerned with the rights of Members whose decision as to whether to participate as a third party is based on which measures are specifically identified in the EC's panel request.

2. The Panel Conducted the Proper Analysis of the U.S. Preliminary Objection

a. The Panel's Analysis as to the Lack of Specificity in the EC's Panel Request is not Flawed

69. The EC alleges that the Panel erred "insofar as it interpreted [Article 6.2 of the DSU] so as to conclude that the EC Panel Request did not identify the specific measures at issue."[31] The Panel, however, demonstrated why the EC's alleged 18 "duties" could not be considered specific within the meaning of Article 6.2 and properly rejected those alleged measures as outside its terms of reference.[32]

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[29]EC Appellant Submission, para. 36.

[30]*EC – Chicken Cuts (AB)*, para. 155.

[31]EC Appellant Submission, para. 68; *see also* EC Appellant Submission, paras. 50-51.

[32]Panel Report, paras. 7.56-7.59. The United States also refers to the explanation of its preliminary objection under Article 6.2. *See* Part II.A.1, *supra.*

70. Under Article 6.2 of the DSU, a panel request must identify the "*specific* measures at issue."[33] As the Panel explained, "Article 6.2 of the DSU, in principle, does not allow a panel to make findings regarding measures that do not exist as of the date of the panel's establishment."[34] The Panel recognized that the EC's inclusion of the application or continued application of antidumping duties was an attempt to "affect the determinations that the DOC might make in anti-dumping proceedings that may be conducted in the future. In other words, if granted, the findings sought by the European Communities will have an impact on measures that did not exist at the time of the establishment of the Panel, nor during the panel proceedings."[35] This ground alone justified the Panel's finding that the identification of the alleged 18 "duties" failed to meet the specificity requirement of Article 6.2.

71. The EC claims that it "would have been *impossible* for the EC Panel Request to be *any more specific*. . . ."[36] The United States agrees that it was impossible to identify specific measures not yet in existence, and that hence, it was impossible under Article 6.2 of the DSU to include the application and continued application of antidumping duties in 18 "cases" within the Panel's terms of reference. As the United States explained above, for any given importation, the antidumping duty imposed or assessed depends on a particular administrative determination, while the continued imposition of an antidumping duty depends on an underlying sunset review.[37] And as the Panel recognized, it did not make sense to describe the continued application of duties "in isolation from any proceeding in which such duties have been calculated, allegedly through zeroing."[38] That the EC could not be *more* specific does not mean that its panel request identified the "specific measure at issue," however.

72. The EC's panel request could not fulfill the requirements of Article 6.2 of the DSU unless it identified the specific determination leading to the particular antidumping duty; the EC's panel request could not be consistent with Article 6.2 if it merely referred to the application or

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[33]Emphasis added.

[34]Panel Report, para. 7.59; *see also US – Upland Cotton (Panel)*, paras. 7.158-7.160 (rejecting inclusion of the Agricultural Adjustment Act of 2003 in the panel's terms of reference because that law did not come into existence until after panel establishment) ("In this case, the Agricultural Assistance Act of 2003 could not possibly have been impairing any benefits at the date of Brazil's referral of its complaint to the DSB because it did not yet exist.").

[35]Panel Report, para. 7.59.

[36]EC Appellant Submission, para. 50.

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

[38]Panel Report, para. 7.56.

continued application of a duty in a general and detached way. However, the EC did not identify such determinations, nor could it have, because, by its own admission, the EC was trying to sweep in any subsequent and not-yet-taken determinations related to the application or continued application of duties in 18 "cases."[39] The fact that the EC could not be "any more specific" does not excuse the EC from the requirements of Article 6.2. The Panel properly granted the U.S. preliminary ruling request under Article 6.2, and found that its terms of reference did not include the alleged "application" of some unspecified duties arising out of unspecified determinations on the unknowable condition that these alleged duties breached the AD Agreement.

b. The Panel Properly Considered Jurisdictional Issues in This Dispute

73. The EC makes the remarkable claim that "the appealed findings are inconsistent with: Article 7.1 *DSU*; with Article 12.1 and Appendix 3 *DSU* and paragraphs 4 and 13 of the Working Procedures; with the rule that the United States had the burden of raising an issue under Article 3.3 of the *DSU*; and with the rule that the Panel must not make the case for the defending Member – insofar as the Panel made findings regarding the existence and precise content of the 18 "duties", which relate to Article 3.3 of the *DSU*, and concern matters never raised by the United States."[40] The EC essentially asks that the Appellate Body consider the Panel's findings as improper, since they allegedly addressed an issue that was raised *sua sponte*. The EC's assertions have no basis in fact, nor in the DSU, and should be rejected.

74. In the first instance, the United States recalls that it timely raised a preliminary objection to the EC's identification of the application or continued application of antidumping duties in 18 "cases" as part of its first written submission.[41] As indicated above, the United States was uncertain as to what the EC intended by identifying "the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping order" in 18 "cases" and accordingly asked for a ruling that these alleged measures were outside the Panel's terms of reference.[42] At the first substantive meeting, the United States stated at closing that it "would like to shed light on how it believes the Panel should approach the question of *whether such 'measures' exist* and, to the extent they do, whether they fall within the Panel's terms of

[39]EC Response to U.S. Preliminary Objections, para. 47.

[40]EC Appellant Submission, para. 62.

[41]U.S. First Written Submission, paras. 51, 66. The U.S. preliminary objection was made by the time of its first written submission, as required by Article 13 of the Working Procedures of the Panel.

[42]In fact, the Panel was likewise uncertain, as it sought clarification at the first substantive meeting. *See* Panel Questions 1-5, Feb. 1, 2008.

reference."[43] The United States then explained throughout the statement that the problems with the EC's shifting definition of the "supposed" or "alleged" measures. It is clear that from the outset of the underlying proceeding the United States considered the existence of the measures as part of the Panel's general inquiry into whether the EC had identified specific measures in its panel request.[44]

75. Although the United States made a preliminary objection here, it could have done so at a later stage in the proceeding. The preliminary objection simply alerted the Panel to a failure in the EC's case; the point of the preliminary objection was that the United States did so at an *early* stage. The United States recalls here that the preliminary objection practice in WTO dispute settlement is in part a response to the Appellate Body's invitation in *EC – Bananas III* to create such a practice. As the Appellate Body stated when reviewing the Article 6.2 issue addressed by the panel,"[w]e note, in passing, that this kind of issue could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, *inter alia*, for preliminary rulings."[45] In other words, it is permissible, *as a DSU matter*, to raise this sort of failure late in the proceeding. The preliminary objection is a device to assist with procedural efficiency, but that does not change its nature, and in particular, the fact that a party raises the point does not mean that it has the burden of proof. As the report in *EC – Bananas III* makes clear, the complaining party has a duty to comply with Article 6.2.

76. The EC's argument relies on two alleged "rules": 1) "the United States had the burden of raising an issue under Article 3.3 of the *DSU*" and 2) "the Panel must not make the case for the defending Member."[46] The EC, however, ignores the actual rules governing the Panel's authority to address issues pertaining to its terms of reference, as well as the rules related to the burden of proof in this dispute.

77. The Appellate Body has stated:

> [P]anels have to address and dispose of certain issues of a fundamental nature, *even if the parties to the dispute remain silent on those issues*. In this regard, we have previously observed that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings." For this reason, panels cannot simply ignore issues which go

[43]U.S. Closing at the First Substantive Meeting, para. 4 (emphasis added).

[44]As the United States noted in paras. 88-89, *infra*, the EC appeared to share this view.

[45]*EC – Bananas III (AB)*, para. 144.

[46]EC Appellant Submission, para. 62.

> to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – *if necessary, on their own motion* – in order to satisfy themselves that they have authority to proceed.[47]

Thus, even had the United States not made a preliminary objection to the EC's identification of the alleged 18 "duties", the Panel was entitled to examine the issue on its own accord. Whether a specific measure is identified in a complaining Member's panel request goes to the very "root" of a panel's jurisdiction. In other words, a measure which does not meet the requirements of Article 6.2 of the DSU cannot fall within the panel's terms of reference under Article 7.1 of the DSU, and the Panel was not required to wait for the United States to raise the issue (which, in any event, the United States did here).

78. The EC also misrepresents the rules concerning burden of proof which govern WTO dispute settlement. It is well-established that a complaining Member must establish a *prima facie* case by presenting evidence and argument to establish the existence of measures being challenged and the basis of the claimed inconsistency with a WTO provision.[48] The Panel correctly observed that:

> The European Communities, as the complaining party, must therefore make a *prima facie* case of violation of the relevant provisions of the agreements at issue, which the United States must refute. We also note that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof. . . . In this regard, we recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.[49]

79. A panel also has an obligation under Article 11 of the DSU to make an objective assessment of the matter before it, and in accordance with that obligation, a panel must satisfy itself that, even if a responding party does not contest the complaining party's claims, the complaining party has established a *prima facie* case by presenting evidence and arguments to identify the measure being challenged and explaining the basis for the claimed inconsistency with the covered agreements.[50]

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[47] *Mexico – HFCS (Article 21.5) (AB)*, para. 36 (quoting *US – 1916 Act (AB)*, para. 54) (emphasis added).

[48] *US – Wool Shirts (AB)*, pp. 12-13.

[49] Panel Report, para. 7.6.

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

80. In this dispute, the EC was required to make a *prima facie* case, including evidence sufficient to establish the existence of the 18 "duties." As the Panel properly recognized, "it is for the [EC] to make a *prima facie* case before the burden shifts to the United States to rebut it."[51] And in particular, the Panel understood that "[t]he fact remains, however, that the [EC] has to demonstrate the existence and the precise content of the purported measure."[52] The Panel, following its legal analysis, concluded that the EC did not make a *prima facie* case: "[W]e do not consider [what the EC has described] to represent a measure in and of itself."[53]

81. The EC faults the Panel for making the very inquiry that it was required to make as part of its objective assessment of the matter.[54] Even if the United States had not objected to the existence and precise content of the 18 "duties," the Panel had to satisfy itself that the EC made a *prima facie* case with respect to the alleged measures.[55] And the Panel had the authority to address this issue, which, contrary to the EC's assertion,[56] was fully within the Panel's terms of reference as part of the Panel's examination of whether the EC made a *prima facie* case with respect to the measures identified in the EC's panel request.

82. The EC also alleges that the Panel's findings are inconsistent with Article 12.1 and Appendix 3 of the DSU, as well as paragraphs 4 and 13 of the Working Procedures.[57] The EC never articulates how these provisions were allegedly violated by the Panel. The United States sees no basis to conclude that Panel did not follow its own Working Procedures (Appendix 3, as amended), pursuant to Article 12.1. Moreover, paragraphs 4 and 13 of the Working Procedures impose procedural requirements on the parties as to submissions and preliminary objections, and do not concern the responsibilities of the Panel. The EC's claims as to inconsistency with Article 12.1 of the DSU, and paragraphs 4 and 13 of the Working Procedures, are entirely unfounded.

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[51]Panel Report, para. 7.41. The EC believes that a complaining Member need not "in its first written submission necessarily provide *argument*" as to the existence and precise content of a measure. EC Appellant Submission, para. 63. The United States is at a loss to understand why the EC is addressing this issue, as the Panel never concluded that the EC should have made argument about the existence and precise content of the 18 "duties" in its first written submission.

[52]Panel Report, para. 7.56.

[53]Panel Report, para. 7.56

[54]EC Appellant Submission, paras. 64-65.

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

[56]EC Appellant Submission, para. 65.

[57]EC Appellant Submission, para. 62.

c. The EC's Claim That the Panel Undertook a "Confounded Legal Analysis" is Erroneous

83. The EC asserts that the Panel, in response to the U.S. preliminary objection, confounded the legal analysis under Article 6.2 and Article 3.3 of the DSU.[58] According to the EC, the Panel carried out a "covert substantive analysis" and incorrectly addressed the issue of whether the alleged measures in fact constituted measures.[59] The Panel, however, properly examined the alleged measures at issue and found that they fell outside its terms of reference under Article 6.2. The Appellate Body should affirm the Panel's finding.

