UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS (“ZEROING”)

WT/DS294

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Brazil – Desiccated Coconut (AB)	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997
Canada – Wheat Exports (AB)	Appellate Body Report, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004
EC – Audio Tapes	Committee on Anti-Dumping Practices, Panel Report, *EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, issues 28 April 1995 (unadopted)
EC – Bed Linen (Article 21.5) (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Cotton Yarn	Committee on Anti-Dumping Practices, Panel Report, *EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, adopted 30 October 1995
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EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
Japan – Alcohol (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R adopted 1 November, 1996
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, Report of the Panel adopted 11 April 2005

US – 1916 Act (AB)	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – DRAMS AD	Panel Report, *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea*, WT/DS99/R, adopted March 19, 1999
US – DRAMS CVD	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, circulated 21 December 2004 (notice of appeal filed 29 March 2005)
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001
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US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – German Corrosion-Resistant Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002
US – Hot-Rolled Steel (Panel)	Panel Report, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R
US – OCTG from Argentina (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004

US – Softwood Lumber Dumping (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Underwear (AB)	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997

I. INTRODUCTION

1. With respect to the conduct of U.S. assessment proceedings, the substantive issues in this dispute boil down to a very simple question: Has the EC established that the phrase "the existence of margins of dumping during the investigation phase" is one that is not limited to Article 5 investigations? The answer to this question is equally simple: No. The United States has demonstrated, based upon the application of customary rules of treaty interpretation, that the phrase "the existence of margins of dumping during the investigation phase" is inextricably and uniquely linked to Article 5 investigations to determine the "existence, degree and effect" of dumping.

2. Thus, all of the issues concerning assessment proceedings can be resolved on the basis of this interpretation of Article 2.4.2. The EC also has asserted claims based upon the fair comparison requirement of Article 2.4, but the EC's positions with respect to these claims have become internally inconsistent and are based upon interpretations of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") that cannot be reconciled with customary rules of treaty interpretation. In particular, while the EC has now recognized that offsets should not be required when using the targeted dumping comparison methodology of Article 2.4.2 (in order to avoid rendering the second sentence of Article 2.4.2 a nullity), the EC has not been able to explain how the targeted dumping provision is excepted from the fair comparison requirements of Article 2.4. Consequently, the EC's claimed offset requirement cannot be rooted in Article 2.4.

3. With respect to the EC's "as such" claims, the EC is simply recycling its idiosyncratic approach to the mandatory/discretionary distinction; an approach that was recently and roundly rejected by the panel in *Korea – Commercial Vessels*. In fact, no panel or Appellate Body report has ever applied the EC's approach. In this dispute, the EC has not come close to demonstrating that the things the EC identifies as challenged measures mandate WTO-inconsistent action, or preclude WTO-consistent action. This failure runs the spectrum from clear, U.S. court decisions that directly hold that the statutory provisions identified by the EC do not mandate so-called "zeroing" to the EC's own declarant, Ms. Owenby, who recognizes that the so-called "standard computer program" is routinely altered by programmers in its application. Such discretionary measures cannot give rise to WTO dispute settlement findings of "as such" WTO inconsistency.

4. Finally, the United States addresses the Appellate Body report in *US – Softwood Lumber Dumping* and the EC's claims concerning "zeroing" in antidumping investigations. The United States remains cognizant of that report's adoption and its implementation obligations. Nevertheless, the United States believes that the Appellate Body's findings concerning "zeroing" were in error, and invites this Panel to take a fresh look at these issues.

II. THE PANEL SHOULD REJECT THE EC'S CLAIMS CONCERNING METHODOLOGIES IN ASSESSMENT PROCEEDINGS AND REVIEWS

A. The EC Has Failed to Establish That Article 2.4.2 Applies Outside of an Investigation within the Meaning of Article 5

5. The essential question before this panel is whether Article 2.4.2, which on its face applies when establishing "the existence of margins of dumping during the investigation phase", is limited to Article 5 investigations, or whether, as the EC claims, it applies to each and every phase of an anti-dumping proceeding that happens to involve a systematic examination or inquiry. Not only does a critical examination of each of the words in this phrase, independent of one another, support the U.S. position, but when the phrase "the existence of margins of dumping during the investigation phase" is considered in its entirety, it is clear that the obligations in Article 2.4.2 do not extend beyond an investigation within the meaning of Article 5.

6. The use of the terms "investigation," "existence," and "initiated" creates a linkage that ties Articles 1, 2.4.2 and 5 together in such a way that confirms that the drafters were referring to Article 5 investigations when they provided that the Article 2.4.2 comparison methodologies are to be used to establish "the existence of margins of dumping during the investigation phase."

7. An Article 5 investigation is a *sui generis* proceeding that resolves the threshold question of "the existence, degree, and effect" of dumping. An analysis of the relationship between Article 2.4.2 and an Article 5 investigation begins with the text of Article 1, which provides as follows:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to *investigations initiated* [1] and conducted in accordance with the provisions of this Agreement ... .
>
> ______
>
> [1]The term "*initiated*" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.[1]

8. The text of Article 1, when read with its footnote, provides that "investigations initiated and conducted in accordance with the provisions of this Agreement" are investigations initiated pursuant to Article 5. Article 5 then defines the nature of the investigation for which it provides:

> [A]n investigation to determine the *existence*, degree and effect of any alleged dumping shall be initiated ... .[2]

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[1] AD Agreement, Article 1 (emphasis added).

[2] AD Agreement, Article 5.1 (emphasis added).

9. Thus, Article 1 defines the "initiation" of the investigation phase that leads to an antidumping measure as "the procedural action by which a Member formally commences an investigation as provided in Article 5." Article 5.1, in turn, provides that investigations are initiated upon a written application, or pursuant to other specified conditions, to determine the "existence, degree and effect" of alleged dumping.[3] Consequently, there is no ambiguity as to the nature of the "investigations initiated and conducted" pursuant to Article 1. Because there is only one type of investigation provided for in Article 5, and footnote 1 to Article 1 explicitly links Article 1 to "an investigation as provided in Article 5," Article 1 can only be referring to Article 5 investigations.

1. Establishing the "Existence" of Margins of Dumping Is Unique to the Article 5 Investigation Phase of An Antidumping Proceeding

10. To complete the linkage between Articles 1, 2.4.2, and 5, the term "existence" as it is used in Article 5.1 of the AD Agreement must be considered. The word existence is used in connection with the term dumping in only one other place in the AD Agreement besides Article 5.1: Article 2.4.2. Article 2.4.2 provides for the manner in which the "existence" of dumping margins is to be established:

> [T]he existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison ... . (emphasis added).

11. The ordinary meaning of the word "existence" according to *The New Shorter Oxford English Dictionary* is "the fact or state of existing; actual possession of being; a mode or kind of existing; dealing with the existence of a mathematical or philosophical entity." The word "existence" before the phrase "of margins of dumping" indicates that Members are to determine the "existence of [the] mathematical or philosophical entity" referred to as "margins of dumping." This "existence" is a necessary part of an Article 5 investigation which may lead to applying an antidumping measure consistent with Article 1.

12. This reasoning is consistent with that adopted by the Appellate Body in *US – OCTG from Argentina*. There, the Appellate Body considered whether the limitations on cumulation in Article 3.3 of the AD Agreement applied outside the context of an Article 5 investigation. The Appellate Body relied on the use of the term "anti-dumping investigations" in Article 3.3, the lack of any mention in Article 3.3 of injury analyses undertaken in any proceeding other than Article 5 investigations, and the absence of a cross-reference to Article 11 in order to find that Article 3.3 on its own does not address cumulation in sunset reviews.[4] The Appellate Body's analysis is consistent with the linkage between Article 3.3 and Article 5.1 through the use of the term "effects" and "effect", respectively, in those provisions.

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[3] This belies the EC's contention that the reference to "initiation" in Article 1, footnote 1, also could refer to something other than the Article 5 investigation phase. *See*, Exhibit EC-45, para. 6.

[4] *US – OCTG from Argentina (AB)*, para. 294.

13. The drafters' intent to limit Article 2.4.2 exclusively to Article 5 investigations is further demonstrated by the use of the *definite* article "the" before the term "investigation phase", rather than the indefinite article "an". According to *The New Shorter Oxford English Dictionary*, the ordinary meaning of the article "the" is "designating one or more persons or things already mentioned or known, particularized by context, or circumstances, inherently unique, familiar or otherwise sufficiently identified." (Emphasis added). If, as the EC contends, the term "investigation" in the context of Article 2.4.2 may be interpreted in generic terms, rather than as a term of art referring to the Article 5 phase, then the use of the *indefinite* article "an" would have been much more appropriate. But that is not what the Agreement says.

