BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")

(AB-2006-2)

OTHER APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

February 1, 2006

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SERVICE LIST

OTHER PARTY TO THE DISPUTE

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THIRD PARTIES

H.E. Mr. Alberto Juan Dumont, Permanent Mission of Argentina
H.E. Mr. Clodoaldo Hugueney, Permanent Mission of Brazil
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H.E. Mr. Eirik Glenne, Permanent Mission of Norway
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US – Wool Shirts (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997

I. Introduction and Executive Summary

1. With respect to the issue of what the Panel referred to as "model zeroing" in antidumping investigations, the Panel concluded that there were two distinct breaches of U.S. WTO obligations. First, the Panel concluded that the application of model zeroing by the United States in fifteen specific antidumping investigations was inconsistent with Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").[1] Second, the Panel concluded that a so-called "zeroing methodology" exists that is, as such, inconsistent with Article 2.4.2.[2] In this other appeal, the United States challenges the second, "as such" conclusion.

2. Perhaps the most striking aspect of the Panel Report is the difference between the Panel's consideration of the "as such" claim regarding "zeroing methodology" and its treatment of the numerous other claims presented to it. With respect to those other claims, the Panel's analysis is comprehensive, methodical and carefully reasoned. By contrast, the Panel's handling of the "as such" claim regarding "zeroing methodology" is cursory, conclusory and lacking rigor.

3. However, the fact remains that the issues dealt with by the Panel under the rubric of "zeroing methodology" are fundamental and important. For that reason, the errors committed by the Panel in its consideration of those issues need to be corrected and the Panel's findings reversed.

4. In its consideration of the "as such" claim regarding "zeroing methodology," the Panel committed the following serious errors. First, the Panel declared that a "norm" is a "measure." In so doing, the Panel not only disregarded prior Appellate Body findings that "norms" are

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[1] Panel Report, paras. 7.32, 8.1(a).
[2] Panel Report, paras. 7.106, 8.1(c).

created by, or contained in, measures (and thus that "norms" are necessarily different from "measures"), but also ignored the fundamental principle embodied in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") that WTO dispute settlement deals with "measures taken" by a Member. The Panel set a new standard under which abstractions can be measures. The Panel's approach would start the WTO dispute settlement system down the path of legislating "norms" rather than resolving disputes concerning measures.

5. Second, by applying its incorrect standard under which a "norm" is a "measure," the Panel improperly found a measure without ever identifying any act or instrument that created or contained the norm called "zeroing methodology."

6. Third, the Panel failed to proceed properly in making its finding that the measure it had conjured up – the "norm" called "zeroing methodology" – was "as such" inconsistent with Article 2.4.2 of the *AD Agreement*. The Panel failed to apply the correct standard for determining whether a measure is "as such" inconsistent with a WTO obligation. Moreover, by relying entirely on past results, the Panel engaged in an analysis that the Appellate Body already has found to be inconsistent with the obligation in Article 11 of the DSU to make an objective assessment of the matter.

7. Finally, by applying its incorrect standard for identifying a measure to the evidence before it, the Panel effectively relieved the EC of its burden of proving that "zeroing methodology" was a measure that was "as such" inconsistent with Article 2.4.2.

II. The Panel Erred in Finding That "Zeroing Methodology" Constitutes a "Measure"

8. The fundamental error of the Panel was its finding that an abstraction called "zeroing methodology" constituted a measure that could be subject to an "as such" claim. To a large extent, the Panel's other errors flowed from this fundamental error.

9. This basic error on the part of the Panel consisted of two components. First, there was the Panel's adoption of an incorrect standard for identifying a measure, a standard under which the Panel equated a "norm" with a "measure." Second, there was the Panel's application of its incorrect standard, which resulted in the Panel concluding that "zeroing methodology" is a "norm" and, thus, a "measure," even though the Panel did not identify an act or instrument creating or containing this "norm." As explained in the following sections, the Panel essentially engaged in circular reasoning, concluding that because a Member had acted consistently in the past then there must be some separate measure that required those past consistent actions.

A. The Standard Used by the Panel to Identify the Purported Measure Was Erroneous as a Matter of Law

10. In concluding that "zeroing methodology" constituted a measure, the Panel used a standard that was erroneous as a matter of law. Essentially, the Panel articulated a standard pursuant to which a "norm" is a "measure" that can be challenged "as such." This standard is unsupported by the text of the DSU.

11. Although the DSU does not contain a definition of the term "measure," Article 3.3 of the DSU refers to "measures *taken* by another Member" in describing the role of WTO dispute

settlement (emphasis added).[3] As noted by the Appellate Body, "[t]his phrase identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'."[4] According to the Appellate Body, "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[5] Thus, a measure may exist where, at a minimum, a Member acts, or where it fails to act where it has an obligation to do so.

12. The Appellate Body also has recognized that measures can "consist[ ] not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance."[6] However, as is clear from the quoted passage, there is a distinction between an act or instrument and rules or norms. Acts or instruments that set forth or contain rules or norms could in at least some circumstances constitute "measures." A "rule" or a "norm" in the sense of a principle or standard is not itself a "measure."[7]

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[3] Similarly, Article 4.2 of the DSU refers to "consultation regarding . . . *measures* affecting the operation of any covered agreement *taken* ... ." (Emphasis added).

[4] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 81; *see also US – Gambling (AB)*, para. 121.

[5] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 81 (footnote omitted).

[6] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 82 (footnote omitted).

[7] Two definitions of "norm" are: "1 : an authoritative standard : MODEL; 2: a principle of right action binding upon the members of a group and serving to guide, control, or regulate proper and acceptable behavior." *Merrian-Webster's Collegiate Dictionary* (10th ed. 2001). However, another definition of "norm" is: "3b : a pattern or trait taken to be typical in the behavior of a social group; c : a widespread practice, procedure or custom." *Id.*

With respect to the word "rule," one definition is: "1a : a prescribed guide for conduct or

13. The Panel was aware of what the Appellate Body had said regarding the identification of a measure. It quoted the same passages from *US – Corrosion-Resistant Steel Sunset Review (AB)* as the United States has quoted above.[8] Indeed, the Panel applied the standard articulated by the Appellate Body in finding that the so-called "Standard Zeroing Procedures" – which the Panel identified as certain lines of computer code[9] – did not constitute a measure. According to the Panel:

> [W]e consider that to characterize the "Standard Zeroing Procedures" as an act or instrument that sets forth rules or norms intended to have general and prospective application is somewhat difficult to reconcile with the fact that the "Standard Zeroing Procedures" are only applicable in a particular anti-dumping proceeding as a result of their inclusion in the computer programme used in that particular proceeding. The need to incorporate these lines of computer code into each individual programme indicates that it is not the "Standard Zeroing Procedures" *per se* that set forth rules or norms of general and prospective application. For this reason, we also question whether these "Standard Zeroing Procedures" are "administrative procedures" within the ordinary meaning of that term as used in Article 18.4 of the *AD Agreement*. *The "Standard Zeroing Procedures" by themselves do not create anything and are simply a reflection of something else.*[10]

14. Thus, with respect to the "Standard Zeroing Procedures" the Panel correctly recognized that a measure has to do something and cannot be "simply a reflection of something else." Had the Panel applied this standard consistently, this appeal would not have been necessary.