84. As an initial matter, the United States notes that the EC is advancing a novel argument under Article 3.3 of the DSU. That provision reads: "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." Article 3.3 does not define a "measure." Nor does this provision relate to the identification of measures in the panel request, nor to the panel's terms of reference. Rather, Article 3.3 relates to the goal of prompt settlement of disputes in the WTO dispute settlement system. The United States fails to see how Article 3.3 provides a basis for the EC's appeal.

85. In any event, contrary to the EC's assertion, there is nothing "covert" about the Panel's analysis. The Panel was clear that, as part of its analysis, it also considered whether the "application or continued application" of duties arising out of particular determinations in 18 "cases" fit within the definition of "measure."[60] The Panel's overall inquiry led it to conclude that these were outside the scope of the proceeding.[61]

86. Under Article 6.2 of the DSU, a panel request is to identify the "specific *measures* at issue,"[62] and these measures form part of a panel's terms of reference under Article 7.1. The Panel properly understood that an inquiry under Article 6.2 is related to the issue of whether the thing being challenged is classifiable as a "measure," as that term is used in Article 6.2 and

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[58]EC Appellant Submission, paras. 54-61; 66.

[59]EC Appellant Submission, para. 58.

[60]*See, e.g.*, Panel Report, paras. 7.45, 7.50, 7.56.

[61]Panel Report, paras. 7.61, 8.1(b).

[62]Emphasis added.

throughout the DSU.[63] In other words, if something is not even a "measure," then it is not, and cannot be, "specifically identified" for the purposes of DSU Article 6.2. Here, the Panel did not agree that the application or continued application of antidumping duties in the 18 "cases" enumerated in the annex to the EC's panel request were classifiable as measures, nor that they were specifically identified, and therefore concluded that the alleged 18 "duties" were outside its terms of reference.

87. The EC tries to create a false dichotomy between a so-called "substantive" issue under Article 3.3 of the DSU and a so-called "procedural" issue under Article 6.2 of the DSU.[64] This argument is just another version of the one rejected in *US – 1916 Act*, where the Appellate Body stated that "[w]e do not share the European Communities' view that objections to the jurisdiction of a panel are appropriately regarded as simply 'procedural objections'."[65] If something is not a "measure," then it cannot fall within a panel's terms of reference under Article 7.1, and a panel may not examine claims concerning it. The proper way to view the issue is one going to the question of what a WTO Member may include in a WTO dispute settlement panel request in accordance with the DSU, and thus what may fall within a panel's terms of reference. In that sense, the issue is "procedural," though – more importantly – it is an issue presented by the text of Article 6.2 of the DSU and thus properly considered by the Panel.

88. The EC's position in this appeal is disingenuous, given that the EC itself asked the Panel to consider the issue of whether the application or continued application of antidumping duties in 18 "cases" were measures when ruling on the U.S. preliminary objection under Article 6.2 of the DSU. As the EC stated in its second written submission:

> In particular, with respect to the "application or continued application" of anti-dumping duties, the United States disputed the description of the first set of measures in the Panel Request as being "specific" in accordance with Article 6.2 of the DSU.[66]
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> However, the European Communities has clearly identified the precise content of the first set of measures being challenged: that being a duty rate based on the use of the zeroing methodology which is being applied against imports of a specific product from a specific

[63]The panel in *US – Gambling* recognized the interconnectedness of the inquiry as to the existence of a "measure" and the specific identification of that "measure." *See US – Gambling (Panel)*, paras. 6.177-6.180 (noting in support of a finding that the "total prohibition" on the cross-border supply of gambling and betting services was not a measure the fact that the alleged measure was not specifically identified within the sense of Article 6.2).

[64]*See, e.g.*, EC Appellant Submission, paras. 55-56.

[65]*US – 1916 Act (AB)*, para. 54.

[66]EC Second Written Submission, para. 52.

> country. . . . [T]he Appellate Body has accepted that both the European Communities and Japan have described the "precise content" in the context of the methodology itself. It necessarily follows that what the European Communities has described in each of the 18 measures also meets the "precise content" requirement. . . .[67]
>
> There is thus no requirement as to the form of a "measure". . . . The European Communities has in the Panel Request precisely identified the content of the measure being challenged. That is sufficient.. . .[68]
>
> Furthermore, the European Communities submits that there can reasonably be no dispute as to the existence of the 18 measures in the Panel Request. . . .[69]

89. As demonstrated above, the EC responded to the U.S. preliminary objection by referring to its arguments on how the application or continued application of duties in 18 "cases" constituted "measures."[70] It follows that the EC understood that the inquiry as to whether something is a "measure" is related to whether a panel request identifies the "specific measures at issue," as required by Article 6.2. The Panel did as the EC asked, and examined the existence and precise content of the alleged 18 "duties," but did not agree with the EC's arguments. The Panel's decision to consider the issue was not erroneous, as even the EC should admit in light of its statements to the Panel.

d. The Panel's Analysis as to the Existence and Precise Content of the 18 "Duties" is not Flawed

90. The EC claims that the Panel erred in finding that the EC "had not demonstrated the existence and precise content of the 18 measures at issue."[71] The Panel, however, thoroughly examined the alleged measures described by the EC in its panel request (which, contrary to the

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[67]EC Second Written Submission, para. 53.

[68]EC Second Written Submission, para. 55.

[69]EC Second Written Submission, para. 56. The EC also noted in its answers to questions from the Panel that: "the Appellate Body has clearly stated that any act or omission of a WTO Member may be a measure for the purposes of dispute settlement. In these circumstances, the EC is of the view that the preliminary objection raised by the US is wholly without merit." EC Answer to Panel Question 1(a), Feb. 22, 2008, para. 6. Once again, the EC tied the issue of the existence of a "measure" to the U.S. preliminary objection concerning specificity.

[70]Given the EC's response to the U.S. preliminary objection in its second written submission, it is difficult to understand how the EC can now assert that it told the Panel that the issue of whether the EC demonstrated the existence and precise content of the 18 "duties" "was not before the Panel." EC Appellant Submission, para. 55.

[71]EC Appellant Submission, para. 67; *see also* EC Appellant Submission, paras. 27-48.

EC's re-formulation on appeal, would have been far more than 18 measures because duty could change with each determination). The Panel properly concluded that the EC's description of the "measure" it was challenging would put the alleged measure "in isolation from any proceeding in which such duties have been calculated, allegedly through zeroing", meaning that the Panel "did not consider this [description] to represent a measure in and of itself."[72] The Appellate Body should reject the EC's appeal as erroneous.

91. At the outset, the Panel correctly recognized "the Appellate Body's pronouncement that '[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings'."[73] The Panel also noted that "[t]he fact remains, however, that in order to successfully raise claims against a measure, the complaining Member must in the first place demonstrate the existence and the precise content of such measure."[74] The EC apparently does not take issue with these criteria,[75] but rather how they were applied by the Panel when examining the 18 "duties.

92. The Panel found the EC's description of the continued application or application of duties in 18 "cases" to be "on its face. . . ambiguous."[76] According to the Panel, the EC's panel request did "not sufficiently distinguish" between the 52 antidumping determinations and the 18 "duties." The Panel understood that by the EC's own admission, the 18 "duties" were not challenging zeroing *per se*, but the Panel also viewed the 18 "duties" as a different set of measures than the 52 specific determinations identified in the panel request, otherwise there would have been no need to also challenge 52 determinations that relate to the same duties.[77] The distinction in the EC's request was anything but "crystal clear."[78] What the Panel grasped was that the EC's challenge to the application or continued application of duties in 18 "cases" seemed directed at free-floating, indefinite "measures," disconnected from any specific determinations giving rise to a duty rate.

93. As the Panel went on to explain:

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[72]Panel Report, para. 7.56.

[73]Panel Report, para. 7.45 (citing *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 81).

[74]Panel Report, para. 7.50.

[75]EC Appellant Submission, paras. 27-28.

[76]Panel Report, para. 7.49.

[77]Panel Report, para. 7.49.

[78]EC Appellant Submission, para. 46.

> The fact remains, however, that the European Communities has to demonstrate the existence and the precise content of the purported measure. . . . In this case, however, the European Communities challenges the continued application of 18 duties, which, in and of itself, does not amount to the identification of a measure. . . . We note. . . that what the European Communities describes as a measure in these proceedings is the continued application of 18 duties, in isolation from any proceeding in which such duties have been calculated, allegedly through zeroing. As such, we do not consider this to represent a measure in and of itself.[79]

This conclusion is not, as the EC thinks, "particularly difficult to understand."[80] To the Panel, the application or continued application of antidumping duties in the 18 "cases" could not exist as a "measure" separate and apart from the underlying determinations which would give rise to each instance of such application or continued application. But divorcing the underlying determination from the application or continued application of antidumping duties is exactly what the EC intended by merely referring to "application or continued application" of duties in a general and detached way.

94. The Panel was also correct to dismiss the EC's "precise content" argument as contradictory.[81] As the EC asserted in response to a question from the Panel: "In *US - Zeroing (EC)* and in *US - Zeroing (Japan)*, the Appellate Body has accepted that both the EC and Japan have described the 'precise content' in the context of the methodology itself. It necessarily follows that what the EC has described in each of the 18 measures - which is the same - also meets the 'precise content' requirement."[82] The Panel properly concluded: "[the EC's] argument equates the continued application of the 18 duties at issue with the zeroing methodology 'as such', addressed in the cited two prior disputes. Given the EC's clear statement that it is not challenging zeroing 'as such' in this case, we find this proposition to be internally inconsistent and reject it."[83]

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[79]Panel Report, para. 7.56.

[80]EC Appellant Submission, para. 49.

[81]Panel Report, para. 7.55.

[82]EC Answer to Panel Question 1(a), Feb. 22, 2008, para. 4 (cited in Panel Report, para. 7.55, underlining in Panel Report). The EC answer cited to the discussion in *US – Zeroing (EC)* and *US – Zeroing (Japan)* finding that the zeroing methodology could be challenged "as such."

[83]Panel Report, para. 7.55.

95. The EC now claims that it is "at a loss to understand how the Panel could make such a statement."[84] However, the EC asserts that "the relevant part of the '*precise content*' of the 18 measures (that is, the zeroing methodology) was the *same as the precise content* of the zeroing methodology measure."[85] In other words, the EC explicitly acknowledges the overlap in the precise content of the two measures. The EC's position is further confirmed by the statement that "[w]hat we are discussing in the present case [i.e., the zeroing methodology] is *precisely the same thing* but *more specifically limited* to particular anti-dumping duties on particular products exported from the European Communities to the United States."[86] The Panel was properly at a loss to understand how the 18 "duties" could contain the same precise content as the so-called zeroing methodology which had been challenged "as such" in other disputes, when the EC stated that it was not challenging that methodology "as such" in this dispute.

96. Finally, the EC attempts to justify its challenge to the 18 "duties" by relying on arguments related to the "*prompt* and *effective* settlement of disputes,"[87] and the need to ensure proper compliance by the United States in light of prior disputes over implementation of the DSB's recommendations and rulings concerning zeroing. These arguments are unfounded and do not justify a departure from the requirements of the DSU related to the identification of specific measures by the complaining party in a dispute. In any event, issues concerning U.S. implementation in other zeroing disputes were not within the Panel's terms of reference and thus are not within the scope of this proceeding.[88]

97. The EC made similar arguments to the Panel about alleged U.S. non-compliance in other disputes. As the Panel concluded:

> We note that the European Communities repeatedly refers to the US alleged failure to implement the DSB recommendations and rulings in the past zeroing cases. This suggests that the European Communities somehow links its claims regarding the continued application of the 18 duties at issue to the US alleged failure to implement the DSB recommendations and rulings in the past zeroing cases. The European Communities

[84]EC Appellant Submission, para. 47.

[85]EC Appellant Submission, para. 47 (emphasis added in second instance).

[86]EC Appellant Submission, para. 42 (emphasis added in the first instance).

[87]EC Appellant Submission, para. 33.

[88]To the extent that the EC believes that the United States has not implemented the DSB's recommendations and rulings in other disputes, the United States recalls that those disputes are the subject of ongoing compliance panel proceedings, and in any event, the United States is demonstrating in those proceedings that the claims of non-compliance are in error.

