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

**WT/DS294**

## FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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## 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 *General Agreement on Tariffs and Trade 1994* ("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. In the two disputes that have addressed this issue to date, 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 comparison method. In this dispute, the EC seeks to extend this obligation even further to post-investigation, assessment proceedings. However, 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 issue here relates to the basic comparison method that should be used to measure dumping. 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.

4. As the United States will demonstrate below, the provisions of the WTO agreements invoked by the EC do not require that an offset or credit be granted for "negative dumping" in assessment proceedings and do not require the use of the average-to-average or transaction-to-transaction method in assessment proceedings. Therefore, the Panel should reject the EC's claims.

## II. FACTUAL BACKGROUND

5. The U.S. antidumping duty law is designed to provide domestic producers with a remedy against injurious dumping. The U.S. statute governing antidumping proceedings is the Tariff Act of 1930, as amended ("the Tariff Act"). The Tariff Act, consistent with the AD Agreement, provides for two distinct phases in antidumping proceedings. In the first stage of the proceeding,

the investigation phase, the United States determines, among other things, whether dumping existed during the period of investigation by calculating an overall weighted average dumping margin for each foreign producer/exporter investigated. Separately, the United States determines whether an industry in the United States is materially injured by reason of the dumped imports.

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

### A. The Investigation Phase

7. With respect to the investigation phase of an antidumping proceeding, U.S. law provides that Commerce will normally use the average-to-average method for comparable transactions during the period of investigation. U.S. law also provides for the use of transaction-to-transaction comparisons and, provided that there is a pattern of prices that differs significantly by region or time period,[1] for use of the average-to-transaction method.

8. In the investigation phase, Commerce must resolve the threshold question of whether dumping "exists" such that the imposition of an antidumping measure is warranted. Section 771(35)(A) of the Tariff Act, consistent with Article 2.1 of the AD Agreement, defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Thus, for purposes of U.S. law, the "dumping margin" is the result of a specific comparison between an export price (or constructed export price) and the normal value for comparable transactions. Some of these comparisons could result in dumping margins while other comparisons might result in no dumping margin.

9. Section 771(35)(B) of the Tariff Act defines "weighted average dumping margin" as the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." Thus, to calculate a single weighted-average dumping margin for each foreign exporter/producer individually examined in an investigation, Commerce first sums the total quantum of dumping found for each sales transaction of that exporter/producer in the United States during the period of investigation.

10. Commerce then divides that number by the aggregate export prices of *all* U.S. sales by the exporter/producer during the period of investigation. The resulting margin of dumping is therefore simply an expression of the overall quantum of dumping observed during the period of

[1] In antidumping circles, this pattern commonly is referred to as "targeted dumping."

investigation as a percentage of total sales during the period. If the overall weighted average dumping margin for a particular exporter/producer is *de minimis*, the exporter/producer is excluded from any antidumping measure. If the overall weighted average dumping margin for each exporter/producer is *de minimis*, the antidumping proceeding is terminated.

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

### B. The Assessment Phase

12. Unlike investigations, which are subject to a single set of rules, the AD Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment phase. There are two basic types of assessment systems – prospective and retrospective. In a prospective system, normal values or an *ad valorem* duty rate are established and applied prospectively to imports of the merchandise subject to the antidumping measure. The normal values or *ad valorem* rate determine the duties that will be assessed at the time the merchandise is imported.

13. The United States has a retrospective assessment system. In the U.S. retrospective system, an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Rather, the United States collects security in the form of a cash deposit at the time of entry, and determines the amount of duties due on the entry at a later date. Specifically, once a year (during the anniversary month of the orders) interested parties may request a review to determine the amount of duties owed on each entry made during the previous year.[2] Antidumping duties are calculated on a transaction-specific basis and are assessed on an importer-specific basis, in much the same way as duties are assessed in prospective assessment systems. If no review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties.

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

## III. PROCEDURAL BACKGROUND

14. This dispute began when the EC requested consultations on June 12, 2003.[3] Consultations in response to this request were held on July 17, 2003. On September 8, 2003, the EC made a second request for consultations.[4] Consultations in response to this request were held on October 6, 2003.

15. On February 5, 2004, the EC requested the establishment of a panel.[5] On February 16, 2004, the EC submitted a revised request for the establishment of a panel.[6] On March 19, 2004, the Dispute Settlement Body established a panel pursuant to the EC's revised request.