2. The EC's Multiple Alternatives Fail

14. The EC seeks to deny the evident links between Articles 2.4.2 and 5.1, suggesting that the Panel should narrow its consideration to the term "investigation" and, to that end, apply its ordinary meaning. In other words, the EC complains that any time a Member makes "a systematic examination or inquiry" as to dumping, that Member is conducting an investigation subject to the disciplines of Article 2.4.2.[5]

15. The contrived nature of the EC's approach is apparent. For example, among the various alternative definitions that the EC posits for the meaning of "during the investigation phase" in Article 2.4.2, it claims that the phrase may be read as synonymous with the term "period of investigation":

> [T]he word "phase" and the word "period" have very similar meanings ... . The two words may therefore be considered synonymous in the context of Article 2 of the *Anti-Dumping Agreement*, referring to a "stage" in the passage of time.[6]

16. However, the EC's interpretation would deny any meaning to the drafters' decision to utilize the unique "investigation phase" terminology in Article 2.4.2. 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.'"[7] Numerous provisions

[5] EC Replies to the Panel's Questions, 7 April 2005, paras. 13, 47 (hereinafter "EC Replies").

[6] EC Replies, para. 56 (footnote omitted). The contrived nature of the EC interpretation is highlighted by the fact that in *US – German Corrosion-Resistant Steel*, para. 68, the Appellate Body used the term "investigation phase" in finding that the *de minimis* standard of Article 11.9 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") does not apply "*beyond* the investigation phase of a countervailing duty proceeding." (Emphasis in original). Although the SCM Agreement does not contain the term "investigation phase", the Appellate Body was using the word "phase" in its ordinary, non-contrived sense as descriptive of the process set out in Article 11, the SCM Agreement counterpart to Article 5 of the AD Agreement.

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

in the AD Agreement refer to a "period of investigation," and the drafters' use of the term "investigation phase" must have been deliberate and must be given meaning.[8]

17. The emptiness of the EC's effort to deny a specific meaning to the term "investigation phase" is highlighted in its response to Questions 12 and 15 from the Panel.[9] When asked whether its interpretation of the term "investigation" would leave any aspect of an antidumping proceeding outside of its coverage, the EC admitted only to "the possibility of pre or post investigation 'phases' within a proceeding."[10] Thus, when this response is considered in the context of the phrase "during the investigation phase," it is clear that the EC's approach would deny any meaning to what otherwise appears, on its face, to be limiting language.

B. Article 2.4 Contains No Independent and Overarching Requirements With Respect to Offsetting and Symmetry

18. The EC commenced this dispute arguing, among other things, that the fair comparison requirement of Article 2.4 is an independent and overarching obligation that applies to any phase of an antidumping proceeding, that this fair comparison requirement requires a symmetrical comparison (average-to-average or transaction-to-transaction), and that this fair comparison requirement obligates Members to offset any dumping found with any non-dumped transactions. At this stage in the dispute, there appears to be little left of these EC positions.

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[8] *See, e.g.*, *EC – Hormones (AB)*, para. 164, in which the Appellate Body stated: "The implication arises that the choice and use of different words in different places in the *SPS Agreement* are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement."

In this regard, as the United States noted in its response to the Panel's first set of questions, the negotiating history of the AD Agreement supports the distinction between "period of investigation" and "investigation phase." By using both terms in the same provision, the text of the Ramsauer draft is consistent with providing distinct meanings to each of those phrases. In that context, the Ramsauer draft suggests that the term "during the investigation phase" was intended to be synonymous with the time in which the investigating authority examines pricing behavior that occurred within the period of investigation. *See Answers of the United States to the Panel's Questions to the Parties in Connection with the First Substantive Meeting*, April 7, 2005, para. 32 (hereinafter "U.S. Answers").

[9] The United States notes that while the EC devotes considerable attention to the grammatical structure of the first sentence of Article 2.4.2, *see, e.g.*, EC Replies, para. 57 (discussion of whether "during the investigation phase" is more properly associated with "existence" or "established"), at no point has the EC sought to give meaning to, or otherwise address, the use of the term "existence" in the first sentence of Article 2.4.2. In fact, while the EC provides some discussion of the phrase "margins of dumping" in the first sentence of Article 2.4.2, it ignores the immediate context of that phrase, which is its location in the broader phrase "the existence of margins of dumping."

[10] EC Replies, para. 49.

1. No Independent and Overarching Obligation

19. As an initial matter, the United States emphasizes that it does not dispute that Article 2.4 is applicable to Article 9.3.1 assessment proceedings. In assessment proceedings, Members must make fair comparisons between normal values and export prices. In each of the assessment proceedings challenged by the EC, the United States did make fair comparisons between normal values and export prices within the meaning of Article 2.4. Among other things, such comparisons must be, and were, made at the same level of trade with due allowance for differences in terms of sale, quantities, physical characteristics and other differences demonstrated to affect price comparability.

20. The United States contests, however, the EC's suggestion that the first sentence of Article 2.4 creates an obligation – the extent of which is unstated in the AD Agreement – that is independent of the remainder of Article 2.4, that applies after the comparisons between normal value and export price are made, and that is results-oriented. When asked to justify its assertion that the fair comparison requirement is independent of, and extends beyond, the remainder of Article 2.4, the string of quotations the EC provided is unconvincing.[11] The United States has previously addressed the *dicta* contained in the Appellate Body Report in *EC – Bed Linen* regarding fair comparison upon which the EC relies.[12] The quotations provided in paragraphs 100 through 105 of the EC's answers to the Panel's questions do not suggest an independent meaning for the first sentence of Article 2.4.[13] To the contrary, in each of those quotations, the fair comparison requirement is discussed in the context of the remainder of Article 2.4. With respect to the quotations provided in paragraphs 106 to 110, they are of no relevance to the issues in this dispute, because they involve the use of the word "overarching" in connection with provisions other than Article 2.4.[14] The EC did not provide any explanation of their relevance to the interpretation of Article 2.4.

2. No Symmetry Obligation

21. A critical aspect of the EC's Article 2.4 claim has been that its assertion that Article 2.4 creates an obligation to conduct a symmetrical analysis in an assessment proceeding (*i.e.*, average-to-average or transaction-to-transaction). To this extent, the EC has argued that the average-to-transaction comparison methodology applied by the United States in the assessment proceedings before this Panel is inconsistent with this asserted obligation.

22. To the extent that the AD Agreement contains an obligation to conduct a symmetrical comparison, that obligation is found in Article 2.4.2, not Article 2.4. As discussed above, the obligations of Article 2.4.2 are limited to Article 5 investigations. The fact that the symmetrical

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[11] EC Replies, paras. 99-110.
[12] EC Replies, para. 99.
[13] EC Replies, paras. 100-105.
[14] EC Replies, paras. 106-110.

comparison methodologies provided for in the first sentence of Article 2.4.2 are made "subject to" the provisions of Article 2.4 governing fair comparison belies any claim that the fair comparison requirement includes a symmetry obligation independent of Article 2.4.2. In accordance with the principle of effectiveness in treaty interpretation, the drafters could not have intended the "fair comparison" requirement to encompass symmetrical comparisons, because such coverage would have rendered the language in Article 2.4.2 superfluous.[15]

23. In fact, in response to a question from the Panel, the EC as much as admitted that its effort to read a symmetry obligation into the fair comparison requirement would nullify the first sentence of Article 2.4.2. In response to Question 43, the EC stated that "the first sentence of 2.4.2 merely recalls the norm contained in Article 2.4 that fairness implies equal and symmetrical treatment in normal circumstances. The second sentence clarifies that in cases of targeted dumping symmetrical treatment may be departed from when certain conditions are met."[16] Because the EC interpretation would deny meaning to an entire sentence, it must be rejected.

24. The problems with the EC's interpretation of Article 2.4 as requiring a symmetrical analysis do not stop here, however. In particular, the AD Agreement explicitly provides for the use of asymmetrical comparisons in at least two places, neither of which is identified as an exception to the "fair comparison" requirement of Article 2.4. First, asymmetrical comparisons are expressly provided for in the targeted dumping provision – the second sentence of Article 2.4.2. While this provision is an express exception to the symmetry requirements of the first sentence of Article 2.4.2, there is no basis for interpreting it to be an exception to the fair comparison requirements of Article 2.4.

25. Second, in the application of antidumping duties to imports from producers for which an individual dumping margin has not been separately calculated, Article 9.4(ii) of the AD Agreement expressly provides for the use of asymmetric comparisons by Members with prospective normal value systems. Nothing in Article 9.4 suggests that this methodology was provided as an exception to the fair comparison requirement of Article 2.4 or the criteria for using the targeted dumping methodology of Article 2.4.2. In fact, the EC has not provided any textual basis to explain how Article 9.4(ii) could constitute an exception to a notional independent, fair comparison-based "symmetry" requirement.

