

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

**(WT/DS350)**

**Rebuttal Submission of the United States of America**

**February 26, 2008**

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Short Form	Full Citation
<i>Argentina – Footwear Safeguard (Panel)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R
<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>Brazil – Aircraft (AB)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999
<i>Chile – Price Band System (Panel)</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207/AB/R
<i>EC – Audiocassettes</i>	GATT Panel Report, <i>EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan</i> , ADP/136, circulated 28 April 1995 (unadopted)
<i>EC – Bed Linen (Article 21.5) (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003
<i>EC – Cotton Yarn</i>	GATT Panel Report, <i>EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil</i> , ADP/137, adopted 30 October 1995
<i>Guatemala – Cement I (AB)</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998
<i>Mexico – HFCS</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R, adopted 24 February 2000

<i>Mexico – Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>US – Carbon Steel (Panel)</i>	Panel Report, <i>United States – Carbon Steel</i> , WT/DS213/R and Corr. 1, adopted 19 December 2002, as modified by the Appellate Body Report, WT/DS213/AB/R and Corr.1
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – Certain EC Products (AB)</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 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)

## I. Introduction

1. In this dispute, the European Communities (“EC”) has asked this Panel to read an obligation into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”) and the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), notwithstanding the lack of any textual basis for the obligation that the EC proposes. The EC also would like the Panel to consider as binding Appellate Body reports finding “zeroing” in certain contexts inconsistent with the covered agreements, despite the absence of *stare decisis* in the WTO dispute settlement system. The EC goes so far as to argue that Article XVI:4 of the *Agreement Establishing the World Trade Organization* (“WTO Agreement”) imposes on the United States some sort of continuing international obligation to eliminate “zeroing.”

2. At the same time that the EC uses terms like “good faith” it presents the Panel with a wildly inaccurate version of the negotiating history of the AD Agreement, as discussed more fully below. In particular, not only did the EC never agree to any of the Uruguay Round proposals that would have limited or eliminated zeroing, the EC was one of the participants in the negotiations that had defended the use of zeroing under the similar language in the Tokyo Round Code and continued to use it after the WTO came into force. Indeed, the EC defended the use of zeroing under the WTO in the *Bed Linen* dispute. The United States is unsure which prospect it finds more disturbing, that the EC has knowingly presented this incorrect negotiating history, or that it did not bother to check the actual negotiating history before making its representations to the Panel. Far from a “unilateral” interpretation of the AD Agreement,<sup>1</sup> the interpretation that the EC disparages is one that the EC itself held and advocated.

3. The United States has asked that this Panel remain faithful to its obligation under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), which calls on each panel to make its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. Moreover, the United States has emphasized that under Articles 3.2 and 19.2 of the DSU the Panel cannot add to or diminish the rights and obligations provided for in the covered agreements. Acceptance of the EC’s interpretation of the AD Agreement, the GATT 1994, and the WTO Agreement would improperly add to the obligations of the United States under the covered agreements. Such a result would undermine the very security and predictability of the multilateral trading regime that the WTO dispute settlement system is designed to preserve.

4. The United States is confident that the Panel will conduct an objective assessment of the matter before it, and find that there is no general obligation to provide offsets for non-dumped transactions in assessment reviews. We believe that the Panel should find persuasive the reasoning of panels in four other disputes – *US – Zeroing (EC)*, *US – Softwood Lumber Dumping (Article 21.5)*, *US – Zeroing (Japan)* and *US – Zeroing (Mexico)* – which all conducted an

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<sup>1</sup>EC Opening Statement at the First Substantive Meeting with the Parties, para. 14 (“EC First Opening Statement”).

objective assessment as required by Article 11 and found that “zeroing” was not inconsistent with the covered agreements outside the context of weighted average-to-weighted average comparisons in investigations.

5. In this rebuttal, the United States first responds to the EC’s arguments against the U.S. request for preliminary rulings. As the United States shows, the EC has added 14 measures to its panel request that were not identified in its consultations request. Under Articles 4 and 6 of the DSU, these measures cannot fall within the Panel’s terms of reference. The EC’s attempted reliance on prior Appellate Body reports cannot support its position that it was entitled to add 14 new measures to its panel request.

6. The United States also addresses the EC’s attempt to include 18 measures, identified as the application or continued application of antidumping duties in 18 cases listed in the Annex to its panel request. These alleged measures were the subject of considerable debate at the first meeting with the Panel. As the United States explains, the EC failed to specifically identify these 18 “measures” as required by Article 6.2 of the DSU. The EC is trying to reach indefinite subsequent proceedings that were not identified in its panel request and that were not in existence at the time of that request. It now would like the Panel to treat any duties in the 18 cases as some type of free-standing measure, divorced from the underlying determinations. Such an approach is inconsistent with the requirement to identify the specific measures at issue.

7. The United States also objects to the EC’s challenge to four preliminary measures. Under Article 17.4 of the AD Agreement, only those measures where “final action has been taken by the administering authorities” may be referred to a panel. The EC claims that the Panel should allow these preliminary measures, even though it has not demonstrated that the exception under Article 17.4 applies here. In fact, the EC asks the Panel to take into account so-called “specific circumstances” of this case that are not contained in the AD Agreement or anywhere else in the covered agreements.

8. The United States also addresses several arguments that the EC made in its first written submission, at the first substantive meeting with the parties, and in its answers to the Panel’s questions concerning methodologies in assessment proceedings. At the meeting with the Panel, the EC seemed almost singularly focused on its flawed argument that Article 2.4.2 of the AD Agreement applies outside the context of investigations. In this submission, the United States demonstrates that, based on the application of customary rules of treaty interpretation, the phrase “the existence of margins of dumping during the investigation phase” in Article 2.4.2 is inextricably and uniquely linked to Article 5 investigations to determine the “existence, degree and effect” of dumping. The United States further rebuts the EC’s assertion that Article 9.3.1 of the Antidumping Agreement requires an exporter-oriented analysis, and shows that the undesirable outcome of such a requirement would be to reward importers involved in the transactions priced furthest below normal value. Lastly, the United States demonstrates that it is not at all clear that the EC made a claim against the alleged use of the “third methodology” in Article 2.4.2 in assessment reviews.

## II. The Panel Should Grant the U.S. Request for Preliminary Rulings

### A. The EC's Panel Request Contained Measures That Were Not Identified in its Request for Consultations

9. The United States objects to the EC's addition of measures in its panel request that were not contained in its request for consultations. As the United States explained in its first written submission and at the first meeting with the Panel, a measure cannot fall within a panel's terms of reference unless it was first identified in the request for consultations.<sup>2</sup> Under Article 7.1 of the DSU, a panel's terms of reference are based on the complaining party's request for the establishment of a panel. In turn, Article 6.2 of the DSU provides that a panel request must "identify *the specific measures at issue*" in a dispute.<sup>3</sup> Under DSU Article 4.7, however, a Member may only request the establishment of a panel with regard to a measure upon which the consultations process has run its course. Finally, Article 4.4 of the DSU requires that the request for consultations state the reasons for the request, "including identification of *the measures at issue*."<sup>4</sup> There is thus a clear progression from consultations request to panel request, and measures not identified in the consultations request, but later identified in the panel request, cannot properly form part of the panel's terms of reference.<sup>5</sup>

10. The EC would have this Panel apply legal standards that are not found in the DSU. The EC asserts that there is no need for measures in the panel request to be identified in the request for consultations, as long as they "involve essentially the same matter" or "relate to the same matter" as those identified in the request for consultations.<sup>6</sup> Moreover, provided the additional measures have a "direct relationship" with the measures in the request for consultations, the EC

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<sup>2</sup>U.S. First Written Submission, paras. 47-65; U.S. Opening Statement at the First Substantive Meeting with the Parties, paras. 13-18. ("U.S. First Opening Statement").