## IV. GENERAL PRINCIPLES

### A. Burden of Proof

16. 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:

> We note, first, that, in dispute settlement proceedings, Members may challenge the consistency with the covered agreements of another Member's laws, as such, as distinguished from any specific application of those laws. In both cases, the complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:
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> > … it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence*. (emphasis added)
>
> Thus, a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The 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.[7]

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[3] WT/DS294/1 (19 June 2003).
[4] WT/DS294/1/Add. 1 (15 September 2003).
[5] WT/DS294/7 (6 February 2004).
[6] WT/DS294/7/Rev. 1 (19 February 2004).
[7] *US – Corrosion-Resistant Steel CVD (AB),* paras. 156-157 (footnote omitted).

17. 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.

## B. Standard of Review

### 1. Findings of Fact: The Applicable Standard of Review is Whether the Authority's Establishment of Facts was Proper and Whether its Evaluation of Those Facts was Objective and Unbiased, *Not* Whether the Panel Would Have Made the Same Establishment and Evaluation

18. 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, is as follows:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

19. 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.[8]

### 2. Conclusions of Law: The Applicable Standard of Review is Whether the Authority's Measure Rested on a Permissible Interpretation of the AD Agreement

20. With respect to an investigating authority's interpretation of provisions in the AD Agreement, the standard of review, as set forth in Article 17.6(ii), is as follows:

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[8] *US – India Steel Plate*, para. 7.6 (emphases added); *see also Argentina – Poultry*, para. 7.45 (Under Article 17.6(i), panels "may not engage in *de novo* review"); *Egypt – Rebar*, paras. 7.8 and 7.14 (acknowledging that Article 17.6(i) precludes *de novo* review); *Guatemala – Cement II*, para. 8.19 ("We consider that is not our role to perform a *de novo* review of the evidence which was before the investigating authority in this case.").

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

21. 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.[9]

22. The negotiators of the AD Agreement, uniquely among negotiators of the WTO Agreements, saw fit to make specific provision for the possibility that customary rules of interpretation would not always yield definitive meanings of particular provisions of the AD Agreement. That very fact provides context for the interpretation of the AD Agreement. It reflects the negotiators' understanding that they had left a number of issues ambiguous, and that customary rules of interpretation would not always yield unequivocal results. The negotiators also recognized that they could not possibly foresee every interpretive question in the conduct of highly technical and complex anti-dumping proceedings. They understood that, with regard to many of these complex issues, the established practices of national authorities at the time of the AD Agreement's conclusion differed, and that the AD Agreement should allow sufficient flexibility for authorities to continue their different practices.

23. Thus, 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.[10]

24. 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.

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[9] *See Argentina–Poultry*, para. 7.341 and n. 223 ("We recall that, in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it.").

[10] *Id.*

# V. ARGUMENT

25. The U.S. argument is structured in the following manner. First, in Section A, the United States responds to the EC's claims concerning assessment proceedings. The United States will demonstrate that for purposes of an assessment proceeding, there is no WTO requirement to offset "negative dumping" or use the average-to-average method or transaction-to-transaction method.[11] Therefore, the Panel should reject both the EC's "as applied" and "as such" claims.

26. In Section B, the United States responds to the EC's "as such" claims based on the assumption, for purposes of argument, that the EC's positions concerning the offsetting of "negative margins" and "symmetry" are correct. The United States will demonstrate that even if the EC's basic positions were correct, the EC has failed to demonstrate that the measures or alleged measures that it cites require WTO-inconsistent action or preclude WTO-consistent action. Therefore, the Panel has an additional reason for rejecting the EC's "as such" claims.

27. In Section C, the United States will address the EC's one-paragraph argument concerning its claims as they relate to new shipper, changed circumstances and sunset reviews. The United States will demonstrate that these claims should be rejected.

28. Finally, in Section D, the United States will address the EC's claims concerning certain determinations by the ITC. The United States will demonstrate that the EC's claims are speculative, at best, and should be rejected by the Panel.

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

29. 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 there is no clear distinction in the AD Agreement between the investigation phase of an antidumping proceeding and subsequent phases, and that assessment proceedings properly fall under the rubric of an antidumping "investigation." Consequently, the EC contends, 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.

30. As the United States demonstrates below, the EC's claims are utterly without foundation, 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

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

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 of an antidumping proceeding. 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. There is simply no basis for imposing the investigation-specific obligations of Article 2.4.2 to assessment proceedings. Moreover, the EC's attempt to use the "fair comparison" reference in Article 2.4 to nullify the express limitation in Article 2.4.2 is inconsistent with principles of treaty interpretation and, for that reason, should be rejected by the Panel.