15. Unfortunately, in its analysis of what the EC described as the "methodology of zeroing," the Panel applied a different standard. Notwithstanding prior statements by the Appellate Body that measures create or contain norms, as well as the Panel's own conclusion that the "Standard

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action." *Id*. However, another definition is: " 1c : an accepted procedure, custom, or habit." *Id*.

[8] Panel Report, para. 7.93.

[9] Panel Report, para. 7.91.

[10] Panel Report, para. 7.97 (emphasis added).

Zeroing Procedures" are not measures because they themselves do not create anything, the Panel declared that a "norm" is a "measure."[11]

16. The reasoning used by the Panel to reach this novel and radical conclusion does not withstand scrutiny. Referring to the Appellate Body's prior consideration of the Sunset Policy Bulletin ("SPB") of the U.S. Department of Commerce ("USDOC"), the Panel accurately notes that the Appellate Body has found the SPB to be a measure challengeable as such because it contains rules or norms of general and prospective application, even though the SPB is not legally binding under U.S. law.[12] So far so good. The United States does not dispute that an act or instrument of a Member that is non-binding may be a measure.

17. However, the Panel then makes the following remarkable statement: "If, as confirmed by the Appellate Body, a non-legally binding policy instrument such as the SPB is a measure that can be challenged as such, it must logically also be possible to challenge as a measure a norm that is not expressed in the particular form of an official written statement but the existence of which is made manifest on the basis of other evidence."[13] The first thing to note about this sentence is that in it, the Panel acknowledges that it is going beyond the path that prior Appellate Body reports (or prior panel reports for that matter) have trodden. The Panel recognized the need to justify, as a matter of logic, why it was making this leap. Unfortunately, its justification does not withstand scrutiny.

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[11] Panel Report, para. 7.99.
[12] Panel Report, para. 7.99.
[13] Panel Report, para. 7.99.

18. In the first place, the Panel never defined what it meant by "norm." As explained above, dictionaries offer more than one definition of "norm." In fact what appears to have been happening is that the Panel was confusing or conflating different definitions of "norm."[14] One definition is: "a pattern or trait taken to be typical." Under this definition, a norm is descriptive. Other definitions are: "an authoritative standard" or "a principle of right action binding upon the members of a group." Under these definitions, a norm is prescriptive. The Panel appears to be saying that if it is possible to describe what is "typical" based on evidence of a Member's actions, then logically it follows that this same evidence demonstrates the existence of a prescriptive "standard" or "principle" and this abstract "standard," "principle" or "norm" can then be found to be a "measure" for purposes of WTO dispute settlement regardless of the actual measures maintained by the Member.

19. There is nothing "logical" about the Panel's analysis. It is a *non sequitur* to say that because an instrument that sets forth or contains a norm can be a measure, the norm itself is a measure.[15] First, there is no necessary relationship between a measure and a norm. One measure of a Member could set forth multiple norms. At the same time, there are an incalculable number of "norms" that a panel could derive as an academic exercise from the various actions of Members, without those norms ever being contained in a measure. A <u>description</u> of what a Member has "typically" or consistently done is not the same thing as a separate measure that causes or <u>prescribes</u> that Member to act in that typical or consistent fashion. The Panel's

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[14] As indicated in the discussion below, this may also have contributed to the Panel's erroneous findings concerning the mandatory nature of the so-called "methodology."

[15] It is analogous to Antigua's claim in *US – Gambling* that the effect of measures is itself a measure, a claim which the Appellate Body rejected. *US – Gambling (AB)*, para. 123.

approach overlooks the fact that a Member may be acting in a consistent fashion simply because the Member is reacting consistently in the face of similar situations, not because there is some exogenous "measure" that is causing that consistent action.

20. To justify treating a norm as a measure, the Panel again invokes the Appellate Body, quoting the passage from *US – Corrosion-Resistant Steel Sunset Review (AB)* in which the Appellate Body explains how the objective of GATT and WTO disciplines, as well as the dispute settlement system, would be frustrated if "instruments setting out rules or norms" or "instruments embodying rules or norms" could not be challenged as such.[16] According to the Panel, this objective "can just as readily be frustrated if well-established norms that systematically and predictably lead to WTO-inconsistent actions cannot be challenged or if they can be challenged only if they are embodied in a particular type of instrument."[17]

21. The problem with this line of reasoning is that it is a policy argument of the Panel as to how the WTO dispute settlement system should function in the Panel's opinion. It is entirely results-oriented and divorced from the text of the DSU. As the Appellate Body has recognized, the DSU deals with "measures taken by another Member."[18] Under the Panel's analysis, however, there need be no act (or failure to act where action is required) by a Member at all. Instead, it is sufficient that the Panel is able to identify something that it calls a "rule" or "norm." The Panel justifies its approach on the grounds that it would promote objectives of security and predictability, but this is just another way of saying that, for purposes of treaty interpretation, the

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[16] Panel Report, para. 7.100, *quoting US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 82.

[17] Panel Report, para. 7.100.