3. No Offset Obligation

26. Based upon its answers to the Panel's questions, it appears that the EC cannot reconcile its contention that the "fair comparison" requirement creates a general obligation to offset dumping margins with the remaining text of the AD Agreement, at least not in a manner consistent with customary rules of treaty interpretation. As the United States previously has

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

[16] EC Replies, para. 153.

explained, application of the targeted dumping methodology will yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are allowed to offset dumped comparisons. In this respect, an offset requirement would render the targeted dumping exception in Article 2.4.2 a complete nullity.[17]

27. During the first Panel meeting, in response to these arguments, the EC tentatively suggested that the same result might not always occur. As the United States noted, if all other things are treated the same (and the targeted dumping methodology would not require any other differences), as a matter of mathematics, the results necessarily would be the same.

28. In its response to the Panel's questions, the EC appears to have accepted this mathematical certainty. Now, in its answers, the EC has recognized that "zeroing" is not prohibited *per se* under the Agreement, because "zeroing" is permissible when applying the targeted dumping methodology of Article 2.4.2 "if the conditions for a targeted dumping analysis are fulfilled."[18]

29. This latest position, however, cannot be squared with the EC's contention that "zeroing" is prohibited under Article 2.4 because it amounts to "an arbitrary and artificial reduction" of the export price and that "an adjustment to export price, normal value or otherwise for differences that do not affect price comparability is inconsistent with Article 2.4."[19] As noted above, the targeted dumping methodology is not an exception to the fair comparison requirement of Article 2.4; it is an exception to the symmetrical comparison requirements for investigations set forth in the first sentence of Article 2.4.2. Having asserted that "zeroing" is an "impermissible adjustment to export price" not related to a difference that affects price comparability as provided in Article 2.4, the EC has failed to explain how this "adjustment" becomes "permissible" when the targeted dumping methodology is used.[20] Again, nothing in Article 2.4.2 suggests that the requirements of Article 2.4 as to how to make a fair comparison cease to apply when the targeted dumping methodology is used.

C. Article 9.3.1 Does Not Require an "Exporter-Oriented" Analysis

30. In an effort to approach the issues of symmetry and offsets from a different angle, the EC also asserts that the United States must undertake an exporter-oriented approach to Article 9.3.1

[17] *Opening Statement of the United States of American at the First Substantive Meeting of the Panel*, 16 March 2005, para. 13; and U.S. Answers, para. 67.

[18] EC Replies, paras. 6, 157.

[19] EC Replies, paras. 115 and 112, respectively; *see also*, EC Replies, paras. 125 and 142.

[20] The United States notes that it disagrees with the EC's characterization of "zeroing" as an adjustment to price. In all cases, the United States makes price adjustments to permit a fair comparison between the export price and the normal value, in conformity with Article 2.4. The United States does not adjust the export price based on the difference between the export price and normal value as suggested by the EC, whether in Article 5 investigations, Article 9 assessment proceedings, or in any other phase of an antidumping proceeding.

assessment proceedings. The EC's position, however, is unsupported by the plain text of the AD Agreement.

31. By its terms, the function of an Article 9.3.1 assessment proceeding is to determine "the final liability for payment of anti-dumping duties." This function is fundamentally different from that of Article 2.4.2, which sets forth the comparison methodologies to be used to establish the "existence of margins of dumping during the investigation phase."

32. Antidumping duties, like other duties or tariffs, are paid by importers. Accordingly, the United States provides for the assessment of antidumping duties on an import- and importer-specific basis. Importers are not liable for antidumping duties for non-dumped transactions. During an assessment proceeding, the United States reviews individual import transactions and calculates antidumping duty liability for each of them with reference to a contemporaneous normal value. Importers are then charged antidumping duties commensurate with the amount of dumping that actually occurred with respect to the imports for which they were responsible. In this way, the United States provides that, consistent with Article 9.3 of the Agreement, "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."

33. The EC proposes, in contrast, an approach that divorces the amount of antidumping duty assessed with respect to an import from the dumping margin associated with that import transaction. The EC contends that investigating authorities must assess antidumping duties based on the <u>aggregated pricing behavior of exporters</u>, without regard to the margin of dumping actually associated with the particular import transaction:

> If all the claims of the European Communities would be accepted, all other things being equal, there would indeed be one normal value, one export price, and one margin of dumping, for each exporter, in all cases of retrospective assessment, due allowances being made for any differences affecting price comparability and targeted dumping.[21]

34. The EC effectively turns Article 9.3 on its head when it argues that "it is not, however, a question of 'compensating' an importer for a 'negative margin'" because "the only relevant margin of dumping is that of the exporter."[22] This argument reflects the EC's effort to force the Article 2.4.2 investigation phase provisions (which focus on the existence of margins of dumping) onto Article 9.3 (with its focus on duty liability). However, the provisions of Article 2.4.2 are irrelevant to Article 9.3.1 assessment proceedings. As the Appellate Body explained in *EC-Bed Linen:*

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[21] EC Replies, para. 147.
[22] EC Replies, para. 148.

> [The] requirements of Article 9 do not have a bearing on Article 2.4.2, because the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties.[23]

35. The EC argues that a Member acts inconsistently with its WTO obligations if it assesses antidumping duties on an import-specific basis, stating that the "only relevant margin of dumping is that of the exporter."[24] However, the mandatory aggregated assessment phase methodology that the EC posits would mean that importers that pay relatively high, non-dumped export prices could nevertheless also be liable for antidumping duties because of low, dumped prices paid by other, unrelated importers. Conversely, importers who paid dumped prices for import transactions would have their duty liability reduced, because the antidumping duties attributable to their transactions would be partially shifted to other importers that paid non-dumped prices. Nothing in the text or context of Article 9.3.1 supports such a result.

D. The EC Has Failed to Support Any Claims Under Article 11

36. In its response to the Panel's request that the EC explain the basis for its claim under Article 11, the EC provided a non-response. Rather than explain the basis for its claim, the EC simply asserted that "the conduct of retrospective assessments in the United States must be consistent both with the provisions of Articles 2.4, 2.4.2 and 9.3, and with the provisions of Article 11."[25] The EC failed, however, to provide the requested explanation, despite the EC's own recognition that "United States 'periodic reviews' of the amount of duty correspond to and fit within Article 9.3 of the Anti-Dumping Agreement."[26] The United States has demonstrated that the EC's claims under Articles 2.4 and 2.4.2 should be rejected. In the absence of any justification or explanation of the EC's Article 11 claims and how they relate to Article 9.3 assessment proceedings, the EC has failed to make its *prima facie* case with respect to its Article 11 claims. Accordingly, the Panel should reject those claims.

E. Because the Challenged Measures Are Based on a Permissible Interpretation, the Panel Should Find Them to Be in Conformity with the AD Agreement

37. Based on the foregoing, the United States believes that the provisions of the AD Agreement at issue are clear, and that the challenged measures are based on *the* correct interpretations of those provisions. Therefore, the Panel should reject the EC's claims on that basis.

38. However, even if the Panel should find, after applying customary rules of interpretation of public international law, that the provisions of the AD Agreement at issue admit of more than

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[23] *EC – Bed Linen (Article 21.5) (AB)*, para. 124 (emphasis in original).
[24] EC Replies, para. 148.
[25] EC Replies, para. 193.
[26] EC First Submission, para. 183.

one permissible interpretation, the challenged measures are based on a permissible interpretation of those provisions. For the reasons discussed above, interpreting “during the investigation phase” under Article 2.4.2 as referring to an investigation under Article 5 is a permissible interpretation. Likewise, interpreting Article 2.4 as containing no independent and overarching requirements with respect to offsetting and symmetry is a permissible interpretation.

39. Therefore, because the challenged measures rest on permissible interpretations, Article 17.6(ii) of the AD Agreement requires the Panel to find that those measures are in conformity with the AD Agreement. As found by the panel in *Argentina – Poultry*, “[I]n accordance with Article 17.6(ii) of the *AD Agreement*, if an interpretation is ‘permissible’, then we are compelled to accept it.”[27]

III. THE PANEL SHOULD REJECT THE EC’S “AS SUCH” CLAIMS

A. The Panel in *Korea – Commercial Vessels* Rejected the “No-Discretion” Rule Proposed by the EC

40. In its response to the Panel’s Question 54, the EC continues to advocate its own idiosyncratic version of the mandatory/discretionary distinction.[28] According to the EC, if a measure provides authorities with the discretion to act in a WTO-inconsistent manner, a panel can find such a measure to be WTO-inconsistent “as such.” For the following reasons, the Panel should reject the EC’s arguments.