31. Moreover, the U.S. importer-specific retrospective assessment system is equivalent in all material respects to a prospective normal value system. The EC's claim that the United States must provide offsets for non-dumped transactions when calculating the antidumping duties owed on entries during a certain period effectively means 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. There is no basis in the AD Agreement for such a requirement in any duty assessment system, nor is there any basis for suggesting that Members agreed to undertake dramatically different obligations with respect to offsets depending upon their particular system of duty assessment.

### 1. The Text of the AD Agreement Expressly Limits the Obligations of Article 2.4.2 to the Investigation Phase of an Antidumping Proceedings

32. Article 2.4.2 of the AD Agreement provides that authorities shall normally use one of the following methods to establish the existence of dumping margins: (1) "a comparison of weighted average normal value with a weighted average of prices of all comparable export transactions", or (2) "a comparison of normal value and export prices on a transaction-to-transaction basis." We will refer to method (1) as the "average-to-average" method, and to method (2) as the "transaction-to-transaction" method.

33. In addition, in situations involving "targeted dumping,"[12] Article 2.4.2 provides that "[a] normal value established on a weighted average basis may be compared to prices of individual export transactions ... ." We will refer to this method as the "average-to-transaction" method.

34. The EC argues that under Article 2.4.2 of the AD Agreement, the United States is obliged to make "symmetrical" comparisons in assessment proceedings.[13] The EC posits that the U.S. assessment methodology, whereby Commerce calculates antidumping duties on a per-transaction

[12] See footnote 1, above.

[13] *First Written Submission; European Communities*, 20 December 2004, para. 163 [hereinafter "EC First Submission"].

basis using the average-to-transaction method is "asymmetrical." Consequently, the EC argues, 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.[14] The EC's rationale, however, is belied by the express terms of Article 2.4.2, and has been expressly rejected by another panel.

35. Contrary to the EC's assertions, the U.S. methodology for calculating antidumping duties in its assessment proceedings is WTO-consistent. The express terms of Article 2.4.2 limit its application to the investigation phase of an antidumping proceeding. Moreover, nothing in the text of Article 9 contradicts or invalidates the express limitation found in Article 2.4.2. Therefore, the EC's claims must fail.

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

36. The EC argues that "as a matter of WTO law" the terms "investigation" and "review" are not "mutually exclusive."[15] It contends that the Panel should not recognize a distinction between the investigation phase and other phases of an antidumping proceeding in terms of the methodologies that apply because the AD Agreement contains "no definition of the terms 'investigation' or 'review.'"[16] The EC argues, moreover, that the AD Agreement does not distinguish between the rules governing investigations, assessment proceedings, and the various proceedings that constitute Article 11 reviews.[17] The text of the AD Agreement and prior panel and Appellate Body reports, however, do not support these claims.

37. Article 18.3 of the AD Agreement explicitly recognizes the difference between investigations, which may lead to the imposition of a measure, and "reviews" of existing measures. In *Brazil – Desiccated Coconut (AB)*, the Appellate Body, analyzing an identical distinction in Article 32.3 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), noted that the imposition of "definitive" duties (an "order" in U.S. parlance) ends the investigative phase.[18] This distinction in the transitional provisions of the AD Agreement mirrors the distinctions between investigations and reviews contained in the substantive provisions of the Agreement.

38. The Appellate Body and prior panels have recognized these distinctions, consistently finding that the provisions in the AD Agreement with express limitations to investigations are, in

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[14] EC First Submission, para. 163.
[15] EC First Submission, para. 176.
[16] EC First Submission, para. 176.
[17] EC First Submission, para. 176.
[18] *Brazil– Desiccated Coconut (AB)*, p. 9. See, also, *US – Hot-Rolled Steel AD (AB)*, paras. 53, 61 (distinguishing between Article 21.2 reviews and the original determination in an investigation).

fact, limited to the investigation phase of a proceeding. Just recently, in evaluating whether restrictions on cumulation in investigations were equally applicable to sunset reviews, the Appellate Body noted that Article 3.3 of the AD Agreement – like Article 2.4.2 – "plainly speaks to anti-dumping investigations . . . . It makes no mention of injury analyses undertaken in any proceeding other than original investigations . . . . [T]he text of Article 3.3 plainly limits its applicability to original investigations."[19] The Appellate Body's finding confirms the approach taken by prior panels. For example, the panel in *US – DRAMS AD* found that the term "investigation" means "the investigative phase leading up to the final determination of the investigating authority."[20]

39. 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

40. The EC argues that the obligations contained in Article 2.4.2 for investigations apply equally to Article 9 assessment proceedings.[21] Contrary to the EC's assertion, however, the express terms of Article 2.4.2 limit its application to the "investigation phase" of a proceeding. To require the application of Article 2.4.2 to Article 9 assessment proceedings would read out of the AD Agreement Article 2.4.2's express limitation to investigations. Such a result would be inconsistent with the principle of effectiveness, which requires that all the terms of an agreement be given meaning.[22] The EC ignores the plain language of Article 2.4.2 and improperly seeks to expand it to other proceedings.

