

**UNITED STATES – CONTINUED EXISTENCE AND APPLICATION OF ZEROING
METHODOLOGY**

(WT/DS350)

**Answers of the United States of America
to Questions from the Panel to the Parties
in connection with the First Substantive Meeting of the Panel**

February 22, 2008

Table of Reports

Short Form	Full Citation
<i>Argentina – Poultry (Panel)</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Softwood Lumber Dumping (AB)</i>	Appellate Body Report, <i>United States - Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Softwood Lumber Dumping (Article 21.5) (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/RW, adopted 1 September 2006, as modified by the Appellate Body Report, WT/DS264/AB/RW
<i>US – Zeroing (EC) (Panel)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
<i>US – Zeroing (Japan) (Panel)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R
<i>US – Zeroing (Mexico) (Panel)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, circulated to WTO Members 20 December 2007 (on appeal)

CONTINUED APPLICATION OF 18 ANTI-DUMPING DUTIES

EUROPEAN COMMUNITIES

- Q1. The Panel notes that the European Communities challenges two sets of measures in these proceedings: first, it challenges the application or continued application of anti-dumping duties resulting from the 18 anti-dumping orders listed in the annex to its panel request, and second, the application of zeroing in the 52 anti-dumping proceedings also listed in the annex to its panel request.**

The Panel also notes the EC's explanations, in paragraphs 111 through 119 of its First Written Submission, as to how the application or continued application of these 18 anti-dumping duties constitutes a measure for purposes of WTO dispute settlement proceedings. More specifically, the Panel notes the following statements:

"In short, in this case the European Communities is challenging the duty rates currently applied in the 18 anti-dumping measures concerned..." (emphasis added)

"Instead, the European Communities challenges the use of the zeroing methodology in 18 specific anti-dumping measures, in other words, with respect to 18 specific products originating in specific Member States of the EC." (emphasis added)

"As can be seen, the European Communities is challenging the adoption of anti-dumping duties with respect to the 18 measures mentioned in the Annex to the Panel request insofar as the original duty levels and subsequent review levels are inconsistent with WTO rules, as a result of the use of zeroing by the United States." (emphasis added)

"Consequently, the European Communities submits that the 18 measures brought before the Panel are the duty rates applied in the 18 anti-dumping proceedings concerned." (emphasis added)

- a) The Panel notes that as far as the claim regarding the application or continued application of the 18 anti-dumping duties is concerned, the specific measure at issue is described in different ways in different places in the EC's First Written Submission. Please describe clearly what the specific measure at issue is in connection with this claim. Please also explain how you identify the existence of this measure. Finally, please explain the difference between the specific measure at issue in connection with this claim and the specific measures at issue in connection with your claims regarding the 52 anti-dumping proceedings where zeroing was allegedly used by the USDOC.

- b) **The Panel notes that although the European Communities generally refers to this measure as "application or continued application" of the 18 anti-dumping duties at issue, in some instances it only uses the term "continued application". Please clarify what significance, if at all, the variation between "application" and "continued application" has on your description of the specific measure at issue in connection with this claim.**

BOTH PARTIES

- Q2. The Panel notes that, except for its claim under Article XVI:4 of the WTO Agreement, the legal basis of the EC's claim regarding the application or continued application of the 18 anti-dumping duties at issue is identical to the legal basis of its claims regarding the 52 anti-dumping proceedings related to the same 18 duties. In this regard, the Panel notes the following statement in the EC's First Written Submission:**

"For the sake of brevity, the European Communities will not here re-state the arguments which respect to these violations, since these are identical to the arguments submitted by the European Communities in Section III.D below. Therefore, the European Communities refers the Panel to that Section in support of this claim, the arguments therein equally applying with respect to the present measures and claims." (emphasis added)

Assuming *arguendo* that the European Communities has successfully demonstrated the existence of a measure in connection with its claim regarding the application or continued application of the 18 anti-dumping duties at issue, given that the European Communities bases the mentioned claim on the same legal reasoning as its claims regarding the 52 anti-dumping proceedings in which zeroing was allegedly used, what, in your view, would be the further implications of the EC's claim regarding the application or continued application of the 18 measures at issue? Put differently, what, if any, would be the value-added of addressing the EC's claim regarding the 18 measures, after addressing its claims regarding the 52 proceedings?

1. As an initial matter, the United States reaffirms that the EC's claims concerning the 18 alleged measures¹ and 14 of the 52 determinations identified in the panel request are not within the Panel's terms of reference. These "measures" were not identified anywhere in the EC's

¹ The United States adopts the Panel's terminology here, but notes that the EC identified the "18 measures" in its panel request as the "continued application of, or the application of the specific anti-dumping duties" resulting from the antidumping duty orders in 18 separate cases, listed in the Annex to the panel request, "as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding."

consultations request, but appeared for the first time in the EC's panel request. By virtue of Articles 4 and 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), they cannot fall within this Panel's terms of reference.² The United States also reiterates its preliminary objection to the EC's failure to identify the specific measures at issue as required by Article 6.2 of the DSU regarding the 18 alleged measures.³ Because those alleged measures were not specifically identified in the panel request, they cannot form part of the Panel's terms of reference. Finally, under Article 17.4 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), a matter may not be referred to a panel if no "final action" has been taken by the administering authority. Here, the United States has asked the Panel to exclude 4 determinations for which no final action had been taken by the time of the request for establishment.⁴

2. The United States explained fully in its first written submission, and at the first substantive meeting with the Panel, that the United States has not acted inconsistently with its obligations under the AD Agreement and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").⁵ As demonstrated, neither agreement imposes a blanket prohibition on so-called "zeroing" in antidumping proceedings. Once the Panel reaches a finding that the United States has not acted inconsistently with the AD Agreement and GATT 1994 as to 38 of the 52 determinations listed in the Annex,⁶ there would be little value added by a separate finding, based on the same legal reasoning and the same provisions of the covered agreements, that the U.S. has acted consistently as to the 18 alleged measures.

EUROPEAN COMMUNITIES

Q3. The Panel notes that as part of its argumentation under Article XVI:4 of the WTO Agreement in connection with its claim regarding the application or continued application of the 18 anti-dumping duties at issue, the European Communities contends that the United States violated the obligation set out under that provision by maintaining a specific law, regulation or administrative practice found to be WTO-inconsistent in a report adopted by the Dispute Settlement Body ("DSB"). The European Communities then goes on and argues that "allowing claims against measures which are the result of the application of instruments or norms which have been found as such inconsistent with WTO rules serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to

² U.S. First Written Submission, paras. 47-65.

³ U.S. First Written Submission, paras. 66-71.

⁴ U.S. First Written Submission, paras. 72-74.

⁵ U.S. First Written Submission, Part V.B-D; U.S. Opening Statement, paras. 25-41.