<sup>3</sup>Emphasis added.

<sup>4</sup>Emphasis added.

<sup>5</sup>The AD Agreement imposes parallel requirements in Articles 17.3-17.5. U.S. First Written Submission, paras. 56-58.

<sup>6</sup>EC Response to the U.S. Request for Preliminary Rulings, paras. 17, 21, 22, 24, 29 ("EC Response"). The EC fails to understand what "matter" means for purposes of dispute settlement. The Appellate Body has stated that the "matter" consists of two elements: "the specific *measures at issue* and the *legal basis for the complaint* (or the *claims*)." *Guatemala – Cement I (AB)*, para. 72. The EC, however, describes the "matter" for purposes of its legal standard as "the application of zeroing methodologies when calculating the dumping margins in the specific anti-dumping proceedings with respect to a particular product originating from one specific country." EC Response, para. 17. This is not the "matter." The EC's definition does not encompass the specific measures, nor does it encompass the legal basis for the complaint. In short, the EC would also like the Panel to apply a standard that relies on an erroneous view of what the "matter" is.

claims that they are properly before the Panel.<sup>7</sup> The EC’s interpretation disregards the text of Articles 4 and 6 of the DSU – a panel’s terms of reference cannot include measures that were not the subject of a request for consultations – and should be rejected.

11. Here, the EC added 14 new proceedings, as well as an imprecise reference to the application and continued application of antidumping duties in 18 cases, to its panel request.<sup>8</sup> These measures were not identified anywhere in its consultations request, and pursuant to Articles 4 and 6 of the DSU, they are not within this Panel’s terms of reference. This finding is supported by the Appellate Body in *US – Certain EC Products*, which agreed that the scope of measures subject to establishment of a panel is defined by the consultations request, and that new, legally distinct measures may not be added in the panel request.<sup>9</sup>

12. The EC erroneously relies on the Appellate Body report in *Brazil–Aircraft*, which is distinguishable from the matter before this Panel.<sup>10</sup> In that case, the Appellate Body considered whether certain regulatory instruments relating to the Brazilian regional aircraft export subsidies program PROEX were properly before the panel.<sup>11</sup> Canada had included new regulatory measures under PROEX in its panel request, but not in its request for consultations. The Appellate Body found that the new regulations “did not change the essence” of the export subsidies that were at issue in the dispute and included in the request for consultations, and that they therefore were properly before the panel.<sup>12</sup>

13. The critical question here is whether the measures added to the panel request are in essence the same measures as those identified in the consultations request. In *Brazil – Aircraft*, the new regulatory instruments were simply periodic re-enactments of the identical measures that were specified in a consultations request as part of Canada’s challenge to payments under those measures. In this dispute, however, the EC identified in its consultations request separate antidumping measures that are legally distinct under U.S. law, and added new and legally distinct antidumping measures to its panel request. The four new administrative review determinations and 10 new sunset review determinations, even if they involve the same subject merchandise as the measures listed in the consultations request, resulted from completely different proceedings than those identified in the consultations request. They each involve different time frames, and different calculations using different information and data. The results from one administrative

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<sup>7</sup>EC Response , paras. 25, 29.

<sup>8</sup>U.S. First Written Submission, paras. 49-50, provides a specific list of the new “measures.”

<sup>9</sup>*US – Certain EC Products (AB)*, paras. 70, 82.

<sup>10</sup>EC Response, paras. 18-19.

<sup>11</sup>*Brazil–Aircraft (AB)*, paras. 127-29.

<sup>12</sup>*Brazil–Aircraft (AB)*, para. 132.



review do not apply to entries of subject merchandise for any other administrative review. Moreover, a sunset review results in a determination about whether an antidumping order should be revoked going forward, and does not affect the results of an administrative review, which is conducted independently of a sunset review. The EC's reference to the "continued application, or application" of antidumping duties in 18 cases also appeared for the first time in its panel request, and is legally distinct from the separate challenge to the "zeroing methodology" as applied in separate antidumping proceedings that was identified in the consultations request. None of the new "measures" can be considered a mere "re-enactment" of identical measures identified in the consultation request, as in *Brazil – Aircraft*.

14. The EC also invokes the Appellate Body report in *Mexico – Rice* as supporting its view that there is "no need for identity between the specific measures that were the subject of the request for consultations and those subject of the Panel request provided that they involve essentially the same matter."<sup>13</sup> In *Mexico – Rice*, however, the question was whether provisions of the covered agreements that the United States added to its claims against Mexico in its panel request were within the panel's terms of reference.<sup>14</sup> Here, the EC has not added to the *legal basis* for its complaint; rather, it added to the *measures* at issue that were identified in its consultations request.

15. The EC relies on the panel report in *Chile – Price Band System* to support its assertion that "the inclusion of new measures which amount to an extension or a modification of measures previously mentioned in the request for consultations do not affect the consistency of the panel request with the consultations carried out between the parties."<sup>15</sup> In *Chile – Price Band System*, Chile promulgated a regulation which extended the period of application of a definitive safeguard measure. The extension was not identified in the consultations request. The panel, examining the text of the Agreement on Safeguards, considered that the extension was not a distinct measure, and instead a mere continuation in time of the definitive safeguard measure that was identified in the consultations request. The panel concluded that the extended safeguard measure fell within the panel's terms of reference.<sup>16</sup>

16. The EC's reliance on the panel report in *Chile – Price Band System* is misplaced. The EC's challenge does not pertain to a safeguard measure whose "duration" has been extended. The EC explicitly listed determinations from original investigations, administrative reviews, and sunset reviews in its consultations request. Its focus was on the determinations in the individual proceedings in which the alleged "zeroing methodology" was applied. The EC then tried to

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<sup>13</sup>EC Response, paras. 20-21.

<sup>14</sup>*Mexico – Rice (AB)*, para. 133.

<sup>15</sup>EC Response, para. 23.

<sup>16</sup>*Chile – Price Band Systems (Panel)*, paras. 7.110-7.120.

expand the number of proceedings by adding 10 new sunset review determinations, as well as four new administrative review determinations, to its panel request. Each of these measures is separate and legally distinct, and not a mere “extension” or “modification” of another identified antidumping determination.

17. The EC has relied on semantics (“essentially the same matter,” “direct relationship”) and has asked the Panel to consider Appellate Body and panel reports that do not support its position in this dispute. Nothing the EC does, however, can avoid the logical outcome of a proper analysis under Articles 4 and 6 of the DSU: the specific proceedings identified in the EC’s panel request for the first time – 14 new antidumping determinations and the application or continued application of duties in 18 cases – cannot properly fall within the panel’s terms of reference.