41. Article 2.4.2 provides as follows:

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

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

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

[21] EC First Submission, para. 175.

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

> comparison of normal value and export prices on a transaction to transaction basis. (Emphasis added.)

42. Other provisions of the AD Agreement also expressly limit their application to the investigation phase of an antidumping proceeding, and do not apply elsewhere. For instance, Article 5.1 refers to "an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated by or on behalf of a domestic industry." Similarly, Article 5.7 provides that evidence of dumping and injury must be considered simultaneously "in the decision whether or not to initiate an investigation" and "during the course of the investigation." Panels have consistently found that the references to "investigation" in Article 5 only refer to the original investigation and not to subsequent phases of an antidumping proceeding.[23] As the panel found in *US – Corrosion-Resistant Steel AD Sunset Review*:

> [T]he text of paragraph 8 of Article 5 refers expressly to the termination of an investigation in the event of *de minimis* dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews.[24]

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

> Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping "during the investigation phase."[25]

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

44. The EC's argument that Article 2.4.2 applies in Article 9 assessment proceedings ignores the clear distinctions made in the text of the AD Agreement between original investigations and other proceedings, distinctions that the EC itself recognizes. Specifically, the EC acknowledges that the AD Agreement distinguishes between the purpose of investigations and assessment reviews, when it notes that Article 2.4.2 is concerned with "establishing the existence of margins

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

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

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

of dumping" in the investigation phase of an antidumping proceeding,[26] whereas Article 9 proceedings are concerned with determining the amount of duty assessed.[27]

45. Despite this acknowledged distinction, the EC repeatedly asks the Panel to ignore the explicit limitation in Article 2.4.2 to investigations and extend the requirements of that provision to Article 9 assessment proceedings. The EC complains, for example, that in the assessment proceedings at issue here, the United States did not apply the investigation phase comparison methods (average-to-average or transaction-to-transaction) set out Article 2.4.2 of the AD Agreement.[28] But as discussed previously, Article 2.4.2, by its express terms, does not apply outside of the investigation phase and, in the absence of such application, the EC's claim is without merit.

46. The limited application of Article 2.4.2 to the investigation phase is consistent with the divergent functions of investigations and other proceedings under the AD Agreement. The Appellate Body has already recognized that investigations and other proceedings under the AD Agreement serve different purposes and have different functions, and therefore are subject to different obligations under the Agreement.[29] Contrary to the EC's contention, 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. That inquiry would have already been resolved in the affirmative in the investigation phase. Instead, Article 9, by its terms, focuses on the amount of duty to be assessed on particular entries, an exercise that is separate and apart from the calculation of an overall dumping margin during the threshold investigation phase of an antidumping proceeding.[30]

47. 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

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[26] EC First Submission, para. 172.

[27] EC First Submission, para. 174.

[28] EC First Submission, para. 162

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

[30] *See e.g*, AD Agreement, Article 9.1 ("the decision whether the amount of antidumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the importing country or customs territory"); Article 9.3 ("the amount of antidumping duty shall not exceed the margin of dumping as established under Article 2").

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.

48. The EC's argument here is a transparent attempt to evade the express limitation of Article 2.4.2 to the investigation phase by mischaracterizing everything in the AD Agreement as an "investigation." This mischaracterization necessarily fails, however, because it is contrary to the text of the AD Agreement and is at odds with consistent findings by the Appellate Body and panels that the AD Agreement recognizes the investigation phase as a discrete phase of an antidumping proceeding.[31]

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

49. For the reasons discussed above, an analysis of the text of Article 2.4.2 demonstrates that Article 2.4.2 does not apply to assessment proceedings. The EC, however, argues that Article 2.4.2 is nonetheless applicable to assessment proceedings by virtue of Article 9.3 of the AD Agreement. Article 9.3 provides:

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

50. 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.[32] 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.[33]

51. But 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 that the requirements of Article 2.4.2 apply in assessment proceedings.

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[31] The EC contends that a U.S. assessment reviews "corresponds" to an investigation because "questionnaires are sent out; verification visits take place; and hearings are organized." EC First Submission, para. 177. However, the fact that an authority undertakes a fact-gathering exercise does not transform that exercise into an "investigation" within the meaning of the AD Agreement, particularly when the term "investigation" has a particular meaning within that Agreement.