⁶ The United States maintains that 14 of the 52 proceedings are not properly before the Panel, so the finding should involve only 38 proceedings.

be eliminated." (emphasis added).

Please explain whether the application or continued application of the 18 anti-dumping duties at issue constitutes a norm or instrument, or the result of the application of such an instrument or norm. Is there, in your view, a difference between these two descriptions? Please elaborate.

Q4. The Panel notes that in paragraph 131 of its First Written Submission, the European Communities recalls the adopted Appellate Body decisions regarding zeroing and argues that the kinds of zeroing methodologies allegedly used in the 18 anti-dumping duties at issue is the same as those condemned in such past decisions. The European Communities then argues:

"Consequently, by maintaining and applying the model and simple zeroing procedures, which are administrative procedures not in conformity with various provisions of the *Anti-Dumping Agreement* and the GATT 1994, the European Communities submits that the United States failed to take all necessary steps to ensure it complies with its WTO obligations. Accordingly, the United States also violated its obligation under Article XVI:4 of the WTO Agreement." (emphasis added)

- a) Please explain whether the European Communities argues that in the resolution of the EC's claim regarding the application or continued application of the 18 anti-dumping duties at issue, this Panel should take into account the EC's allegation that the United States has failed to comply with DSB rulings and recommendations in some other disputes in the past.
- b) If your response to question (a) is in the affirmative, please explain how this approach can be reconciled with the provisions of the Dispute Settlement Understanding ("DSU") regarding the implementation of adopted panel and Appellate Body decisions. More specifically, please explain whether, in your view, this Panel can take into consideration the EC's allegation regarding the implementation of the mentioned DSB rulings and recommendations in connection with past disputes, in the resolution of the EC's claim regarding the application or continued application of the 18 anti-dumping duties at issue.

Q5. The Panel notes the following statement in paragraph 266 of the EC's First Written Submission:

"In order to make effective these obligations, the European Communities requests this Panel to recommend, pursuant to Article 19 of the Dispute Settlement

Understanding, that the United States takes the steps necessary to bring its measures into conformity with the cited WTO provisions. In particular, in the view of the European Communities, the Panel should suggest that the United States cease using zeroing when calculating dumping margins in any anti-dumping proceeding with respect to the 18 measures mentioned in the Annex to the Panel request or any other. This recommendation will be appropriate to help promote the resolution of the dispute." (emphasis added)

- a) **In connection with the phrase "the Panel should suggest", please explain whether the European Communities seeks a suggestion or a finding from the Panel with regard to this claim.**
- b) **Please explain the nature of your claim regarding the 18 anti-dumping duties at issue. Is the Panel to understand that the European Communities requests the Panel to find that the US investigating authorities should refrain from using zeroing in dumping margin calculations that may be carried out in future proceedings (investigations, duty assessment proceedings or reviews) pertaining to these 18 duties? If so, would this mean that the Panel is invited to make findings that would apply to measures that may come into being in the future? If this is a correct characterization of the finding requested by the European Communities, please explain the legal basis that would allow a WTO panel to make findings regarding measures that are to come into force in the future.**

4 PRELIMINARY MEASURES

- Q6. The Panel notes the EC's explanations, in paragraphs 49-55 of its response to the US' request for a preliminary ruling, regarding the inclusion in its panel request of four preliminary determinations. The Panel recalls the conditions precedent set out under Article 17.4 of the Anti-Dumping Agreement ("ADA") for referring to the DSB issues pertaining to provisional anti-dumping duties. Please explain whether these conditions apply in this case with regard to the four preliminary measures identified in the EC's panel request. If your response is in the negative, please explain in detail the legal basis for such response.**

ZEROING IN PERIODIC REVIEWS

UNITED STATES

- Q7: The Panel notes the description, in paragraphs 20-29 of the EC's First Written Submission, of the calculation by the USDOC of margins of dumping and the description of the alleged "simple zeroing" in periodic reviews.**

- a) **Does the United States agree with the EC's description of the way the USDOC calculates margins in periodic reviews? If your response is in the negative, please explain in what ways the EC's description differs from the method used by the USDOC. (Please note that this question is limited to the mechanics of the USDOC's dumping margin calculations in periodic reviews, not the legal characterization of such methodology under WTO law.)**

3. As a generalized description of the calculations performed in periodic reviews, the EC's summary is generally accurate, to the extent it is based directly on the text of the Tariff Act of 1930 and regulations of the U.S. Department of Commerce ("Commerce"). Notwithstanding that general level of accuracy, there are certain inaccuracies in the EC's summary and numerous self-serving mischaracterizations with which the United States does not agree.

4. It is factually inaccurate for the EC to state that "USDOC sends appraisal instructions to customs, determining an 'assessment rate'."⁷ While it is accurate to state that USDOC sends "appraisal" instructions to Customs, those instructions do not determine the assessment rate; instead, those "appraisal" instructions constitute the ministerial act of informing Customs of the assessment rates that were established in the final determination in the administrative review.

5. The United States recognizes the Panel has excluded from the scope of this question "legal characterizations"; nonetheless, for greater certainty, the United States wishes to note that it disagrees with certain characterizations made by the EC, including its references to administrative review "investigations" (paras. 20 and 25), and its assertion that "the sum of total dumping is inflated" (para. 26), among others. Such characterizations assume the correctness of certain legal interpretations the EC has failed to establish in this dispute.

- b) **The Panel notes the evidence submitted by the European Communities, in Exhibit EC-31 and Exhibits EC-33 through EC-68, regarding the calculation by the USDOC of dumping margins in the 37 periodic reviews at issue in this dispute. The Panel notes that in the view of the European Communities, the mentioned evidence demonstrates that the above-referenced methodology was used by the USDOC in the 37 periodic reviews at issue. Please explain whether you agree with that proposition. Put differently, please explain whether the determinations of the USDOC presented in the mentioned exhibits demonstrate that the above-referenced methodology was used by the USDOC in the 37 administrative reviews at issue. (Please note that this question is limited to the mechanics of dumping margin calculations in the 37 periodic reviews at issue, not the legal characterization of such methodology under WTO law.)**

Please provide your answers in connection with each one of the exhibits

⁷ EC First Written Submission, para. 29.

mentioned above.

6. The United States has reexamined the documents contained in Exhibit EC-31 and Exhibits EC-33 through EC-68. After doing so, the United States is unable to confirm whether these documents demonstrate that Commerce did not provide offsets in the 37 reviews at issue in this dispute. Each of these exhibits is comprised of several documents. While the EC has attached labels to the documents, it has not identified whether each document was generated by Commerce during the conduct of the assessment proceeding, or whether it was generated by the EC for purposes of this dispute. In this regard, the burden is on the EC to fully demonstrate the factual bases for its challenges.