41. The United States reiterates that the panel in *Korea – Commercial Vessels* rejected the very approach advocated by the EC in this dispute.[29] Here is what the EC argued in that dispute:

> The EC considers that this traditional distinction is no longer applicable, and claims that its application was excluded by the Appellate Body in *US – Corrosion Resistant Steel Sunset Review*. According to the EC, therefore, it is no longer necessary that legislation must mandate export subsidization in order for it to be condemned under Article 3.1(a) of the *SCM Agreement*. The EC asserts that it is enough that legislation specifically envisages export subsidization in order for it to be condemned. The EC also argues that Article 3.2 of the *SCM Agreement* confirms that Members may not maintain the discretionary power to provide export subsidies. The EC relies on the panel report in *Brazil – Aircraft* to

[27] *Argentina – Poultry*, para. 7.341, footnote 223 (panel found that an interpretation that defines domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible); *see also id.*, para. 7.361 (panel found it permissible for a Member to levy anti-dumping duties on the basis of the actual margin of dumping prevailing at the time of duty collection).

[28] EC Replies, paras. 171-186.

[29] *See*, U.S. Answers, para. 83, quoting *Korea – Commercial Vessels*, para. 7.63.

> support an argument that a legal framework that provides for the provision of future export subsidies may be subject to an "as such" attack.[30]

This is, of course, precisely the EC's argument in this dispute.

42. In roundly rejecting the EC's attempt to refashion the mandatory/discretionary distinction, here is what the Panel had to say:

> 7.60 There is no dispute between the parties regarding the fact that the traditional mandatory / discretionary distinction has been applied by both GATT and WTO dispute settlement panels. The only dispute is whether or not that distinction continues to apply. Since the starting point for the EC's analysis is that "[t]he Appellate Body has recently laid to rest the notion that non-mandatory measures cannot be the subject of dispute settlement in *US – Sunset Review (Japan)"*, we shall focus principally on whether or not the Appellate Body in that case really did rule against the continued application of the traditional mandatory / discretionary distinction.
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> 7.61. In order to do so, we shall first consider the Appellate Body's treatment of this issue in the earlier *US – Section 211 Appropriations Act* case. The Appellate Body analysed the panel's application of the traditional mandatory / discretionary distinction in the following terms:
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>> 259. ... the Panel relied on previous rulings addressing the issue of legislation that gives discretionary authority to the executive branch of a Member's government. As the Panel rightly noted, in *US – 1916 Act*, we stated that a distinction should be made between legislation that mandates WTO-inconsistent behaviour, and legislation that gives rise to executive authority that can be exercised with discretion. We quoted with approval there the following statement of the panel in *US – Tobacco*:
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>>> … panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation

[30] *Korea – Commercial Vessels*, para. 7.58 (underscoring added).

> > inconsistent with the General Agreement could be subject to challenge.
>
> Thus, where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the *WTO Agreement* in good faith. Relying on these rulings, and interpreting them correctly, the Panel concluded that it could not assume that OFAC would exercise its discretionary executive authority inconsistently with the obligations of the United States under the *WTO Agreement*. Here, too, we agree.

7.62 Although the Appellate Body went on to reverse the panel's application of the traditional mandatory / discretionary distinction to the facts of that case, the above extract indicates clearly to us that the Appellate Body was not rejecting the use of the traditional mandatory / discretionary distinction *per se*. To the contrary, the Appellate Body explicitly found that "where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the *WTO Agreement* in good faith." This is generally understood to be the very rationale behind the traditional mandatory/discretionary distinction.

7.63 In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body examined two issues. First, it considered whether certain types of measures could not, as such, be subject to dispute settlement proceedings. Second, the Appellate Body considered whether the measure at issue in that case could be inconsistent with the *AD Agreement*. The Appellate Body treated the first issue as a jurisdictional matter. Thus, having found that there was "no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'", the Appellate Body stated that panels are not "obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory". However, this does not mean that the Appellate Body was excluding the application of the traditional mandatory / discretionary distinction, since it went on to acknowledge that the distinction might be relevant as part of the second issue, i.e., the panel's assessment of whether the measure at issue was inconsistent with particular obligations. In addressing that second issue, the Appellate Body "caution[ed] against the application of [the traditional mandatory / discretionary] distinction in a mechanistic fashion". In particular, the Appellate Body condemned the panel for having taken a "narrow approach", and failing to consider other indications as to whether or not the measure at issue was "binding" or of a "normative nature". The use of such phrases suggests to us that the Appellate Body ultimately resolved the case on the basis of whether or not the measure at issue was mandatory (i.e., "binding", or "normative" in nature).

Furthermore, we note that the Appellate Body stated that it was not “undertak[ing] a comprehensive examination of this distinction”. Having explicitly applied the traditional mandatory / discretionary distinction in *US – Section 211 Appropriations Act*, we fail to see how the Appellate Body could be understood to have excluded the continued application of that distinction in a subsequent case in which it was not even conducting a “comprehensive examination” of the distinction.

7.64 The EC also argues that *SCM* Article 3.1(a) prevents a Member from maintaining the discretion to provide export subsidies. We note, however, that such an approach would be inconsistent with the principle – confirmed by the Appellate Body in *US – Section 211 Appropriations Act*, that “where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the *WTO Agreement* in good faith”.

7.65 The EC has also relied on the following statement by the *Brazil – Aircraft* panel to argue that measures that provide for the provision of future export subsidies may be subject to an “as such” attack:

> the effective operation of the SCM Agreement requires that a party be able in some manner to obtain prospective discipline on the provision of subsidies in cases where it can be established in advance, *based upon the legal framework governing the provision of those subsidies*, that they would be inconsistent with Article 3 of the SCM Agreement. (Emphasis added)

7.66 We consider that, contrary to the EC’s argument, this statement actually supports the application of the traditional mandatory / discretionary distinction, since it relates to circumstances in which one can establish in advance that a provision or measure “would” be inconsistent with Article 3 of the *SCM Agreement*. The word “would” (as opposed to “could”) suggests to us a degree of certitude that is only be found in mandatory (as opposed to discretionary) provisions.

7.67 For the above reasons, <u>we reject the EC’s argument that the Appellate Body ruled against the application of the traditional mandatory / discretionary distinction in *US – Corrosion-Resistant Steel Sunset Review*. We shall therefore</u>

> resolve the EC's "as such" claims on the basis of whether or not the measure at issue mandates the provision of (export) subsidies.[31]

43. Thus, the panel in *Korea – Commercial Vessels* rejected the EC's approach to the mandatory/discretionary distinction, including the specific arguments that the EC advances in this dispute. For example, the EC asserts that in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body found that a non-mandatory measure "was of such nature that it could violate provisions of the *Anti-Dumping Agreement* and found that it could."[32] The panel in *Korea – Commercial Vessels* confirmed that this is not what the Appellate Body found.[33]

44. Significantly, the EC has not been able to cite to a single panel or Appellate Body report that has applied the EC's approach to the mandatory/discretionary distinction. Although the EC invokes the panel report in *US – Section 301*,[34] the panel in that dispute found, rightly or wrongly, that the obligation at issue – Article 23 of the DSU – proscribed a Member's right to maintain certain types of discretionary measures.[35] The EC has not alleged, let alone demonstrated, that the obligations at issue in this dispute are of that nature.

45. In summary, the answer to the EC's lament that "*[t]here is no perfect solution to the 'as such' problem*",[36] is that the EC is the only one that sees a "problem." Panels and the Appellate Body have not had a "problem" in applying the traditional mandatory/discretionary distinction.[37]

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[31] *Korea – Commercial Vessels*, paras. 7.60-7.67 (underscoring added; footnotes omitted).

[32] EC Replies, para. 172.

[33] In addition, to the extent that the EC is suggesting that the Appellate Body found that the measure at issue – Commerce's *Sunset Policy Bulletin* – is a mandatory measure, the United States notes that the Appellate Body made no such finding.

[34] EC Replies, para. 174.

[35] *See* U.S. Answers, paras. 72-76.

[36] EC Replies, para. 185 (italics in original).

[37] Before leaving the topic of the mandatory/discretionary distinction in general, the United States would like to comment on the second bullet example in paragraph 184 of the EC Replies. There, the EC hypothesizes a statute that provides a Member's authorities with discretion to act in a WTO-consistent manner or in a WTO-inconsistent manner. Clearly, as long as the authorities have the discretion to act in a WTO-consistent manner, the statute is not inconsistent "as such" with that Member's WTO obligations under the mandatory/discretionary distinction. Here, the United States simply would note that one reason a Member might have such a statute is to deal with imports from non-WTO Members. Surely, the EC is not suggesting that in this situation, a Member must maintain separate statutes – one applicable to imports from WTO Members and one applicable to all others – in order to conform to its WTO obligations?