[32] EC First Submission, para. 168.

[33] EC First Submission, para. 168.

52. 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.[34]

53. 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.[35]

54. 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

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[34] *Argentina – Poultry*, para. 7.357.
[35] *Argentina – Poultry*, para. 7.355.

time limits for conducting assessment proceedings, ensuring that respondent companies may obtain timely refund of any excess antidumping duties collected by a Member.[36]

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

55. Relying on its extension of Article 2.4.2 to assessment proceedings, the EC contends that the United States may only make "asymmetrical" comparisons in such proceedings when it finds that the prerequisites of Article 2.4.2 for "targeted dumping" have been met (*i.e.*, "a pattern of export prices which differ significantly among different purchases, regions, or time periods").[37] The EC's argument is without merit. Not only are the Article 2.4.2 restrictions on the investigation phase irrelevant in assessment proceedings, but Article 9 expressly provides for comparisons between weighted average normal values and individual export transactions in assessment proceedings, notwithstanding the EC's description of such comparisons as "asymmetrical." The EC is thus arguing that the Panel ignore the text of not just one, but two provisions of the AD Agreement.

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

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

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.

57. In fact, 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.[38] Under that assessment system, the authorities imposed duties on a transaction-by-transaction basis when particular export prices were below the weighted average normal value. The United States agrees with the EC's position in that case that:

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

[37] EC First Submission, para. 162, 163.

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

> 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.[39]

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

58. 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

59. 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."[40] 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."[41] 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.

60. An analysis of the EC's claims necessarily begins with the text of Article 2.4. Article 2.4 of the AD Agreement provides as follows:

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[39] *Argentina – Poultry*, Annex C-2, para. 33.
[40] EC First Submission, paras. 66-67; 150-151.
[41] EC First Submission, para. 151.

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

61. Article 2.4 thus 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. Article 2.4 recognizes that the normal value and export transactions to be compared may occur, *inter alia*, (a) with respect to models with differing physical characteristics, (b) at distinct levels of trade, (c) pursuant to different terms and conditions, and (d) in varying quantities.

62. 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.[42]

63. To the extent that the EC suggests that the requirement to make "symmetrical" comparisons between normal values and export prices (*i.e.*, average-to-average or transaction-to-transaction comparisons) 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.

[42] *Egypt – Rebar*, para. 7.335.

64. The United States cannot be found to have violated an obligation that does not exist. There is no "independent and overarching obligation" in Article 2.4 to make "symmetrical" comparisons of normal value and export price. 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.[43]

65. The EC also 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.[44] But the EC can point to nothing in the text of the Agreement to support its contention that a methodology can be designated as "fair" or "unfair" within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down.

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

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

68. Thus far, we have been discussing the "symmetry" issue and whether the AD Agreement requires that the average-to-average or transaction-to-transaction methods of Article 2.4.2 be used in assessment proceedings. 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

[43] As discussed above, limiting Article 2.4.2 to investigations is consistent with the flexibility Members retained in Article 9.3 to maintain diverse duty assessment systems, some of which could not be reconciled with a requirement to make average-to-average comparisons for duty assessment purposes.

[44] EC First Submission, para. 152.

"symmetrical" comparisons in assessment proceedings.[45] However, the text of the AD Agreement plainly permits several types of assessment systems, some of which inherently operate on an entry-specific basis. Moreover, again as discussed above, Article 9.4(ii) of the AD Agreement expressly provides for a comparison of weighted average normal values to individual export transactions for purposes of assessment.

69. Moreover, the EC has not offered any argument as to how an offset to antidumping duties assessable on one entry as a result of a distinct entry having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under the rubric of Article 2.4. The focus of Article 2.4 is on the selection of comparable transactions and the making of appropriate adjustments to those transactions so as to render them comparable. Even as described by the EC, an offset requirement would be applied to the *results* of comparisons, and would not pertain to the comparisons themselves.[46] Consequently, it falls clearly outside the scope of Article 2.4.[47]

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

70. In addition to its "as applied" claims concerning offsets for "negative dumping" and "asymmetry," in Sections III.A.3 and III.B.3 of its first submission, 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."

71. The United States does not dispute the notion that measures can be challenged "as such." 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."

72. 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.[48] Thus, if a measure provides a Member with the discretion to act in a WTO-consistent manner, it may not be presumed that the

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[45] 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.

[46] EC First Submission, para. 152-153.