7. Taking Exhibit EC-31 as an example, we are able to confirm that Appendices I and II are the Final Results determination and the Issues and Decision Memorandum supporting that determination issued by Commerce pursuant to that proceeding. We can further confirm that with respect to these two documents, Commerce indicated it would not provide offsets for non-dumped sales. Appendices III and IV contain program logs for the margins calculated for two companies, FAG and SKF. These program logs appear to be what Commerce would generate during the course of an administrative review, but the EC has not indicated whether they were generated by Commerce during the administrative proceeding or by another entity. There are no distinguishing features indicating that these are documents generated by Commerce. These are printouts of the results from applying a computer program to a data set. Because it is not apparent whether these are program logs generated by Commerce during the conduct of the proceeding, whether the logs were generated by the companies and put before Commerce during the proceeding, or whether they were generated by the EC for purposes of this dispute (and in the latter two cases, whether the data sets or programs were altered in any fashion), we cannot confirm the contents of those appendices. To do so would require extensive comparison and analysis of a voluminous amount of computer-generated records. Moreover, the burden is on the EC to prove its case, including demonstrating the accuracy, source, and relevance of its exhibits.

8. At the very least, again using Exhibit EC-31 as an example, the United States can confirm that tables, such as those contained in Appendices V through VIII, were not produced or generated by Commerce. These documents appear to have been produced by the EC for purposes of this dispute and the United States, therefore, neither can confirm their accuracy, nor can agree that they establish any facts relevant to this dispute.

- c) Please explain whether the methodology described in the above-mentioned paragraphs of the EC's First Written Submission is the same as the methodology addressed by the panels in *DS294-US-Zeroing (EC)*, *DS322-US-Zeroing (Japan)* and *DS344-US -Stainless Steel (Mexico)* in connection with administrative reviews? If your response is in the negative, please explain in what ways the method at issue in this case differs from those addressed in the three past disputes mentioned.**

9. The methodologies employed in these administrative reviews are, in many respects, similar to and consistent with the methodologies applied in the administrative reviews at issue in those disputes. Whether there are distinctions that the EC seeks to rely on in this dispute is unclear.

BOTH PARTIES

Q8. Having read the EC's explanations, in paragraphs 15 through 29 of its First Written Submission, regarding the calculation by the USDOC of margins of dumping in periodic reviews, the Panel needs further clarification on certain issues pertaining to such calculations. Please answer the questions below on the basis of the facts presented in the hypothetical case that follows:

The USDOC initiates an administrative review regarding imports of tyres from country A, which is subject to an anti-dumping duty in the United States. The original cash deposit rate imposed following the original investigation was 25 percent. One of the exporters in country A - Exporter 1- sells its tyres to three importers in the United States, importer 1, importer 2 and importer 3. One year after the imposition of the anti-dumping duty, importer 1 comes to the USDOC and asks for an administrative review. During the period of review for the administrative at issue, Exporter A made 1000 domestic sales in its own market. It made 300 shipments to the United States, which were equally divided among its three importers there. In other words, each importer received 100 shipments from Exporter A during the period of review.

a) When importer 1 requests a duty assessment review to have its final liability calculated, does that automatically trigger the process of calculating a new cash deposit rate for Exporter A?

10. Yes. When importer 1 requests an administrative review for assessment purposes, Commerce would conduct a review of all the sales made by Exporter A during the relevant period. As part of any final determination in that review, a new cash deposit rate would be calculated for Exporter A.

b) If it is Exporter A that requests the initiation of a duty assessment proceeding, does the USDOC in such a situation only calculate the new cash deposit rate for Exporter A, or does it also calculate the final liability of all importers that imported from Exporter A during the period of review? Please elaborate.

11. Final liability for antidumping duties is assigned to importers, not the exporter. If an exporter requests an assessment review, the Department calculates an assessment rate based on the final liability for each importer of the subject merchandise from that exporter. Thus, an assessment review conducted at the request of Exporter A would result in both a new cash

deposit rate for importers from Exporter A with respect to its future exports, and final assessment rates for the imports examined in the review with respect to each importer.

c) Can the new cash deposit rate calculated for Exporter A exceed the original cash deposit rate?

12. The cash deposit rate is determined in an assessment review and is based on sales data from a distinct period of time,⁸ which differs from the time period of the investigation. Because the two cash deposit rates are not based on identical sales data, the resulting cash deposit rate from an assessment proceeding could be lower or higher than the investigation rate.

d) What happens if the final liability calculated for Importer 1 exceeds the cash deposit rate? What happens when the final liability is below the cash deposit rate?

13. Generally, while the cash deposit rate is the best estimate available at the time of the final liability, the final liability will require an adjustment in the amount actually collected. Importer 1 will be assessed dumping duties according to the final liability determined for Importer 1. The U.S. statute further provides that, with some limited exceptions, if the final liability is greater than the cash deposit rate, the importer must pay the difference plus interest; in the reverse case, the United States refunds the overage to the importer, plus interest.⁹

e) Is it correct that the calculation of the new cash deposit rate for Exporter A will be based on the comparison of all 1000 domestic sales made by Exporter A and all the 300 shipments that it made to the United States? If so, will this be a two-step process whereby in the first step the USDOC will compare the prices of export transactions made during a specific month against the weighted average ("WA") of the normal value for that month (reflecting only the WA of the domestic transactions made during that month) and in the second step it will compile the results of these comparisons in order to find the margin of dumping that will represent the new cash deposit rate?

14. Generally speaking, there are normally three steps that will occur in an assessment review analysis. First, each export transaction will be compared with a monthly weighted average normal value for the most comparable, most contemporaneous, sales made in the domestic market. (Certain sales may be excluded from normal value for reasons not relevant to this dispute (e.g., outside the ordinary course of trade, etc.)) Second, for purposes of the cash deposit rate, all of the exporter's sales will be considered for purposes of establishing the new cash deposit rate. Third, for purposes of assessment, the export sales will be considered on an

⁸ See 19 C.F.R. § 351.204(b); compare 19 C.F.R. § 351.213(e).

⁹ Section 778(a) of the Tariff Act, 19 U.S.C. § 1677g(a).

importer-by-importer basis for purposes of determining assessment rates.

15. Although it is not relevant to this dispute, it is not necessarily the case that all 1000 domestic sales would be used in such an analysis. Some of those sales may have occurred in months in which there were no export transactions, or may involve particular variations of the product not comparable to the variations sold in the export market during that particular period being reviewed.