B. The EC Has Failed to Demonstrate that the Measures at Issue Mandate WTO-Inconsistent Action or Preclude WTO-Consistent Action

46. Applying the proper mandatory/discretionary distinction to the "measures" at issue in this dispute, it is apparent that the EC has failed to demonstrate that the "measures" mandate WTO-inconsistent action or preclude WTO-consistent action. With respect to the provisions of the Tariff Act of 1930 and Commerce's regulations that the EC challenges, the EC has failed to demonstrate that they mandate WTO-inconsistent action or preclude WTO-consistent action.[38] With respect to the other alleged "measures," the EC has failed to demonstrate that they mandate anything at all.[39] In this section, the United States notes some of the deficiencies in the EC's arguments with respect to particular challenged "measures."

1. The EC Has Failed to Demonstrate that Commerce "Practice" Is a "Measure" that Mandates WTO-Inconsistent Action or that Precludes WTO-Consistent Action

47. The EC has clarified that it is challenging Commerce "practice" as a separate measure.[40] However, the EC has failed to explain how the repeated application of one measure – such as a statute – in the same manner gives rise to a separate and autonomous "measure." As the United States previously noted, 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.[41]

48. Moreover, when the Panel, in its Question 74, asked the EC to distinguish the situation in this dispute from that confronting the panel in *US – India Steel Plate*, the EC gave a non-answer, referring to its answer to Panel Question 51.[42] However, the EC's answer to Question 51 simply contains the EC's explanation as to why the "Standard AD Margin Program" is a "measure" distinct from "practice."[43] It does not address the issue of whether "practice" can be considered a measure that can be subject to an "as such" challenge in WTO dispute settlement.

49. Moreover, even aside from the fact that "practice" is not a separate "measure," the EC has failed to argue, let alone demonstrate, that Commerce "practice" mandates a breach within the

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[38] *First Written Submission of the United States of America*, 31 January 2005, paras. 74-80, 98-110 (hereinafter "U.S. First Submission"); and U.S. Answers, paras. 103-104.

[39] U.S. First Submission, paras. 84-97, 106-110; U.S. Answers, paras. 99-102.

[40] EC Replies, paras. 167, 169.

[41] U.S. First Submission, para. 95.

[42] EC Replies, para. 198.

[43] EC Replies, paras. 164-168.

meaning of the mandatory/discretionary distinction. Here, the United States can do nothing other than to refer the Panel to its prior arguments on this point, which stand unopposed.[44]

2. The EC Has Failed to Make a *Prima Facie* Case With Respect to the Commerce Manual

50. The EC has failed to demonstrate that the Commerce Manual mandates WTO-inconsistent action or precludes WTO-consistent action. As the United States previously has explained, the Manual is a non-binding document that does not "mandate" anything at all.[45] The EC's arguments to the contrary are based upon its idiosyncratic and flawed approach to the mandatory/discretionary distinction, an approach that, as discussed above, has never been followed by any WTO panel or the Appellate Body and that was expressly rejected in *Korea – Commercial Vessels*.

51. However, perhaps an even more fundamental flaw in the EC's claims and arguments is that it has failed to identify the specific portions of the Manual that allegedly mandate the WTO-inconsistent behavior about which the EC complains. By failing to do so, the EC has failed to make its *prima facie* case.

52. In its recent report in *US – Gambling*, the Appellate Body emphasized the importance of the requirement that a complaining party make its *prima facie* case. In that dispute, Antigua – the complaining party – listed nine U.S. federal laws and eighty-four laws from all fifty U.S. states and other U.S. jurisdictions.[46] The United States alleged that in its arguments to the panel, Antigua failed to explain how each individual statute was inconsistent with U.S. WTO obligations.[47] The panel agreed with the United States with respect to most of the state statutes, but, based on its own research, it did find that eight of these statutes were properly before it.[48]

53. With respect to these statutes, the Appellate Body found that Antigua had failed to make its *prima facie* case, and that the panel erred by making findings on such claims.[49] According to the Appellate Body:

> 140. A *prima facie* case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.

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[44] U.S. First Submission, para. 96.
[45] U.S. First Submission, paras. 84-89; U.S. Answers, paras. 99-102.
[46] *US – Gambling*, para. 134.
[47] *US – Gambling*, para. 137.
[48] *US – Gambling*, paras. 135-136.
[49] *US – Gambling*, para. 139.

> 141. In the context of the sufficiency of panel requests under Article 6.2 of the DSU, the Appellate Body has found that a panel request:
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> > ... must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits.
>
> Given that such a requirement applies to panel requests at the outset of a panel proceeding, we are of the view that a *prima facie* case – made in the course of submissions to the panel – demands no less of the complaining party. The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.[50]

54. The Appellate Body added that:

> … it is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation – the evidence – on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.[51]

55. In the instant case, the EC has failed to demonstrate how or why each portion of the Manual that it is challenging is inconsistent with U.S. WTO obligations. In its Question 53, the Panel essentially asked the EC to identify the portions of the Manual that it is challenging. In response, the EC stated that it "is challenging each part of the Manual referenced in the factual part of its first written submission, considered both in isolation and together, including the instruction to use the Standard AD Margin Program."[52] The EC referred to paragraphs 15 to 61 of its first submission and footnotes 1 to 88.[53]

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[50] *US – Gambling*, paras. 140-141 (footnotes omitted).
[51] *US – Gambling*, para. 140, footnote 152, quoting from *Canada – Wheat Exports (AB)*, para. 191.
[52] EC Replies, para. 170.
[53] EC Replies, para. 170, footnote 118.

56. However, the cited portions of the EC first submission identify *the entire Manual* as a measure that the EC is challenging.[54] Thus, if the EC is to be taken at its word, it is challenging the entire Manual because the entire Manual is referenced in its first written submission.

57. Needless to say, the EC has not explained how the entire Manual runs afoul of U.S. WTO obligations. Most of the Manual has nothing to do with the subject of this dispute. Even where the EC cites to more specific portions of the Manual in the referenced portion of its first submission, these portions would appear to have nothing to do with this dispute, and the EC has failed to explain how these specific portions are WTO-inconsistent.[55]

58. In short, to paraphrase the Appellate Body, the EC has filed the entire Manual and expects the Panel to discover, on its own, what relevance the various provisions of the Manual may or may not have for the EC's legal position. While the EC keeps referring to its desire to "cover all the bases,"[56] we do not see this as any different from Antigua's approach in *US – Gambling*. As the Appellate Body has indicated, such an approach is neither sufficient nor acceptable. The EC's failure to identify the specific provisions is even more remarkable given that the Panel specifically asked the EC to identify the portions of the Manual it was challenging. The EC response declined to do so.

59. Thus, in addition to failing to demonstrate that the Manual mandates a WTO breach within the meaning of the mandatory/discretionary distinction, the EC has failed to make a *prima facie* case regarding the Manual by failing to explain how the various portions of the Manual that it is challenging – which is all portions according to the EC – are WTO-inconsistent. Therefore, the Panel should reject the EC's claims regarding the Manual.

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[54] *First Written Submission; European Communities*, 20 December 2004, para. 15, footnote 18 (hereinafter "EC First Submission"), which refers to the entire Manual and which identifies the attachment of the entire Manual as Exhibits EC-36.intro, EC-36.contents and EC-36.1 to EC-36.20.

[55] *See, e.g.,* EC First Submission, para. 21, footnote 18, which refers to Chapter 4, pages 8-9 of the Manual (which deals with antidumping questionnaires) and Chapter 5, page 9 of the Manual (which deals with the analysis of questionnaire responses), and Chapter 9,pages 23 and 27 of the Manual; and para. 24, footnote 24, which refers to Chapter 16 of the Manual (which discusses the role of the U.S. International Trade Commission). The United States could list other examples, but this suffices to illustrate the problem.

[56] *See, e.g.*, EC Replies, para. 170.

3. The EC Has Failed to Demonstrate that Commerce's So-Called "Standard AD Margin Program" Is a Measure, Let Alone a Mandatory Measure Within the Meaning of the Mandatory/Discretionary Distinction

60. The EC has failed to demonstrate that what it calls the "Standard AD Margin Program" is a "measure" or, assuming that it is a measure, that it mandates WTO-inconsistent action or precludes WTO-consistent action.[57] As the United States previously has explained, the computer program does not "mandate" anything at all.[58] The EC's arguments to the contrary are based upon its flawed approach to the mandatory/discretionary distinction, an approach that, as discussed above, has never been followed by any WTO panel or the Appellate Body and that was expressly rejected in *Korea – Commercial Vessels*. For purposes of this submission, the United States will limit itself to a few comments regarding the EC's answers to the Panel's questions.