[47] The United States notes that the EC's "as applied" claims include claims of inconsistency with Article 18.4 of the AD Agreement and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Organization"). Assuming for purposes of argument that the EC's positions regarding "symmetry" and offsets for "negative dumping" are valid, the EC fails to explain how the obligations of these provisions relate to determinations made in specific antidumping proceedings. Accordingly, the Panel should reject the EC's claims.

[48] *Brazil – Aircraft (AB)*, para. 114.

Member will exercise that discretion in bad faith.[49] Moreover, the test accords with the presumption in many Members' legal systems against conflicts in the interpretation of laws and treaty provisions.[50] 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.[51]

73. The United States will demonstrate in this section that the EC's "as such" claims fail to satisfy the mandatory/discretionary test.[52] 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.[53]

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

#### a. The Panel Should Reject the EC's Claims Regarding the Tariff Act, Because U.S. Courts Have Held that the Tariff Act Does Not Preclude Commerce from Offsetting "Negative Margins"

74. 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.[54] In order for these

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[49] This does not preclude the possibility that a particular obligation, by its terms, prohibits such discretion.

[50] In general,

> [A]lthough national courts must apply national laws even if they conflict with international law, there is a presumption against the existence of such a conflict. As international law is based upon the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be so interpreted as to avoid such conflict.

*Oppenheim's International Law*, 9th ed., at 81-82 (footnote omitted).

[51] This would be an odd result from a dispute settlement system that is "a central element in providing security and predictability to the multilateral trading system." DSU Article 3.2.

[52] In this section, the United States assumes, for purposes of argument, that the EC is correct that: (1) the AD Agreement requires the offsetting of negative margins in all phases of an antidumping proceeding, and (2) the AD Agreement precludes average-to-transaction comparisons in all phases of an antidumping proceeding except to the extent allowed by the last sentence of Article 2.4.2.

[53] In this regard, the United States notes that the EC refers to the U.S. *Statement of Administrative Action*, or "SAA", as a "measure." *See, e.g.*, EC First Submission, para. 15. However, the EC does not advance any arguments as to why or how the SAA is WTO-inconsistent.

[54] EC First Submission, para. 130. Specifically, the EC claims inconsistencies with Articles 1, 2.4, 2.4.2, 9.3 and 18.4 of the AD Agreement, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO

(continued...)

claims to succeed, the EC must demonstrate that these statutory provisions prohibit Commerce from providing an offset for non-dumped transactions.

75. From the standpoint of the WTO, the meaning of a Member's municipal law is a fact which a WTO panel may need to determine in order to evaluate whether the Member is in compliance with its WTO obligations.[55] In order to determine the meaning of a purported measure, it is necessary to examine the status and meaning of that measure *within* the municipal legal system itself. By definition, the measure at issue has an effect *because* of how it operates within the municipal legal system of which it forms a part. An analysis of the meaning of a measure which neglects its actual status and meaning within the municipal legal system of the Member involved will not, and cannot, reflect an "objective assessment" under DSU Article 11.

76. 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."[56] Again, that evidence must, of necessity, demonstrate the measure's meaning under municipal law if it is to yield an objectively correct result.

77. 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.[57] 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 ... ."[58] The court went on to hold that while offsetting was not prohibited by the statute, not offsetting represented one permissible interpretation of the statute.

78. The second case was *Corus*, which involved an antidumping investigation.[59] In *Corus*, the Federal Circuit again held that not offsetting reflected a permissible interpretation of the

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[54] (...continued)
Agreement.

[55] *See India – Patents (AB),* paras. 65-71 (citing *Certain German Interests in Polish Upper Silesia*, [1926], PCIJ Rep., Series A, No. 7, p. 19. "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures.").

[56] *US – Corrosion-Resistant Steel CVD (AB)*, para. 157.

[57] *Timken Co. v. United States*, 354. F.3d 1334 (Fed. Cir. 2004), *rehearing denied*, 2004 U.S. App. LEXIS 6741 (Mar. 17, 2004), *cert. denied*, 160 L.Ed.2d 352, 125 S.Ct. 412, 2004 U.S. LEXIS 7382, 73 U.S.L.W. 3273 (U.S. 2004) [hereinafter referred to as "*Timken*"] (copy attached as Exhibit US-1). Note that the signal "*cert. denied*" means that one of the parties asked the U.S. Supreme Court to review the Federal Circuit's decision, but the Supreme Court declined to do so.

[58] *Timken*, 354 F.3d at 1342-1343.

[59] *Corus Staal BV v. United States*, No. 04-1107, 2005 U.S. App. LEXIS 1077 (Federal Circuit, Jan. 21, 2005) [hereinafter referred to as "*Corus*"] (copy attached as Exhibit US-2).