- f) **Is it correct that the final liability for Importer 1 for the period of review will be calculated through two steps whereby in the first step the USDOC will compare the prices of each export shipment sent to Importer 1 in a given month with the WA normal value for that month? If so, is it correct that the monthly WA normal values used for the calculation of the new cash deposit rate for Exporter A and the ones used for the calculation of the final liability for Importer 1 will be the same? Is it correct that the export shipments used for the calculation of the new cash deposit rate for Exporter A will be all the 300 shipments whereas the ones used for the calculation of the final liability for Importer 1 will be the 100 shipments sent to Importer 1?**

16. As indicated in response to subquestion (e), the Panel's description is generally correct. The result of each comparison of an export price to a contemporaneous average normal value will determine the amount by which that export transaction was dumped. Those comparisons are the basis of both Importer 1's final antidumping duty liability and the future cash deposit rate for importers from Exporter A.

17. As indicated in the question, all 300 export transactions sales will form the basis of Exporter A's new cash deposit rate and only the 100 export transactions in which Importer 1 was involved will form the basis of the Importer 1's assessment rate. In this fashion, there is an incentive for Exporter A not to dump, and instead to capture for itself what otherwise would be assessed as a dumping duty, without any disincentive to Importer 1. Otherwise, if offsets must be applied across importers, importers will have an incentive to obtain the lowest, "most dumped" prices in an effort to capture some benefit (i.e., a reduction to their antidumping duties) from other importers paying higher, "less dumped" prices to the exporter.

Q9: The Panel notes both parties' views as to the meaning that should be given to the word "investigation" in the first sentence of Article 2.4.2 of the ADA. What significance, if any, would you attribute to the fact that the word "investigation" in the provision at issue is followed by the word "phase"? Please elaborate in light of the fact that this represents the only instance where the drafters used the word "phase" in the ADA.

18. The AD Agreement does not define the word "phase." The ordinary meaning of the word "phase" according to *The New Shorter Oxford English Dictionary* is "a distinct period or stage in

a process of change or development; any one aspect of a thing of varying aspects.” Thus, the word “phase” in the context of the AD Agreement recognizes that authorities will determine dumping margins in distinct contexts and the “investigation phase” refers to the “distinct period or phase” in which the domestic authority investigates the existence of dumping.

19. The text of the AD Agreement expressly provides, in Article 1 and Article 5.1, for the existence of a discrete “investigation phase.” An Article 5 investigation is a *sui generis* proceeding that resolves the threshold question of the existence, degree, and effect of dumping. The first sentence of Article 1 cross-references Article 5 in footnote 1 to define “investigations initiated” under the AD Agreement. Article 5.1, in turn, defines the scope of such investigations as “to determine the existence, degree, and effect of any alleged dumping.” Article 2.4.2 establishes how the “existence” of margins of dumping is to be determined: “[T]he existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison” Article 2.4.2 is limited, by its terms, to establishing the existence of margins of dumping “during the investigation phase” and therefore has no bearing on any other segment of an antidumping proceeding other than the original investigation phase. The collection and assessment of antidumping duties under Article 9.3, has a separate and distinct purpose that necessarily occurs *after* the imposition of an antidumping measure.

ALLEGED MATHEMATICAL EQUIVALENCE

Q10. The Panel notes the United States' argument that - absent zeroing- the targeted dumping methodology provided for under Article 2.4.2 of the ADA would yield the same mathematical result as the WA-WA methodology. The United States argues that interpreting the ADA as prohibiting zeroing in connection with this exceptional methodology would render this part of Article 2.4.2 *inutile*.

UNITED STATES

- a) Please demonstrate to the Panel, through a hypothetical calculation table, that such mathematical equivalence exists.**

20. Below, please find Table 1, which demonstrates that, absent zeroing, the targeted dumping methodology provided for under Article 2.4.2 of the AD Agreement yields the same mathematical result as the average-to-average methodology. The mathematical equivalence demonstrated in the example below is a mathematical fact that will hold regardless of the particular values chosen for the quantity or price of any normal value or export transactions and regardless of whether or not additional transactions or models are taken into consideration.

Table 1

Normal Value Transactions			Export Price Transactions			Comparison Results				
Units	Normal Value Prices	Weighted Average Normal Value	Units	Export Prices	Weighted Average Export Price	Average-to-Transaction		Average-to-Average		
						per unit	total	per unit	total	
		(a)	(b)	(c)	(d)	(a-c)=(e)	(e*b)	(a-d)	(*b)	
Model A	5	\$ 11	18	3	\$ 10	\$ 13.0	\$ 2.5	\$ 7.5	\$ -0.5	\$ -9
	6	\$ 12		4	\$ 11		\$ 1.5	\$ 6		
	7	\$ 14		5	\$ 14		\$ -1.5	\$ -7.5		
				6	\$ 15		\$ -2.5	\$ -15		
	Model A			\$ 12.5 ¹⁰				\$ -0.5		
Model B	5	\$ 11	12	3	\$ 10	\$ 12	\$ 3	\$ 9	\$ 1	\$ 12
	6	\$ 12		4	\$ 11		\$ 2	\$ 8		
	7	\$ 13		5	\$ 14		\$ -1	\$ -5		
	8	\$ 15								
	Model B			\$ 13				\$ 1		
Results Combining Models A and B¹²						\$ 0.10	\$ 3	\$ 0.10	\$ 3	

EUROPEAN COMMUNITIES

¹⁰ By way of demonstration, this weighted average normal value was calculated as follows:
 $[(5 \times 11) + (6 \times 12) + (7 \times 14)] / (5 + 6 + 7) = 12.5$.

¹¹ By way of demonstration, this weighted average of average-to-transaction results is calculated as follows: $[(3 \times 2.5) + (4 \times 1.5) + (5 \times (-1.5)) + (6 \times (-2.5))] / (3 + 4 + 5 + 6) = -0.5$.

¹² Per unit results of average-to-average comparisons for Models A and B were combined as follows: $[(-0.5 \times 18) + (1 \times 12)] / (18 + 12) = 0.10$. Per unit results of average-to-average comparisons for Models A and B can be combined either on the basis of model results or transaction results with the same outcome.

- b) **Does the European Communities agree with the US' proposition regarding the alleged mathematical equivalence? In other words, does the European Communities agree that absent zeroing the third methodology would yield the same mathematical result as the first (WA-WA) methodology?**

21. The EC's agreement that, absent zeroing, the third methodology under Article 2.4.2 yields the same mathematical result as the average-to-average method is made evident in Case T-294/02, Ritek Corp. v. Council of the European Union, 24 October 2006, paras. 94 and 109. Specifically, the Council of the European Union argued before the Court of First Instance that

the asymmetrical method, as compared with the first symmetrical method, makes sense only if the zeroing technique is applied. Without that mechanism, that method would mathematically lead to the same result as the first symmetrical method and it would be impossible to prevent the non-dumped exports from disguising the dumping of the dumped exports.¹³

The Court agreed, finding that

as the Council pointed out in its written proceedings, the zeroing technique has proved to be mathematically necessary in order to distinguish, in terms of its results, the asymmetrical method from the first symmetrical method. In the absence of that reduction, the asymmetrical method will always yield the same result as the first symmetrical method¹⁴

BOTH PARTIES

- c) **In connection with the issue of mathematical equivalence, the Panel notes the following finding by the Appellate Body in *US-Zeroing (Japan)*:**

The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions or time periods." The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical

¹³ Ritek Corp., para. 94 (Exhibit US-3).