### **B. The EC’s “18 Measures” Fail for a Lack of Specificity**

18. Under Article 6.2, a panel request must identify the “*specific measures at issue*” in the dispute,<sup>17</sup> and a panel’s terms of reference under Article 7.1 are limited to those specific measures. The EC in its panel request identified as “measures” the “continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present 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.” The United States objects to the EC’s failure to specifically identify these “18 measures” as required by Article 6.2 of the DSU.<sup>18</sup> As the United States explained at the first meeting with the Panel, these “measures” have been the source of considerable confusion;<sup>19</sup> armed with further attempted clarifications from the EC, we would like to explain why these measures do not meet the specificity requirement and why they are not within this Panel’s terms of reference.

19. In its October 5 Response to the U.S. Request for Preliminary Rulings, the EC admitted the broad, indeterminate nature of the 18 measures when it noted that its panel request pertained to all “subsequent measures” adopted by the United States with respect to the 18 measures, and to “any subsequent modification of the measures (*i.e.*, the duty levels).”<sup>20</sup> In its response to the Panel’s questions, the EC also asserted that the term “continued application” reaches “subsequent

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<sup>17</sup>Emphasis added.

<sup>18</sup>U.S. First Written Submission, paras. 66-71; U.S. First Opening Statement, paras. 19-22; U.S. Closing Statement at the First Substantive Meeting with the Parties (“U.S. First Closing Statement”), paras. 7-15.

<sup>19</sup>U.S. First Closing Statement, paras. 7-15. The Panel itself has asked for clarification about the description of the “18 measures” that the EC identified in its panel request. *See* Panel Question 1. The EC, despite all indications to the contrary, still considers the 18 measures “simpler to understand and conceptualise.” EC Answer to Panel Question 2, para. 13.

<sup>20</sup>EC Response, paras. 47-48.

proceedings.”<sup>21</sup>

20. Under the DSU, such “subsequent measures,” “subsequent proceedings,” and “subsequent modifications” cannot be subject to dispute settlement – among other things, they were not in existence at the time of the Panel’s establishment.<sup>22</sup> Each determination that sets a margin of dumping for a defined period of time is distinct and separate, and under Article 6.2 of the DSU, the EC must identify each such measure in its panel request.<sup>23</sup> The EC is improperly trying to include the application or continued application of duties resulting from determinations that have not yet been made – the EC even admits that these “measures” have “a life stretching an indeterminate time into the future.”<sup>24</sup> As we stated at the first meeting with the Panel, the United States is unable to determine when these determinations were or will be made, what calculations they did or will include, what duty rates they have established or will establish, and what individual companies they did or will cover.<sup>25</sup>

21. The EC invokes several Appellate Body and panel reports to support its argument that “subsequent measures” are properly before the Panel.<sup>26</sup> In these disputes, a law of general application, or framework law, was identified in a panel request, and the subsequent implementing regulations issued after the panel request were considered to fall within the panel’s terms of reference. For example, in *Japan – Film*, the United States discussed various measures for the first time in its written submission. Japan objected on the grounds that these measures were not identified in the United States’ panel request and that the United States had therefore failed to meet the specificity requirement of Article 6.2 of the DSU. The panel found that subsequent measures promulgated under a framework law that was identified in the panel request fell within its terms of reference. It considered these measures “subsidiary” or “so closely related” to the law of general application specifically identified that the responding party could reasonably be found to have received adequate notice of the scope of the claims.<sup>27</sup>

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<sup>21</sup>EC Answer to Panel Question 1(b), para. 10. The EC claims that variation in the phrasing “application or continued application” throughout its first written submission “is for ease of reference,” but that it “has no incidence on the legal assessment to be conducted by the Panel.” However, that very phrasing, and any variations thereto, is related to the way in which the EC described the 18 measures, and is directly relevant to how the Panel analyzes the specificity of those alleged measures.

<sup>22</sup>U.S. First Closing Statement, para. 9.

<sup>23</sup>U.S. First Written Submission, para. 67.

<sup>24</sup>EC Answer to Panel Question 3, para. 20.

<sup>25</sup>U.S. First Opening Statement, para. 21.

<sup>26</sup>EC Response, paras. 37, 43-47.

<sup>27</sup>*Japan – Film (Panel)*, paras. 10.8-10.14.

22. Unlike *Japan–Film* and the other reports, this dispute does not involve subsequent regulations issued under a law of general application. The EC instead is asking this panel to consider any and all subsequent antidumping measures related to 18 specified cases. Such subsequent measures, however, are not “subsidiary” or “so closely related” to all of the antidumping proceedings that were identified in the panel request. The application or continued application of antidumping duties results from distinct legal proceedings leading to a final determination. Each proceeding, whether an original investigation, administrative review, or sunset review, involves different time periods, different entries of merchandise, and different information and data. The EC’s challenge to application or continued application of duties related to all subsequent and previously unidentified proceedings is not the equivalent of a challenge to regulations promulgated under the general authority of a framework law after a panel request has been made.

23. The EC also seems to indicate, as it did at the hearing, that the 18 measures cover the application or continued application of the “zeroing” methodology in 18 cases. The EC tells the Panel that the word “continued” in the description of the 18 measures “reflects the fact that the US continues to use the zeroing methodology throughout the various proceedings in the 18 anti-dumping cases.”<sup>28</sup> Moreover, the EC claims that “[t]he 18 measures are instances of the application of the zeroing methodology.”<sup>29</sup> To the extent the EC is saying that it is challenging the application or continued application of zeroing in 18 cases (a description not found anywhere in its panel request), that “measure” lacks specificity. The EC cannot make a generalized reference to the application of zeroing in 18 broadly-defined cases without indicating the exact determinations where “zeroing” was applied.

24. In response to the Panel’s questions, the EC has put further spin on its description of the 18 measures. It now speaks of the concept of “duty as measure.”<sup>30</sup> To the EC, the 18 measures contain a methodology that is “like a computer virus replicating itself”<sup>31</sup> and “have a life which stretches, at least potentially, further into the future than the 52 measures.”<sup>32</sup> Moreover, the EC incorrectly analogizes the duties to “a subsidy programme under the *SCM Agreement*,”<sup>33</sup> without even explaining the exact nature of the analogy.

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<sup>28</sup>EC Answer to Panel Question 1(b), para. 10.

<sup>29</sup>EC Answer to Panel Question 3, para. 20.

<sup>30</sup>EC Answer to Panel Question 1(a), para. 7.

<sup>31</sup>EC Answer to Panel Question 1(a), para. 4.

<sup>32</sup>EC Answer to Panel Question 2, para. 17; *see also* EC Answer to Panel Question 2, para. 13; EC Answer to Panel Question 3, para. 20; EC Answer to Panel Question 5(b), para. 28.

<sup>33</sup>EC Answer to Panel Question 1(a), para. 5; EC Answer to Panel Question 3, para. 20.