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

79. Although in principle the U.S. Supreme Court can review decisions of the Federal Circuit involving antidumping matters, in practice it does not.[60] 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.

80. In asking the Panel to substitute its judgment as to the meaning of U.S. law for that of the Federal Circuit, the EC refers to the fact that Commerce had argued unsuccessfully that the Tariff Act requires the use of zeroing.[61] 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

81. In Section III.A.3(b) of its first submission, the EC challenges what it describes as "the Standard Zeroing Procedures."[62] It is unclear what the EC means by this phrase. In the introductory paragraph to its "as such" claims, the EC refers to the following items:

> the Tariff Act; the SAA; the Regulations; the Manual; the Standard Computer Programs; the Standard AD Margin Program; the *Standard Zeroing Procedures (or methodology)*; and the United States standard practice.[63]

This suggests that "the Standard Zeroing Procedures" are a "methodology" (whatever that may mean).

82. Elsewhere, however, the EC states that the "as such" measure before the Panel consists of "the *Standard Zeroing Procedures* (and the Manual to the extent it refers to the Standard

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[60] The United States believes that the U.S. Supreme Court has never considered a case arising under the antidumping provisions of the Tariff Act or its predecessor statute, the Antidumping Act, 1921. Indeed, as noted above, in *Timken*, the U.S. Supreme Court rejected a request that it review the Federal Circuit's decision.

[61] *See, e.g.,* EC First Submission, para. 143.

[62] EC First Submission, paras. 104-129.

[63] EC First Submission, para. 103 (emphasis added).

Computer Programs), *or* the United States practice or *methodology* of zeroing ... ."[64] This statement suggests that "the Standard Zeroing Procedures" are something other than "methodology."

83. 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"[65] 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" Nor Does it Require that Commerce Ignore "Negative Margins"

84. 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.

85. 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."[66]

86. The EC asserts that: "In reality, USDOC treats the Standard Zeroing Procedures as binding, at least until changed."[67] There are several problems with this assertion.

87. First, 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

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[64] EC First Submission, para. 125 (emphasis added).

[65] Exhibits EC-36.intro, EC-36.contents and EC-36.1 to EC-36.20 [hereinafter referred to as "the Manual"].

[66] Exhibit EC-36.intro. "Import Administration" is the name of the unit within Commerce that has operational responsibility for antidumping matters.

[67] EC First Submission, para. 120. Again, for purposes of this discussion, the United States assumes that the phrase "the Standard Zeroing Procedures" includes the Manual.

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 ... ."[68] Indeed, if Commerce were to treat the Manual as binding, it would be in violation of the U.S. Administrative Procedure Act.[69]

88. Second, 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.

89. Thus, for the foregoing reasons, the Panel should reject the EC's claims regarding the Manual.

### ii. The AD Margin Program Is Not a "Measure" and Even if It Were, It Does Not Preclude Commerce from Offsetting "Negative Dumping Margins" Nor Does it Require that Commerce Ignore "Negative Margins"

90. The Panel should reject the EC's "as such" claims regarding the AD Margin Program for two reasons.

91. First, 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.[70] 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.

92. 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

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[68] EC First Submission, note 156 and cases cited therein.

[69] The Administrative Procedure Act provides, *inter alia*, that an administrative agency may not adopt binding rules unless such rules are first subject to public notice and comment. The Manual is an internal document that has not been subjected to the notice-and-comment process.

[70] *US – Corrosion-Resistant Steel AD Sunset Review (AB)*, para. 82.

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 Panel Should Reject the EC's Claims Regarding "the Practice or Methodology of Zeroing" Because "Practice" Is Not a "Measure" and, Even if It Were, It Would Not Be a Mandatory Measure Within the Meaning of the Mandatory/Discretionary Test

93. As noted above, insofar as its "as such" claims involving "zeroing" are concerned, the nature of the "measure" being challenged by the EC is unclear. To the extent that the EC purports to be challenging a "practice or methodology of zeroing,"[71] the United States addresses that challenge in this section.

94. 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. The United States does not see how applying a measure more than once would somehow give rise to a new, autonomous measure. As noted, the EC offers no explanation as to how this might occur.

95. In fact, 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.[72] 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

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[71] EC First Submission, para. 125.

[72] *See US – India Steel Plate*, para. 7.22; *US – Export Restraints*, para. 8.126.