¹⁴ Ritek Corp., para. 109 (Exhibit US-3).

comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern."

The Panel also notes the following findings by the Panel in *US -Stainless Steel (Mexico)* regarding the view that, while using the third methodology under Article 2.4.2 of the ADA, the investigating authorities would have to base their determinations on a subset of export transactions.

"This approach leaves certain questions unanswered. First, the Appellate Body has not pointed to any textual basis for the proposition that the export transactions to be used in the third methodology would necessarily be more limited than those in the first two methodologies. In light of the text of Article 2.4.2, it is not evident to us that dumping determinations in the third methodology could be limited to the subset of the export transactions that fall within the relevant price pattern. The second sentence of Article 2.4.2 simply mentions that the authorities may, under certain circumstances, compare prices of individual export transactions with the WA normal value. It does not mention in any way whether such comparison may, or has to, be limited to the subset of export transactions that fall within the relevant price pattern. Second, assuming that this proposition does in fact have a textual basis in the Agreement, the Appellate Body did not explain how the authorities would treat the remaining export transactions. If, for instance, what the Appellate Body meant is that the export transactions that do not fall within the relevant price pattern are to be excluded from dumping determinations, this would mean disregarding them. Given the Appellate Body's strongly expressed view that dumping has to be determined for the product under consideration as a whole and hence all export transactions pertaining to the product under consideration have to be taken into consideration by the authorities, we do not consider that this can be what the Appellate Body meant. Alternatively, if the Appellate Body meant that the authorities would use the WA-WA methodology with respect to the export transactions that do not fall within the relevant price pattern, and combine these results with the results obtained through the WA-T methodology for the prices that fall within the pattern, we note

that such an approach would also lead to the same mathematical result as the WA-WA methodology. We therefore do not consider that the Appellate Body's approach invalidates the mathematical equivalence problem."

Please comment.

22. A general prohibition on so-called zeroing, as advocated by the EC, may not be read into the AD Agreement because such an interpretation would be inconsistent with the customary rules of treaty interpretation. This is evident, *inter alia*, from the fact that if such a general prohibition were applied to the second sentence of Article 2.4.2, the resulting dumping margin would be mathematically equivalent to the result of an average-to-average comparison conducted pursuant to the first sentence of Article 2.4.2, rendering the second sentence of Article 2.4.2 *inutile*. Such an approach contradicts the Appellate Body's express admonition in *US – Gasoline* that "interpretation must give meaning and effect to all the terms of a treaty."¹⁵

23. In the first quoted passage, the Appellate Body appears to take the position that it is possible to either ignore or assume away the fact of mathematical equivalence by interpreting the targeted dumping provision to permit the investigating authority to discard a subset of export transactions from the analysis.

24. The Appellate Body, however, did not reconcile this position with the text of the AD Agreement or the argument to which it was addressed. To the knowledge of the United States, no Member has applied the so-called targeted dumping comparison methodology by excluding the non-targeted transactions from the calculation. In fact, as discussed above, the EC's representations in the Ritek case confirm that the EC, probably the most regular user of the targeted dumping methodology among WTO Members, recognizes that mathematical equivalence exists in the presence of a general prohibition on zeroing.

25. The second quoted passage from the panel in *US - Zeroing (Mexico)*, explains why the panel, having undertaken an objective assessment of the issue, found that the Appellate Body had not adequately resolved the problem of mathematical equivalency that would be caused by such a general prohibition on the "zeroing" methodology in all contexts. The United States agrees with the reasoning set forth by panel in *US - Zeroing (Mexico)*.

26. The language of Article 2.4.2 of the AD Agreement says nothing about selecting a subset of transactions when conducting a targeted dumping analysis. Instead, the provision refers to a "pattern of export prices which differs significantly among different purchasers, regions or time periods . . . [that] cannot be taken into account appropriately by the use of a weighted

¹⁵*US – Gasoline (AB)*, p. 23.

average-to-weighted average or transaction-to-transaction comparison.”¹⁶ The word “pattern” has the ordinary meaning: “An arrangement or order discernable in object, actions, ideas, situations, etc.”¹⁷ In this context, the “pattern” incorporates export prices that differ significantly. Nothing in the text of the provisions or in the meaning of the word “pattern” suggests that one part of the identified pattern may be treated in one way (i.e., used in average-to-transaction comparisons) while another part of the identified pattern may be treated differently (i.e., ignored or used in average-to-average comparisons).

27. Furthermore, the use of a sub-group of merchandise when using a targeted dumping comparison is inconsistent with the Appellate Body’s conclusion that “all” export transactions must be included when performing average-to-average or transaction-to-transaction comparisons. Moreover, this interpretation appears to render trivial the requirement in the text of Article 2.4.2 to provide an explanation “as to why such differences cannot be taken into account appropriately by the use of one of the two symmetrical comparison types. The Appellate Body would have an investigating authority account for the differences by merely disregarding a subset of transactions that are the basis for the differences, i.e., the part “outside the relevant pattern.” In that way, the requirement to provide an explanation, set forth in the second sentence of Article 2.4.2, appears to be reduced to a mere observation of the fact that the universe of transactions can be truncated when a pattern of differences has been found. Contrary to the implication of the text, the explanation need not have any basis in the symmetrical or asymmetrical nature of the available comparison types.

28. Alternatively, if the excerpt of the Appellate Body report were read to mean that the use of average-to-transaction comparisons with a subset of the export transactions is to be done in conjunction with the use of the average-to-average comparison for the remaining export transactions, then the Appellate Body’s conclusion is a *non sequitur*, because, as Table 2, below, illustrates, the combined results of such comparisons will be mathematically equivalent to the results obtained through the use of average-to-average comparisons.

29. This table, utilizing the same transactions set as in Table 1, demonstrates that the mathematical equivalence demonstrated in Table 1 is not avoided by using average-to-transaction and average-to-average comparisons in combination under the second sentence of Article 2.4.2. The result of such combination is identical to the results demonstrated in Table 1 using solely average-to-average or solely average-to-transaction comparisons.

¹⁶ AD Agreement, Art. 2.4.2, second sentence.

¹⁷ *New Shorter Oxford English Dictionary*, 1993 Ed., Vol. 2, p. 2126, def. 6d.