61. First, in response to the Panel's Question 58 – which asked whether the "Standard Zeroing Procedures"[59] are "administrative procedures" within the meaning of Article 18.4 of the AD Agreement, the EC gave a non-answer. The EC responded that they are "laws, regulations or administrative procedures ... ."[60] Is the EC seriously contending that a line of computer code is a "law" or a "regulation"? If it is, then it has failed to demonstrate why that is so. Thus far, it simply has argued that computer code could qualify as a "procedure" based upon one non-ordinary definition of that term in a dictionary, and the United States has demonstrated why this argument is incorrect.[61]

62. Second, in response to the Panel's Question 72, the EC asserts that it is not necessary that the "Standard AD Margin Program" prescribe a result.[62] This is simply incorrect. Even assuming *arguendo* that lines of computer code can constitute a measure, in order to be found WTO-inconsistent "as such" they must mandate WTO-inconsistent action or preclude WTO-consistent action; *i.e.*, they have to prescribe a course of action. Tellingly, the EC cites to no authority for its remarkable assertion.

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[57] In this regard, the United States notes that notwithstanding the EC's statement that the measures at issue "include" the "Standard AD Margin Program in force" on a particular date, *see European Communities; Response to Question from the United States Following the First Meeting*, 7 April 2005, para. 3 (hereinafter "EC Replies (US)"), the EC also states that is challenging only "those specific lines of code, as set out in the first written submission of the [EC]." EC Replies (US), para. 5. Because the only specific lines of code set out in the EC First Submission are the lines of code reproduced at paragraphs 21 and 37, the EC has limited its claims in this dispute to those lines of code.

[58] U.S. First Submission, paras. 90-92, 106-110; U.S. Answers, paras. 86-102, 105.

[59] The United States assumes that "Standard Zeroing Procedures" is a reference, in whole or in part, to the "Standard AD Computer Program. Certainly, the EC lumps the Program in with what it refers to as the "Standard Zeroing Procedures." *See, e.g.*, EC Replies, para. 188.

[60] EC Replies, para. 187.

[61] *See* U.S. Answers, paras. 88-92.

[62] EC Replies, para. 196.

63. Third, again in response to the Panel's Question 72, the EC asserts that the Standard AD Margin Program is "just like the Regulations", presumably referring to Commerce's antidumping regulations.[63] To the extent that the EC is asserting that the legal status of lines of computer code are the same as Commerce's regulations, it is, once again, incorrect. Under U.S. law, validly promulgated regulations are binding on Commerce, the public, and the courts. Commerce's computer programs are not binding on anyone.

64. Finally, the United States would call the Panel's attention to footnote 6 of the memorandum of Ms. Owenby, submitted as Exhibit EC-46. There, Ms. Owenby acknowledges that the variables used depend upon the Commerce programmer. This further undermines the EC claim that there is a "standard" Commerce computer program, and emphasizes that the computer program used in any particular proceeding reflects policy choices, rather than mandating them.

4. The EC Has Failed to Demonstrate that the Identified Provisions of the Tariff Act of 1930 Mandate WTO-Inconsistent Action or Preclude WTO-Consistent Action

65. The EC has failed to demonstrate that the provisions of the Tariff Act of 1930 that it has identified mandate WTO-inconsistent action or preclude WTO-consistent action. Again, for purposes of this submission, the United States will limit itself to a few comments regarding the EC's answers to the Panel's questions.

66. First, in its Question 67, the Panel asked the EC to address the fact that the U.S. Court of Appeals for the Federal Circuit has twice held that the statutory provisions cited by the EC do not require "zeroing." The EC's response was to declare this to be an inappropriate case for a "mechanistic" application of the mandatory/discretionary distinction, and then refer to the Standard AD Margin Program and the Regulations.

67. The use of "mechanistic" is simply EC code language for its idiosyncratic and flawed approach to the mandatory/discretionary distinction. As discussed above, the EC has not cited to a single panel or Appellate Body report that has embraced the EC approach, and in *Korea – Commercial Vessels*, the panel expressly rejected it.

68. As for the Standard AD Margin Program – whatever that may be – for the reasons previously discussed, it is not a "measure" at all, let alone a mandatory measure within the meaning of the mandatory/discretionary distinction. Finally, with respect to the EC's reference to "the Regulations," Commerce's antidumping regulations do not address "zeroing." If the EC

[63] EC Replies, para. 197.

is referring to the provision of the regulations that it associates with the "symmetry" issue, the United States has previously addressed the EC's arguments.[64]

69. Second, in its Question 70, the Panel asked the EC to comment on the U.S. argument that the EC had failed to make a *prima facie* case with respect to section 777A(d)(2) and sections 751(a)(2)(A)(i) and (ii) of the Tariff Act of 1930. The EC denied that it had failed to make a *prima facie* case.[65] However, with respect to its challenge to section 777A(d)(2) – but not sections 751(a)(2)(A)(i) and (ii) – the EC did modify paragraph 217, line 2, of its first submission so that the words "given that" replace the word "if".[66]

70. With respect to the EC's denial of its failure to make a *prima facie* case, the United States refers the Panel to the discussion of *US – Gambling*, above, in connection with the EC's failure to make a *prima facie* case regarding the Manual. With respect to the statutory provisions in question, the EC has not explained, let alone demonstrated, how the provisions operate in a WTO-inconsistent manner.

71. With respect to sections 751(a)(2)(A)(i) and (ii), the EC continues to assert that these provisions are WTO-inconsistent "if they mean" that asymmetry is required, so the original problem noted by the United States remains. However, even if the EC substituted "given that", this would not suffice to make its case. The EC has to explain why the statute that it quotes mandates the outcome to which it objects. Thus far, it has not done so, notwithstanding that the EC, as the complaining party, bears the burden of proof.

72. With respect to section 777A(d)(2), the EC does not even quote the provision, which reads as follows:

> In a review under section 751, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

On its face, section 777A(d)(2) provides that "when" the average-to-transaction method is used in reviews under section 751, Commerce must use monthly weighted average prices to determine normal value. Section 777A(d) does not address the question of whether or when the average-to-transaction method must be used. The EC has failed to explain how the plain text of section 777A(d)(2) mandates WTO-inconsistent action. Put differently, the EC has failed to make its *prima facie* case.

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[64] *See* U.S. First Submission, paras. 102-105.
[65] EC Replies, para. 194.
[66] EC Replies, para. 194.

5. The EC Is Not Challenging the SAA as a Separate Measure

73. In response to the Panel's Question 50, the EC has clarified that it is not challenging the Statement of Administrative Action ("SAA").[67] Given that the EC has clarified that it is not challenging the SAA as a separate measure in and of itself, the Panel need not decide whether the SAA can be treated as a separate "measure."[68]

IV. THE PANEL SHOULD REJECT THE EC'S REQUEST THAT THE PANEL RECOMMEND THAT CERTAIN MEASURES BE REPEALED

74. In its first submission, the EC asked the Panel to recommend that the United States "takes the steps necessary to bring its measures into conformity with the cited WTO provisions."[69] However, in its answers to the Panel's questions, the EC, without explanation, revised its position and asked the Panel to recommend that certain of the "as applied" measures "be repealed."[70]

75. However, the first sentence of Article 19.1 limits the recommendations of panels and the Appellate Body to recommendations that the Member concerned bring its measure into conformity with the covered agreement in question.[71] Thus, Article 19.1 of the DSU precludes the type of recommendation sought by the EC.

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[67] EC Replies, para. 163 ("The European Communities does not challenge the SAA in isolation.).

[68] To be clear, however, the position of the United States is that the SAA does not constitute a separate measure in and of itself. *See US – Export Restraints*, para. 8.99 ("We find no evidence, in the [Uruguay Round Agreements Act], in the SAA, or anywhere else, that the SAA has an operational life or status independent of the statute such that it could, on its own, give rise to a violation of WTO rules.").

[69] EC First Submission, para. 226, final bullet point.

[70] EC First Submission, para. 127. In this regard, the United States notes that in its first submission, the EC asserted that certain injury determinations by the ITC were inconsistent with Article 3 of the AD Agreement because the volume of imports determined to be dumped was purportedly inflated, as a result of the use of the so-called "zeroing" methodology. EC First Submission, paras. 90-93, 102. While it now asks the Panel to recommend that those measures "be repealed," the EC, in response to the Panel's Question 32, does not deny that its claims as to such measures are merely speculative, given that the EC cannot presume the results of an alternative margin calculation methodology permitted by the AD Agreement. EC Replies, para. 127. The EC instead adopts the new position that the use of so-called "zeroing" somehow renders the injury determinations necessarily "unsound." EC Replies, para. 127. The EC does not explain, however, how the use of "zeroing" necessarily caused the volume of dumped imports to be inflated, or how "zeroing" otherwise gives rise to an Article 3 claim. The EC's Article 3 claims remain speculative and should therefore be denied.

[71] *See, e.g.*, *US – DRAMS CVD*, para. 8.4 ("[A]rticle 19.1 . . . restricts us to recommending that the US bring the relevant measures into conformity with the relevant agreement."); *US – Hot-Rolled Steel (Panel)*, para. 8.7 ("Thus, in our view, the language of Article 19.1 constrains us to recommend that the United States bring its measures into conformity with the provisions of the AD Agreement ... ."); and *EC – Geographical Indications (Australia)*, para. 7.14 ("[A]rticle 19.1 of the DSU . . . foresees only one type of recommendation, namely, that a Member bring a measure into conformity with a covered agreement.".

76. The United States notes that the second sentence of Article 19.1 authorizes panels and the Appellate Body to "suggest" ways in which a measure could be brought into conformity. Should the EC repackage its request for a "recommendation" into a request for a "suggestion," the Panel nonetheless should reject the EC request. A Member generally has many options available to it to bring a measure into conformity with its WTO obligations. A panel should not prejudge by its suggestions the particular option a Member may choose. This is particularly true for the instant dispute, in which the EC has offered no explanation as to why "repeal" would be the only option available to the United States. Accordingly, the Panel should decline to suggest any particular method of implementation. Instead, the Panel should follow the lead of the *US – DRAMS (AD)* panel, which sagely concluded: "[I]n light of the range of possible ways in which we believe the United States could appropriately implement our recommendation, we decline to make any suggestion in the present case."[72]

V. THE TRANSACTION-TO-TRANSACTION METHOD IS NOT WITHIN THE PANEL'S TERMS OF REFERENCE

77. The United States notes that the Panel's questions to third parties contained questions concerning the so-called transaction-to-transaction method. While with a few exceptions the United States disagrees with the answers of the third parties, the United States must note that transaction-to-transaction comparisons are not within the terms of reference of the Panel. While the EC's panel request refers to the average-to-average and average-to-transaction comparison methods, it does not mention the transaction-to-transaction method, either with respect to investigations or assessment proceedings.[73]

78. However, notwithstanding that the transaction-to-transaction method is not within the Panel's terms of reference, the United States feels compelled to comment on the EC's assertion that the transaction-to-transaction method "was essentially intended for circumstances in which there are a few very large transactions ... ."[74] Under Article 2.4.2, there is no hierarchy between the average-to-average method and the transaction-to-transaction method; they are both equally acceptable. The EC cites to no authority for the proposition that the average-to-average method is preferred other than the Commerce Regulations and Manual. However, the fact that Commerce has historically chosen to limit the use of the transaction-to-transaction method does not mean that it is obliged by the AD Agreement to do so.

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[72] *US – DRAMS AD*, para. 7.4.
[73] WT/DS294/7/Rev. 1 (19 February 2004).
[74] EC Replies, para. 126.

VI. THE PANEL SHOULD REJECT THE EC'S CLAIMS REGARDING THE U.S. METHODOLOGY USED TO DETERMINE THE EXISTENCE OF MARGINS OF DUMPING IN INVESTIGATIONS

79. In *US – Softwood Lumber Dumping*, the Appellate Body found that due to the failure of Commerce to account for non-dumped comparisons in an antidumping investigation on softwood lumber from Canada, the United States had acted inconsistently with Article 2.4.2 of the AD Agreement.[75] As previously indicated, the United States believes that the Appellate Body erred in finding that the AD Agreement requires Members, in the investigation phase, to calculate and give credit for weighted average comparisons when the export price exceeds the normal value.[76] The Panel is not obligated to follow the Appellate Body's reasoning if the Panel also concludes that the Appellate Body erred. Therefore, while the United States recognizes that the Dispute Settlement Body adopted the Appellate Body report in *US – Softwood Lumber Dumping*, we feel compelled to point out for the Panel, in the context of the EC's claims in this dispute, the errors in the Appellate Body's reasoning.

80. With respect to the investigation phase, the EC's "as applied" and "as such" claims are based on its assertion that the AD Agreement requires an offset for non-dumped sales. However, neither the text of the AD Agreement nor its negotiating history recognizes the concept of "negative dumping margins," and the AD Agreement does not contain any obligations with respect to them. An offset requirement – if one existed – would apply to the *results* of comparisons, and would not pertain to the comparisons themselves. Therefore, Article 2.4 does not impose any such requirement. With respect to Article 2.4.2, it limits the use of average-to-transaction comparisons in the investigation phase, a common practice before the Uruguay Round. Neither the text of the AD Agreement nor its negotiating history suggest that the drafters agreed to require a credit for sales made at above normal value. Because such a requirement is antithetical to the historic manner in which antidumping investigations have been conducted by many Members, both before and after the completion of the Uruguay Round, and there is no indication in the text of an agreement to change this historic approach, such an obligation should not be created through the dispute settlement process on the basis of tenuous inferences.

A. The United States Does Not "Exclude" Non-Dumped Sales from Its Dumping Margin Calculation

81. The EC contends that the United States "excludes" non-dumped transactions from its calculation of an overall margin of dumping in the investigation phase[77] and that such exclusions

[75] *US – Softwood Lumber Dumping (AB)*, para. 183(a).

[76] *Opening Statement of the United States of American at the First Substantive Meeting of the Panel*, 16 March 2005, para. 23.

[77] EC First Submission, para. 87.

are "unfair."[78] The EC's assertion is simply incorrect. The United States does not exclude non-dumped sales in calculating the overall dumping margin. When applying the average-to-average method, the United States calculates multiple weighted average normal values, and compares each to a distinct set of weighted average export prices. Each average-to-average pairing is distinguished by a common set of variables establishing their comparability (*e.g.,* model, level of trade). Taken together, these groups of export transactions contain "all comparable export transactions." No export transaction is excluded.

82. For each comparison group, the U.S. compares the weighted average of all the normal values to the weighted average of all the export prices. However, the United States does not determine whether dumping "exists" so as to warrant the imposition of an anti-dumping measure. It simply calculates an amount of dumping for each comparison group. Consistent with the language in Article VI, paragraphs 1 and 2, of GATT 1994, discussed above, when the weighted average export price for a group of transactions is less than its weighted average normal value, this difference is an amount of dumping. The totaling of these dumping amounts occurs subsequently, in order to determine whether the dumping margin for the product is above or below the *de minimis* standard. Even in this totaling exercise, all export transactions are considered, because they are included in the figure by which the aggregate of the dumping amounts is divided. The result of this calculation is the percentage dumping margin against which the *de minimis* standard is applied.

83. The Appellate Body's ultimate finding in *US – Softwood Lumber Dumping* turned on a subsidiary finding that the U.S. practice of calculating intermediate "margins of dumping", while setting the results of those intermediate comparisons that resulted in "negative margins" to zero, was contrary to the requirements of Article 2.4.2.[79] However, it is inaccurate to state that Commerce's intermediate stage calculations constitute a determination of whether dumping margins "exist" within the meaning of the AD Agreement. At the intermediate stage, Commerce merely determines the dollar amount by which the weighted average normal value is found to exceed the weighted average export price for the comparable transactions. The calculation of an overall percentage dumping margin (*i.e.*, expressing the overall amount of dumping found during the investigation phase as a percentage of overall export sales), and using this percentage to determine whether dumping "exists" such that the imposition of an antidumping measure is

[78] EC First Submission, para. 74.

[79] *US – Softwood Lumber Dumping (AB)*, paras. 64-65, 93. In that case, the Appellate Body suggested that the U.S. methodology treated sub-groups of transactions for which the weighted average export price exceeded the weighted average normal value as "non-dumped" for purposes of the results of the comparison, but "dumped" for purposes of determining the overall margin of dumping (because the aggregate export value of those transactions was included in the denominator). The inclusion of such transactions in the denominator, however, is necessary to avoid overstating any margin of dumping determined with respect to the product as a whole. If such transactions were excluded from the denominator, the overall margin would simply reflect the weighted average amount of dumping on only those comparisons for which dumping was found, rather than the weighted average amount of dumping with respect to the product as a whole.

justified, is only done in a separate step in order to satisfy the requirements of Article 5.8 of the AD Agreement.

84. The Appellate Body's understanding of the facts may have resulted from the use of terminology in U.S. law that has been interpreted as having a different meaning in the context of the AD Agreement. The Appellate Body effectively interpreted the term "margin of dumping" for AD Agreement purposes as applying only to the percentage margin for the product as a whole, against which the *de minimis* standard is measured.[80] In the context of this dispute, the "margin of dumping" for AD Agreement purposes is equivalent to the "weighted average dumping margin" defined in section 771(35)(B) of the Act.[81] U.S. law separately defines "dumping margin" in section 771(35)(A) as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise."[82] Nevertheless, the reference in U.S. law to the intermediate dumping amounts as "dumping margins" does not alter the fact that those intermediate dumping amounts were treated in a manner consistent with the AD Agreement and Article VI:1 and 2 of GATT 1994.