[18] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 81.

interpreter's view of how to achieve an objective can be used to re-write or ignore the text of the agreement (in other words, the end justifies the means). The fact that the Panel may feel that it would be beneficial for panels to treat as measures all norms they might identify is no basis for ignoring the fundamental principle that the DSU deals with "measures taken" by a Member. Moreover, "security and predictability," as this phrase is used in the DSU, is not promoted when, as here, a panel engages in reasoning that is not based on the text of the DSU as agreed but is instead purely results-oriented.[19]

22. The Panel then goes further afield, stating as follows:

> While an agency probably can in most cases more easily depart from its own established norm than from a law or regulation, the argument that there cannot be WTO-inconsistency as such if an agency has discretion to make a change strikes

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[19] In this regard, Article 3.2 of the DSU, which is the provision that references "security and predictability," states that "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." How does the dispute settlement system do this? The next sentence of Article 3.2 explains that Members "recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Morever, Article 3.2 provides that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

In this context, it is clear that security and predictability of the kind described in Article 3.2 are achieved by *preserving* the rights and obligations of Members through application of known and predictable rules of interpretation to the text of the covered agreements. In other words, a Member can plan and act based on an agreed-upon framework for interpreting the rights and obligations in the covered agreements, secure in the knowledge that the dispute settlement system will apply those rights and obligations based on that framework, and will not add to or diminish those rights or obligations.

The notion of security and predictability is undermined, not advanced, by a departure from the bedrock requirement in WTO dispute settlement that the alleged measure at issue actually exist. However great the legal rigor that might be brought to an examination of the agreement provisions in question, the resulting findings, if made against a non-existent measure, would have at best questionable credibility, for they would reflect no factual rigor at all, treating speculation as fact.

> us as artificial, at the very least in the case of a norm that has been applied invariably for a considerable period of time. In such a case, WTO-inconsistent conduct may be as predictable as when WTO-inconsistent conduct is envisaged in a law or regulation. We also consider that to accord decisive weight to the nature of a particular instrument in which a norm manifests itself creates a risk of addressing symptoms rather than causes.[20]

23. Here, too, the Panel's reasoning is replete with errors. First, with respect to the Panel's observation regarding an agency's discretion, this factor goes to the question of whether a measure, once properly identified, is mandatory within the meaning of the mandatory/discretionary distinction. As the Appellate Body has explained, and as the Panel recognized in connection with its analysis of the "Standard Zeroing Procedures," the extent to which an agency is bound by a measure is irrelevant for purposes of determining whether a measure exists.[21]

24. Second, the Panel asserts that not allowing for "as such" claims against well-established WTO-inconsistent norms that are "the root of WTO-inconsistent behaviour" might entail a multiplicity of litigation.[22] However, this is a tautology. The Panel incorrectly assumes that the norm is the "root" of the behavior and, therefore, must be a measure. As discussed above, the Panel appears to consider that a description of what is "typical" equates to a prescription of a

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[20] Panel Report, para. 7.100.

[21] *See, e.g.*, Panel Report, para. 7.99. Indeed, the Panel committed the same error as did the panel in *US – Corrosion-Resistant Steel Sunset Review*, but in reverse. In that case, the Appellate Body found that the panel erred to the extent that it concluded, as a preliminary jurisdictional matter, that a non-mandatory measure could not be challenged as such. *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 88-89. Here, the Panel appears to have invoked the mandatory/discretionary distinction in an attempt to justify its jurisdictional finding that "norms" equal "measures." However, the mandatory/discretionary distinction either is or is not relevant to the determination of whether something is a measure, and the Appellate Body has explained that it is not relevant.

[22] Panel Report, para. 7.100.

required standard or principle. But that is circular – it is simply saying that if a Member has acted consistently, then that consistent action is the root of the consistent action. Any "root" of the behavior has to be the act or instrument, if any, setting forth or creating the norm. As the Panel observed in connection with the "Standard Zeroing Procedures," the norm is simply a reflection of something else.[23]

25. Third, the Panel refers to the case of a "norm that has been applied invariably for a considerable period of time."[24] The implication appears to be that the longer the period of time during which a norm has been applied, the more likely the norm is to be a measure.[25] Of course, the Panel's statement that the "norm" is "applied" is circular, because it assumes that there is something to be applied. In fact, what the Panel calls "application" is nothing more than

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[23] Indeed, what the Panel appears to call a "norm" is really nothing more than a description of what the USDOC has done in prior investigations.

In this regard, the Panel also seems to imply that there is something culpable in the fact that the USDOC had not given offsets for negative margins in investigations "for a considerable period of time." Panel Report, para. 7.100. However, until August 31, 2004 – the date on which the panel and Appellate Body reports in *US – Softwood Lumber Dumping* were adopted – there were no findings by the Dispute Settlement Body against "zeroing" by the USDOC, nor had there been any such findings under the Tokyo Round Anti-Dumping Code. Moreover, other Members, including the EC, likewise had not been providing offsets for a "considerable period of time." There is every indication that these other Members, like the United States, did not consider that they were breaching any GATT or WTO obligation. Finally, it is worth recalling that all 15 of the USDOC final determinations in investigations subject to EC claims in this dispute were completed before consultations in *US – Softwood Lumber Dumping* had even been requested.

[24] Panel Report, para. 7.100.

[25] The Panel's reference to a "norm that has been applied invariably for a considerable period of time" further demonstrates the Panel's confusion between a descriptive "norm" and a prescriptive one. There would be no need to refer to the invariable or consistent application of a "norm" or to refer to a length of time unless the Panel was looking at "norm" in the descriptive sense. However, in that case, conduct would not be "predictable" except in the sense that one can "predict" the future from an extrapolation of the past. This does not say anything about the existence of a separate measure over and above the individual acts.

consistent results. However, the fact that a Member has acted consistently over a period of time has nothing to do with whether there is some separate binding or non-binding act or instrument – a measure – that is causing, or contributing to, the consistent behavior. Absent some separate act or instrument, the only thing proven by consistent results is the fact of consistent results. In this regard, it is important to recognize that there are very good reasons why governments act, and should act, in a consistent manner when confronting similar facts. Some of these, for example, are reflected in GATT 1994 Article X:3(a) with respect to measures of general application, namely, uniformity, impartiality and reasonableness.[26] Presumably the Panel was not implying that Members should act arbitrarily or capriciously.

26. Fourth, the error in the Panel's reasoning is fully revealed when it says that consistent "WTO-inconsistent conduct may be as predictable as when WTO-inconsistent conduct is envisaged in a law or regulation."[27] However, the predictability of behavior is not the test for identifying a measure, and the Panel fails to cite anything in the text of the WTO Agreement or

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[26] To give another example, it has long been recognized in other fields of public international law that States may act consistently over a period of time, and that such consistent action can be described as "custom" or "usage." However, the question whether such a custom is legally required (as opposed to repeated for other reasons) is commonly understood to be a separate question from whether such a custom exists in the first place. In this context, publicists typically acknowledge the existence of an additional, independent requirement of *opinio juris*. For example, Ian Brownlie notes that "[t]he sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough, and the practice of states recognizes a distinction between obligation and usage." Ian Brownlie, *Principles of Public International Law*, 6th edition, Oxford Univ. Press, 2003, p. 8.