> does not argue that the measures at issue in this dispute are measures taken to comply with the DSB recommendations and rulings in previous zeroing cases within the meaning of Article 21.5 of the DSU. It, however, submits that the fact that the United States failed to implement the DSB recommendations and rulings in previous zeroing cases is relevant to the Panel's assessment of the EC's claims in this case. . . .[89]
>
> In our view, each dispute settlement proceeding at the WTO is independent from others, except proceedings initiated under Article 21.5 of the DSU which are naturally linked to the relevant original proceedings. . . . The European Communities clearly points out that it does not see these panel proceedings as a forum where the alleged non-compliance in some past cases may be discussed. Yet, it argues, without convincing reasoning, that such non-compliance is somehow relevant to the Panel's evaluation of the EC's claims in this case. For the reasons that we have explained, this proposition lacks a legal basis.[90]

98. The Panel correctly understood that events in other disputes do not have a bearing on the Panel's analysis of the compliance of the EC's panel request with Article 6.2 of the DSU. The Panel therefore rightly refused to accord the EC's arguments any weight in ruling on the U.S. preliminary objection.

B. The EC's Additional Claims as to the Panel's Specificity Finding are Unfounded and Should be Rejected

99. The EC makes a number of additional claims related to the Panel's ruling on the U.S. preliminary objection with respect to the application or continued application of antidumping duties in 18 "cases." The EC's appeal includes claims under Article 7.2, 11, and 12.7 of the DSU, as well as a request to complete the analysis concerning the consistency with the covered agreements of the application or continued application of antidumping duties. As demonstrated below, each of the EC's claims lacks merit and should be rejected.

1. DSU Article 7.2

100. The EC alleges that "the Panel Report is inconsistent with Article 7.2 of the *DSU* insofar as the Panel did not address relevant provisions of the *GATT 1994* and the *Anti-Dumping Agreement* cited by the [EC] in this dispute."[91] More specifically, the EC erroneously claims that the Panel should have addressed the "relevant provisions of the *GATT 1994* and the

[89]Panel Report, para. 7.60.

[90]Panel Report, para. 7.60.

[91]EC Appellant Submission, para. 69.

Anti-Dumping Agreement referenced at paragraphs 37 to 39 of this appeal."[92] The EC's appeal fundamentally misinterprets Article 7.2 and should be rejected.

101. Under Article 7.2 of the DSU, "Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." However, the Appellate Body, examining Articles 7.1, 7.2, and Article 11 of the DSU, has recognized that "[i]n discharging its functions under Articles 7 and 11 of the DSU, a panel is not. . . required to examine *all* legal claims made before it."[93] In other words, "[a] panel may exercise judicial economy."[94] Moreover, the Appellate Body explained in *Dominican Republic – Cigarettes* that "there is no obligation upon a panel to consider each and every argument put forward by the parties in support of their respective cases, so long as it completes an objective assessment of the matter before it, in accordance with Article 11 of the DSU."[95]

102. Here, the EC identified various provisions of the GATT 1994 and the AD Agreement in an attempt to provide contextual support for its argument that it could challenge a duty resulting from a determination without identifying the specific determination giving rise to that duty.[96] The EC was not even making free-standing claims pursuant to these provisions with respect to the U.S. preliminary objection. As discussed above, the Panel was not required to explicitly address each and every argument made by the EC in its report. In addition, Article 7.2 applies to a panel's discharge of the matters *within its terms of reference*. Where a measure is not within a panel's terms of reference – as in this case – Article 7.2 does not operate to expand the terms of reference and require a panel to discuss provisions of the covered agreements with respect to such measures.[97] The Appellate Body should reject as unfounded the EC's appeal under Article 7.2 of the DSU.

2. DSU Article 11

[92]EC Appellant Submission, para. 69.

[93]*Canada – Autos (AB)*, para. 114.

[94]*Canada – Autos (AB)*, para. 114.

[95]*Dominican Republic – Cigarettes (AB)*, para. 125.

[96]EC Appellant Submission, paras. 37-39. The United State notes that the EC makes arguments to the Appellate Body with respect to Articles 17.4 to 17.7 of the AD Agreement. *See* EC Appellant Submission, para. 38. However, the EC appears not to have made such arguments to the Panel. *See* EC Answers to Panel Questions 1-3, Feb. 22, 2003; EC Second Written Submission, paras. 48-58. It is curious how the Panel can be accused of not considering arguments as to certain provisions, when the EC did not even raise such arguments with the Panel.

[97]In any event, it is clear that the Panel did not find the EC's contextual argument persuasive, as it ruled against the EC's attempt to include the alleged 18 "duties" despite the EC's contextual arguments.

103. The EC asserts that "the Panel Report is inconsistent with Article 11 of the *DSU*, insofar as the Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[98] However, the EC never attempts to argue how the Panel allegedly failed to undertake an objective assessment of the U.S. preliminary objection concerning the 18 "duties," and contents itself with rhetorical or conclusory statements.[99] Such statements are not, however, argument sufficient to meet the high burden of an appeal under DSU Article 11. The Appellate Body should reject the EC's appeal as unfounded.

3. DSU Article 12.7

104. Under Article 12.7 of the DSU, "the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." The EC here alleges "[a]s will be apparent from the preceding analysis, and for all the reasons set out in this appeal," the Panel "did not set out the basic rationale behind its findings and recommendations."[100] According to the EC, "[i]n effect, there is no explanation in the Panel Report capable of supporting" the Panel's conclusion as to the 18 "duties."[101]

105. The EC's appeal under Article 12.7 is unfounded and should be rejected. The Panel provided a detailed legal and factual analysis of the U.S. preliminary objection and laid out the rationale behind its findings that the 18 "duties" were not within its terms of reference.[102] In fact, the EC devoted considerable space in its appellant submission to criticizing the very rationale and analysis that the EC now says does not exist.[103] The EC's argument is conclusory and fails to demonstrate anything more than the EC's dissatisfaction that the Panel did not accept its arguments as to the alleged 18 "duties".

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[98]EC Appellant Submission, para. 70.

[99]EC Appellant Submission, para. 71 ("[I]t is impossible for the [EC] to understand on what basis the Panel arrived at the conclusion that the 18anti-dumping duties in question do not exist or that there precise content has not been demonstrated."; "These [EC] companies know very well from the enormous, direct, painful and illegal financial penalties they have incurred and continue to incur that the [EC] has not 'simply divined the existence of a measure in the abstract'."); para. 72 ("[I]t is difficult to understand how the drafters of the Panel Report could have allowed themselves to be beguiled by the subsequent analysis . . . .")

[100]EC Appellant Submission, para. 73.

[101]EC Appellant Submission, para. 73.

[102]Panel Report, paras. 7.30-7.67.

[103]EC Appellant Submission, paras. 12-68.

4. Completion of the Analysis

106. The EC asks the Appellate Body "to complete the analysis by finding that, because of the use of zeroing, each of the 18 "duties" is inconsistent with Articles VI:1 and VI:2 of the *GATT 1994*, Articles 2.4, 2.4.2, 9.3, 11.1 and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*."[104] First, should the Appellate Body properly uphold the Panel's conclusions, there would be no basis to complete the analysis. Second, were the Appellate Body to reverse the Panel's conclusions, the United States asks that the Appellate Body exercise judicial economy and not complete the analysis. In any event, should the Appellate Body proceed to complete the analysis, the United States asks the Appellate Body to find that the application or continued application of antidumping duties in 18 "cases" is not inconsistent with the AD Agreement, the GATT 1994, and the WTO Agreement for the reasons stated in the U.S. written submissions to the Panel, and at the Panel's substantive meetings with the parties.[105]

107. The EC also uses its appellant submission to make an irrelevant attack on the WTO Secretariat's circulation of communications from the United States to the DSB as "WT/DS" documents.[106] The EC focuses in particular on the U.S. communication to the DSB concerning the Appellate Body report in *US – Stainless Steel (Mexico)*, but notes other such communications from the United States.[107] According to the EC's flawed view, the "incorrect designation of these documents almost certainly contributed to the Panel's error" on the issue of simple zeroing in administrative reviews.[108]

108. The Appellate Body should reject the EC's appeal concerning these U.S. communications. As an initial matter, Article 20(2)(d) of the Working Procedures for Appellate Review requires that the appellant's notice of appeal contain a brief statement of the nature of the appeal, including "(i) identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel; (ii) a list of the legal provision(s) of the

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[104]EC Appellant Submission, para. 75.

[105]*See, e.g.*, Other Appellant Submission, Part III.B; U.S. First Written Submission, Parts V.B & V.E; U.S. Rebuttal Submission, Part III; U.S. Opening Statement at First Substantive Meeting, paras. 11-12, 25-41; U.S. Opening Statement at Second Substantive Meeting, paras. 15-17, 22-36.

[106]EC Appellant Submission, paras. 77-80.

[107]The United States notes that the DSB communication on the Appellate Body report in DS344 was submitted to the panel as an attachment to its comments to the Panel on that same report. *See* Attachment 2 to U.S. Comments on *US – Stainless Steel (Mexico) (AB)*.

[108]EC Appellant Submission, para. 77.

covered agreements that the panel is alleged to have erred in interpreting or applying; and (iii) without prejudice to the ability of the appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors." The Appellate Body has explained that "the Notice of Appeal serves to give notice to the appellee of the findings being appealed" and has "excluded from the scope of appeal a finding that had not been 'covered' in the allegations of error set out in the Notice of Appeal because the appellee 'had no notice'" that the appellant was appealing the finding.[109] Here, the EC did not raise its claim regarding the U.S. communications in its notice of appeal, and the United States had no notice that the EC would raise this issue. The EC's claim is therefore outside the scope of this appeal, and should be rejected for that reason alone.

109. Even had the EC noticed the appeal on the issue of the United States communications, the United States fails to see on what basis the EC could make such an appeal. Under Article 17.6 of the DSU, "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." The EC makes no showing of how the WTO Secretariat's circulation of communications from the United States to the DSB as "WT/DS" documents is related a finding of law, or a legal interpretation, in the Panel Report that can be appealed under Article 17.6 of the DSU.

110. The United States also recalls that it submitted the DSB communication on the report in *US – Stainless Steel (Mexico)* to the Panel. The EC had an opportunity to make the arguments it is now making with respect to this document, and the others mentioned in the U.S. communication. Instead, the EC merely told the Panel that "[t]he EC is not at all impressed by these documents."[110] The EC is now in no position to object to the Panel having considered them more carefully than the EC decided to. The United States is also astonished to see that the EC is spending the time of the Appellate Body on the matter of what document series the Secretariat circulates documents in. The EC is merely searching for excuses as to why the Panel agreed with the U.S. interpretation of the AD Agreement and making a non-sensical appeal on an issue of long-standing disagreement with the United States. The Appellate Body should reject the EC's groundless challenge to the designation of Member communications to the DSB.

[109] *US – Countervailing Measures (AB)*, paras. 61-62 (citing *EC – Bananas III (AB)*, para. 152); *see also US – Bananas III (Article 21.5) (AB)*, paras. 280-81.

[110] Comments of the EC on the Comments of the United States on the Appellate Body Report in *US – Stainless Steel (Mexico)*, para. 5.

III. The Panel Properly Excluded the Four Preliminary Determinations from its Terms of Reference

111. The United States asked the Panel for a preliminary ruling that three sunset review preliminary determinations and one administrative review preliminary determination were outside the Panel's terms of reference because they did not constitute "final action" within the meaning of Article 17.4 of the AD Agreement.[111] The Panel agreed with the United States, and found that all four of these on-going proceedings were outside its terms of reference.[112] The EC now appeals the Panel's finding.[113] The Panel's conclusion is based on a proper interpretation of the AD Agreement, and does not constitute legal error. The Appellate Body should reject the EC's appeal and affirm that these four preliminary measures were outside the Panel's terms of reference.