B. Article 2.4.2 Restricts the Use of the Average-to-Transaction Comparison Method in the Investigation Phase But Does Not Address the Offsetting of Negative Dumping

85. The EC argues that the U.S. methodology is "inherently unfair" because Article 2 and Article 2.4.2 require the United States to provide an offset for comparison groups when the weighted average export price exceeds the weighted average normal value.[83] However, Article 2.4.2 restricts the use of the average-to-transaction method, a method that was commonly used in antidumping investigations before the Uruguay Round. Thus, the EC's argument that Article 2.4.2 was intended to require an offset for non-dumped sales is contradicted by the negotiating history.

1. By Normally Requiring the Use of "Symmetric" Comparisons, Article 2.4.2 Reflects a Negotiated Change to Limit the Use of "Asymmetric" Comparisons in Investigations

86. The negotiating history confirms that Article 2.4.2 does not require an offset for negative dumping. Pursuant to customary principles of treaty interpretation, as reflected in Article 32 of the *Vienna Convention on the Law of Treaties*, the Panel may have recourse to this preparatory material to confirm the meaning arrived at through the application of the rules reflected in Article 31. The Appellate Body's analysis would have benefitted from a consideration of this negotiating history.

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[80] *US – Softwood Lumber Dumping (AB)*, para. 96.
[81] 19 U.S.C. Section 1677(35)(B).
[82] 19 U.S.C. Section 1677(35)(A).
[83] EC First Submission, para. 21.

87. Prior to the entry into force of the WTO Agreement, many users of the antidumping remedy, including the United States and the EC, determined the existence of dumping margins by using the average-to-transaction comparison method.[84] Several delegations sought to negotiate a change in this practice in the Uruguay Round negotiations.[85] The negotiations over this "asymmetry" issue were protracted and difficult.

88. Article 2.4.2 of the AD Agreement was ultimately agreed upon specifically to address this "asymmetry" issue. Article 2.4.2 established the major new requirement that in antidumping investigations, investigating authorities would normally establish the existence of margins of dumping on the basis of either the average-to-average method or the transaction-to-transaction method. Under Article 2.4.2, the use of the average-to-transaction method is limited to "targeted dumping" situations; *i.e.*, situations involving "a pattern of export prices which differ significantly among different purchasers, regions or time periods."[86] If the average-to-transaction method is used in an investigation, Article 2.4.2 provides that Members must explain "why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

89. Separately, a number of signatories to the Tokyo Round Anti-Dumping Code, including the United States and the EC, utilized a methodology whereby they calculated the final overall margin of dumping for a company by aggregating the positive dumping amounts for comparisons where normal value exceeded export price and dividing that number by the aggregate of all export prices. So-called "negative margins" (for those comparisons where export price exceeded normal value) were not taken into account in aggregating the overall amount of dumping. This practice was well-known by the Uruguay Round negotiators and was referred to as "zeroing." Concurrent with the negotiations, the practice of "zeroing" was reviewed by two dispute settlement panels and was found to be consistent with the Anti-dumping Code.[87] In the Uruguay Round negotiations, several delegations sought to prohibit "zeroing" and to require an offset for "negative dumping."[88] No provision to require such offsetting was agreed to by the negotiators. While agreement was reached to address the "asymmetry" issue through, and to the extent provided for in, the language of Article 2.4.2 of the AD Agreement, the Agreement ultimately did not address the "zeroing" issue.

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[84] *Communication from Japan Concerning the Anti-Dumping Code*, MTN.GNG/NG8/W/81 (9 July 1990), at 2; *Submission of Japan on the Amendments to the Anti-Dumping Code*, MTN.GNG/NG8/W/48 (3 August 1989), at 5; *Communication from the Delegation of Hong Kong*, MTN.GNG/NG8/W/51/Add. 1 (22 December, 1989), at 4; *Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (13 October 1989), at 8.

[85] *Id*.

[86] AD Agreement, Article 2.4.2.

[87] *See EC – Cotton Yarn*, paras. 500-501; *EC – Audio Tapes*, para. 356.

[88] *See Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (13 October 1989), at 7; *Communication from the Delegation of Hong Kong*, MTN.GNG/NG8/W/46 (3 July 1989), at 7.

2. The Definitions of Dumping in Article VI of GATT 1994 and the AD Agreement Address Only Dumped Sales And Not "Negative Margins"

90. The EC contends that the U.S. methodology used in the investigation phase is inconsistent with the AD Agreement because, in comparing weighted average normal values to weighted average export prices for comparable transactions, Commerce does not reduce the amount of dumping found on some comparisons based on the amount by which export price exceeds normal value on other comparisons.[89] The EC argues that the U.S. approach is "inherently unfair" because Article 2.4.2 requires such an offset.[90]

91. The EC erroneously bases its argument on the definition of "margin" found in *The New Shorter Oxford English Dictionary*. Based on that dictionary definition, the EC argues that "a margin is the amount by which one thing differs from another" and that given that normal value may be greater than or less than export price, "in both cases there is a margin."[91] Such reasoning, however, cannot be reconciled with the context in which the term "margin" is used in the AD Agreement.

92. In the AD Agreement, the word "margin" is modified by the word "dumping," giving it a special meaning. Paragraph 2 of Article VI of GATT 1994 provides that "[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1." When read with the provisions of paragraph 1, the "margin of dumping" is the price difference when a product has been "introduced into the commerce of an importing country at less than its normal value"; *i.e.,* the price difference when the product has been dumped.

93. The provisions of the AD Agreement must be read in conjunction with Article VI of GATT 1994.[92] While the AD Agreement does not provide a definition of "margin of dumping," it does define "dumping" in a manner consistent with the definition provided in Article VI. Article 2.1 provides:

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[89] EC First Submission, para. 21.

[90] EC First Submission, para. 89. To the extent that the EC's claim of "unfairness" is based on Article 2.4, for the reasons discussed above and in prior U.S. submissions, that claim must fail.

[91] EC First Submission, para. 81.

[92] This is made clear by Article 1 of the AD Agreement, which provides that "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 ... ." It also is consistent with the Appellate Body's analysis of the relationship between the SCM Agreement and Article VI insofar as countervailing duty proceedings are concerned. *Brazil – Desiccated Coconut (AB)*, pages 17-18 (approving panel's finding that Article VI and SCM Agreement together create a single package of rights and obligations). Indeed, the title of the AD Agreement indicates that it is an agreement concerning the implementation of Article VI. Thus, as an agreement whose object is to implement Article VI, the AD Agreement is anchored in Article VI.

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (emphasis added).

The express terms of Article VI provide that the *margin of dumping* is the amount by which normal value "exceeds" export price, or alternatively the amount by which export price "falls short" of normal value. Consequently, there is no textual support in Article VI of the GATT or the AD Agreement for the concept of "negative dumping."

94. Similarly, there is nothing in the text to suggest that the prevailing meaning of the term "dumping" is suspended for purposes of Article 2.4.2. Article 2.4.2 provides as follows:

> Subject to the provisions governing fair comparison in paragraph 4 of this Article, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods and if an explanation is provided why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (Emphasis added)

Thus, Article 2.4.2 sets forth three comparison methods for establishing "the existence of margins of dumping" in an investigation: (1) average-to-average; (2) transaction-to-transaction; or (3) when certain conditions are met, comparison of normal value established on a weighted average basis with individual export transactions.

95. There is no reference in Article 2.4.2 to "negative margins," "negative dumping," or any other modification to the term "margin of dumping." Article 2.4.2 establishes an obligation for the administering authority to determine whether dumping "exists" based on certain methodological constraints. Emblematic of the narrowness of Article 2.4.2 is that fact that nothing in Article 2.4.2 requires the expression of the margin of dumping as a percentage. Article 5.8 is the only place in the AD Agreement where the amount of dumping must be expressed as a percentage margin so that it may be measured against the *de minimis* standard. As the EC correctly recognized in *Argentina – Poultry*:

> The Anti-Dumping Agreement does not require to express [sic] the margin of dumping as a percentage of the export price (except for the purpose of

> establishing whether it is de minimis). Nor does it prescribe any particular type of duties.[93]

96. In the absence of any obligation in Article 2.4.2 to calculate an overall margin of dumping, let alone any obligations detailing the manner in which such a calculation must be performed, Article 2.4.2 cannot serve as the basis for finding a requirement to offset negative dumping.

VII. CONCLUSION

97. For the reasons set forth above, along with those set forth in the United States' first written submission, oral statements at the first substantive meeting with the Panel, and responses to the Panel's questions, the United States requests that the Panel reject the EC's claims.

[93] *Argentina – Poultry*, Annex C-2, para. 34 (emphasis added).