25. The EC’s analysis of the 18 measures, when defined in this way, does not assist its position. It is entirely circular for the EC to suggest that it has described measures with specificity because it asserts that “duties” are “measures.” In the first place, to repeat the terms of the Antidumping Agreement (as the EC does in paragraphs 2 through 3 of its answers) tells the Panel nothing about specifically what measures the EC is challenging *in this dispute*. Moreover, the EC ignores the fact that, for any given importation, the antidumping duty assessed depends on a particular underlying administrative determination, whether that be an original investigation, assessment review, new shipper review, or changed circumstances review, while the continuation of that duty depends on an underlying sunset review.<sup>34</sup> The EC must identify the specific determination leading to the particular application or continued application of an antidumping duty, and cannot merely refer to “duty” in a general and detached way.

26. The EC’s description also appears to demonstrate what the EC asserted at the first meeting with the Panel – that the 18 measures are some sort of “as applied/as such” measures.<sup>35</sup> By considering a duty to be the equivalent of a subsidy program, the EC seems to think that it can challenge “as such” a duty resulting from the application of “zeroing.” It is difficult to understand how the EC could be making an “as such” claim when it has defined the measure as “the *application* or the continued *application*” of antidumping duties. Moreover, the EC has explicitly stated that it decided not to make an “as such” claim in this dispute.<sup>36</sup> The United States still is unsure whether the EC is trying make “as such” claims.

27. Apparently then, the EC is not seeking to challenge particular measures, but rather to have the Panel make a general, overall pronouncement with respect to the future and “zeroing” without regard to whether such a pronouncement would apply to real measures that were in existence at the time of the consultations request or even at the time of the Panel’s findings.<sup>37</sup> The EC cannot ignore the specificity requirement of Article 6.2 of the DSU and define “measures” in such a way so as to reach indeterminate future antidumping determinations.<sup>38</sup> The Panel should reject the EC’s attempt to expand the scope of this proceeding beyond what is permissible under the DSU.

28. The EC also claims that the Panel request adequately informs the United States of the

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<sup>34</sup>AD Agreement, Articles 1, 5, 7, 9, 11.

<sup>35</sup>U.S. First Closing Statement, paras. 12-13.

<sup>36</sup>EC First Written Submission, para. 2, 115.

<sup>37</sup>EC Answer to Panel Question 4(b), paras. 25-26; EC First Written Submission, paras. 127-28.

<sup>38</sup>As the EC acknowledges, “findings concerning the 18 measures will have a broader impact than those concerning the 52 measures.” EC Answer to Panel Question 1(a), para. 8.

challenged measures.<sup>39</sup> According to the EC, “the United States has failed to show that the Panel request is so flawed that the defending party’s rights of defence are prejudiced. . . .”<sup>40</sup> The implication of this argument is that even with a failure to identify the specific measures at issue, those measures can be considered by the Panel, as long as the responding party is not prejudiced. (Apparently the EC is not concerned with the rights of Members whose decision as to whether to participate as a third party is based on which measures are specifically identified in the EC’s panel request.) This prejudice requirement, however, is not found in Article 6.2 of the DSU, or anywhere else in the covered agreements. The requirements of the DSU are clear: the complaining party must specifically identify the measures at issue, or those measure cannot properly fall within a panel’s terms of reference.

### **C. The EC’s Request Included Measures Which Were Not Final at the Time of Establishment**

29. The United States has asked the Panel to exclude from consideration four measures which were not final at the time of the EC’s request for panel establishment.<sup>41</sup> Under Article 17.4 of the AD Agreement, only those measures where “final action has been taken by the administering authorities” may be referred to a panel.<sup>42</sup> As the United States explained in the first written submission, the EC added three on-going sunset reviews, and one on-going administrative review to its request for establishment. Therefore, under Article 17.4 of the AD Agreement, the four preliminary measures in the EC’s panel request cannot properly form part of the Panel’s terms of reference.

30. In rebutting the United States, and in responding to the Panel’s questions, the EC has complicated an issue which is not very complicated at all. The EC first claims that its challenge to the application or continued application of antidumping duties in 18 cases includes “subsequent measures, including preliminary determinations setting out the duty levels (wrongly calculated by applying zeroing) and insofar as those duties are still in place,”<sup>43</sup> and that therefore the preliminary measures are properly before the Panel. Aside from the fundamental problem with the EC’s attempt to include “subsequent measures” in its panel request,<sup>44</sup> the United States

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<sup>39</sup>EC Response, paras. 40-42.

<sup>40</sup>EC Response, para. 42.

<sup>41</sup>U.S. First Written Submission, paras. 72-74; U.S. First Opening Statement, paras. 23-24.

<sup>42</sup>Under Article 17.4, a provisional measure may only be challenged when it “has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7.” The EC has not demonstrated the applicability of this exception.

<sup>43</sup>EC Response, para. 50; EC Response to Panel Question 6, para. 29.

<sup>44</sup>See Part II.B, *supra*.

fails to see how preliminary measures in existence at the time of panel request are “subsequent measures.” Moreover, neither on-going administrative reviews, nor on-going sunset reviews, can be the basis for the “application or continued application” of antidumping duties, as the EC seems to think. A preliminary determination in an administrative review does not affect the cash deposit rate or the assessment rate – those rates are set in the final determination, and until then, the rates in effect from the prior administrative review remain in effect. In addition, a sunset review can only result in the continuation of an order beyond the five-year sunset period once a final determination has been made by both the U.S. Department of Commerce and the U.S. International Trade Commission. Most importantly, the EC’s argument ignores the plain text of Article 17.4. The investigating authority must take final action by the time of the panel request, which has not happened here; otherwise, the antidumping measure cannot fall within the panel’s terms of reference.<sup>45</sup>

31. The EC attempts to confuse the Panel by citing to the panel report in *Mexico – HFCS* and asserting that other panels have allowed claims against preliminary measures.<sup>46</sup> *Mexico – HFCS* involved a claim that Mexico had applied a provisional measure for longer than six months, and thereby violated Article 7.4 of the AD Agreement. Mexico argued that because the United States failed to identify the provisional measure in its panel request, the claim concerning that measure fell outside the panel’s terms of reference. The United States, however, had identified the definitive antidumping duty in its panel request, and argued that it was asserting a violation of Article 7 not with reference to the provisional measure as a “measure” in the dispute, but rather as one of its legal claims related to the final antidumping measure. The panel concluded that the claim was related to the definitive antidumping duty identified in the panel request and therefore fell within the scope of the proceeding.<sup>47</sup>

32. Unlike the United States in *Mexico – HFCS*, the EC has not even challenged a final determination in any of the four proceedings, so there is no question as to whether the preliminary determination is somehow related to the final measure. There is no textual basis under which the EC can bring these claims, when it can wait until the issuance of final results and challenge those as inconsistent with the AD Agreement. The plain text of Article 17.4 is clear: the EC’s specific claims against preliminary measures are outside this Panel’s terms of reference.

33. The Panel asked the EC whether the exception to the finality requirement under Article

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<sup>45</sup>The EC also challenges 52 determinations, among which are four preliminary determinations. The EC’s alleged defense neglects to address the fact that the EC is making separate claims as to these preliminary determinations. It now appears that the EC is abandoning its claims with respect to the four preliminary measures insofar as they are part of its claims against zeroing as applied in 52 antidumping proceedings.