112. Under Article 17.4 of the AD Agreement, a matter may only be referred to a panel if "final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties." There is only one exception: a "provisional measure" may 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."[114] Here, the four on-going proceedings challenged by the EC were not "final action" within the meaning of Article 17.4.[115] To the contrary, at the time of the panel request, the United States had not yet made a decision to levy definitive duties. Indeed, it was entirely possible that once the final results of the sunset reviews or administrative review were issued, no definitive antidumping duties would be levied, or would continue to be levied, at all. And the measures did not fall into the "provisional measures" exception, something the EC readily admits.[116]

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[111]*See* U.S. First Written Submission, paras. 72-74; U.S. Rebuttal Submission, paras. 29-35. The four preliminary measures are: *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).

[112]Panel Report, paras. 7.70-7.77; 8.1(c).

[113]EC Appellant Submission, paras. 81-95.

[114]AD Agreement, Art. 17.4.

[115]As the Panel noted, "[i]t is factually uncontested that four of the 52 measures identified in the EC's panel request were preliminary determinations made by the USDOC." Panel Report, para. 7.70.

[116]EC Appellant Submission, paras. 86, 93.

Therefore, under the AD Agreement, the four preliminary determinations could not properly be considered by the Panel.

113. The EC erroneously asserts that the Panel rejected the EC's claims "on the *assumption* that the European Communities had argued that the four preliminary determinations were 'provisional measures.'"[117] However, the Panel properly concluded that the EC's challenge did not fit within the exception to the finality requirement in Article 17.4.[118] This is not the same thing as assuming that the EC was arguing that the four preliminary determinations were "provisional measures." The Panel understood that the only way a non-final agency action could be challenged under the AD Agreement would be if it were a provisional measure fitting into the exception in the second sentence of Article 17.4. The Panel therefore made the relevant inquiry and found that the exception did not apply to the four preliminary determinations.

114. The EC falls back on the argument that the "matter" referred to the Panel was the "the continued application of specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in [its] Annex as *calculated* or *maintained in place* pursuant to the most recent [anti-dumping proceedings]."[119] It reasons that the "matter" includes "any subsequent 'measure'(that is, the type of measure falling into the category of the 52 measures) adopted by the United States, including preliminary determinations setting out the duty levels . . . ."[120] And, according to the EC, any act taken with regard to the 18 duties, even if not final, was covered by the Panel's terms of reference.[121]

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[117]EC Appellant Submission, para. 85 (emphasis in original). The United States notes that during the Panel proceeding, the EC asserted that the it met the exceptions to the finality requirement, even though it maintained that it was not challenging "provisional measures within the sense of Article 17.4." *See* EC Answer to Panel Question 6, Feb. 22, 2008. Even if the preliminary determinations were classified as "provisional measures" within the sense of Article 17.4, the EC failed to meet the requirements of the exception for provisional measures – it neither made a claim under Article 7.1 of the AD Agreement, nor did it show that the measures had a "significant impact." *See, e.g.*, Panel Report, para. 7.73 (noting that the EC did not make a claim under Article 7.1 of the AD Agreement).

[118]Panel Report, para. 7.73.

[119]EC Appellant Submission, para. 87 (emphasis in original).

[120]EC Appellant Submission, para. 87. The EC misrepresents what "matter" means for purposes of dispute settlement. The Appellate Body, in the very report cited by the EC, stated that the "matter" consists of two elements: "the specific *measures* at issue and the *legal basis for the complaint* (or the *claims*)."*Guatemala – Cement I (AB)*, para. 72. The EC, however, describes the "matter" for purposes of its legal standard as the application or continued application of antidumping duties in 18 cases. This is not the "matter." The EC's definition does not encompass specific measures within the sense of Article 6.2 of the DSU, nor does it encompass the legal basis for the complaint.

[121]EC Appellant Submission, para. 87.

115. The EC cannot avoid the finality requirement of Article 17.4 of the AD Agreement based on such a flawed argument. As an initial matter, the EC relies on the notion that the preliminary measures were "subsequent measures" that were part of the EC's panel request and therefore properly within the Panel's terms of reference. Aside from the fundamental problem with the EC's attempt to include "subsequent measures" in its panel request,[122] the United States fails to see how preliminary measures in existence at the time of the EC's panel request, and included in that request, are measures *subsequent* to that request.

116. Most importantly, the EC's argument ignores the plain text of Article 17.4. In fact, the EC outright asserts that it may challenge any act related to the 18 duties, "even if not final," and that Article 17.4 "allows Members to challenge. . . 'preliminary determinations.'"[123] Article 17.4, however is clear: the investigating authority must take *final action* by the time of the panel request; otherwise, the antidumping measure cannot fall within the panel's terms of reference. Neither on-going administrative reviews, nor on-going sunset reviews, can be classified as final action to levy definitive antidumping duties. In other words, they cannot serve as the basis for the application or continued application of antidumping duties. A preliminary determination in an administrative review does not affect the cash deposit rate or the assessment rate – those rates are set in the final determination, and until then, the rates in effect from the prior administrative review remain in effect. Moreover, a sunset review can only result in the continuation of an order, and the imposition of duties, beyond the five-year sunset period once a final determination has been made by both the U.S. Department of Commerce and the U.S. International Trade Commission.

117. The EC improperly relies on the Appellate Body report in *Guatemala – Cement* to support its erroneous interpretation of Article 17.4.[124] In fact, that report reinforces the U.S. view. The Appellate Body noted that Article 17.4 specifies three types of "measure" which may be referred as part of the "matter" to the DSB: definitive antidumping duties, price undertakings, and provisional measures.[125] Here, the EC claims that it identified the definitive antidumping duties in place, and made claims as to why they were WTO-inconsistent.[126] However, with respect to the three on-going sunset reviews and one on-going administrative review, the EC did not identify the definitive antidumping duty, nor could it have. Final action was required before the United States could assess antidumping duties or impose cash deposit rates pursuant to the

[122]*See* Panel Report, para. 7.59.

[123]EC Appellant Submission, paras. 87-88.

[124]EC Appellant Submission, paras. 88-90.

[125]*Guatemala – Cement I (AB)*, para. 79.

[126]EC Appellant Submission, para. 92.

administrative review, and final action was also required in the sunset reviews before the United States could continue imposing antidumping duties beyond the five-year life of the order. Until final determinations were made, there was no way for the EC to know whether antidumping duties would still be imposed on the subject merchandise, nor whether zeroing would even be used or relied on in making such final determinations.

118. The EC also mistakenly relies on the panel report in *Mexico – HFCS*.[127] That dispute involved a claim that Mexico had applied a provisional measure for longer than six months, and thereby violated Article 7.4 of the AD Agreement. Mexico argued that because the United States failed to identify the provisional measure in its panel request, the claim concerning that measure fell outside the panel's terms of reference. The United States, however, had identified the definitive antidumping duty in its panel request, and argued that it was asserting a violation of Article7, not with reference to the provisional measure as a "measure" in the dispute, but rather as one of its legal claims related to the final antidumping measure. The panel concluded that the claim was related to the definitive antidumping duty identified in the panel request and therefore fell within the scope of the proceeding. [128]

119. Unlike the United States in *Mexico – HFCS*, the EC did not even challenge a final determination in any of the four proceedings, so there is no question as to whether the preliminary determination is somehow related to the final measure. The Panel also properly recognized that the report in *Mexico – HFCS* was irrelevant, concluding that "the panel report in *Mexico – Corn Syrup* does not support the EC's position in this dispute."[129]

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[127]EC Appellant Submission, paras. 90-91. The EC also cites to the Appellate Body report in *US – 1916 Act*. In that dispute, the Appellate Body discussed the rationale behind Article 17.4 as it pertained to antidumping investigations. *See US – 1916 Act (AB)*, paras. 73. Here, the EC's claims do not relate to investigations, but to preliminary administrative review and sunset review determinations. In any event, the rationale advanced by the Appellate Body applies with equal force to why the AD Agreement generally requires final action prior to referring a matter to a panel; otherwise, a responding Member could be "harassed or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small" that an administering authority takes during the course of an antidumping proceeding. *US – 1916 Act (AB)*, para. 73.

In *US – 1916 Act*, the Appellate Body also was considering whether antidumping legislation could be challenged "as such." *See US – 1916 Act (AB)*, paras. 72-74. The EC fails to explain how this issue is relevant to the issue of whether preliminary antidumping determinations, which were challenged "as applied," were properly before the Panel.

[128]*Mexico – HFCS (Panel)*, paras. 7.44-7.55.

[129]Panel Report, para. 7.74.

120. According to the Panel, the EC's argument as to the ongoing proceedings was "internally inconsistent."[130] As the Panel observed, the EC asserted that the four preliminary determinations were within the Panel's terms of reference as "subsequent measures" at the same time it urged the Panel to consider so-called "special circumstances" so that the Panel would have a basis to examine preliminary determinations that were outside of its terms of reference under Article 17.4[131] The EC was essentially arguing that it need not meet the exception to the finality requirement in Article 17.4, while simultaneously asking the Panel to create an exemption to that requirement because it could not meet the exemption in Article 17.4.

121. The Panel properly found that both of these arguments "lack a legal basis in the Agreement" and could not justify a departure from the finality requirement of Article 17.4.[132] As the United States has explained above, the EC's argument as to "subsequent measures" is inconsistent with the specificity requirement of Article 6.2 of the DSU, and cannot trump the requirement of final action in Article 17.4 of the AD Agreement. Likewise, the EC's "special circumstances" argument relied on an assumption that the Panel could exceed the jurisdictional limitations that Members have negotiated. However, the Panel understood that it was bound by the terms of the DSU and the covered agreements, which did not accord it the authority to consider a matter which otherwise would not be within the Panel's terms of reference. It would have been entirely improper to have taken into account "specific circumstances" that are nowhere to be found in the text of Article 17.4. The Panel was justified in denying the EC's attempt to include preliminary determinations based on theories that could not override the explicit prohibition in Article 17.4 on challenging measures where no final agency action was taken, unless those measures were provisional measures that fit into the exception to the finality requirement.

[130]Panel Report, para. 7.76; *see also* EC Answer to Panel Question 6, Feb. 22, 2008, paras. 29-30.

[131]Panel Report, para.7.76. To the EC, the "specific circumstances" included the "fact that the EC is complaining about what is essentially a mathematical formula that is essentially identical" wherever it is used; the alleged response of the United States to Appellate Body reports on "zeroing" in wholly unrelated disputes; and the nonsensical reasoning that Article 17.1 refers to Article 7.1 and Article 7.5 refers to Article 9 of the AD Agreement, the "provision that the US has already been found to have infringed." *See* EC Answer to Panel Question 6, Feb. 22, 2008, para. 30. (The Panel used the term "special circumstances" as opposed to "specific circumstances.") The EC asserted that these "specific circumstances" had a "significant impact" on the EC, and that it was therefore "within the Panel's discretion" to exercise jurisdiction. *See* EC Answer to Panel Question 6, Feb. 22, 2008, para. 30.

[132]Panel Report, para. 7.76.

122. For the above reasons, the United States asks that the Appellate Body reject the EC's appeal and affirm the Panel's finding that the four preliminary determinations in the EC's panel request were outside the Panel's terms of reference.[133]

IV. The EC Did Not Make a *Prima Facie* Showing that the Zeroing Methodology Was Actually Employed in Seven of the Challenged Administrative Reviews

123. Before the Panel, the EC made "as applied"[134] challenges, to 37 separate administrative reviews, alleging that the United States "failed to comply with its obligations under the *Anti-Dumping Agreement* and the GATT 1994" when it applied "zeroing" in each of those administrative reviews.[135] It was, therefore, the EC's burden to demonstrate that the evidence submitted to the Panel supported its factual allegation that zeroing was employed in each of the individual measures it challenged.[136] The EC failed to meet its burden with respect to seven administrative reviews, and the Panel properly excluded those reviews from its terms of reference.[137]

A. Proceedings Before The Panel

1. Evidence Before the Panel

124. To support the factual component of its claims, the EC submitted documentation purporting to show that zeroing was employed in each of the enumerated administrative

[133]The United States notes that the EC asks the Appellate Body to reverse the Panel's findings and to complete the analysis of the EC's claims under the AD Agreement and the GATT 1994. *See* EC Appellant Submission, para. 94. Should the Appellate Body do so, the United States asks the Appellate Body to find that the four preliminary determinations are not inconsistent with the AD Agreement and the GATT 1994 for the reasons stated in the U.S. written submissions to the Panel, and at the Panel's substantive meetings with the parties. *See, e.g.*, U.S. Other Appellant Submission, Part III.B; US First Written Submission, Part V.B; U.S. Rebuttal Submission, Part III;; U.S. Opening Statement at First Substantive Meeting, paras. 25-41; U.S. Opening Statement at Second Substantive Meeting, paras. 22-36. We also ask the Appellate Body to use judicial economy and to not address those provisions of the covered agreements that were not addressed by the Panel. *See* Part VI.B, *infra*.