In *US – Privatization*, the panel characterized as "methodologies" certain analytical approaches taken by U.S. investigating authorities in twelve specific countervailing duty investigations. *See US – Privatization (Panel)*, para. 2.55. This characterization was not appealed, and the Appellate Body did no more than accept the panel's characterization. *See US – Privatization (AB)*, paras. 12-16 (accepting panel's characterization but using the term "method" instead of "methodology.") Moreover, at the panel stage, this issue was also not disputed as the United States focused its argumentation on the substantive issues. Thus, the fact that the panel referred to the analytical approach in this manner, as did the Appellate Body thereafter, provides no guidance as to how either a panel or the Appellate Body should answer the question of whether there is any such thing as a "practice" that can independently be challenged as a measure, and whether, if it can be so challenged, it can mandate a breach of a particular obligation.

> outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice.[73]

96. 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.[74]

97. Thus, for the foregoing reasons, the Panel should reject the EC's challenge to a "practice or methodology of zeroing."[75]

### 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

98. In Sections III.B.3.(c) and (d) of its first submission, the EC addresses its claims concerning the issue of "asymmetry."[76] The measures cited by the EC are section 777A(d)(2) and section 751(a)(2)(A)(i) and (ii) of the Tariff Act. With respect to each statutory section, the EC asserts that the section is "as such" inconsistent with various WTO obligations "if it means" that a symmetrical comparison is normally precluded or an asymmetrical comparison is normally required.[77] The Panel should reject these claims because the EC has failed to make a *prima facie* case that the statutory sections in question are WTO-inconsistent.

99. As discussed above, 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,

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[73] *US – India Steel Plate*, para. 7.22.

[74] *See US – Export Restraints*, para. 8.126.

[75] For similar reasons, the Panel should reject the EC's claims regarding "other types of averaging groups," which are set forth in section III.A.3.(e) of the EC First Submission, paras. 146-147. The identity of the measure(s) that the EC is challenging in this section is not clear. However, the section appears as part of the larger EC section dealing with its "as such" challenge involving antidumping investigations. Because in paragraphs 146 and 147 the EC refers to the "use of such a method", the United States assumes that the EC is complaining about "zeroing" as a practice.

Likewise, the Panel should reject the EC's claims regarding "importer specific assessment rates," which are set forth in section III.B.3.(f) of the EC First Submission, para. 224. Again, the identity of the measure(s) that the EC is challenging in this section is not clear. However, the section appears as part of the larger EC section dealing with its "as such" challenges involving antidumping reviews. Because in paragraph 224, the EC refers to the "use of such a method", the United States assumes that the EC is complaining about "zeroing" as a practice.

[76] EC First Submission, paras. 217-219.

[77] EC First Submission, paras. 217, 219.

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."[78] Here, while the EC has submitted the text of the statutory sections at issue as exhibits, it 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 seems to be unsure of the answer to the question, and apparently hopes that the United States or the Panel will make the EC's case for it.

100. However, that is not the way WTO dispute settlement works. As noted above, it is the EC's burden to prove that the statutory sections are WTO-inconsistent.[79] 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."[80]

101. Thus, because the EC has failed to satisfy its burden of proof, the Panel should reject the EC's claims in question.

### b. The Panel Should Reject the EC's Claims Regarding Section 351.414(c)(2) of the Commerce Regulations Because that Section Does Not Mandate WTO-Inconsistent Action or Preclude WTO-Consistent Action

102. In Section III.B.3.(e) of its submission, the EC claims that section 351.41(c)(2) of the Commerce Regulations is inconsistent with various WTO obligations relating to the issue of symmetry.[81]

103. 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.[82]

104. As previously recognized by the Appellate Body, the word "normally" is an indicator of discretion.[83] Thus, section 351.414(c)(2), on its face, it provides discretion to use something

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

[79] This burden includes not only the burden of coming forward with evidence, but the ultimate burden of persuasion. *Argentina – Hides and Leather*, paras. 11.11-11.12.

[80] *Japan – Agricultural Products (AB)*, para. 129.

[81] EC First Submission, paras. 220-223.

[82] Exhibit EC-35 (emphasis added).

[83] *US – Corrosion-Resistant Steel AD Sunset Review (AB)*, para. 156 ("In our view, 'normally will' seems to allow for a greater degree of discretion than 'will' alone.") and para. 179.

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.

105. Thus, for the foregoing reasons, the Panel should reject the EC claims in question.

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

106. 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.

107. In the preceding sections, 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

108. 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.[84] 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.

109. 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.

110. 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

[84] EC First Submission, paras. 90-93, 102.

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

111. As set forth above, the United States requests that the Panel reject the EC's claims.

**Table of Exhibits**