<sup>46</sup>EC Response, para. 53.

<sup>47</sup>*Mexico – HFCS (Panel)*, paras. 7.44-7.55.

17.4 of the AD Agreement was applicable in this dispute as to the four preliminary measures identified by the EC.<sup>48</sup> The EC’s response is anything but clear, and does violence to the text of Article 17.4. The EC first seems to be saying that the conditions “are in any event met in this case,” but then contradicts itself in the very next sentence by claiming that “the EC is however not challenging provisional measures in the sense of Article 17.4.”<sup>49</sup> It is difficult to see how the exception could be applicable, if the exception requires that the measures be provisional within the meaning of Article 17.4. Moreover, the EC does not demonstrate that it is making a claim under Article 7.1 of the AD Agreement, as required by the terms of Article 17.4.

34. The EC also asks the Panel “to take into account the specific circumstances of this case.”<sup>50</sup> To the EC, these include the “fact that the EC is complaining about what is essentially a mathematical formula that is essentially identical” wherever it is used; the alleged response of the United States to Appellate Body reports on “zeroing” in wholly unrelated disputes; and the nonsensical reasoning that Article 17.1 refers to Article 7.1 and Article 7.5 refers to Article 9 of the AD Agreement, the “provision that the US has already been found to have infringed.”<sup>51</sup> The EC asserts that these “specific circumstances” have a “significant impact” on the EC, and that it is “within the Panel’s discretion” to exercise jurisdiction.<sup>52</sup>

35. These EC essentially would like the Panel to act as a court of equity. However, this Panel is bound by the terms of the DSU and the covered agreements, which do not accord it the authority to assume jurisdiction over a matter which otherwise would not be within the Panel’s terms of reference. It is improper to take into account “specific circumstances” that are nowhere to be found in the text of Article 17.4. Most egregiously, the EC is asking the Panel to consider the alleged U.S. response to prior Appellate Body reports on “zeroing,” which is another manifestation of the EC’s attempt to improperly bring into this dispute for what allegedly has happened in separate, distinct disputes. The EC, however, cannot escape the fact that it is challenging preliminary measures, and that under Article 17.4, such measures are not within the Panel’s terms of reference.

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<sup>48</sup>Panel Question 6.

<sup>49</sup>EC Answer to Panel Question 6, para. 29.

<sup>50</sup>EC Answer to Panel Question 6, para. 30.

<sup>51</sup>EC Answer to Panel Question 6, para. 30.

<sup>52</sup>EC Answer to Panel Question 6, para. 30. The EC attempts to create confusion by using the “significant impact” language of the exception under Article 17.4. However, as demonstrated above, the EC is not even challenging a provisional measure under Article 7.1 of the AD Agreement, so the exception is not applicable in the first instance.



### **III. The Panel Should Reject the EC’s Arguments Concerning the Methodologies in Assessment Proceedings**

#### **A. U.S. Assessment Reviews are Distinctively Different from Investigations**

36. The EC’s proposed approach in this dispute fails to appreciate what is happening in investigations and assessment reviews. The United States would like briefly to discuss for the Panel how investigations and administrative reviews operate under U.S. law.

37. In the investigation phase, U.S. law provides that the U.S. Department of Commerce (“Commerce”) will normally use the average-to-average method for comparing transactions during the period of investigation. U.S. law also authorizes the use of transaction-to-transaction comparisons and, provided that there is a pattern of prices that differs significantly by region or time period, among other things, the average-to-transaction method.

38. In the second phase of a U.S. antidumping proceeding – the “assessment phase”– Commerce’s focus is on the retrospective calculation and assessment of antidumping duties on individual customs entries covered by an antidumping order. While an antidumping investigation typically covers a broad range of exporters, foreign producers, and U.S. importers, antidumping duties are paid by U.S. importers, who become liable when they enter goods into the United States. Thus, the U.S. retrospective assessment system seeks to calculate the duty based on specific entries by importers during the period covered by the review.

39. In the U.S. system,<sup>53</sup> while an antidumping duty liability attaches at the time of entry, duties are not actually assessed at that time. Instead, the United States collects a security in the form of a cash deposit at the time of entry. Once a year (during the anniversary month of the orders) interested parties may request a “periodic review” to determine the final amount of duties owed on each entry made during the previous year.<sup>54</sup> Antidumping duties are calculated on a transaction-specific basis, and are paid by the importer of the transaction. If the final antidumping duty liability exceeds the amount of the cash deposit, the importer must pay the difference. If the final antidumping duty liability is less than the cash deposit, the difference is refunded. If no periodic review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties. To simplify the collection of duties calculated on a transaction-specific basis, the absolute amount of duties calculated for the transactions of each importer are summed up and divided by the total entered value of that importer’s transactions, including those for which no duties were calculated. U.S. customs authorities then apply that rate to the entered value of the imports to collect the correct total

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<sup>53</sup>See *US – Zeroing (Mexico)*, paras. 7.98-7.100.

<sup>54</sup>The period of time covered by U.S. assessment proceedings is normally twelve months. However, in the case of the first assessment proceeding following the investigation, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures during the investigation.

amount of duties owed. A similar calculation is performed for each exporter to derive a new estimated antidumping duty deposit rate.

40. The U.S. retrospective duty assessment system is more complex to operate, and requires a larger expenditure of administrative resources and personnel. However, it allows U.S. authorities to closely calibrate the imposition of antidumping duties to the actual levels of dumping during the period covered by a periodic review. In addition, it encourages exporters and importers to adjust prices on their own – either through the exporter reducing prices in their home market to bring down the “normal value,” the importer and exporter agreeing to a higher “export price,” or in the case of a related importer, if the importer raises its U.S. sales price – in order to eliminate dumping margins and avoid paying antidumping duties. Thus, in the United States the level of antidumping duties actually collected from importers typically declines sharply during the period covered by an order.<sup>55</sup> This means that prices in the marketplace can adjust without the actual collection of duties.

41. In contrast, while a prospective assessment system is more predictable (because the duty does not change),<sup>56</sup> it is also more punitive and inflexible because an importer generally is subject to the original *ad valorem* rate or reference price found in an original investigation or sunset review for the next five-year period, regardless of price fluctuations or changing competitive conditions in the market. While refunds are theoretically available under Article 9 in such systems, antidumping authorities often tend to strongly “discourage” requests for a refund, and most sophisticated importers are well aware of the “risks” of seeking one (or simply discover that no refund procedure exists under the antidumping law, e.g. India.) A prospective *ad valorem* system also typically results in the collection of much higher amounts of duties from a revenue standpoint, since the antidumping duty effectively serves as an additional tariff for the five-year period, as opposed to being adjusted annually as in the United States.

### **B. The EC Failed to Establish That Article 2.4.2 Applies Outside of an Investigation**

42. The EC focused much attention at the first meeting with the Panel on its arguments concerning its allegedly proper reading of Article 2.4.2 of the AD Agreement. It is the EC’s position that any time a Member makes “a systematic examination or inquiry” as to dumping, that Member is conducting an investigation subject to the disciplines of Article 2.4.2.<sup>57</sup> The

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<sup>55</sup>On average, margins in the U.S. system decline by approximately 75-80%. This, of course, varies by case, and there are exceptions, such as where the respondents do not cooperate and margins must be calculated on the basis of the facts available.