[134]EC First Written Submission, para. 115.

[135]EC First Written Submission, para. 180; *see also* EC First Written Submission, para. 264 ("The European Communities respectfully requests this Panel to make the following findings: . . . [t]he United States violated Articles 2.4, 2.4.2, 9.3 and 11.3 of the *Anti-Dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT when using model zeroing in the 37 administrative review proceedings included in the Annex to the Panel request.").

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

[137]Panel Report, para. 7.151-7.158.

reviews.[138] Within each exhibit were several documents that purportedly corresponded to each of the challenged administrative reviews, including*, Federal Register* notices, Issues and Decision Memoranda, program logs, and tables showing margin results with and without zeroing.[139] The EC chose in its first written submission to provide a detailed explanation for only one of the submitted exhibits (Exhibit EC-31, pertaining to *Ball Bearings and Parts Thereof from Italy*, 2004/2005 review).[140] For the other exhibits the EC limited its explanation to two cursory paragraphs, wherein the EC stated:

> Exhibits EC-33 to EC-68 contain documents for the other cases, including generally, the Final Results, Issues and Decision Memorandum, Final Margin Program Log and Output, and margin calculation without zeroing. These documents generally demonstrate: that simple zeroing was used, that there were some negative intermediate margins - set to zero by USDOC; and the super-inflationary effect of simple zeroing.[141]

125. At both substantive meetings with the parties, the Panel inquired as to the factual evidence submitted by the EC in support of its claims concerning the 37 challenged administrative reviews. Initially, the Panel asked the United States to indicate whether the documentation submitted by the EC demonstrated that the "zeroing" methodology was used by Commerce in the 37 challenged reviews.[142] The United States responded that it "was unable to confirm whether [the submitted] documents demonstrate that Commerce did not provide offsets in the 37 reviews at issue . . ."[143] The United States explained that it was only in a position to confirm the accuracy of Commerce-generated documents, and that, aside from published *Federal Register* notices and Commerce's own Issues and Decision Memoranda, the origin of the remaining documents included within the EC's exhibits was unclear.[144] The United States further conveyed that "[i]n this regard, the burden is on the EC to fully demonstrate the factual bases for its challenges."[145]

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[138]Exhibits EC-31, 33-68.

[139]Exhibits EC-31, and 33-68. (The actual documentation submitted varied by exhibit.)

[140]EC First Written Submission, paras. 181-88.

[141]EC First Written Submission, para. 239.

[142]Panel Question 7(b), Feb. 1, 2008.

[143]U.S. Answer to Panel Question 7(b), February 22, 2008, para. 6.

[144]U.S. Answer to Panel Question 7(b), February 22, 2008, paras. 6-7.

[145]U.S. Answer to Panel Question 7(b), February 22, 2008, para. 6.

126. At the second substantive meeting with the parties, the Panel addressed further inquiries concerning the EC's evidence to both parties, as reflected in Question 1 (a), (b) and (c).[146] The Panel pointed to language referencing the "zeroing" methodology, that appeared in 30 of the submitted Issues and Decision Memoranda, and asked, "do, in your view, the USDOC's statements in the Issues and Decision Memorandum in Exhibit 31 and those in 29 of the 36 Exhibits . . . show that the USDOC did indeed apply simple zeroing in the relevant administrative reviews." In response, the United States did not contest the accuracy of any documents submitted by the EC that were generated by Commerce itself, namely, the Issues and Decision Memoranda pertaining to several of the challenged administrative reviews.[147] The United States further did not contest that where the quoted language, referenced by the Panel appeared, that the "United States did not provide offsets in the individual proceeding to which each specific Issues and Decision Memorandum pertains."[148] The United States then reiterated that it could not confirm the accuracy of any submitted documentation that was *not* Commerce-generated,[149] explaining that "because [it] is only in a position to verify the accuracy of documents generated by Commerce, it cannot confirm the accuracy of documents, program logs, printouts or margins produced by the EC's legal advisors, which the EC claims are the result of Commerce's program without the application of the zeroing methodology."[150]

127. To the EC, the Panel inquired as to why the relevant Issues and Decision Memoranda were not submitted for the remaining seven administrative reviews challenged, and provided an opportunity for the EC to submit them belatedly, along with its answers to the Panel's questions.[151] The EC responded by first acknowledging that it did not provide the "Issues and Decision Memorandum {*sic*} in relation to Exhibits EC-35, EC-47, EC-48, EC-57, EC-58, EC-62 and EC-65 because such memoranda did not discuss the use of zeroing methodologies in the margin calculation."[152] The EC then attached the previously omitted memoranda, along with

[146]Panel Questions, April 25, 2008.

[147] U.S. Answer to Panel Question 1(b), May 2, 2008, para. 1.

[148]U.S. Answer to Panel Question 1(b), May 2, 2008, para. 2.

[149]U.S. Answer to Panel Question 1(b), May 2, 2008, para. 2.

[150]U.S. Comments on EC Answer to Panel Question 1(a), May 9, 2008, para. 3.

[151] Panel Question 1(c), April 25, 2008; *see* also Panel Report, para. 7.146 ("Following the second meeting with the parties, the Panel asked the European Communities why the copies of such memoranda had not been submitted for the seven periodic reviews at issue and invited it, if it so wished, to do so").

[152]EC Answer to Panel Question 1(b), May 2, 2008, para. 10.

"two margin programs" to supplement Exhibit EC-57 that had not previously been submitted.[153] The Panel, over U.S. objections[154], accepted and considered these additional margin programs, stating that "[w]e did not intend *to limit* the submission of evidence along with the EC's response to the question at issue to such memoranda."[155] However, at no point during the Panel proceedings did the EC identify whether its submitted documentation was Commerce-generated, or otherwise inform the Panel as to its source.

2. The Panel's Consideration of the Evidence Before It

128. The Panel recalled that "a *prime facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prime facie* case."[156] In determining whether the EC made a *prima facie* case with respect to zeroing in the administrative reviews at issue, the Panel first considered that the EC had submitted Issues and Decision Memoranda for 30 of the 37 of the challenged administrative reviews, and that each of these Issues and Decision Memoranda made references to the application of zeroing in the administrative reviews to which they refer.[157] The Panel further considered, that with respect to these 30 administrative reviews, the United States did not contest the application of zeroing in these administrative reviews.[158] As such, the Panel found the EC's claims as to the use of zeroing was supported for 30 of the 37 challenged administrative reviews by virtue of the submitted Issues and Decision Memoranda, pertaining to each review.[159]

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[153]EC Answer to Panel Question 1(b) May 2, 2008, para. 11 & nn.3-4 (stating "the EC now attaches a copy of the two margin programs used in this review," and attaching Exhibits EC-88 and EC-89).

[154]U.S. Comments on EC Answer to Panel Question 1(c), May 9, 2008, para. 5 (arguing that the EC violated Article 14 of the Panel's working procedures by belatedly submitting evidence that exceeded that which the Panel requested).

[155]Panel Report, para. 7.148.

[156]Panel Report, para. 7.6.

[157]Panel Report, para. 7.145.

[158] Panel Report, para. 7.146 (citing U.S. Answer to Panel Question 1(b), May 2, 2008 ("The United States does not contest that, where the quoted language, or identical language or similar language, appears in specific Issues and Decision Memoranda, the United States did not provide offsets in the individual proceeding to which each specific Issues and Decision Memorandum pertains...[however], any statement as to offsets made within the context of a particular assessment review, *only* provides evidence as to that individual assessment review, and offers *no* indication or evidence as to whether the United States provided offsets in any other proceeding before Commerce.")).

[159]Panel Report, para. 7.158.

129. For the remaining seven administrative reviews[160], however, the Panel, concluded that the EC's submitted evidence corresponding to each administrative review did not support a *prima facie* case showing that zeroing was employed in these administrative reviews.[161] Specifically, the Panel ruled that (1) the applicable Issues and Decision Memoranda and Final Results pertaining to these reviews did not demonstrate that zeroing was employed; (2) it was not readily discernable from the additional documentation that zeroing was employed; and (3) that additional documents supporting the EC's claims were not generated by Commerce during the conduct of the reviews.[162] The Panel further considered and rejected late-raised arguments submitted with the EC's comments on the interim report explaining how each of its submitted pieces of evidence demonstrated that zeroing was employed.[163]

130. In reaching its conclusion, the Panel also considered and addressed what the EC refers to as "other evidence" in its appellate submission,[164] which, in the EC's view, supports its assertion that the United States applied zeroing in the seven administrative reviews.[165] Specifically, the Panel examined a publication in the *Federal Register* wherein Commerce explained that it "will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons,"[166] but made no change to its practice in other types of proceedings.[167]

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[160]The remaining seven administrative reviews are: *Steel Concrete Reinforcing Bars from Latvia*; (Exhibits EC-35 and EC-81); *Stainless Steel Bar from France*, 2004/2005 review (Exhibits EC-47 &82); *Stainless Steel Bar from France*, 2003/2004 review (Exhibits EC-48 &83); *Stainless Steel Bar from Germany*, 2004/2005 review (Exhibits EC-57, 84, 88-89); *Stainless Steel Bar from Germany*, 2001/2003 review (Exhibits EC-58 & 85); *Stainless Steel Bar from Italy*, 2001/2003 review (Exhibits EC-62 & 86); and *Certain Pasta from Italy*, 2004/2005 review (Exhibits EC-65 & 87).

[161]Panel Report, para. 7.158.

[162]Panel Report, para. 7.151 (*Stainless Steel Concrete Reinforcing Bars from Latvia*); para. 7.152 (*Stainless Steel Bar from France*, 2004/2005 review); para. 7.153 (*Stainless Steel Bar from France*, 2003/2004 review); 7.154 (*Stainless Steel Bar from Germany*, 2004/2005 review); para. 7.155 (*Stainless Steel Bar from Germany*, 2001/2003 review); para. 7.156 (*Stainless Steel Bar from Italy*, 2001/2003 review); and para. 7.157 (*Certain Pasta from Italy*, 2004/2005 review); *see also* para. 7.158.

[163]Panel Report, paras. 6.13-6.18.

[164]EC Appellant Submission, paras. 124-129.

[165]Panel Report, paras. 6.9, 6.11 and 6.20.

[166]*Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During and Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (December 27, 2006).

[167]*Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During and Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722, 777424 (December 27, 2006).

Although the EC argued that this notification supported its contention that the "zeroing" methodology was employed in all of the challenged reviews,[168] the Panel disagreed:

> . . . the USDOC's policy change makes no specific reference to periodic reviews and the methodologies that may be used in such reviews. It simply mentions that the USDOC is not changing the methodologies it uses in investigations where methodologies other than WA-WA are used, and in other anti-dumping proceedings. As such, we find this statement to be too broad to support the EC's argument that the USDOC used simple zeroing in all periodic reviews carried out before the effective date of the policy change.[169]

131. The Panel further rejected the EC's contention that past disputes concerning the "zeroing" methodology supported the EC's claim that zeroing was necessarily employed in any of the challenged reviews:[170]

> We do not consider that the existence of past disputes against the United States regarding zeroing discharges the European Communities' burden of proving in this dispute that the simple zeroing methodology was used in specific periodic reviews challenged. We consider that whether the United States complied with the DSB recommendations and rulings in past disputes is irrelevant to our task in these proceedings, since every dispute stands on its own merits.[171]

132. Finally, the Panel did not expect the United States to rebut a *prima facie* case that the EC did no make,[172] nor did it find the United States had "failed to cooperate" with respect to the EC's attempt to prove the use of zeroing in the reviews at issue.[173] The United States had explained that it was unable to confirm whether zeroing was employed based upon the documentation submitted because it was unclear whether the documentation submitted was Commerce-generated, and to confirm its accuracy:

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[168] EC Appellant Submission, para. 126.