Of course, this dispute does not involve the question of whether a legally binding custom exists at customary international law, but rather a question of whether a measure exists under the municipal law of the United States. However, the point is simply that, contrary to the Panel's assumptions, there is nothing unusual about the idea that WTO Members behave consistently over a period of time without a legal obligation compelling that behavior.

[27] Panel Report, para. 7.100.

in prior Appellate Body reports for the proposition that it is. Moreover, as discussed further below, the Panel does not indicate, beyond the fact of past results and "the reflection of something else" in lines of computer code already found not to be a measure, the basis for its conclusion that this "behavior" is predictable not only with respect to these past results, but also on a forward-going basis. The Appellate Body's past discussions of measures that can be challenged as such emphasized that these types of measures set forth rules or norms "of prospective application." The Panel is doing nothing more than assuming from past results that these results will continue, and are "predictable." Again, the Panel may have been confusing the concept of a description of what is "typical" with a prescription of a required standard or principle.

27. Finally, the Panel makes what is perhaps its most remarkable and alarming error when it states as follows: "We also consider that to accord decisive weight to the nature of a particular instrument in which a norm manifests itself creates a risk of addressing symptoms rather than causes."[28] The Panel's assertion that the issue before it involved the nature of a particular instrument misses the mark, because the issue was whether a measure could be found to exist in the *absence* of an act or instrument. The standard applied by the Panel obviates the need for any sort of act or instrument at all, binding or non-binding.

28. The Panel's pronouncement is breathtaking in its scope. To appreciate why this is so, let us step away from the trade remedies context and consider how the Panel's standard would work in a different context. Suppose, for example, that over the years a Member has consistently

[28] Panel Report, para. 7.100.

provided subsidies in the form of non-commercial financing to a particular company each time that the company prepares to develop and sell a new product. Each time the Member provides the subsidies, they are export contingent, and, thus, prohibited. However, there is no law, regulation, program or other instrument, either of a binding or non-binding nature, that calls for the Member to provide these subsidies. It is simply something that the Member consistently has done.

29. According to the Panel, in this situation, there would be a "norm," which for ease of discussion we shall refer to as "export subsidization methodology." This "export subsidization methodology" would be a challengeable measure separate and apart from the individual instances of subsidization. Under the logic of the Panel, this "export subsidization methodology" represents the proclivity of the Member to provide prohibited subsidies – as demonstrated by past acts – and would be the "root of the WTO-inconsistent behaviour" that makes future WTO-inconsistent action "predictable." According to the Panel, the Member's proclivity would be the cause, and the individual acts of subsidization would be merely symptoms.

30. The United States submits that Members have not agreed that proclivities to act in a certain way constitute "measures taken" within the meaning of the DSU. For one thing, if a mere proclivity to act in a certain way were found to be a WTO-inconsistent measure, how would the offending Member bring this "measure" into conformity within the meaning of Article 19.1 of the DSU? How does one demonstrate that one has changed a proclivity or state of mind? Would the Member have to guarantee that it would never provide an export subsidy in the future,

notwithstanding that the Appellate Body has previously recognized that it is unreasonable to require strict guarantees or absolute assurances as to future actions?[29] In other words, would Members be required to start adopting measures in order to prevent any possible exercise of discretion in a WTO-inconsistent manner? This would go far beyond the text of the WTO agreements. And when would a "norm" develop? On the second application? The twenty-second? How "consistent" would the Member have to be in order for its behavior to evolve into a "norm"?

31. Moreover, under the Panel's standard, once panels are freed from the requirement to make findings only with respect to actual "measures taken," they would be free to make findings in the abstract and on theoretical principles. In other words, they would be licensed to issue advisory opinions regarding "norms" derived by the panel from a Member's actions or inactions, separate and apart from the particular measures at issue. A panel would be free to opine that a Member acting the same way twice evidences a norm to be derived from those actions, and then pronounce as to the WTO consistency or inconsistency of that norm, separate and apart from the actual actions at issue. The Member would then need to adopt a measure to prohibit for all time acting in accordance with the imputed norm. Nothing in the DSU confers such authority on panels.[30] Indeed, under the Panel's approach, panels would be at risk of legislating the rules or

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[29] *Canada – Aircraft (Article 21.5) (AB)*, para. 38.

[30] By contrast, in other WTO agreements, when the drafters sought to confer authority on institutions to provide advisory opinions, they made this intention clear. *See Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*") (Articles 24.3 and 24.4 concerning the Permanent Group of Experts); *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*, Annex II (paragraphs 2(a) concerning the Technical Committee on Customs Valuation); and *Agreement on Rules of Origin*, Annex I (paragraph 1(a) concerning the Technical Committee on Rules of Origin).

norms that would be permissible for Members rather than resolving the particular disputes before them.

32. In summary, for the reasons set forth above, the Appellate Body should find that the standard applied by the Panel in identifying "zeroing methodology" as a measure was erroneous as a matter of law.[31]

B. Having Applied the Wrong Standard for Identifying a Measure, The Panel's Finding That "Zeroing Methodology" Constituted a "Measure" Is Erroneous, as is its Subsequent Finding that "Zeroing Methodology" Breached Article 2.4.2 of the *AD Agreement*

33. Because the Panel applied a legally erroneous standard for identifying a measure, its finding that "zeroing methodology" constitutes a measure was erroneous, and should be reversed. The Panel's conclusion that "zeroing methodology" is a norm was insufficient, as a matter of law, to conclude that "zeroing methodology" constitutes a measure, because the Panel did not identify any act or instrument of the United States setting forth or creating that rule or norm. Because the Panel's finding that "zeroing methodology" is a measure was erroneous, its subsequent finding that "zeroing methodology," as such, breached Article 2.4.2 of the *AD Agreement* was also erroneous, and should also be reversed.

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[31] In this regard, the Panel observed that "the idea that methodology can be challenged as such is not new." Here, the Panel refers to *US – Countervailing Measures (AB)* and the Appellate Body's findings regarding the "same person method." However, there was no consideration in that dispute of whether the "method" at issue was a measure for dispute settlement purposes. Neither the parties, the panel, nor the Appellate Body analyzed whether such a method could be a measure. Moreover, there is no rule in the DSU under which "Members are limited in presenting their arguments in a particular dispute by the arguments made, or not made, in previous disputes, even if those previous disputes involved a related or similar topic." *See US – OCTG from Mexico*, para. 7.176.