Table 2

Normal Value Transactions			Export Price Transactions				Comparison Results			
Units	Normal Value Prices	Weighted Average Normal Value	Customer/Region/Time Period	Units	Export Prices	Weighted Average Export Price of not X transactions	Average-to-Transaction and Average-to-Average used in Combination			
	per unit	per unit			per unit	per unit	per unit	total		
		(a)		(b)	(c)	(d)	(a-c) or (a-d)	(*b)		
Model A	5	\$ 11	X	3	\$ 10	\$14.55 ¹⁸	\$ 2.5 (a-c)	\$ 7.5		
	6	\$ 12		4	\$ 11		\$ 1.5 (a-c)	\$ 6		
	7	\$ 14		not X	5		\$ 14			
				not X	6		\$ 15			
				not X subtotal:	11				\$-2.05 (a-d) ¹⁹	\$ -22.5
	Model A			\$ 12.5	total:		18			\$ -0.5 ²⁰
Model B	5	\$ 11	X	3	\$ 10	\$14	\$3 (a-c)	\$ 9		
	6	\$ 12		4	\$ 11		\$2 (a-c)	\$ 8		
	7	\$ 13		not X	5		\$ 14			
	8	\$ 15		not X subtotal:	5				\$-1 (a-d)	\$ -5
	Model B			\$ 13	total:		12			\$ 1
Results Combining Models A and B							\$ 0.10	\$ 3		

¹⁸ Figure is rounded for presentation. Actual figure is: \$ 14.5454545454545.

¹⁹ Figure is rounded for presentation. Actual figure is: \$ -2.0454545455.

²⁰ By way of demonstration, this weighted average of average-to-transaction and average-to-average results is calculated as follows: $[(3 \times 2.5) + (4 \times 1.5) + (11 \times (-2.0454545455))] / (3 + 4 + 11) = -0.5$.

THE USE OF THE THIRD METHODOLOGY

Q11. The Panel notes the following statement in paragraph 189 of the EC's First Written Submission:

"Rather, USDOC used, without justification, an asymmetrical method of comparison between normal value and export price." (emphasis added)

Similarly, in paragraph 209 of its First Written Submission, the European Communities argues:

"The European Communities submits that by using the asymmetrical method of comparison of the second sentence of Article 2.4.2 and by using simple zeroing in the measure at issue, the United States breached Article 2.4.2 of the *Anti-Dumping Agreement*." (emphasis added)

- a) **Please explain how this argument should be interpreted by the Panel. Does this constitute a claim raised by the European Communities in this case? Does the European Communities argue that the USDOC's use of the third methodology in periodic reviews (irrespective of whether or not the USDOC uses simple zeroing in such reviews) violates Article 2.4.2? Please elaborate.**
- b) **If your answer is in the affirmative, please direct the Panel to where in the EC's panel request that claim has been raised.**

30. These first two subquestions are best addressed by the EC in the first instance. The United States will address this issue, as appropriate, in response to the EC's answers.

UNITED STATES

- c) **Please explain whether the USDOC used the third methodology set forth under Article 2.4.2 of the ADA in the duty assessment proceedings at issue. If so, please explain whether it complied with the conditions for the use of that methodology as set forth under the second sentence of Article 2.4.2. If your position is that the USDOC did not use the mentioned methodology, please explain in what ways the method used by the USDOC differed from the third methodology under Article 2.4.2.**

31. Commerce conducts assessment proceedings pursuant to Article 9.3 of the AD Agreement. The collection and assessment of antidumping duties under Article 9.3 is a separate and distinct

phase that necessarily occurs after an antidumping duty is imposed. Article 2.4.2, which addresses the comparison methodologies used to establish “the existence of margins of dumping during the investigation phase,” does not apply to an Article 9.3 assessment proceeding to determine the amount of antidumping duty to be assessed or refunded.

32. The application of Article 2.4.2 is limited to Article 5 investigations. The function of Article 9.3 assessment proceedings is distinct from that of investigations governed by Article 5. The Article 9.3 assessment proceedings follow the conclusion of the investigation phase and focus on the assessment or refund of duties with respect to particular export transactions, whereas Article 5 investigations focus on determining the existence, degree, and effect of any alleged dumping.

33. Article 9.3 imposes no obligations as to how comparisons must be made between normal value and export price. Members are free to conduct assessment proceedings on any time period – from import-specific to some longer, multi-month time period. Similarly, the range of comparison methodologies available to a Member may vary depending upon the type of antidumping system operated by the Member. In other words, Members operating prospective normal value systems may be more constrained in the types of comparisons that could be used, as a practical matter, and the AD Agreement provides flexibility for Members to retain their diverse duty assessment systems.

BOTH PARTIES

- d) **Do, in your view, the conditions set forth in the second sentence of Article 2.4.2 of the ADA, for the use of the third methodology, have to be met in duty assessment proceedings where such methodology is used? Please elaborate.**

34. As discussed in response to subquestion (c), the requirements of Article 2.4.2 apply only when determining “the existence of margins of dumping during the investigation phase.”

ZEROING IN SUNSET REVIEWS

UNITED STATES

Q12. The Panel notes the following statement in the United States' First Written Submission:

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

Does the United States argue that in order to make a *prima facie* case regarding its

claim concerning the alleged use of zeroing in sunset reviews, the European Communities has to demonstrate that the margins of dumping calculated through zeroing and then used in the sunset reviews at issue in this case would have fallen below *de minimis* without zeroing? Please elaborate.

35. The EC argues that the determinations in the challenged sunset reviews are inconsistent with the Antidumping Agreement because when making its determinations that the removal of the antidumping duty would likely lead to a continuation or recurrence of dumping, the United States relied on margins that were calculated in proceedings using model zeroing. The EC must demonstrate not simply that zeroing occurred in a sunset review but that zeroing was germane to the outcome of the sunset review. The magnitude of the margin of dumping is not a relevant consideration in sunset reviews. The question is whether dumping is likely to continue or recur, and whether injury is likely to continue or recur. As a result, it is insufficient for the EC simply to state that the assessment rates were higher than they would have been had Commerce provided offsets; the EC must, at a minimum, demonstrate that those margins would have been zero.²¹ Even then, as footnote 22 of the AD Agreement demonstrates, a zero margin is not necessarily grounds for termination of the order.

Q13. The Panel notes the evidence submitted by the European Communities, in Exhibits EC-69 through EC-79, regarding the margins used by the USDOC in the 11 sunset reviews at issue in this dispute. Does the United States object to the accuracy of the factual information contained in the mentioned exhibits? In other words, does the United States agree that the determinations of the USDOC contained in the mentioned exhibits demonstrate that the margins relied upon by the USDOC in the sunset reviews at issue were margins obtained through what the European Communities refers to as model zeroing or simple zeroing. If your answer is in the negative, please explain in detail which pieces of information presented in the mentioned exhibits do not support the EC's proposition.

Please provide your answers in connection with each one of the exhibits mentioned above.