[169]Panel Report, para. 6.9

[170]EC Appellant Submission, para. 127.

[171]Panel Report, para. 6.11.

[172]Panel Report, para. 6.20; *see also* EC Appellant Submission, para. 128.

[173]EC Appellant Submission, para. 177.

> [W]ould require extensive comparison and analysis of a voluminous amount of computer-generated records. Moreover, the burden is on the EC to prove its case, including demonstrating the accuracy, source, and relevance of its exhibits.[174]

133. Rather, the Panel concluded that because it was the EC's burden to submit evidence of its factual assertions, and the EC failed with respect to certain reviews, "we see no reason why the United States should be expected to rebut a factual assertion unsupported by relevant evidence from the party making the assertion."[175]

134. Accordingly, having considered all of the evidence placed before it, along with the parties' arguments, the Panel found that the EC had not established a *prima facie* showing that zeroing was employed in seven of the challenged reviews. As such, the Panel concluded that its "findings regarding the use of simple zeroing in periodic reviews shall, therefore, not affect such reviews."[176]

B. The Panel Correctly Concluded that No *Prima Facie* Case Was Established That The "Zeroing" Methodology Was Employed in Seven of the Challenged Administrative Reviews

135. Pursuant to Article 17.6 of the DSU, appeals are "limited to issues of law covered in the panel report and legal interpretations developed by the panel." The Appellate Body has been hesitant to disturb factual conclusions of a panel, and has stated, to the extent that parties' arguments "concern the Panel's appreciation and weighing of the evidence," it "will not interfere lightly with the Panel's discretion 'as the trier of facts.'"[177] As such, a finding as to whether zeroing was employed in the challenged administrative reviews, as distinguished from legal interpretations or legal conclusions by a panel are, in principle, not subject to review by the Appellate Body.[178]

136. In weighing the evidence before it, the Panel's duty, pursuant to Article 11 of the DSU is "to make an objective assessment of the matter before it, including an objective assessment of the

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[174]U.S. Answer to Panel Question 7(b), May 2, 2008, para. 7 May 2, 2008.

[175]Panel Report, para. 6.20.

[176]Panel Report, para. 7.158.

[177]*US - Upland Cotton (AB)*, para. 399.

[178] *See e.g., EC - Hormones (AB)*, para. 132. ("The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not Codex has adopted an international standard, guideline or recommendation on MGA is a factual question.").

facts of the case." This duty is "an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence."[179] While the "deliberate disregard of, or refusal to consider, the evidence submitted . . . is incompatible with a panel's duty to make an objective assessment of the facts,"[180] the Appellate Body has, "[i]n view of the distinction between the respective roles of the Appellate Body and panels, . . .taken care to emphasize that a panel's appreciation of the evidence falls, in principle, 'within the *scope of the panel's discretion as the trier of facts.*"[181]

137. The EC, however, alleges that the "Panel failed to carry out an objective assessment of the facts contrary to its obligations under Article 11 of the DSU" in that the Panel "exceeded its margin of discretion as a trier of fact and thus committed an egregious error by misunderstanding, ignoring or misinterpreting the evidence provided . . . and by failing to draw the necessary inferences from the evidence on the record."[182] The EC contends that "the totality of facts contained in the record of this case 'necessarily show' that the zeroing was part of the measure and 'actually used' in the seven administrative reviews concerned."[183]

138. The EC's assertion that the Panel "ignored", "misinterpreted" or "misunderstood" the totality of the evidence before it is based solely on the EC's disagreement with the Panel's conclusion as to the submitted evidence. However, this is not an appropriate or correct standard for review by the Appellate Body. In assessing a panel's appreciation of the evidence, the Appellate Body has stated that it will not "base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached. Rather, [it] must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence, . . . [and that it] *will not interfere lightly with the panel's exercise of its discretion."*[184]

139. As the facts set forth in the previous section demonstrate, the Panel fully discharged its duty under Article 11 with respect to the seven administrative reviews at issue by considering the *full range of evidence* that was put before it as to these seven reviews. The Panel's thoughtful

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[179] *EC - Hormones (AB),* para. 133.

[180] *EC - Hormones (AB)*, para. 133.

[181] *US - Wheat Gluten (AB)*, para. 151, (emphasis in original) *(*citing *Korea-Dairy Safeguard (AB),* para. 137, n.29).

[182] EC Appellant Submission, para. 182.

[183] EC Appellant Submission, para. 182.

[184] *US - Wheat Gluten (AB)*, para. 151 (emphasis added).

and deliberate consideration of the evidence is demonstrated by its numerous additional inquiries of both parties about the submitted evidence, its request and acceptance of late additional documentary submissions by the EC in support of its assertion that the "zeroing" methodology was employed in these seven reviews,[185] and by further considering *additional* argument from the EC as to its documentation,[186] that was submitted as late as its interim comments.[187] The Panel's reasoning set forth in paragraphs 6.7- 6.20 and 7.145-7.158 of its report reveals that its conclusion was based on its full and careful consideration of all the evidence before it, which necessarily included its own laborious efforts to extract information from the EC concerning the sufficiency of its evidence, as well as late consideration of the EC's untimely raised arguments.[188] The Panel's conclusion that the EC failed to establish a *prima facie* showing that "zeroing" was employed is supported by the Panel's evaluation and consideration of the evidence before it, and the EC has presented no bases upon which it may be reconsidered by the Appellate Body.

1. The EC Failed to Establish That The Relevant Documentation Was Generated By Commerce

140. The EC's argument, in large part, consists of a re-explanation of evidence and reiteration of argument that the Panel already considered, apparently believing that the Appellate Body will disregard entirely the applicable standard of review as set forth in Article 17.6 of the DSU, and revisit the factual findings and conclusions of the Panel. In the EC's re-explanation of its factual evidence, the EC essentially ignores the Panel's finding that the EC *never* established that the submitted documents were generated by Commerce, and therefore the factual component of its claim that the U.S. had employed the "zeroing" methodology was never established for seven of the challenged administrative reviews. Indeed, the EC dismisses this pivotal basis for the Panel's conclusions as "*incorrect* and *irrelevant*."[189]

141. First, the Panel's finding as to whether the submitted documents were Commerce-generated, is not "irrelevant" to the question of whether the EC properly satisfied its burden of establishing the factual component of its challenges to the seven administrative reviews at issue. The burden was thus on the EC, as the complaining party, to prove all components of its "as applied" claims that the United States acted inconsistently with its obligations when it employed

[185]Panel Report, para. 7.148.

[186]EC Comments on Panel's Interim Report.

[187]Panel Report, paras. 6.12-6.18.

[188]Panel Report, paras. 6.9-6.20, 7.145-7.158.

[189]EC Appellant Submission, para. 137 (emphasis in original).

the "zeroing" methodology in 37 enumerated reviews.[190] At a minimum, the EC was required to supply the Panel with documentation showing that "zeroing" was in fact employed by Commerce in the administrative reviews challenged. Absent program logs *generated by Commerce*, or other proof from Commerce issued documents, it is not apparent from the evidence submitted by the EC that zeroing was employed in the seven administrative review determinations in question.

142. Second, contrary to the EC's assertion, the Panel correctly found that the EC never established that its submitted documentation was actually generated by Commerce. Before the Panel, the United States made clear that it was unable to confirm the accuracy of the contents of any documents contained in the EC's submissions that were not generated by Commerce itself.[191] The United States offered that it was able to confirm that the published notices, submitted by the EC, were generated by Commerce,[192] but said it could not discern, based on its own review of all of the submitted documents, whether the remaining documentation had been generated by Commerce, or the EC's legal advisors for purposes of this dispute.[193]

143. For its part, the EC made *no* attempt, despite several ongoing questions concerning the submitted evidence during the Panel proceedings, to authenticate the documentation contained in its own exhibits. Indeed, as the United States commented before the Panel, the EC had not "performed the simple task of identifying which of the documents in its exhibits were generated by Commerce versus those that were generated by the EC for purposes of this proceeding."[194] Accordingly, the Panel properly and correctly concluded that it could not be established that the evidence relied upon by the EC was generated by Commerce. Based on the evidence before it, and the cursory explanations provided by the EC in response to the Panel's request for information, it was the only reasonable conclusion that might be reached.

144. The EC now attempts to establish on appeal that which it neglected to establish during the Panel proceedings. For the *very first time*, the EC, in its Appellate Body submission asserts an origin for its submitted documentation.[195] Despite the Panel being open to accept and consider

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[190] *US – Corrosion-Resistant Steel CVD (AB)*, paras. 156-57.

[191] U.S. Answer to Panel's Question 7(b), February 22, 2008, paras. 6-7.

[192] U.S. Answer to Panel Question Q1(b), May 2, 2008, para. 1.

[193] U.S. Answer to Panel Question 7(b), February 22, 2008, paras. 6-7.

[194] US Comments on EC Comments on Panel's Interim Report, para. 7.

[195] EC Appellant Submission, para. 117 ("The documents provided to the Panel were printouts of the Standard Margin Programmes used in each review in WORD format."); para. 119 ("[T]he documents provided to the Panel were hard copies or print runs of the printouts of the programme logs as disclosed by the United States."; para.

evidence and argument on a ongoing basis,[196] the EC *chose* not to provide the more detailed explanations it now offers for the Appellate Body for consideration as to the source of its submitted documentation. New explanations of evidence that it submitted to the Appellate Body for the first time, are by definition, not evidence that the Panel considered. Because these relevant explanations as to the sources of the EC's evidence were *never* before the Panel, the EC's contention that, pursuant to Article 11 of the DSU, the Panel "exceeded its margin of discretion as the trier of facts and thus committed egregious error by misunderstanding, ignoring, or misinterpreting the evidence . . .," necessarily fails.[197]

145. Newly formed explanations of evidence and much belated attempts to authenticate its evidence before the Appellate Body have no place in the context of review by the Appellate Body given the prescribed limits of Article 17.6 of the DSU. Additionally, the EC is placing the Appellate Body in the untenable position of weighing evidence never before considered by the Panel.[198] The Appellate Body, has properly declined to entertain such new arguments warning that "if complaining parties were allowed to raise new arguments . . . on appeal, that could . . . undermine the due process rights of responding parties, which would not have had the opportunity to rebut such allegations by submitting evidence in response."[199]

146. Furthermore, even the EC's new attempts at authentication of its evidence fail to establish that its evidence was generated by Commerce, and thus do not demonstrate that "zeroing" was used in the seven administrative reviews. As an initial matter, the EC's assertions about a supposed "standard" computer program, which, according to the EC "mandates" or "requires"

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121 ("These documents (**in our example**, Exhibit EC-35, Appendix IV) contain certain lists of transactions and tables including the dumping calculations, provided by the USDOC in paper and/or electronic version as a result of the execution of the Standard Margin Programme.") (emphasis in original); para. 123 ("These lists and tables (**in our example**, Exhibit EC-35, Appendix V) are the same ones mentioned before but with the exception that they were produced by the interested parties by neutralising the zeroing line of the USDOC's Standard Programmes.")(emphasis in original) (internal citation omitted).

[196]Panel Report, 7.146 ("Following the second meeting with the parties, the Panel asked the European Communities why the copies of such memoranda had not been submitted for the seven periodic reviews at issue and invited it, if it so wished, to do so); *see also* para. 7.148 (The Panel further accepted information beyond just Issues and Decision Memoranda stating that "[w]e did not intend *to limit* the submission of evidence along with the EC's response to the question at issue to such memoranda.") (emphasis added).

[197]EC Appellant Submission, para. 182.

[198]*Canada - Aircraft,* para. 211 ("In principle , new arguments are not *per se* excluded from the scope of appellate review . . . However, for us to rule on Brazil's new argument, we would have to solicit, and receive new facts that were not before the Panel, and were not considered by it. In our view, Article 17.6 of the DSU manifestly precludes us from engaging in such an enterprise.")