34. In its analysis supporting its conclusion that "zeroing methodology" is a norm, the Panel further illustrated its neglect of the necessary first step of its analysis – the identification of an act or instrument that might constitute a measure. As discussed above, under the standard described by the Appellate Body, in identifying a measure, a panel would look for "acts setting forth rules or norms that are intended to have general and prospective application" or "instruments of a Member containing rules or norms."[32] However, there was no evidence that such acts or instruments exist.

35. In paragraph 7.103 of the Panel Report, the Panel describes the evidence on which it relied to find that its so-called "zeroing methodology" constitutes a measure. The Panel first cited the fact that the "Standard Zeroing Procedures" – certain lines of computer code – "are always included in the computer programmes used by the USDOC in antidumping proceedings" and that these lines "are a constant feature of the computer programmes used by USDOC to perform dumping margin calculations."[33] There are at least two problems with the Panel's consideration of this evidence.

36. First, the Panel's use of the present tense – "are always included" and "are a constant feature" – is inaccurate. The evidence before the Panel was historical, and related to what the USDOC has done in the past, not what it does.[34] Later, the Panel correctly switches to the past tense when it discusses how zeroing "has been invariably performed by the USDOC" and how

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

[33] Panel Report, para. 7.103.

[34] Even the claims of Ms. Owenby – who prepared a declaration that the EC submitted – as to what the USDOC computer program "does" were based on her examination of programs used in the past. Exhibit EC-46, para. 10.

the United States could not identify an instance where the "USDOC had given a credit for non-dumped sales."[35]

37. The second problem with the Panel's reliance on the past use of certain lines of computer code is that this fact does not help to identify the act or instrument, if any, that is causing the use of these lines of code. The Panel previously recognized (correctly) that these lines of code "do not create anything."[36] The Panel went on to say – indeed, to assume – that these lines of code "are simply a reflection of something else."[37] However, the use of these lines of code sheds no light on the identity of the act or instrument, if any, that might constitute that "something else." The evidence considered by the Panel did not suggest anything other than that the decision-makers in past cases simply considered zeroing to be an appropriate response to the facts.

38. The only other piece of evidence cited by the Panel is the fact that the USDOC has engaged in zeroing in the past, and that the United States was unable to identify an instance where the USDOC had not zeroed.[38] Again, however, evidence that a Member has acted

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[35] Panel Report, para. 7.103.

[36] Panel Report, para. 7.97.

[37] Panel Report, para. 7.97.

[38] Panel Report, para. 7.103. In this regard, the Panel asserts that "[t]he United States has not contested in this proceeding that USDOC's zeroing methodology reflects a deliberate policy." However, the question of whether the USDOC's use of zeroing in the past was a "deliberate policy" never arose during the panel proceedings, and, unfortunately, the Panel does not specify what it was in the record that the United States was supposed to contest. Instead, this appears to be an instance of the Panel improperly shifting the burden of proof to the United States, an issue which is addressed in the following section of this submission.

Moreover, it is unclear what the Panel even means by "deliberate policy." If "policy" is used simply as a description of what has been done in the past, then it is nothing more than that – a description of past acts. Used in this sense, "policy" does not constitute an act or instrument independent of the individual past acts that could constitute a measure for dispute settlement purposes.

consistently in the past does not demonstrate that there is any measure that has caused the prior actions to be consistent.[39]

39. Thus, the evidence relied upon by the Panel to identify a measure causing WTO-inconsistent behavior consisted entirely of the Panel's finding that acts that were later judged to be WTO-inconsistent had occurred consistently in the past. However, to conclude, as did the Panel, that the fact of past behavior means that there must have been an act or instrument causing the behavior would be tautological. In any event, the Panel did not consider it necessary to identify an act or instrument of the United States in order to find that there was a measure, and, for the reasons described above, its finding of a measure was therefore erroneous.

40. Finally, the United States notes that the Panel's reliance on *Japan – Film* is inapt. In *Japan – Film*, the United States challenged certain laws and regulations, as well as "less formal or less concrete forms of governmental *action*."[40] The question before the panel was whether informal "action," such as "administrative guidance" (*gyō**sei shid**ō*), could constitute a measure. The panel concluded that it could. However, "administrative guidance," even though informal, is still an "act," and, thus, satisfies the minimum requirement for a "measure."[41] The panel was not presented with the question of whether something other than an act or an instrument could

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[39] For the same reason, the Panel's reference to the pre-WTO practice of the United States and other signatories to the Tokyo Round Anti-Dumping Code is irrelevant to the issue of identifying the act or instrument that may be causing the use of zeroing today. *See* Panel Report, para. 7.103, footnote 200.

[40] *Japan – Film*, para. 10.42 (emphasis added).

[41] As noted by the panel in *Japan – Semi-Conductors*, para. 107, "administrative guidance" was "a traditional *tool* of Japanese government policy" (emphasis added).

constitute a measure. Therefore, *Japan – Film* provides no support for the Panel's conclusion that "zeroing methodology" is a measure.

41. In summary, the Panel neither attempted to identify an act or instrument of the United States that might constitute a measure subject to an "as such" challenge, nor did its analysis reveal any such measure. The Panel's finding that "zeroing methodology" nevertheless constitutes a measure was erroneous, and should be reversed, as should its subsequent finding that this "measure" breached Article 2.4.2 of the *AD Agreement.*

III. In Finding "Zeroing Methodology" to Be "As Such" Inconsistent, the Panel Failed to Apply the Correct Standard and Failed to Make an Objective Assessment of the Matter Before It, as Required by Article 11 of the DSU

42. As demonstrated above, the Panel's finding that "zeroing methodology" constitutes a "measure" was in error. For that reason alone, the Panel's conclusion that "zeroing methodology" was "as such" inconsistent with Article 2.4.2 of the *AD Agreement* should be reversed. However, there are additional reasons for reversing the Panel's conclusion. Assuming *arguendo* that "zeroing methodology" could constitute a "measure," the Panel still failed to apply the correct standard in determining that "zeroing methodology" is "as such" inconsistent. In addition, the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU. The Panel dispatched its analysis in a mere two paragraphs, never clearly setting forth the standard it was applying or the evidence that supported its conclusion.