<sup>56</sup>The main advantage of the prospective assessment system is that an importer knows its maximum antidumping liability in advance – for better or worse.

<sup>57</sup> EC First Written Submission, paras. 213-216; EC Answer to Panel Question 9, paras. 54-65.

United States has fully demonstrated in its first written submission and response to the Panel’s questions,<sup>58</sup> that Article 2.4.2 does not apply to each and every segment of an antidumping proceeding that happens to involve a systematic examination or inquiry.

43. A critical examination of each of the words in the phrase “the existence of margins of dumping during the investigation phase,” independent of one another, support the U.S. position. Additionally, when the phrase is considered in its entirety, it is clear that the obligations in Article 2.4.2 do not extend beyond an investigation within the meaning of Article 5.

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

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to *investigations initiated*<sup>1</sup> and conducted in accordance with the provisions of this Agreement ... .

<sup>1</sup>The term “*initiated*” as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.<sup>59</sup>

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

[A]n investigation to determine the *existence*, degree and effect of any alleged dumping shall be initiated. . . .<sup>60</sup>

46. Thus, Article 1 defines the “initiation” of the investigation phase that leads to an antidumping measure as “the procedural action by which a Member formally commences an investigation as provided in Article 5.” Article 5.1, in turn, provides that investigations are initiated upon a written application, or pursuant to other specified conditions, to determine the “existence, degree and effect” of alleged dumping. Consequently, there is no ambiguity as to the

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<sup>58</sup> See U.S. First Written Submission, para. 107-110, *see also* U.S. Answer to Panel Question 9, paras. 18-19 (discussing, among other things, the meaning of the word “phase”).

<sup>59</sup> AD Agreement, Article 1 (emphasis added).

<sup>60</sup> AD Agreement, Article 5.1 (emphasis added).

nature of the “investigations initiated and conducted” pursuant to Article 1. There is only one type of investigation provided for in Article 5, and footnote 1 to Article 1 explicitly refers to “an investigation as provided in Article 5,” thus, Article 1 can only be referring to Article 5 investigations.

47. Additionally, the term “existence” must be considered as it is a necessary part of an Article 5 investigation which may lead to applying an antidumping measure consistent with Article 1. “Existence” is used in connection with the term dumping in only one other place in the AD Agreement besides Article 5.1: Article 2.4.2. Article 2.4.2 provides for the manner in which the “existence” of dumping margins is to be established, “[T]he *existence* of margins of dumping during the investigation phase shall normally be established on the basis of a comparison . . . .”<sup>61</sup> The ordinary meaning of the word “existence” according to *The New Shorter Oxford English Dictionary* is “the fact or state of existing; actual possession of being; a mode or kind of existing; dealing with the existence of a mathematical or philosophical entity.” The word “existence” before the phrase “of margins of dumping” indicates that Members are to determine the “existence of [the] mathematical or philosophical entity” referred to as “margins of dumping.”

48. The drafters’ intent to limit Article 2.4.2 exclusively to Article 5 investigations is further demonstrated by the use of the *definite* article “the” before the term “investigation phase,” rather than the *indefinite* article “an.” According to *The New Shorter Oxford English Dictionary*, the ordinary meaning of the article “the” is “designating one or more persons or things already mentioned or known, particularized by context, or circumstances, inherently unique, familiar or otherwise sufficiently identified.” If, as the EC contends, the term “investigation” in the context of Article 2.4.2 may be interpreted in generic terms, rather than as a term of art referring to the Article 5 phase, the drafters would have used the *indefinite* article “an.”

49. The EC has argued that ordinary rules of grammar compel its reading of “during the investigation phase” as any investigation (in the sense of an inquiry) undertaken by the investigating authority. For the reasons given above, the United States disagrees. In this regard, it is notable that the Appellate Body itself has used the phrase “the investigation phase” in order to describe how obligations in Article 11 of the SCM Agreement (the parallel provision to Article 5 of the AD Agreement)<sup>62</sup> are limited to original investigations and do not apply to any reviews. In particular, in the dispute *United States – Carbon Steel*, in rejecting a claim by the EC that the *de minimis* standard in Article 11.9 applied also to sunset reviews pursuant to Article 21.3, the Appellate Body noted:

Although the terms of Article 11.9 are detailed as regards the obligations imposed on authorities thereunder, none of the words

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<sup>61</sup>Emphasis added.

<sup>62</sup>Article 11 of the SCM Agreement is entitled “Initiation and Subsequent Investigation.” Article 5 of the AD Agreement is entitled “Initiation and Subsequent Investigation.”

in Article 11.9 suggests that the *de minimis* standard that it contains is applicable beyond *the investigation phase* of a countervailing duty proceeding.<sup>63</sup>

Indeed, before the panel in that dispute, the EC *itself* used the phrase “the investigation phase” to mean the initial investigation and not any reviews.<sup>64</sup> The EC was not acting contrary to the ordinary rules of grammar but rather used the phrase according to its ordinary, and grammatical, sense.

50. The limited application of Article 2.4.2 to the investigation phase is further consistent with the divergent functions of investigations and other proceedings under the AD Agreement. The Appellate Body has already recognized that investigations and other proceedings under the AD Agreement serve different purposes and have different functions, and therefore are subject to different obligations under the Agreement.<sup>65</sup> Contrary to the EC’s contention, the AD Agreement does not require Members to examine whether margins of dumping “exist” in the assessment phase. Article 9 assessment proceedings are not concerned with the existential question of whether injurious dumping “exists” above a *de minimis* level such that the imposition of antidumping measures is warranted. That inquiry would have already been resolved in the affirmative in the investigation phase. Instead, Article 9, by its terms, focuses on the amount of duty to be assessed on particular entries, an exercise that is separate and apart from the calculation of an overall dumping margin during the threshold investigation phase of an antidumping proceeding.

51. Even the EC recognizes that “different types of proceedings have different purposes and are not all subject to all the provisions of the *Anti-Dumping Agreement*.”<sup>66</sup> Thus, as the panel in *US – Zeroing (EC)* found, the qualitative differences between Article 5 and Article 9.3 make reasonable an interpretation that different methodologies could be applied to address the different

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<sup>63</sup>*US – Carbon Steel (AB)*, para. 68 (italics added; footnote omitted); *see id.*, para. 68 n. 58 (“We do not subscribe to the view, expressed by Japan, that the use of the word “cases” (rather than the word “investigation”) in the second sentence of Article 11.9 means that the application of the *de minimis* standard set forth in that provision must be applied in *all* phases of countervailing duty proceedings—not only in investigations. The use of the word “cases” does not alter the fact that the terms of Article 11.9 apply the *de minimis* standard only to *the investigation phase*.”) (italics added); *id.*, para. 89 (“For these reasons, we consider that the non-application of an express *de minimis* standard at the review stage, and limiting the application of such a standard to *the investigation phase* alone, does not lead to irrational or absurd results.”) (italics added).