36. The United States has reexamined the documents contained in Exhibits EC-69 through EC-79. As the United States explained in its answer to Question 7(b), the United States is unable to confirm the accuracy of any documents not generated by the United States during the course of the proceeding nor is it possible, in some cases, to determine whether the attached document was generated by the United States or produced by the EC for purposes of this dispute. To do so would require extensive comparison and analysis of a voluminous amount of computer-generated records. Moreover, the burden is on the EC to prove its case, including demonstrating the

²¹ The EC admits as much when it states that “at least in the case where the use of zeroing in the original proceeding had the effect of creating a more than *de minimis* amount of dumping, then the sunset measure will *by definition* be inconsistent with the *Anti-Dumping Agreement*.” EC First Written Submission, para. 258.

accuracy, source and relevance of its exhibits.

37. With respect to Exhibits EC-71 through EC 79, the EC has not included the program logs generated by Commerce, which would indicate, with certainty, whether “zeroing” was employed for purposes of calculating the margins that Commerce relied upon in its sunset determinations. The program logs that were provided in Exhibits EC-69 and EC 70 do not appear to have been generated by Commerce during the proceedings in which the margins were calculated. For example, in Appendix V of Exhibit EC-69, the EC provides a print out of a program log for TKAST purportedly from the original investigation. Upon careful inspection, however, the United States cannot determine with any degree of certainty whether it was created by the EC. Similar uncertainty exists with respect to Exhibit EC-70, Appendix IV. Appendices VI and VII of Exhibit EC-69 also appear to have been generated by the EC for purposes of this case.

AMBIGUITIES

EUROPEAN COMMUNITIES

Q14. Do the references to "model zeroing" in paragraph 241 and the third bullet point in paragraph 264 of your First Written Submission represent typographical errors?

UNITED STATES

Q15. Given that the United States is not contesting the EC's claim regarding the use of model zeroing in the investigations at issue in these proceedings, please explain whether the phrase "and investigations" was inserted inadvertently to the conclusion in paragraph 165 of your First Written Submission. If your answer is in the negative, please explain what meaning should be given to this phrase.

38. The phrase “and investigations” included in paragraph 165 of the United States’ First Written Submission was not inadvertent. The U.S. decision not to defend the EC’s claims with respect to the four investigations properly before the Panel is limited. Specifically, the United States recognized that in *US-Softwood Lumber Dumping*,²² the Appellate Body found that the use of “zeroing” with respect to the average-to-average comparison methodology in investigations was inconsistent with Article 2.4.2, by interpreting the terms “margins of dumping” and “all comparable export transactions” in an integrated manner. The United States acknowledged that this reasoning is equally applicable with respect to the claims for the four investigations that are properly before the Panel. However, the United States continues to contest any claims of WTO inconsistency that extend beyond Article 2.4.2 in this specific dispute, namely the EC’s claims as to Articles 2.1 and 2.4 of the AD Agreement and GATT 1994 Articles VI:1 and VI:2. However, a finding by the Panel based on the narrow issue of Article 2.4.2 is sufficient to resolve the matter.

²² *US-Softwood Lumber Dumping (AB)*, paras. 62-117.

39. The United States provides in the Addendum to these answers the answers of the United States to questions from the European Communities following the first substantive meeting of the Panel with the parties.

ADDENDUM

ANSWERS OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE EUROPEAN COMMUNITIES FOLLOWING THE FIRST SUBSTANTIVE MEETING WITH THE PARTIES

I. CONCERNED MEASURES

A. Original investigations

Q1. The EC refers to paragraph 155 of the US FWS. Would the US please confirm that, as the US stated during the hearing, the US is not contesting that the use of model zeroing in original investigations - including the 4 original investigation measures before the Panel in this case - is inconsistent with Article 2.4.2 ADA - based on the specific reasoning set out or referenced at paragraph 155 of the US FWS ?

1. The United States refers the EC to its answer to Question 15 of the Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel.

B. Sunset review investigations

Q2. The EC refers to section V.C of the US FWS. Apart from the request for preliminary rulings, would the US please confirm that, as the US stated during the hearing, the US defence with respect to the sunset review measures is contained in section V.C of the US FWS?

2. The U.S. response to date to the EC's challenges to certain sunset review measures is contained in Section V.C of the U.S. First Written Submission. The United States recalls that there will be additional filings in this proceeding – for example, it has not yet filed its rebuttal submission.

Q3. The EC is of the view that if a complaining WTO Member has demonstrated that a measure is WTO inconsistent it is entitled to a finding in that respect, and a recommendation that the defending Member bring the measure into conformity. The EC is of the view that the complaining Member does not have to demonstrate what the result of the implementation exercise might or might not be. That would require the Panel to engage in making *de novo* findings beyond its jurisdiction. Does the US agree ?

3. The United States refers the EC to its answer to Question 12 of the Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel.

II. PRECEDENT

Q4: The US FWS contains multiple references to prior panel and Appellate Body Reports. The EC understands the US position to be that, if the US agrees with such prior reports, they are legally relevant to the Panel's assessment; but that if the US disagrees with such prior reports they are legally irrelevant to the Panel's assessment. Is the EC understanding of the US position correct ?

4. No. We believe that the panels in *US – Zeroing (Japan)* and *US – Zeroing (Mexico)* have properly articulated the relevance of prior Appellate Body reports.

Q5. The US FWS refers repeatedly to past panels composed of "trade remedy experts". (1) Please explain why the US considers this characterisation to be legally relevant to the Panel's analysis. (2) Please state which panel reports and, in the case of dissenting opinions, which opinions the US refers to. (3) Is the US implying that the AB lacks "trade remedies expertise", and if so, please state which AB Members the US refers to. (4) Does the US consider that expertise in applying the customary rules of interpretation of public international law is relevant ?

5. The U.S. first written submission speaks for itself. However, the United States would like to note that in the DSU review, many Members have stated that they value the expertise of panelists in the subject matter relevant to a dispute. We hope that the EC shares this view. Moreover, the United States notes that panelists and the Appellate Body, regardless of their specific background or experience, are required under Article 3.2 of the DSU to apply the customary rules of interpretation of public international law. Panelists who are selected by the parties to a dispute or appointed by the Director-General are chosen based on their qualifications, which may include a background in customary rules of interpretation.

Q6. Would the US please confirm what it stated during the hearing, namely that it accepts that the 1960 "group of experts" did not have access to the 1994 ADA and were not engaged in interpreting it in accordance with customary rules of interpretation of public international law ?

6. Well before the recent debate about “zeroing” or “offsets,” a Group of Experts convened to consider numerous issues with respect to the application of Article VI of the GATT 1947.²³ The Group of Experts had before it the language contained Article VI of the GATT. As it does now, Article VI(1) referred to “dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned.”

²³ *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, L/141, adopted on 27 May 1960 9S/194, para. 7.