43. In order to conclude that a measure, as such, is inconsistent with a WTO obligation, that measure must mandate a breach of that obligation. The very notion of an "as such" finding is premised on the notion that the mere existence of the measure, as such, breaches a Member's

obligations, apart from any breach committed when the measure is applied in specific instances.[42]

44. The standard for determining whether a measure as such breaches a WTO obligation is that the measure either mandates WTO-inconsistent action or precludes WTO-consistent action. This standard has frequently been applied in GATT 1947 and WTO dispute settlement proceedings.[43] A corollary of the standard is that where a measure provides authorities with discretion not to breach an obligation, that measure is not, as such, inconsistent with the obligation. The distinction between these diverse situations is commonly referred to as the "mandatory/discretionary distinction." As the Appellate Body has explained, "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."[44]

45. In a footnote, the Panel dismisses the relevance of the mandatory/discretionary distinction when examining whether a "norm" breaches a WTO obligation as such, stating that

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[42] *See, e.g., US – German Steel (AB)*, para. 156 ("We note, first, that in dispute settlement proceedings, Members may challenge the consistency with the covered agreements of another Member's laws, as such, as distinguished from any specific applications of those laws."). A finding against a measure is typically described as an "as-such" finding when the measure is not specifically proscribed by a WTO obligation, but the measure nonetheless requires a Member to breach that obligation when the measure is applied. For example, a WTO provision may prohibit a Member from doing X. A Member's measure that does not itself do "X" may nevertheless be found "as such" inconsistent with the WTO provision if it requires the Member's authorities to do X when the measure is applied.

[43] *E.g., US – Section 211 (AB)*; *Korea – Commercial Vessels*; *Canada – Aircraft (Panel)*; *US – 1916 Act (AB)*; *US – Section 301*; *US – Superfund*; *EEC – Parts and Components*; *Thailand – Cigarettes*; *US – Tobacco*; *US – Non-Rubber Footwear*; *US – Malt Beverages*; and *EC – Audiocassettes*.

[44] *US – Section 211 (AB)*, para. 259.

the distinction is applicable only in the context of legislation providing for discretion that has not yet been used.[45] There is some irony in this assertion, because the very notion of "as such" findings, as distinct from "as applied" findings, arose in the context of the mandatory/discretionary distinction. In any event, past applications of the mandatory/discretionary distinction contradict the Panel's conclusion. While the two disputes cited by the Panel indeed involved legislation that had not yet been applied, several other disputes involving the mandatory/discretionary distinction addressed measures that had been applied.[46] In other disputes, panels described the distinction in terms that made clear that a discretionary measure itself would not breach an obligation even if the measure were applied.[47]

46. These cases reinforce the fact that, regardless of whether a measure has been applied, the mandatory/discretionary distinction is applicable.[48] In every case, "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."[49] This

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[45] Panel Report, footnote 201.

[46] *E.g.*, *Korea – Commercial Vessels*; and *Canada – Aircraft II*.

[47] *See Canada – Aircraft (Panel)*, para. 9.124, *quoting US – Tobacco*, para. 118 ("legislation which merely gave the discretion to the executive authority . . . to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge").

[48] Further, to the extent the Panel is suggesting that the mandatory/discretionary distinction is only applicable to legislation, this too is contradicted by past panel reports. For example, in *US – DRAMS (AD)*, the panel found that one U.S. regulation constituted a mandatory requirement in breach of the *AD Agreement*, but that another was not in breach because of WTO-consistent alternatives that were available to U.S. authorities. *US – DRAMS (AD)*, paras. 6.51, 6.53 and footnote 496. Likewise, in *US – Softwood Lumber CVD Prelim*, the panel rejected a Canadian claim against U.S. regulations because the regulations did not preclude WTO-inconsistent action. *US – Softwood Lumber CVD Prelim*, paras. 7.135-7.159.

[49] *US – Section 211 (AB)*, para. 259.

will be true regardless of whether a Member has in the past exercised discretion provided in a measure in a WTO-inconsistent manner, because it may not be assumed that, *in the future,* the Member will act in bad faith in breach of its obligations. Indeed, precisely this scenario occurred in *Korea – Commercial Vessels,* in which the panel found that specific transactions made pursuant to Korea's KEXIM and PSL programs constituted prohibited export subsidies in breach of Articles 3.1(a) and 3.2 of the *SCM Agreement*, while at the same time rejecting the EC's argument that these programs, and the legal regime within which they operated, "as such" breached the *SCM Agreement*.[50] In undertaking its "as such" analysis, the panel explicitly applied the mandatory/discretionary distinction.[51] Likewise, in both *Canada – Aircraft II* and *EEC – Parts and Components*, panels analyzed measures under the mandatory/discretionary distinction even while finding that the measures had been applied so as to breach their obligations.[52] Thus, the mandatory/discretionary distinction does not call on panels to predict future behavior based on their judgment as to what a Member may, or is likely, to do. As one panel has noted: "The WTO dispute settlement system allows a Member to challenge a law as such or its application in a particular case, but not its possible future application."[53] Rather,

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[50] *Korea – Commercial Vessels*, paras. 7.111, 7.121, 7.129, 7.223, 7.330, and 8.696.

[51] *Korea – Commercial Vessels*, para. 7.67.

[52] In *Canada – Aircraft II*, the panel found that the EDC Canada Account program was not "as such" inconsistent with Article 3.1(a) of the *SCM Agreement*, even though it found that individual transactions under the Canada Account were inconsistent with Article 3.1(a). Similarly, in *EEC – Parts and Components,* the panel found that the EEC's application of its anti-circumvention provision was inconsistent with Article III:2 of GATT 1947. However, with respect to the anti-circumvention provision itself, the panel found that the provision authorized, but did not require, GATT-inconsistent action. *EEC – Parts and Components,* para. 5.26.

[53] *US – Softwood Lumber CVD Prelim*, para. 7.157.

under the distinction, what is important is whether the measure in question deprives the Member of the discretion to avoid a breach.

47. To the extent the Panel failed to apply the mandatory/discretionary distinction in analyzing and finding a breach of Article 2.4.2 of the *AD Agreement*, the Panel erred, and this finding should therefore be reversed. However, despite its explicit dismissal of the relevance of the mandatory/discretionary distinction, it is not altogether clear that the Panel failed to apply it. Prior to reaching its ultimate finding on Article 2.4.2, the Panel concluded, "in light of the considerations in the preceding paragraphs, we find that USDOC maintains a norm that will *necessarily* produce WTO-inconsistent actions."[54] The reference to "necessarily" may indicate that in fact the Panel was considering the mandatory vs. discretionary nature of the "norm."

48. This raises the other significant deficiency in the Panel's analysis: the factual underpinnings for the Panel's assertion that "zeroing methodology" in fact *will* "necessarily produce WTO-inconsistent actions." In this regard, the Panel's analysis is scant, consisting of the following paragraphs:

> We thus consider that the evidence before us indicates that the zeroing methodology manifested in the "Standard Zeroing Procedures" represents a well-established and well-defined norm followed by the USDOC and that it is possible based on this evidence to identify with precision the specific content of that norm and the future conduct that it will entail. In our view, the situation is the same as in the case of the Sunset Policy Bulletin, except that the zeroing methodology is not expressed in writing.[55]
>
> We recall our finding that the use of model zeroing in the anti-dumping investigations at issue in this dispute is inconsistent with Article 2.4.2 of the *AD Agreement*. Therefore, in light of the considerations in the preceding paragraphs,

[54] Panel Report, para. 7.105 (emphasis added).
[55] Panel Report, para. 7.104.

> we find that USDOC maintains a norm which, as such, is inconsistent with Article 2.4.2 of the *AD Agreement*.[56]

Then, to wrap things up, the Panel concludes that "the United States' zeroing methodology, as it relates to original investigations, is a norm which, as such, is inconsistent with Article 2.4.2 of the *AD Agreement*."[57] That is the sum total of the Panel's analysis (both legal and factual).

49. One obvious flaw in this analysis is the Panel's assertion that "the situation is the same as in the case of the [SPB] . . . ." The Panel seemed to be suggesting that "zeroing methodology" was WTO-inconsistent for the same reasons that the SPB has been found to be WTO-inconsistent.[58] However, the Appellate Body has *never* found the SPB to be "as such" inconsistent with a WTO obligation.[59] Thus, if the Panel's reasoning was that the "zeroing methodology" is WTO-inconsistent because it is like the SPB, and the SPB has been found to be WTO-inconsistent, the Panel relied on a factually incorrect premise.

50. On the other hand, if the Panel was attempting to say that it had applied the standard articulated by the Appellate Body in the SPB cases, the Panel was simply wrong. The Appellate Body has twice said that in order to determine whether a measure is "as such" inconsistent, reliance solely on statistics or aggregate results is not enough.[60] It is not enough to say that

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[56] Panel Report, para. 7.105.

[57] Panel Report, para. 7.106.

[58] The question of the WTO-consistency of the SPB was not within the Panel's terms of reference, nor was there any evidence in the Panel's record that would have enabled the Panel to make its own independent assessment of this question. Therefore, the Panel presumably was referring to Appellate Body findings concerning the SPB.

[59] *US – Corrosion-Resistant Steel Sunset Review (AB)*; *US – OCTG from Argentina (AB)*; *US – OCTG from Mexico (AB)*.

[60] *US – OCTG from Argentina (AB)*, para. 215; *US – OCTG from Mexico (AB)*, para. 202.

results are "predictable." Instead, it has to be established that the measure causes the results. As the Appellate Body explained in *US – OCTG from Mexico (AB)* in the context of the SPB, it has to be "demonstrate[d] that the SPB *instructs* the USDOC to treat dumping margins and import volumes as conclusive" and that the USDOC "made a final determination . . . *due to* the SPB."[61] The Panel engaged in no comparable analysis with respect to the "zeroing methodology" because its entire analysis consisted of a tautology: the Panel observed consistent behavior by the USDOC and simply assumed that this behavior was being caused by something else. As discussed above, the Panel appears to be conflating the two different senses in which "norm" may be used – descriptive or prescriptive. The Panel appears to be saying that if a norm in the sense of what is "typical" can be identified, then either it necessarily follows that this "norm" (descriptive) will be followed in the future because it is "typical" (and any other action would not be the "norm") or else it necessarily follows that there is a required standard or principle (a "norm" in the prescriptive sense) that the Member will lack discretion not to apply. Each of these is in fact a *non sequitur*; but more importantly, neither of these is the same as a finding that there is some measure that necessitates the United States to act in the same manner in the future.

51. Indeed, the lack of rigor in the Panel's analysis of the "as such" issue is striking and disturbing,[62] especially in light of the fact that the Panel appeared to recognize that "'as such' challenges are 'serious challenges' ... ."[63] If the Panel is right, it would be better for complaining

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[61] *US – OCTG from Mexico (AB)*, para. 206.

[62] *See US – OCTG from Argentina (AB)*, para. 215 (conclusion of "as such" inconsistency "would need to be supported by a rigorous analysis of the evidence regarding the manner in which Section II.A.3 of the SPB is applied by the USDOC").

[63] Panel Report, para. 7.102.

parties seeking an "as such" finding to avoid the burden of challenging legislation, regulations or other actual measures at all, and instead simply assert the existence of a "norm." Under the Panel's analysis, past results would lead to the finding of a "norm," the norm would be found to be a measure, and the measure would be found to be "as such" inconsistent because the same past results could be assumed "necessarily" to produce WTO-inconsistent results in the future. However, as another panel concluded when faced with a similar situation involving past results, "[i]t would be particularly anomalous to rule that a non-mandatory 'practice' is inconsistent with relevant WTO obligations when a non-mandatory statute allowing the practice would not be found inconsistent."[64]

52. At bottom, the Panel's analysis with respect to the "zeroing methodology" relies on nothing more than the fact that the USDOC has engaged in zeroing in the past using computers. However, the Appellate Body has found that an "as such" analysis that relies solely on past results does not constitute an "objective assessment of the matter" within the meaning of Article 11 of the DSU.[65] The Panel cited absolutely no reason to believe that past determinations by the USDOC involving zeroing support the conclusion that the USDOC, in future determinations, will "necessarily" take WTO-inconsistent actions. The Panel's assertion that "zeroing methodology" will necessarily produce WTO-inconsistent results was just that – an assertion. As the Appellate Body stated in *US – Wool Shirts (AB)*, "we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the

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[64] *US – India Steel Plate*, para. 7.20.

[65] *US – OCTG from Argentina (AB)*, para. 215; *US – OCTG from Mexico (AB)*, para. 210.

mere assertion of a claim could amount to proof."[66] While the Appellate Body made this statement with respect to the burden on a party to establish a *prima facie* case, it cannot be any less true in the case of a panel, required under DSU Article 11 to "make an objective assessment of the matter." The Panel failed to make such an assessment, and for this reason, too, the Appellate Body should reverse the Panel's finding of an "as such" inconsistency.

IV. The Panel Relieved the EC of Its Burden of Proving That a Measure Existed and That the "Measure" "As Such" Breached Article 2.4.2 of the *AD Agreement*

53. An additional consequence of the Panel's application of an incorrect standard and its exclusive reliance on past behavior was that it improperly relieved the EC of its burden of proving that a measure existed and that the alleged measure was "as such" inconsistent with Article 2.4.2 of the *AD Agreement*.

54. After finding that the so-called "Standard Zeroing Procedures" did not constitute a measure, the Panel noted that the EC "has also challenged what it describes as 'the United States practice or *methodology* of zeroing'."[67] The Panel then stated that it would "proceed to consider whether there exists what the European Communities terms methodology and whether this methodology can be found to be WTO-consistent."[68]

55. However, nowhere in the Panel's analysis does it explain what the EC meant by "methodology," nor does the Panel identify where the EC explained how "methodology" could constitute an act or instrument and properly be considered as a measure. In the view of the

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[66] *US – Wool Shirts (AB)*, page 14.
[67] Panel Report, para. 7.98 (emphasis in original).
[68] Panel Report, para. 7.98.

United States, the Panel could not do this, because the EC never did explain how "methodology" properly could be considered as a measure.

56. During the panel proceedings, there was considerable confusion as to the precise identity of the various measures alleged by the EC.[69] In particular, because the EC repeatedly referred to the fact that it was challenging "practice or methodology," it was not clear whether the EC considered "practice" to be distinct from "methodology" or even what the EC meant by "methodology." Thus, the Panel asked the EC several questions aimed at clarifying the situation.

57. Question 51 posed the following:

> EC: First Submission of the EC, paragraphs 103, 125, 129, 212, 214 and 226: could the EC clarify precisely how "Standard Zeroing Procedures" relates to "the US methodology or practice of zeroing"? Is the EC challenging a "practice" or "methodology" as a measure distinct from the Standard zeroing procedures? If so, what is the view of the EC on the arguments in paragraphs 93-97 of the First Submission of the US?[70]

With respect to the issue of "practice or methodology," the EC responded as follows: "The practice consists of using the particular type of methodology (asymmetry, model zeroing or simple zeroing) repeatedly in a series of specific determinations, in one specific anti-dumping proceeding after another."[71] Then, after discussing the so-called "Standard AD Margin Program," the EC stated: "However, to 'cover all the bases', the European Communities has

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[69] *First Written Submission of the United States of America*, January 31, 2005, para. 93.

[70] The U.S. arguments in paragraphs 93-97 were that the "Standard Zeroing Procedures" and "practice or methodology" neither were "measures" nor were they "mandatory measures" within the meaning of the mandatory/discretionary distinction.

[71] *EC Answers to Questions to the Parties*, 18 March 2005, para. 165 (hereinafter "EC Answers").

also made a claim with respect to the consistent practice of the United States."[72] The EC then added that it was challenging the USDOC's Anti-Dumping Procedures Manual ("Manual") as a separate measure, and noted that the Manual stated that it "incorporates the current AD methodology."[73]

58. Question 52 posed the following:

> EC: In the absence of the existence of the AD margin computer program, what would be the "measure" the EC could challenge, if the US was zeroing in the same manner set out in the AD margin computer program?

The EC's response was as follows: "'As such', the European Communities would continue to challenge United States practice or methodology, as well as the other provisions of the Tariff Act and Regulations listed in its first written submission."[74]

59. The EC's answers to Questions 51 and 52 constitute the entirety of the EC's response to the Panel's legitimate inquiry as to what the EC meant by the terms "practice" and "methodology." While one can glean from these responses that by "practice" the EC meant consistent application of a "methodology," the EC utterly failed to explain what it meant by "methodology," and never explained how such an abstraction could constitute a separate "measure" that required WTO-inconsistent action.[75]

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[72] EC Answers, para. 167.

[73] EC Answers, para. 168; *see also id.*, para. 170, where the EC confirmed that it was challenging the Manual as a separate measure. The Panel did not make any findings regarding the Manual as a separate measure, concluding that the EC had referred to the Manual "principally as evidence to confirm the 'standard' character of the 'Standard Zeroing Procedures'." Panel Report, para. 7.107.

[74] EC Answers, para. 169.

[75] Indeed, the EC never even explained how "practice" could constitute a "measure" for purposes of WTO dispute settlement. In Question 74, the Panel asked the following:

60. In short, while the EC consistently referred to "practice" and "methodology" as distinct concepts, it never explained the difference between the two. Nor did the EC ever explain, let alone prove, how an abstraction called "zeroing methodology" could constitute a "measure," nor did it explain or prove how this alleged "measure" required a breach of Article 2.4.2 of the *AD Agreement*.

61. However, because the Panel concluded that a "norm" could be a measure and that the description of past results was the same thing as a prescriptive "norm" (in this case, a "norm" bearing the label of "zeroing methodology"), the Panel effectively excused the EC from the requirement that the EC demonstrate, as part of its prima facie case, an act or instrument that required that the USDOC "zero" in antidumping investigations.

62. It is well-established that a complaining party has the burden of proving its case. It is equally well-established that a panel cannot "make the case for a complaining party."[76]

> EC: How does the EC distinguish the present situation from that which confronted the panel in the *US – India Steel Plate* case, where it stated that "we do not consider that merely by repetition, a Member becomes obligated to follow its past practice"?

The EC answered by referring the Panel to its answer to Question 51. EC Answers, para. 198. However, as the United States noted to the Panel, the EC's answer to Question 51 indicated that it was challenging "practice," but did 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. *See Second Written Submission of the United States of America*, April 13, 2005, para. 48.

Tellingly, however, in an answer to a Panel question concerning the status of the computer program as a "measure," the EC stated that "it is not necessary that the measure 'prescribe' a particular course of action ... ." EC Answers, para. 196 (Answer to Panel Question 72). This statement is totally at odds with the Appellate Body's recognition that measures consist of "acts setting forth rules or norms that are intended to have general and prospective application" or "instruments of a Member containing rules or norms." *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 82.

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

However, by relieving the EC of the burden of making even a *prima facie* case, that is what the Panel did here.

V. Conclusion

63. For the foregoing reasons, the United States respectfully requests that the Appellate Body find that the findings and conclusions of the Panel listed in the U.S. Notice of Other Appeal and further discussed herein are in error, and that the Appellate Body reverse those findings.