[199]*Canada - Aircraft (AB)*, para. 211.

that negative margins be treated as zero, do not bear scrutiny and do not support its position that zeroing was applied in the administrative reviews in question.[200] Because each proceeding is based on a unique set of facts, Commerce does not have a "standard program" that it applies in all cases, nor does it have a program that "mandates" the zeroing of negative margins in all cases. Rather, the computer program that performs the calculations starts as a basic template, and the template is then tailored to a particular exporter/producer for *every* case in which an antidumping calculation is performed.[201] Indeed, the United States has explained this point, and previous panels have so found;[202] the EC had and has no basis for its "standard program" allegation. In addition, the United States also explained this point to the Panel in this dispute when the issue arose at the interim review stage.[203] Furthermore, the EC did not provide the Panel with evidence demonstrating the contents of the alleged "standard programme," let alone evidence demonstrating that if such a program existed, that it could not be altered in particular cases. Therefore, it is not possible for the EC to point to a "standard program" for support that zeroing was applied in a particular administrative review.

147. The EC claims to have submitted such a standard margin program in Exhibits EC-35(II), EC-57(II), and EC-58(II). Importantly, the EC did not authenticate to the Panel that *any* of these submitted exhibits as documents generated by Commerce during the conduct of the administrative reviews at issue. Exhibit EC-57(II)[204] is further problematic in that it is not a margin calculation program.

148. The EC further points to its submissions of program logs, submitted for three of the seven reviews,[205] which allegedly show how the standard program was "executed instruction by

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[200]EC Appellant Submission, paras. 114-118, 133.

[201]*US – Zeroing (EC) (Panel)*, para. 7.97 (noting that "the 'Standard Zeroing Procedures' are only applicable in a particular anti-dumping proceeding as a result of their inclusion in the computer programme used in that particular proceeding").

[202]*US - Zeroing (EC) (Panel),* para. 7.97 (noting that "the Standard Zeroing Procedures' are only applicable in a particular anti-dumping proceeding as a result of their inclusion in the computer programme used in that particular proceeding").

[203]U.S. Interim Comments, para. 8.

[204]EC Appellant Submission, para. 142; *see also* Exhibit EC-57(II) (Exhibit EC-57 is not a margin calculation program, but rather contains macros that margin calculation programs can incorporate. It is further not dated, has no case name, and does not otherwise contain any information tying it to a particular administrative review).

[205]Exhibits EC-35(III), EC-62(II), and EC-65(II).

instruction for a particular data set."[206] The EC, however, did not put any evidence before the Panel, and still offers no evidence to the Appellate Body, to authenticate the program logs as documents generated by Commerce.[207] Rather, the EC relies on broad assertions that such program logs are generated by Commerce and provided to parties. Finally, the EC has acknowledged that the submitted tables, wherein it asserts the results of margin calculations with and without the application of "zeroing," were generated by the EC, and *not* by Commerce.[208]

149. Finally, it is not controverted that other than the published Final Results, which make no reference to "zeroing," *no* review-specific documentation was submitted in support of the EC's challenges to the 2004/2005 or the 2003/2004 reviews of *Stainless Steel Bar from France*.

2. The Panel Applied the Correct Standard of Proof

150. The EC contends that the Panel "applied an unreasonable burden of proof"[209] when it required the EC to "provide evidence 'necessarily showing' . . . that zeroing was 'actually used' in the seven administrative reviews."[210] The EC claims that "it was *impossible* (rather than *more difficult*) to provide the additional documents (*i.e.,* the full transaction listing generated by the USDOC) that the Panel appears to erroneously consider would be the only way to show that zeroing was used in the administrative reviews at issue."[211] The United States reiterates that the burden is on the EC to make a *prima facie* case.[212]

151. The EC, in this dispute, asserted an "as applied" challenge to the U.S. application of the "zeroing" methodology in 37 specified reviews. In order for the Panel to reach "as applied" findings of inconsistency, a *prima facie* showing that zeroing was actually employed, in each of the administrative reviews enumerated by the EC, was required. It is inadequate for the EC, as the complaining party, to attempt to shift the burden to the respondent Member by offering that if

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[206]EC Appellant Submission, para. 119.

[207]The EC states several times that it "does not understand the United States to assert that [program logs and tables have] been improperly altered by the" EC. EC Appellant Submission, paras. 117, 119, 121, 148. This statement does not lend support to the EC's cause given that the United States has not recognized any such exhibits as presenting authentic Commerce-generated documents.

[208]EC Appellant Submission, paras. 121, 123.

[209]EC Appellant Submission, para. 184.

[210]EC Appellant Submission, para. 185.

[211]EC Appellant Submission, para. 199.

[212]*US – Corrosion Resistant Steel CVD (AB)*, paras. 156-57.

"the Panel would consider it necessary to obtain the detailed margin calculations for each of the cases covered by these seven exhibits, it should request a copy of these detailed calculations from the US."[213] The EC cannot summarily discharge its burden by simply claiming that such information is available from the defending Member, while making only cursory efforts on its own behalf to establish the basis for its complaint.

152. Furthermore, there is nothing in the Panel's report to indicate that it required a particular type of document, such as "the full transaction listing generated by the USDOC", but rather, the Panel desired *any* document generated by Commerce that demonstrated "zeroing" had actually been employed.[214] Given the "as applied" nature of the EC's challenge and the failure of the EC to give the Panel any reason to believe that its evidence concerning the seven administrative reviews in question actually reflected calculations that Commerce made in those reviews, such a request is not unreasonable. Additionally, it is simply not the case that it was "impossible" for the EC to have obtained documents generated by Commerce with respect to the reviews it sought to challenge. All documents generated during an individual case are kept on file in Commerce's Central Records Unit.[215] Public documents are available to the public[216], and proprietary documents may be obtained by the interested parties and their representatives that properly have obtained access to proprietary information.[217] Throughout these proceedings, the EC never indicated to the Panel or to the United States that it had attempted, but was unable, to obtain the requisite documentation from Commerce's records office.

3. The Panel Committed No Error Pursuant to Article 13 of the DSU

153. Pursuant to Article 13 of the DSU, a "panel shall have a right to seek information from any individual or body which it deems appropriate." The EC argues that the "Panel made an error in the legal interpretation of Article 13 of the DSU" by finding that the EC's sole suggestion that it should obtain its requested documentation from the United States, "'does not

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[213]EC Answer to Panel Question 1(c), May 2, 2008, para. 11.

[214]*See e.g.,* Panel Report, para. 6.10 ("Nowhere in our report do we imply that such memoranda constitute the only way through which the European Communities could demonstrate that the USDOC used the simple zeroing methodology in the seven reviews at issue. In paragraphs 7.151-7.157 below, we only note that the USDOC's Issues and Decision Memoranda pertaining to the mentioned reviews do not shed light on the methodology used."); *see also* para. 7.151 ("We also note that none of the other documents submitted by the European Communities were issued by the USDOC during the review at issue.") (The Panel repeats similar statements in paras. 7.152, 7.154-7.157.).

[215]19 C.F.R. § 351.104 (April 1, 2008).

[216]19 C.F.R. § 351.104(b).

[217]19 C.F.R. § 351.305.

suffice as a request to the Panel to seek specific factual information from the USDOC pursuant to its authority under Article 13.'"[218] The EC also disagrees with the Panel's decision not to seek information even though the Panel stated that it needed no further elucidation of the facts before it.[219]

154. The Panel was under no obligation to seek information pursuant to Article 13 of the DSU. As an initial matter, it is established that "a panel cannot make a *prima facie* case for a party who bears that burden."[220] In this regard, the EC's claim pursuant to Article 13 appears no more than an improper attempt to shift its rightful burden back to the Panel.

155. Moreover, the Appellate Body has long recognized that "a panel's right to seek information pursuant to Article 13 of the DSU is *discretionary* and not mandatory. . . ."[221] In *EC – Bed Linen*, the Appellate Body rejected India's allegation that the Panel acted inconsistent with its obligations by not seeking information from the defending Member pursuant to Article 13 of the DSU:

> [A] panel's duty to 'actively review the pertinent facts' in order to comply with Article 17.6(i) of the Anti-Dumping Agreement does not, in our view, imply that a panel *must* exercise its right to seek information under Article 13 of the DSU, which explicitly states that the exercise of that right is *discretionary*. Indeed, there is nothing in the texts of Article 17.6(i) of the *Anti-Dumping Agreement* or Article 13 of the DSU to suggest that a reading of these provisions, in combination, would render *mandatory* the exercise of a panel's *discretionary* power under Article 12 of the DSU. . . [I]t is for panels to decide whether it is necessary to request information from any relevant source pursuant to Article 13 of the DSU. The mere fact that the Panel did not consider it necessary to seek information does not, by itself, imply that the Panel's exercise of its discretion was not 'due'.[222]

156. In this instance, the Panel's comprehension of the evidence was not lacking, such that it needed to request further clarification, nor did it find the United States to have withheld

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[218]EC Appellant Submission, para. 203, *see also* Panel Report, para. 6.20, n.20.

[219]EC Appellant Submission, para. 208, *see also*, Panel Report, para. 6.20, n.20.

[220]*US – Shrimp Bonding (Thailand) (AB); US – Shrimp Bonding (India) (AB)*, para. 300.

[221]*EC – Bed Linen (Article 21.5) (AB)*, para. 166 (citing *EC – Sardines (AB)*, para. 302) (emphasis in original).

[222]*EC – Bed Linen (Article 21.5) (AB)*, para. 167 (emphasis in original).

requested information.[223] As such, the Panel acted well within its discretion when it declined to seek information of the United States.

157. Nor did the Panel have reason to treat the EC's blanket suggestion that the documentation requested of it, should instead be obtained from the United States, as a formal request to seek information pursuant to Article 13. The Panel correctly recognized that it was the EC's burden to demonstrate zeroing was employed in the administrative reviews it challenged.[224] The EC never explained to the Panel that it was having undue difficulty collecting the documentation that the EC or the Panel deemed relevant. Instead, the EC simply made a blanket directive that the Panel should "request information of the United States."[225] The EC apparently simply hoped the Panel would summarily (but improperly) agree to shift the EC's burden onto the United States. The EC's minimal efforts in obtaining information that the Panel clearly viewed as relevant to its conclusions provided little basis upon which the Panel could conclude that obtaining the necessary documentation amounted to an "impossible" task, such that an Article 13 request of information from the United States would be warranted:

> If the European Communities believed that the United States was withholding necessary information, it could have asked the Panel to seek such information from the United States. It did not do so. . . .[I]n the absence of such a request, there is in our view no basis upon which to conclude that the United States improperly withheld information, thereby preventing the European Communities from making out its *prima facie* case.[226]

158. Finally, as the Appellate Body has found, the EC's allegation of "'[a] contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the *due* exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2.'"[227] As such, the EC's allegations of a violation pursuant to Article 13, support to the EC's claims of violation pursuant to Article 11.

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[223]Panel Report, para. 6.20.

[224]Panel Report, para. 6.20.

[225]Panel Report, para. 6.20, n. 20 (citing EC Answer to Panel Question 1(c), May 2, 2008).

[226]Panel Report, para. 6.20.

[227]*EC – Bed Linen (Article 21.5) (AB)*, para. 166 (citing *EC - Sardines (AB)*, para. 302) (emphasis in original).

V. The Panel Properly Declined the EC's Request for a Suggestion Under Article 19.1 of the DSU

159. The Panel denied the EC's request for a suggestion under Article 19.1 of the DSU on how the United States could implement the Panel's recommendations in the event that the Panel found that the United States acted inconsistently with its obligations under the AD Agreement and the GATT 1994.[228] According to the Panel, "it is evident under the DSU, particularly Article 19.1 thereof, that Members must implement DSB recommendations and rulings in a WTO-consistent manner. We cannot presume that Members might act inconsistently with their WTO obligations in the implementation of DSB recommendations and rulings."[229] The EC now alleges that the Panel erred as a matter of law "when disregarding the EC request for a suggestion on this ground."[230] The EC's appeal lacks merit and should be rejected.

160. Under Article 19.1 of the DSU:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body *may* suggest ways in which the Member concerned could implement the recommendations.[231]

As is clear from the text of this provision, it is entirely within a panel's discretion to make a suggestion. Nor does any other provision of the DSU impose a requirement to make a suggestion. How a Member chooses to implement findings, if and when adopted, is "in principle, a matter for the [Member] to decide."[232] Therefore, panels should not, and do not, lightly exercise their authority to make suggestions pursuant to Article 19.1.[233]

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[228]Panel Report, para. 8.7.

[229]Panel Report, para. 8.7.

[230]EC Appellant Submission, para. 218.

[231]Emphasis added.

[232]*US – OCTG from Argentina (Article 21.5) (AB)*, para. 143.

[233]Even the EC recognizes that "[t]his power is little used because there are often several different ways of implementing the recommendations and panels are reluctant to restrict, however indirectly, the options of the implementing Member." EC Appellant Submission, para. 221.

161. The Panel committed no legal error in rejecting the EC's request for a suggestion. The decision on whether to do so was fully within the Panel's discretion. In fact, the Panel was not even required to give a reason why it chose to refuse the EC's request. And no provision of the DSU prohibited the Panel from rejecting the EC's request for a suggestion on the grounds that the Panel did not want to assume the United States would act inconsistently with its WTO obligations when implementing the DSB's recommendations and rulings.

162. The EC in its first written submission "asked the Panel to suggest that the United States cease using zeroing when calculating dumping margins in any anti-dumping proceeding with respect to the 18 measures mentioned in the Annex to the Panel request."[234] According to the EC, "[t]his suggestion would be appropriate to help promote the resolution of the dispute because it would provide helpful guidance to the United States as to what it must do in order to comply, and hopefully contribute to avoiding the need for further compliance proceedings."[235] The EC also asked that the Panel "suggest that the United States should take all necessary steps of a general or particular nature to ensure that any further specific action against dumping by the United States in relation to the same products from the European Communities as referenced in the present dispute be WTO consistent, and specifically with reference to the question of zeroing."[236]

163. There is no basis in the text of the DSU for the EC's proposed approach, and the Panel was right to reject it. The second sentence of DSU Article 19.1 states that panels "may suggest ways in which the Member concerned could implement," but says nothing about making suggestions to deal with potential future disputes concerning the scope of compliance proceedings under Article 21.5 of the DSU. The Panel was charged with resolving the dispute within its terms of reference, and had no duty, obligation, or responsibility of predicting whether or what compliance issues would arise under Article 21.5, and crafting suggestions to address such hypothetical scenarios. It is unfortunate that the EC was even asking the Panel to start from the premise that there would be a dispute as to compliance, and the Panel rightly rejected this approach by stating that it would not presume the United States would act inconsistently in implementing any findings of WTO inconsistency.

164. Furthermore, the EC's request also appears to go beyond the limits set by the second sentence of DSU Article 19.1 in another way. That sentence allows panels to make suggestions

[234]EC Appellant Submission, para. 215 (citing EC First Written Submission, para. 266).

[235]EC Appellant Submission, para. 219. In a similar vein, the EC asserted that without a suggestion "as to how the United States could implement the recommendation to bring its measures into conformity with its obligations, the European Communities considers that the objectives of prompt settlement and achieving a satisfactory settlement of the matter may simply not be achieved." EC Appellant Submission, para. 219.

[236]EC Appellant Submission, para. 216 (citing EC Closing Statement at the Second Substantive Meeting).

concerning "ways in which the Member concerned could implement *the recommendations.*"[237] However, the EC's request asked the Panel to suggest that, when implementing, the United States "should take all necessary steps of a general or particular nature to ensure that any further specific action against dumping by the US in relation to the same products from the EC as referenced in the present dispute, be WTO consistent, and specifically with reference to the question of zeroing."[238] First, when read literally, the EC seems to be asking for a broad suggestion that goes beyond the alleged measures in its panel request to cover any and all future "specific action against dumping" related to the products from the EC involved in this dispute, even though such future actions may bear no relationship to any specific findings and recommendations in this specific dispute. Second, even if the proposed suggestion is read more narrowly, it appears that the EC was trying to have the Panel treat any and all subsequent determinations related to the 18 duties as falling within the scope of the panel proceeding. Such indefinite future measures were not in existence at the time of panel establishment, nor were they consulted upon by the parties, which is a prerequisite for requesting a panel with respect to any measure.[239] They therefore fell outside the Panel's terms of reference, as the Panel recognized,[240] and the Panel could not even make any findings or recommendations concerning them. As a result, under Article 19.1 of the DSU, the Panel also could make no suggestions concerning them.

165. For the above reasons, the United States asks the Panel to reject the EC's appeal that the Panel erred by not making a suggestion pursuant to Article 19.1. To find otherwise would impose a requirement on the Panel were there are none.

VI. The EC's Conditional Appeals Should be Rejected

A. The EC's Conditional Appeal Regarding the Relevance of Prior Appellate Body Reports

166. The EC apparently attempts to make a conditional appeal that if the Panel Report is "correctly construed as inconsistent" with certain prior statements by the Appellate Body in *US – Stainless Steel (Mexico)*, then "the European Communities appeals those findings, for all the

[237]Emphasis added.

[238]EC Closing Statement at the Second Substantive Meeting.

[239]*See, e.g.*, U.S. Opening Statement at the Second Substantive Meeting, para. 20 (citing *US – Upland Cotton (Panel)*, paras. 7.158-7.160 and DSU Art. 4.7).

[240]Panel Report, para. 7.61.

reasons set out by the Appellate Body in its report in *US - Stainless Steel (Mexico)*."[241] The EC would then apparently ask the Appellate Body to complete the analysis accordingly. However, the EC first states that if the Panel Report is "correctly construed as consistent" with those same prior statements, "then the EC makes no appeal on this point."[242] The Appellate Body should reject the EC's conditional appeal as baseless.

167. First, the EC's "condition" is not a condition at all. It is up to the EC in the first instance to explain and provide argumentation as to whether the Panel Report contains an erroneous finding of law or legal interpretation – if not, there would be no "appeal" from the Panel Report.[243] By setting out two readings of the Panel Report, each of which it describes as "correct[]" and one of which, in the EC's view, would be "consistent" with a prior Appellate Body statement, the EC has not even attempted to assert there is an erroneous finding of law or legal interpretation, much less explain it. The EC is instead seeking to shift the burden to the Appellate Body to develop the argumentation and explanation in the first instance of whether there is a legal error. Many other parties would be pleased to have the Appellate Body assume this burden on their behalf in appeals. In fact, notices of appeal could simply read "if there are any errors in the panel report, the Appellate Body should modify or reverse accordingly."[244] Therefore, on this basis alone, the EC's attempted "conditional" appeal fails.

168. Second, the only conceivable basis for a claim of error would seem to be under Article 11 of the DSU – that is, an allegation that the Panel failed to make an objective assessment of the applicability of or conformity with the covered agreements at issue in this dispute. However, the EC has not made such a claim in its notice of appeal, nor has it articulated such a claim in its appellant submission. Therefore, the EC's claim of error fails on this basis as well.

169. The EC here is essentially asking the Appellate Body to assess the consistency of the Panel Report with the Appellate Body's dicta in *US – Stainless Steel (Mexico)*. However, the Panel, in undertaking an objective assessment as required by Article 11 of the DSU, was bound neither by the findings, nor the dicta in a prior, unrelated dispute. The WTO dispute settlement system is not a common law system. As the Appellate Body has explained, adopted dispute

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[241]EC Appellant Submission, para. 229.

[242]EC Appellant Submission, para. 229.

[243]DSU Article 17.6.

[244]Or in the EC's view, notices of appeal could state: "if anything in the panel report is inconsistent with a covered agreement or prior AB report," since the EC apparently believes that prior Appellate Body reports are a source of law independent from any covered agreement and thus by definition independent from any agreement by Members. Such a view is not only plainly wrong as a matter of law, but is dangerous to the security and predictability of the dispute settlement system.

settlement reports are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[245] Moreover, the Ministerial Conference and the General Council have the exclusive authority to adopt binding interpretations of the covered agreements under Article IX:2 of the WTO Agreement. Treating prior reports as binding outside the scope of the original dispute would add to the obligations of the United States and other Members, inconsistent with Articles 3.2 and 19.1 of the DSU. The EC therefore cannot treat the statements from a prior report as authoritative and then ask the Appellate Body under Article 17.6 of the DSU to assess whether the Panel acted consistently with them or not.

B. The EC's Conditional Appeal Concerning the Use of Zeroing in Administrative Reviews

170. The Panel limited its legal findings of inconsistency to Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement, and specifically "decline[d] to make findings with regard to the EC's claims under Articles 2.1, 2.4, 2.4.2 and 11.2 of the AD Agreement and Article VI:1 of the GATT 1994."[246] The EC posits that should the Appellate Body reverse the Panel's conclusion that the United States acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement by applying simple zeroing in the 29 periodic reviews at issue in this dispute, the Appellate Body should "complete the analysis."[247]

171. Article 17.6 of the DSU, limits appeals "to issues of law covered in the Panel report and legal interpretations developed by the Panel." Article 17.13 of the DSU further provides that the Appellate Body "may uphold, modify or reverse the legal findings by the Panel." Relying on this language, the Appellate Body, in *EC – Chicken Cuts*, declined to address legal issues when the panel below did not make or "develop legal interpretations" on unaddressed issues.[248]

172. While the EC's notice of appeal makes a claim of error relating to "false judicial economy," the EC in its appellant submission does not explain why the Panel's exercise of judicial economy was false, or legally erroneous. Therefore, the EC has failed to provide a basis for the Appellate Body to rule on that claim on appeal. Even aside from the fact that the EC has

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[245] *US–Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan–Alcohol Taxes (AB)* and *US–Shrimp (Art. 21.5)(AB)*).

[246] Panel Report, para. 7.183.

[247] EC Appellant Submission, para. 230.

[248] *See EC - Chicken Cuts (AB)*, para. 107; *see also EC - Asbestos (AB),* paras. 80-83 (finding that because the panel had not made substantive findings under the TBT Agreement, and because the TBT Agreement had never been interpreted by panels or the Appellate Body, the panel declined to address Canada's claims because "there are no "issues of law' or 'legal interpretations'" for it to review (para. 83)).

provided no basis to support its claim of error, because the Panel made no legal interpretations other than as to Article VI:2 of the GATT 1994 and 9.3 of the AD Agreement, should the Appellate Body reverse the Panel's findings below, it should not "complete the analysis" by making legal interpretations for the first time as to issues the Panel never reached.

173. Should the Appellate Body decide to complete the analysis with respect to the remaining challenged provisions, as the United States has fully demonstrated in its written submissions and at the Panel's substantive meetings with the parties,[249] the provisions of the WTO agreements invoked by the EC do not *require* that an offset or credit be granted for "negative dumping" in administrative reviews. Accordingly, for reasons provided by the United States, should the Appellate Body decide to grant the EC's request and complete a legal analysis of the additional provisions, the United States respectfully requests that the Appellate Body reject the EC's claims regarding the challenged administrative reviews and find that the United States did not act inconsistently with the relevant provisions of the AD Agreement and the GATT 1994.

VII. Conclusion

174. The United States respectfully requests that the Appellate Body reject the EC's appeal for the reasons stated above and:

(a) affirm the Panel's finding that the EC's claims in connection with the continued application of the 18 antidumping "duties" were not within its terms of reference;

(b) affirm the Panel's finding that the EC's claims regarding the four preliminary determinations identified in its panel request were outside its terms of reference;

(c) affirm the Panel's finding that the EC failed to make a *prima facie* case as to the use of simple zeroing in seven administrative reviews and that therefore those reviews were outside its terms of reference; and

(d) affirm the Panel's refusal to make a suggestion under Article 19.1 of the DSU as to how the DSB's recommendations and rulings could be implemented in this dispute.

[249] *See, e.g.*, U.S. Other Appellant Submission, Part III.B; US First Written Submission, Part V.B; U.S. Rebuttal Submission, Part III; U.S. Opening Statement at First Substantive Meeting, paras. 25-41; U.S. Opening Statement at Second Substantive Meeting, paras. 22-36; U.S. Comments on the Appellate Body Report in *US - Stainless Steel (Mexico).*