Article VI(2) further provides that “[i]n order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.” These provisions of the GATT remain unchanged from the language considered by the Group of Experts. As such, the United States finds that the Second Report of the Group of Experts provides a relevant reference point for interpreting the meaning of the word “product” as contained in Article VI of the GATT 1994. Moreover, to the extent interpreters seek appropriate consistency between the language of the AD Agreement and GATT Article VI, the Second Report also provides a relevant reference point regarding the use of the term “product” in the AD Agreement. In finding that there is no textual basis supporting an obligation to provide offsets outside the context of average-to-average comparisons in investigations, panels in both *US – Zeroing (Japan)* and *US – Softwood Lumber Dumping (Art. 21.5)* also recognized the relevance of the Group of Experts report to interpreting the concept of dumping.²⁴

RULES OF INTERPRETATION

Q7. Would the US please confirm what it stated during the hearing, namely that one of the tasks of the Panel is to clarify the existing provisions of the ADA in the light of the customary rules of interpretation of public international law, referenced in DSU Article 3(2); and that these are codified, at least in part, in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties?

7. The task of a panel is laid out in Article 11 of the DSU, which requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the covered agreements. Article 3.2 of the DSU indicates that, in carrying out its task, a panel applies “the customary rules of interpretation of public international law.” The United States considers that these customary rules of interpretation are reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.”

Q8. Does the US agree with the findings of the AB in *US-Hot Rolled Steel*, paragraphs 57 to 62, to the effect that a permissible interpretation is one which is found to be appropriate after application of the pertinent rules in the Vienna Convention ?

8. The United States agrees that a “permissible” interpretation, in the sense of Article 17.6(ii) of the AD Agreement, is one which is permissible after the application of the customary rules of interpretation of public international law, as reflected in the Vienna Convention.

III. CLAIMS

²⁴U.S. First Written Submission, paras. 86-88.

Q9. Under the current methodology the relatively high export transactions are excluded from the numerator but included in the denominator. In other words, the relatively low export transactions form the preponderant basis for the dumping margin calculation. If the relatively high export transactions were also excluded from the denominator (so that the relatively low export transactions would be the only basis for the dumping margin), does the US consider that this would render the measure WTO consistent (the EC considers that it would exacerbate the WTO inconsistency) ? At the hearing, the US declined to answer this question on the grounds that it is "hypothetical". However, the purpose of the question is to bring to the fore the point that the problem does not just relate to the downward adjustment of the relatively high export transactions, but also the selection of the relatively low export transactions as the preponderant or only basis for the calculation. In the view of the EC, insofar as the US is unable or unwilling to be responsive to this question, the Panel is entitled to draw the reasonable inference that the US is unable to refute the point being made by the EC.

9. As an initial matter, the United States disagrees with the premise on which the EC's question is based. It is erroneous for the EC to assert that "the relatively low export transactions form the preponderant basis for the dumping margin calculation" – the United States took into account all export transactions in determining the margins of dumping challenged by the EC. Beyond the erroneous basis for the question, the EC posits an entirely hypothetical calculation methodology that does not reflect a U.S. methodology challenged by the EC, its question is without relevance to the merits of this dispute, and the Panel should not take this issue into consideration.

Q10. The EC understands the US position to be that the term "investigation" in Article 2.4.2 is to be interpreted as referring to "an investigation to determine the existence, degree and effect of any alleged dumping" within the meaning of Article 5.1 ? Is that correct ?

10. It is the United States' position that the language contained in Article 2.4.2 of the AD Agreement, "the existence of margins of dumping during the investigation phase," relates exclusively to the determination of the *existence* of dumping during an investigation conducted pursuant to Article 5 of the AD Agreement.²⁵

Q11. Please would the US confirm that, as is stated during the hearing, it is of the view that the use of model zeroing would be lawful in a new shipper proceeding under Article 9.5 ADA?

11. The EC has not challenged any new shipper proceedings conducted under Article 9.5 of

²⁵U.S. First Written Submission, paras. 99-111.

the AD Agreement. Therefore, this question is not within the Panel's terms of reference in this dispute, and the Panel need not determine whether so-called "model zeroing" is permissible in a new shipper review pursuant to Article 9.5.

12. Article 9.5 provides an expedited process for authorities to review the entries of a new shipper producer or exporter once it has already been established, pursuant to an investigation conducted consistent with Article 5, that injurious dumping exists. The United States does not engage in what the EC terms "model zeroing" when conducting new shipper reviews. Nevertheless, the provisions of Article 2.4.2, which apply in the context of average-to-average comparisons ("model zeroing") in investigations under Article 5, do not apply to reviews conducted pursuant to Article 9.5 of the AD Agreement.

Q12. The EC considers that the subject of the phrase "the existence of margins of dumping during the investigation phase shall normally be established" is "the existence of margins of dumping during the investigation phase". Does the US agree? If not, what does the US consider to be the subject of the phrase ?

13. It is the EC, and not the United States, that has argued that the rules of grammar dictate one and only one interpretation of the phrase "the existence of margins of dumping during the investigation phase." As the proponent of the argument, the burden is on the EC to identify the particular grammatical rules it relies upon, the manner in which those rules apply to the phrase in question, and the relevance of that application to the customary rules of treaty interpretation.

14. The United States does not believe that the rules of grammar, or the application of any other interpretative rule, is inconsistent with its reading of this provision. The United States considers that, for reasons fully set forth in our first written submission, the phrase "during the investigation phase" refers to determinations as to the "existence, degree and effect of any alleged dumping" that authorities make under Article 5.1.²⁶ This interpretation is fully consistent with the customary rules of interpretation of public international law. We note that the panel in *U.S. – Zeroing (EC)* was not persuaded by the EC's grammatical arguments, finding, *inter alia*, that "it would be most natural in the context to read 'the investigation phase' in Article 2.4.2 as referring to the concept of investigation as used in Article 5."²⁷

Q13. The EC considers that the phrase "during the investigation phase" is a temporal modifier of the term "the existence of margins of dumping". Does the US agree ? If not, please explain the grammatical basis for the US view.

15. The United States refers the EC to its answer to Question 12, *supra*.

²⁶U.S. First Written Submission, paras. 99-111.

²⁷*US – Zeroing (EC) (Panel)*, paras. 7.197 and 7.154.

Q14. The EC understands the US position to be that, in assessment proceedings, when comparing an exporter's normal value with export price, based on data contemporaneous with the imports, the US is not bound by the disciplines in Article 2.4.2, or any other rules that regulate in detail which comparison methodology may be used. Is the EC's understanding correct?

16. The United States conducts assessment proceedings pursuant to Article 9.3.1 of the AD Agreement. The provisions of Article 2.4.2 apply when determining “the existence of margins of dumping during the investigation phase” and do not apply to Article 9.3 assessment proceedings. For further elaboration, the United States refers the EC to its answer to Question 11(c) of the Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel.