# UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

**WT/DS294**

# EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

**February 10, 2005**

## I. INTRODUCTION

1. Although the European Communities ("EC") raises many different claims with respect to many different measures and alleged measures, this dispute really involves just two basic issues concerning the particular applications of U.S. antidumping measures. One issue, which often is referred to under the rubric of "zeroing," is whether an offset or credit should be granted for "negative dumping"; *i.e.*, transactions in which export price exceeds normal value. The position of the EC is that the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and Article VI of the GATT 1994 require that such an offset or credit be granted in all phases of an antidumping proceeding. The position of the United States is that such an offset or credit need not be granted in the assessment phase of an antidumping proceeding.

2. Panels and the Appellate Body have found an obligation to provide such offsets in antidumping investigations, at least where authorities use the average-to-average method. The EC seeks to extend this obligation even further to assessment proceedings. As the United States will demonstrate, in order to accept the EC's arguments, one must be willing to suspend disbelief and pretend that assessment proceedings are investigations and that the alternative assessment methods contemplated by Article 9.3 of the AD Agreement do not exist.

3. The second basic issue raised in this dispute is often referred to under the rubric of "symmetry" or "asymmetry." The EC takes the position that the AD Agreement prescribes the average-to-average method or the transaction-to-transaction method as the norm for all phases of an antidumping proceeding – what the EC calls "symmetric" comparison methods. The U.S. position is that the express language of the AD Agreement prescribes these "symmetric" methods as the norm only with respect to the investigation phase of an antidumping proceeding, and permits the use of the average-to-transaction method in the post-investigative phase. Here, too, in order to accept the EC's arguments, one must be willing to pretend that assessment proceedings are investigations and that the alternative assessment methods contemplated by Article 9.3 of the AD Agreement do not exist.

## II. GENERAL PRINCIPLES

4. **Burden of Proof:** The AD Agreement imposes obligations on the authorities that they must satisfy, but the burden of proving that those obligations have not been satisfied is on the complaining party. In *US – Corrosion-Resistant Steel CVD*, the Appellate Body explained that the complaining party bears the burden of proof with respect to an "as such" claim as well as an "as applied" claim. Accordingly, the burden is on the EC to prove that the United States acted in a WTO-inconsistent manner with respect to both its "as applied" and its "as such" claims. The burden is not on the United States to prove that it acted in a WTO-consistent manner.

5. **Standard of Review:** With respect to an investigating authority's establishment and evaluation of facts, the standard of review, as set forth in Article 17.6(i) of the AD Agreement. Several panels have summed up the role of a panel under Article 17.6(i) as the panel did in *US – India Steel Plate*:

> The standard requires us to assess the facts to determine whether the investigating authorities' *own* establishment of facts was proper, and to assess the investigating authorities' *own* evaluation of those facts to determine if it was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves – that is, we may not engage in *de novo* review.

6. With respect to interpretation of provisions in the AD Agreement, the standard of review, is set forth in Article 17.6(ii). The question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is a permissible interpretation. Article 17.6(ii) acknowledges that there may be provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.

7. For example, one recent panel report involved a situation in which Argentina's investigating authority interpreted the term "a major proportion" in Article 4.1 of the AD Agreement (concerning the definition of "domestic industry") as a proportion that may be less than 50 percent. The panel upheld that interpretation as permissible, even while acknowledging that it may not be the only permissible interpretation. Thus, in applying Article 17.6(ii) to the present case, the Panel should recall that there may be multiple permissible interpretations of particular provisions in the AD Agreement. Accordingly, the Panel should reject the EC's claims where the U.S. position is the result of a permissible interpretation.

## III. ARGUMENT

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

8. The EC asks this Panel to find that U.S. laws, regulations and methodologies that govern antidumping assessment proceedings are inconsistent with U.S. WTO obligations. The EC's argument is based on the erroneous premise that assessment proceedings properly fall under the rubric of an antidumping "investigation," and that the alleged constraints of Article 2.4.2 on the use of the average-to-transaction comparison method apply equally to assessment proceedings. The EC also alleges that the requirements to offset "negative dumping" in investigations also apply equally to assessment proceedings.

9. The EC's claims directly contradict the text of the AD Agreement, and are inconsistent with clarifications of the AD Agreement made by the Appellate Body and prior panels. While Article 2.4.2 limits the use of the average-to-transaction method, the terms of Article 2.4.2 expressly and unambiguously indicate that this limitation applies only to the investigation phase. The Appellate Body, prior panels *and the EC itself* have consistently recognized that investigations and assessment proceedings constitute distinct phases of an antidumping

proceeding, have distinct purposes, and are subject to different obligations under the AD Agreement. The EC's attempt to use the "fair comparison" reference in Article 2.4 to nullify the limitation in Article 2.4.2 is inconsistent with principles of treaty interpretation.

10. The U.S. importer-specific retrospective assessment system is equivalent in all material respects to a prospective normal value system. If accepted, the EC's claims regarding "zeroing" would mean that Members with prospective normal value systems are likewise required to provide credits for non-dumped entries when assessing duties on subsequent entries that are dumped.

### 1. The Obligations of Article 2.4.2 Are Limited to the Investigation Phase of Antidumping Proceedings

11. Article 2.4.2 provides that authorities shall normally use the "average-to-average" method or the "transaction-to-transaction" method. The EC considers these methods to be "symmetrical." In situations involving "targeted dumping," Article 2.4.2 permits the "average-to-transaction" method. The EC considers this method to be "asymmetrical."

12. The EC argues that under Article 2.4.2, the United States is obliged to make "symmetrical" comparisons in assessment proceedings. The EC argues that the U.S. "acted inconsistently" with the AD Agreement because it "failed to use a symmetrical method when that was the only lawful option" under Article 2.4.2. The EC's rationale, however, is belied by the express terms of Article 2.4.2, and has been expressly rejected by another panel.

#### a. Investigations and Assessment Proceedings Constitute Distinct Phases of an Antidumping Proceeding and Have Different Purposes

13. Article 18.3 of the AD Agreement explicitly recognizes the difference between investigations, which may lead to the imposition of a measure, and "reviews" of existing measures. The consistency with which the Appellate Body and panels have recognized the distinctions between investigations and other segments of an antidumping proceeding is consistent with the distinct purpose of the investigation phase, which is to establish as a threshold matter whether the imposition of an antidumping measure is warranted. Other phases (such as Article 9 assessment proceedings or Article 11 sunset reviews) have different purposes. Whereas the purpose of an investigation is to determine whether a remedy against dumping should be provided, the purpose of an assessment proceeding is to determine the precise amount of that remedy.

### b. The Express Terms of Article 2.4.2 Limit Its Obligations to the Investigation Phase of an Antidumping Proceeding

14. The express terms of Article 2.4.2 limit its application to the "investigation phase" of a proceeding. To require the application of Article 2.4.2 to Article 9 assessment proceedings would read out of the AD Agreement Article 2.4.2's express limitation to investigations, and would be inconsistent with the principle of effectiveness.

15. Other provisions of the AD Agreement also expressly limit their application to the investigation phase of an antidumping proceeding, and do not apply elsewhere. For instance, panels have consistently found that the references to "investigation" in Article 5 only refer to the original investigation and not to subsequent phases of an antidumping proceeding.

16. The limited applicability of Article 2.4.2 could not be plainer. The text leaves no doubt that the Members did not intend to extend these obligations to any phase beyond the investigation phase. As the panel in *Argentina – Poultry* found: "Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping "during the investigation phase."

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

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

### c. Article 9 Does Not Incorporate the Requirements of Article 2.4.2

19. The EC argues that Article 2.4.2 is applicable to assessment proceedings by virtue of Article 9.3, which provides: "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." The EC interprets Article 9.3 to mean that all the provisions of Article 2 – including Article 2.4.2 – are directly applicable in the context of assessment proceedings. In the EC's view, therefore, an assessment methodology is inconsistent with the AD Agreement when the amount of duties owed are calculated on a transaction-specific basis, rather than for all transactions as a whole.

20. The EC's interpretation is contrary to the express terms of the AD Agreement. The general reference to Article 2 in Article 9.3 necessarily includes any limitations found in the text of Article 2. As discussed above, Article 2.4.2 by its own terms is explicitly limited to the investigation phase. The text of Article 9.3, therefore, does not support the EC's argument.

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

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

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

> [N]othing in the AD Agreement explicitly identifies the form that anti-dumping duties must take ... . As the title of Article 9 of the AD Agreement suggests, Article 9.3 is a provision concerning the imposition and collection of anti-dumping duties. Article 9.3 provides that a duty may not be collected in excess of the margin of dumping as established under Article 2. The modalities for ensuring compliance with this obligation are set forth in sub-paragraphs 1, 2

> and 3 of Article 9.3, each of which addresses duty assessment and the reimbursement of excess duties. The primary focus of Article 9.3, read together with sub-paragraphs 1-3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected.

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

### d. Article 9 Explicitly Permits the Comparison of Weighted Average Normal Values to Export Transactions

24. The EC contends that the United States may only make "asymmetrical" comparisons in assessment proceedings when it finds that the prerequisites of Article 2.4.2 for "targeted dumping" have been met. Not only are the Article 2.4.2 restrictions on the investigation phase irrelevant in assessment proceedings, but Article 9 expressly provides for comparisons between weighted average normal values and individual export transactions in assessment proceedings. The EC is thus arguing that the Panel ignore the text of not just one, but two provisions of the AD Agreement.

25. Article 9.4(ii) explicitly provides for the calculation of antidumping duties, in the assessment phase, on the basis of a comparison of weighted average normal values and individual export prices This provision plainly indicates that there is nothing exceptional about assessing antidumping duties on the basis of comparisons of weighted average normal values with individual export prices.

26. A panel recently found the calculation of transaction-specific antidumping duties in assessment reviews to be entirely consistent with the AD Agreement. In *Argentina – Poultry,* the panel found the Argentine prospective normal value assessment system to be fully consistent with the AD Agreement. The United States agrees with the EC's position in that case that:

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

As the EC acknowledged in *Argentina – Poultry*, the AD Agreement does not specify the form which duties must take in assessment reviews.

27. In sum, the EC's claim that, with respect to the assessment proceedings at issue in this dispute, Commerce erred in not applying either the average-to-average or transaction-to-transaction methods must fail, as must the EC's related "as such" claims. There is no textual basis in the AD Agreement for the EC's assertion that Article 9.3 requires the application of Article 2.4.2 in assessment proceedings. On the contrary, as the panel in *Argentina – Poultry* correctly found, the reference in Article 9.3 to Article 2 does not overcome the limiting language in Article 2.4.2 which, by its own terms, limits its obligations to "the investigation phase."

### 2. The "Fair Comparison" Language of Article 2.4 Refers to Price Adjustments and Does Not Create An "Overarching and Independent" Obligation to Apply the Comparison Methods of Article 2.4.2 in Assessment Proceedings

28. The EC contends that with respect to both the investigation and assessment phase, "Article 2.4 contains an overarching and independent obligation to make a fair comparison, that goes beyond the obligations to make due adjustment described in Article 2.4." The EC goes on to state that a "fair comparison" must be "a symmetrical comparison" and that "[a] symmetrical comparison for the purposes of calculating a margin of dumping and eventually imposing a duty, in relation to a given product or time, is necessarily one that precludes simple zeroing." Thus, while it is clear that the EC is arguing that a "fair comparison" in an assessment proceeding must involve "symmetry," what is less clear is the extent to which the EC claims that the failure to provide an offset for "negative dumping" in assessment proceedings is "unfair" in the absence of a symmetry requirement. In any case, the EC's arguments, such as they are, are without merit with respect to both categories of claims.

29. The text of Article 2.4 establishes the obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make the appropriate adjustments for differences that affect price comparability. As the panel in *Egypt – Rebar* explained: "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value."

30. To the extent that the EC suggests that the requirement to make "symmetrical" comparisons between normal values and export prices in assessment proceedings can be found in the fair comparison language of Article 2.4, such an argument cannot be reconciled with the text. The first sentence of Article 2.4.2 provides that those "symmetrical" comparisons are "subject to" the provisions governing "fair comparison." Plainly, the drafters never intended "fair comparison" to cover symmetrical comparisons, because such coverage would have rendered this language superfluous. To the extent that any obligation concerning "symmetrical" comparisons exists, it is found in Article 2.4.2 and is explicitly limited to the investigation phase.

31. The EC argues that the U.S. assessment methodology is inconsistent with U.S. obligations under Article 2.4 because it allegedly results in a higher duty assessment than the EC's preferred methodology. The EC can point to nothing in the text to support its contention that a methodology can be designated as "fair" or "unfair" under Article 2.4 solely on the basis of whether it makes dumping margins go up or down. Moreover, a simple example demonstrates that the "symmetrical" transaction-to-transaction method can result in higher duty assessment than the "asymmetrical" average-to-transaction method. Assume that the export price for a particular transaction is 9, and that there are two corresponding home market transactions, one at 8 and one at 10. Assume also that both home market transactions are comparable to the export transaction, but that the transaction at 10 is the most comparable. Under a transaction-to-transaction method, the transaction at 10 would be used for normal value, resulting in a dumping amount of 1 (10-9 = 1). However, under the so-called "asymmetrical" average-to-transaction method, the two home market transactions would be averaged, resulting in a normal value of 9 and, in turn, a dumping amount of zero (9-9 = 0).

32. Turning to the issue of offsets for sales at above normal value, as noted above, the EC's argument that an offset for non-dumped transactions is required in an assessment proceeding is predicated on its assertion that the AD Agreement mandates "symmetrical" comparisons in assessment proceedings.[1] However, the text of the AD Agreement plainly permits several types of assessment systems, some of which inherently operate on an entry-specific basis. As discussed above, Article 9.4(ii) expressly provides for a comparison of weighted average normal values to individual export transactions for purposes of assessment.

33. The EC has not offered any argument as to how an offset to antidumping duties assessable on one entry as a result of a distinct entry having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under the rubric of Article 2.4. Even as described by the EC, an offset requirement would be applied to the *results* of comparisons, and would not pertain to the comparisons themselves. Consequently, it falls clearly outside the scope of Article 2.4.

### B. The Panel Should Reject the EC's "As Such" Claims

34. In Sections III.A.3 and III.B.3, the EC makes a series of "as such" claims. The alleged "measures" that are the subject of these claims range from provisions of the Tariff Act to mere administrative "practice."

35. It is well established that if a measure mandates WTO-inconsistent action or precludes WTO-consistent action, the measure is WTO-inconsistent "as such." This standard is commonly referred to as the "mandatory/discretionary test."

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[1] EC First Submission, para. 151. The EC does not appear to argue that an offset for "negative dumping" must be made when the average-to-transaction method is used, although it does disagree with the United States as to when the use of the average-to-transaction method is appropriate.

36. The mandatory/discretionary test has been consistently applied in GATT and WTO dispute settlement proceedings. The test reflects the fact that, as the Appellate Body has noted, panels may not presume bad faith on the part of Members. Thus, if a measure provides a Member with the discretion to act in a WTO-consistent manner, it may not be presumed that the Member will exercise that discretion in bad faith. Without the mandatory/discretionary test, the assessments of Members over many years on how to judge whether their measures are consistent with GATT and then WTO rules would be severely undermined.

37. The EC's "as such" claims fail to satisfy the mandatory/discretionary test. In some cases, this is because the EC has failed to demonstrate that the measures are mandatory within the meaning of the test. In some cases, the EC has failed to make even a *prima facie* case that the measure in question is mandatory. In other cases, the "measures" cited by the EC are not measures at all for purposes of WTO dispute settlement, let alone mandatory measures.

### 1. The Panel Should Reject the EC's "As Such" Claims Regarding "Zeroing"

#### a. U.S. Courts Have Held that the Tariff Act Does Not Preclude Commerce from Offsetting "Negative Margins"

38. The EC claims that sections 771(35)(A) and (B) and section 777A(d) of the Tariff Act are inconsistent "as such" with various provisions of various WTO agreements. In order for these claims to succeed, the EC must demonstrate that these statutory provisions prohibit Commerce from providing an offset for non-dumped transactions. In *US – Corrosion-Resistant Steel CVD*, the Appellate Body explained, "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion." That evidence must, of necessity, demonstrate the measure's meaning under municipal law if it is to yield an objectively correct result.

39. The EC cannot make the necessary demonstration, because the U.S. Court of Appeals for the Federal Circuit has held twice that the Tariff Act – including these two sections in particular – does not require the use of zeroing. The first case was *Timken*, which involved an assessment proceeding. In *Timken*, Commerce argued that the Tariff Act precluded it from reducing the amount of dumping duties to be assessed based on non-dumped sales. The Federal Circuit disagreed, finding that "the statute does not directly speak to the issue of negative-value dumping margins ... ." The court went on to hold that while offsetting was not prohibited by the statute, not offsetting represented one permissible interpretation of the statute.

40. The second case was *Corus*, which involved an antidumping investigation. In *Corus*, the Federal Circuit again held that not offsetting reflected a permissible interpretation of the statute,

citing its earlier decision in *Timken*. However, Commerce did not argue, and the court did not hold, that the statute prohibited offsetting.

41. Although in principle the U.S. Supreme Court can review decisions of the Federal Circuit involving antidumping matters, in practice it does not. Therefore, for practical purposes, *Timken* and *Corus* constitute the last word on the interpretation of the Tariff Act insofar this issue is concerned. And that word is that the Tariff Act does not prohibit offsetting. Thus, as a factual matter, the EC's claims must fail.

42. The EC refers to the fact that Commerce had argued unsuccessfully that the Tariff Act requires the use of zeroing. The EC neglects to mention that Commerce ceased making this argument after the *Timken* decision. In any event, for purposes of determining what U.S. law means – which is the task before the Panel – greater weight cannot be accorded to the historical views of Commerce – an administrative agency – than to the current holdings of the Federal Circuit, the institution that has the final say as to what the U.S. antidumping statute means.

### b. The Panel Should Reject the EC's Claims Regarding "the Standard Zeroing Procedures" Because the "Measures" Identified by the EC Either Are Not Measures At All or Are Not Mandatory Measures Within the Meaning of the Mandatory/Discretionary Test

43. In Section III.A.3(b) of its first submission, the EC challenges what it describes as "the Standard Zeroing Procedures." It is unclear what the EC means by this phrase. The United States is disadvantaged by the EC's imprecision, because it is uncertain as to the identity of the "specific measure" (*see* DSU Article 6.2) that it must defend. However, in Section III.A.3.(b) of its first submission, the EC spends most of its time talking about Commerce's "Antidumping Manual" and the "AD margin program." Therefore, for purposes of this submission, the United States will assume that by the phrase "the Standard Zeroing Procedures" the EC means the Manual and the AD margin program. Of course, the United States reserves its rights in the event that the EC should subsequently clarify that the phrase "the Standard Zeroing Procedures" means something other than the Manual and the AD margin program.

#### i. The Manual Does Not Preclude Commerce from Offsetting "Negative Dumping Margins"

44. For purposes of this dispute, the United States does not contest the EC's assertion that the Manual is a "measure" for purposes of a WTO dispute. There is no need to do so, because even if the Manual is considered to be a measure, it does not preclude the Commerce decisionmaker from offsetting negative margins nor does it mandate that the Commerce decisionmaker ignore negative margins. In fact, the Manual does not mandate that the Commerce decisionmaker do anything, nor does it preclude the Commerce decisionmaker from doing anything. This is because the Manual is nothing more than a source of guidance and training for Commerce

personnel. As set forth on page one of the "Introduction" section of the Manual: "This manual is for the internal guidance of Import Administration (IA) personnel only, and the practices set out are subject to change without notice."

45. The EC asserts that: "In reality, USDOC treats the Standard Zeroing Procedures as binding, at least until changed." The EC provides no evidence to support the assertion that the "USDOC" – whatever the EC means by that expression – considers itself to be bound by the Manual. Indeed, what little evidence the EC does provide on this point contradicts the EC assertion. The EC cites U.S. court decisions that expressly state that the Manual is "not a binding legal document ... ." Indeed, if Commerce were to treat the Manual as binding, it would be in violation of the U.S. Administrative Procedure Act.

46. By referring to the "USDOC" the EC obscures the fact that the U.S. antidumping law is administered by human beings, and that in the case of Commerce there are two categories of human beings: (1) the decisionmaker, and (2) the staff that implement the decisionmaker's decisions. Here, the relevant decisionmaker is the Assistant Secretary of Commerce for Import Administration. For purposes of the mandatory/discretionary test, the question is whether the Assistant Secretary is obligated to follow the Manual. Clearly he is not; as indicated above, the Manual states that he can change the practices set out in the Manual "without notice." Thus, if the Assistant Secretary decided in a particular case to offset negative margins, the Manual could not preclude him from doing so.

### ii. The AD Margin Program Is Not a "Measure" and Even if It Were, It Does Not Preclude Commerce from Offsetting "Negative Dumping Margins"

47. The AD Margin Program cannot be regarded as a "measure" for purposes of WTO dispute settlement. The Appellate Body has indicated that instruments setting out rules or norms can be challenged "as such" in a WTO dispute. However, the AD Margin Program does not set out or establish rules or norms. Instead, it is a piece of computer software that, at most, implements rules or norms adopted by a decisionmaker in some other instrument, such as a regulation or a determination in a specific antidumping proceeding.

48. Second, even assuming that the AD Margin Program is a "measure," it does not preclude the Commerce decisionmaker from offsetting negative dumping margins nor does it require the Commerce decisionmaker to ignore negative dumping margins. If the Commerce decisionmaker decided to offset negative dumping margins in a particular case, his decision would be implemented simply by using a different set of computer instructions.

#### c. The "Practice or Methodology of Zeroing" Is Not a "Measure" and, Even if It Were, It Would Not Be a Mandatory Measure Within the Meaning of the Mandatory/Discretionary Test

49. The EC appears to assert without explanation that "practice" is an autonomous measure that can be challenged in and of itself. Simply said, repeatedly applying a particular measure – such as a statute – in the same manner, does not somehow create a new and separate "autonomous measure." Rather, it is just what the definition implies – it is a repeated application of a measure.

50. When panels *have* been asked to find that a "practice" of the type described by the EC constitutes a measure that can be challenged as such, they have uniformly declined. As the panel in *US – India Steel Plate* correctly noted:

> That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice.

51. Moreover, even if past instances of not offsetting by Commerce were deemed to constitute a measure, the EC's claims would have to be rejected because this alleged "measure" does not mandate anything, let alone anything inconsistent with a WTO obligation under the mandatory/discretionary test. Under U.S. law, there is no principle of administrative *stare decisis*, and administrative agencies, such as Commerce, may depart from prior practice as long as they provide a reasoned explanation for doing so.

### 2. The Panel Should Reject the EC's "As Such" Claims Regarding Average-to-Transaction Comparisons

#### a. The Panel Should Reject the EC's Claims Regarding the Tariff Act Because the EC Has Failed to Make a *Prima Facie* Case

52. In Sections III.B.3.(c) and (d), the EC addresses its claims that section 777A(d)(2) and section 751(a)(2)(A)(i) and (ii) of the Tariff Act are "as such" inconsistent with various WTO obligations "if it means" that a symmetrical comparison is normally precluded or an asymmetrical comparison is normally required. The EC has failed to make a *prima facie* case that the statutory sections in question are WTO-inconsistent.

53. In *US – Corrosion-Resistant Steel CVD*, the Appellate Body explained that the complaining party has the burden of proof with respect to "as such" claims, and that "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty

obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion." Here, the EC has not offered any explanation, let alone demonstrated, why or how those sections preclude "symmetry" or require "asymmetry." Instead, through its use of the phrase "if it means," the EC simply poses a question as to whether the statutory sections *might* preclude "symmetry" or compel "asymmetry." The EC apparently hopes that the United States or the Panel will make the EC's case for it.

54. However, it is the EC's burden to prove that the statutory sections are WTO-inconsistent. It is not the task of the United States to prove that they are WTO-consistent. Likewise, it is well-established that a panel may not "make the case for a complaining party."

#### b. Section 351.414(c)(2) of the Commerce Regulations Does Not Mandate WTO-Inconsistent Action or Preclude WTO-Consistent Action

55. The heading to paragraph (c) of section 351.414 is entitled "*Preferences*." Subparagraph (c)(2) itself provides as follows: "In a review, the Secretary will *normally* use the average-to-transaction method."

56. As previously recognized by the Appellate Body, the word "normally" is an indicator of discretion. Thus, section 351.414(c)(2), on its face, it provides discretion to use something other than the average-to-transaction method. Given that the EC relies solely on the text of the regulation, there is no basis for finding that the regulation mandates asymmetry or precludes symmetry. Accordingly, there is no basis for finding that the regulation is inconsistent "as such" with U.S. WTO obligations.

### C. The Panel Should Reject the EC's "As Such" Claims Regarding New Shipper, Changed Circumstances and Sunset Reviews

57. In paragraph 225, the EC asserts that the "same conclusions should be reached for new shipper, changed circumstances and sunset reviews." Although the identity of the "same conclusions" is unclear, the EC appears to suggest that its "as such" claims concerning investigations and assessment proceedings also apply to the three types of reviews to which it refers. However, the EC does not offer any new arguments concerning these types of reviews.

58. The United States has demonstrated that the Panel should reject the EC's claims insofar as investigations and assessment proceedings are concerned. For the same reasons, the Panel should rejected the EC's claims with insofar as new shipper, changed circumstances and sunset reviews are concerned.

### D. The Panel Should Reject the EC's Claims That the ITC Acted Inconsistently with Article 3 Because Those Claims Are Purely Speculative

59. The EC asserts that the methodology by which Commerce calculated dumping margins in certain original investigations (listed in Exhibits EC-1 to EC-15) rendered the attendant injury determinations by the ITC inconsistent with Articles 3.1, 3.2, and 3.5 of the AD Agreement. The EC contends that the use by Commerce of an AD Agreement-consistent methodology in these investigations necessarily would have resulted in zero or *de minimis* dumping margins for certain exporting companies and exporting countries. From that flawed premise, the EC argues that the ITC treated certain imports as dumped that were not dumped, leading to injury determinations that were inconsistent with Articles 3.1, 3.2, and 3.5.

60. The Panel should dismiss the EC's claims concerning injury because even if the methodology used by Commerce in the cited investigations were inconsistent with the AD Agreement, the assertion that the margins calculated pursuant to that methodology caused the ITC to act in a manner inconsistent with Articles 3.1, 3.2, and 3.5 is speculative and unfounded.

61. Assuming that the margin calculations were inconsistent with the AD Agreement, it does not follow that Commerce, using an AD Agreement-consistent methodology, would calculate zero or *de minimis* dumping margins in the cited cases. Because the AD Agreement provides more than one permissible comparison methodology by which dumping margins may be calculated (average-to-average, transaction-to-transaction, or, in certain circumstances, average-to-transaction), the EC cannot presume what alternative methodology would be employed by Commerce in the cited instances, or what results an alternative methodology would produce. Accordingly, the EC cannot establish that Commerce necessarily would have calculated zero or *de minimis* dumping margins in the cited cases, or that the ITC treated certain non-dumped imports as dumped. In the absence of such showings, the EC has failed to meet its burden to demonstrate that any of the cited determinations by the ITC is inconsistent with Articles 3.1, 3.2, and 3.5.

## VI. CONCLUSION

62. The United States requests that the Panel reject the EC's claims.