<sup>64</sup>*US – Carbon Steel (Panel)*, para. 5.97 (reproducing EC oral statement at the first panel meeting: “The US also draws (at para. 67) the wrong conclusions from the distinction between *the investigation phase* and the review phase of a CVD proceeding.”) (italics added; underlining in original).

<sup>65</sup>*US – Corrosion-Resistant Steel AD Sunset Review (AB)*, para. 87.

<sup>66</sup>EC First Written Submission, para. 223.

purposes of the separate and distinct proceedings.<sup>67</sup>

52. Among the various alternative definitions that the EC posits for the meaning of “during the investigation phase” in Article 2.4.2, it claims that the phrase may be read as synonymous with the term “period of investigation.”<sup>68</sup> However, this suggested interpretation denies meaning to the drafters’ decision to utilize the unique “investigation phase” terminology in Article 2.4.2. As the panel in *Argentina – Poultry* found: “Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping ‘during the investigation phase.’”<sup>69</sup> Numerous provisions in the AD Agreement refer to a “period of investigation,”<sup>70</sup> and the drafters’ use of the different term “the investigation phase” was deliberate and must be given separate meaning.

53. Furthermore, the EC’s argument that duties calculated in assessment proceedings are subject to Article 2.4.2 because “margin of dumping” has only one meaning, is premised on the incorrect presumption that margins of dumping must be calculated for the product as a whole in all contexts, and that transaction-specific margins are not permitted.<sup>71</sup> No confusion or inconsistency is present if, as the AD Agreement provides, transaction-specific margins are permitted. In Article 9 assessment proceedings, because it is the importers that will incur liability for duties, it is appropriate to determine liability on an importer- and transaction-specific basis. Additionally, the general reference to Article 2 in Article 9.3 necessarily includes any limitations found in the text of Article 2. Article 2.4.2 by its own terms is limited explicitly to the investigation phase, whereas Article 9 contains certain procedural obligations applicable in assessment reviews,<sup>72</sup> but does not prescribe methodologies for assessment proceedings such as those established in Article 2.4.2 for the investigation phase. Thus, there is no basis in Article 9 for ignoring the explicit language in Article 2.4.2, limiting its reach to investigations.

54. The Appellate Body in *EC – Bed Linen* found that there is no connection between Article 9.3 and Article 2.4.2, and that the “requirements of Article 9 do not have a bearing on Article

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<sup>67</sup>*US – Zeroing (EC) (Panel)*, paras. 7.113-7.223. (considering and rejecting arguments the EC raises here in connection with the term “investigation phase”). The Appellate Body “[did] not express [] any view” on the Panel’s analysis of Article 2.4.2. *US – Zeroing (EC) (AB)*, paras. 160-164.

<sup>68</sup> EC Answer to Panel Question 9, para. 53.

<sup>69</sup> *Argentina – Poultry (Panel)*, para. 7.357.

<sup>70</sup> See, e.g., AD Agreement, Articles 2.2.1, 2.2.1.1, 2.2.1.1 n.6, 2.4.1.

<sup>71</sup> EC Answer to Panel Question 9, para. 58.

<sup>72</sup> *Argentina – Poultry*, para. 7.355 (“The primary focus of Article 9.3, read together with sub-paragraphs 1-3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected.”).

2.4.2, because the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties.”<sup>73</sup> As the panel in *Argentina – Poultry* concluded, if “the drafters of the *AD Agreement* had intended to refer exclusively to Article 2.4.2 in the context of Article 9.3, the latter provision would have stated that ‘the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.4.2.’”<sup>74</sup>

55. Finally, the EC’s arguments related to the negotiated placement of various terms within the phrase “the existence of margins of dumping during the investigation phase shall normally be established” are based on mere speculation.<sup>75</sup> The negotiating history does not define “investigation phase” and does not comment on the reason for moving the text. Further, as the Panel observed in *US – Zeroing (EC) (Panel)*, moving the text could have been a compromise to limit ability to impose an order, but to maintain the ability to extend an order once in place.<sup>76</sup>

### C. Article 9.3.1 Does Not Require an “Exporter-Oriented” Analysis

56. The EC’s assertions that an exporter-oriented approach to Article 9.3.1 assessment proceedings is appropriate because “exporters can dump [and] . . . importers cannot”<sup>77</sup> is unsupported by the plain text of the AD Agreement because it ignores that it is *importers* who participate in export transactions and are ultimately liable for the antidumping duties. By its terms, the function of an Article 9.3.1 assessment proceeding is to determine “the final liability for payment of anti-dumping duties.” This function is fundamentally different from that of Article 2.4.2, which sets forth the comparison methodologies to be used to establish the “existence of margins of dumping during the investigation phase.”

57. Although, as stated by the Appellate Body in *US - Zeroing (Japan)*, dumping involves differential pricing behavior of exporters or producers between its export market and its normal value,<sup>78</sup> in the real world dumping occurs at the level of an importer’s individual transactions. It is the importer who negotiates the “export price” when purchasing a product from a foreign producer or exporter, or, in a related-party transaction, when selling to an unrelated purchaser in the United States. Thus, while the foreign producer may control the “normal value” by virtue of its sales prices in its home market, it is the importer who actually helps determine whether a

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<sup>73</sup>*EC – Bed Linen (Article 21.5) (AB)*, paras. 123-124 (emphasis in original).

<sup>74</sup>*Argentina – Poultry (Panel)*, para. 7.358 (emphasis added).

<sup>75</sup>EC Answer to Panel Question 9, para. 57.

<sup>76</sup>*US – Zeroing (EC) (Panel)*, paras. 7.212, 7.219.

<sup>77</sup>EC Answer to Panel Question 8, para. 45.

<sup>78</sup>*US – Zeroing (Japan) (AB)*, para. 156.

product is “dumped” in the United States by agreeing on an “export” price and thus becoming liable for any resulting antidumping duties. Moreover, under both prospective and retrospective assessment systems, the remedy for dumping in Article VI:2 of GATT 1994, *i.e.*, antidumping duties, is applied at the level of individual customs entries and paid by importers who thereby incur liability for the additional duties.

58. The U.S. retrospective assessment system is designed to ensure that an individual importer’s liability reflects the actual level of dumping associated with its transactions. Put another way, an importer should not pay duties because another importer has bought dumped goods, or escape liability because another importer has bought non-dumped goods. In addition, one of the underlying goals of the U.S. retrospective assessment system is not to collect large amounts of antidumping duties from importers, but to encourage exporters and importers to adjust prices on their own to bring them in line with fair market value. Thus, upon issuance of a U.S. order, sophisticated exporters and importers typically will work together to adjust either the home market price or U.S. export price to eliminate the dumping margins and avoid future liability for antidumping duties. Thus, the U.S. system encourages importers to raise resale prices (or exporters to reduce prices in their home market) to cover the amount of the antidumping duty liability, thereby eliminating injurious dumping. This achieves the goals of the U.S. antidumping law (and GATT Article VI) of preventing injurious dumping, while avoiding subjecting importers to additional duties.

59. If under *US – Zeroing (EC) (AB)* and *US – Zeroing (Japan) (AB)*, the amount of one importer’s antidumping margin must be aggregated with other importers to account for the amount by which some other transaction involving an entirely different importer was sold at above normal value, and *vice versa*, then an importer could be subjected to liability for dumped imports made by another importer over whom he or she has no control. This also means the importer who is engaged in dumped transactions would receive a windfall, because he or she may escape antidumping duties, or have his or her liability sharply reduced through the actions of another importer who behaved responsibly by eliminating its dumping margin.

60. No panel that has considered this issue has agreed that it is reasonable for one importer’s liability to be reduced because another importer paid a “less dumped” price.<sup>79</sup> The panel in *US – Zeroing (Japan)* observed that mandating an exporter-oriented approach in Article 9.3 assessment reviews, where assessment liability is determined based on the product as a whole, would mean WTO Members with retrospective assessment systems “may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export

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<sup>79</sup> U.S. First Written Submission, paras. 133-136, quoting *US - Zeroing (Japan)(Panel)*, para. 7.199 and *US - Softwood Lumber Dumping (Article 21.5)(Panel)*, paras. 5.54-5.57; see also *US - Zeroing (Mexico)*, para. 7.146



transactions to other importers at a different point in time that exceed normal value.”<sup>80</sup> The panel in *US-Zeroing (Mexico)* agreed that such “competitive disincentive to engage in fair trade could not have been intended by the drafters of the Antidumping Agreement and should not be accepted . . . as consistent with a correct interpretation of Article 9.3.”<sup>81</sup>

61. Furthermore, an exporter-oriented approach, where assessment liability is determined for the product as a whole, makes no sense in the context of a prospective normal value duty assessment system, because the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. Under Article 9.4(ii), in a prospective normal value system,<sup>82</sup> the importer’s liability for payment of antidumping duties must be determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value.<sup>83</sup> As a result, an importer who imports a product, the export price of which is equal to or higher than the prospective normal value, cannot be subjected to liability for payments of antidumping duties. If other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers.<sup>84</sup>

62. It would be manifestly absurd to interpret Article 9 as requiring offsets between importers in a retrospective assessment system while capping the importer’s liability based on individual transactions in a prospective system.<sup>85</sup> As the panel in *US – Zeroing (Japan)* concluded, “the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transaction below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value.”<sup>86</sup> If in a prospective normal value system individual export transactions at prices less than normal value can lead to liability for

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<sup>80</sup>*US – Zeroing (Japan) (Panel)*, para. 7.199.

<sup>81</sup>*US – Zeroing (Mexico)*, para. 7.146, quoting Oral Statement of the United States at the Second Meeting, para. 18.

<sup>82</sup>*US – Zeroing (Japan) (Panel)*, para. 7.201.

<sup>83</sup>*US – Zeroing (Japan) (Panel)*, para. 7.201; *See also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53.

<sup>84</sup>*US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.54-5.57.

<sup>85</sup>*US-Zeroing (Mexico)*, para. 7.133.

<sup>86</sup>*US – Zeroing (Japan) (Panel)*, para. 7.205; *see also US – Zeroing (EC) (Panel)*, para. 7.206.

antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, the clear implication is that liability for payment of antidumping duties can be similarly assessed on the basis of individual export prices for less than normal value in the retrospective system applied by the United States.

63. The EC’s exporter-oriented approach suggests that investigating authorities must assess antidumping duties based on the aggregated pricing behavior of exporters, without regard to the actual margin of dumping associated with the particular import transaction.<sup>87</sup> This approach turns Article 9.3 on its head as it divorces the amount of antidumping duty assessed with respect to an import from the dumping margin associated with that import transaction, and is inconsistent with the importer- and import-specific character of the obligation to pay an anti-dumping duty.<sup>88</sup> Nothing in the text or context of Article 9.3.1 supports such a result. This argument reflects the EC’s effort to force the requirements of Article 2.4.2 with respect to the *existence* of margins of dumping during the investigation phase, into Article 9.3, with its focus on *duty liability*. However, as we fully set forth above, and in our first written submission and answers to the Panel’s questions,<sup>89</sup> the provisions of Article 2.4.2 are irrelevant to Article 9.3.1 assessment proceedings.

64. Furthermore, the EC’s proposed “solution”<sup>90</sup> only serves to demonstrate the absurdity of its argument. The EC suggests that even though some importers import subject merchandise at less than normal value, the importing Member should only be permitted to assess a partial amount of the duties owed on those transactions. The panel in *US – Zeroing (Japan)*, correctly observed that the “[i]mplication of such an interpretation is that a Member . . . may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value.”<sup>91</sup> Such a result would be inconsistent with the notion that injurious dumping is to be condemned and may be remedied under the Antidumping Agreement.

65. Finally, the EC’s contention that importer-specific dumping duties are unnecessary because the targeted dumping provision is available when low-price exporter transactions are

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<sup>87</sup>EC Answer to Panel Question 8, para. 45 (“only an exporter can have a dumping margin.”).

<sup>88</sup>*US – Zeroing (Japan)(Panel)*, para. 7.199

<sup>89</sup>U.S. First Written Submission, paras. 99-111; 119-28; U.S. Answer to Panel Question 119(c) & (d), paras. 31-34.

<sup>90</sup>EC Answer to Panel Question 8, para 49.

<sup>91</sup>*US – Zeroing (Japan)(Panel)*, para. 7.199

attributable to only one importer<sup>92</sup> does not resolve the mathematical equivalency problem discussed in our first written submission and in our answer to the Panel Question 10. Nor, has the EC, in its answers to Question 10, provided a viable solution to the fact that the targeted dumping provision is rendered *inutile* by its suggested interpretation. On the contrary, despite its asserted concern with the customary rules of treaty interpretation, the EC states that the fact that the mathematical equivalence caused by a general prohibition on zeroing in all contexts renders an entire provision in the Agreement redundant, “doesn’t matter.”<sup>93</sup>

**D. The EC’s Challenge with Respect to an Asymmetrical Method of Comparison Without Justification is Not Apparent From the EC’s Panel Request and First Written Submission**

66. The United States disagrees that the EC made “very clear” that it intended to make a separate claim that the “use of the third methodology in periodic reviews” violates Article 2.4.2 of the Antidumping Agreement.<sup>94</sup> The EC’s citations to its panel request in support of its assertion that it made such a claim are, at best, veiled references. Moreover, the EC provided no discussion in support of this claim in its first written submission. Given that the EC’s panel request was unclear, and that it did not attempt to make a *prima facie* case in its first written submission, it is hardly meaningful that the United States did not respond more fully in its first written submission to such an alleged claim by the EC.

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

67. With respect to the EC’s substantive arguments, the Panel should reject the EC’s request that this Panel create an obligation to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same assessment proceeding exceed normal value, notwithstanding the absence of any textual basis for such an obligation. For the reasons set forth in the U.S. first written submission, the United States respectfully requests the Panel to refrain from reading into the AD Agreement and Article VI of the GATT 1994 an obligation that is not reflected in the text. Furthermore, for the reasons discussed above, interpreting “the existence of margins of dumping during the investigation phase” under Article 2.4.2 as referring to an investigation under Article 5 is a permissible interpretation because it follows from the application of the customary rules of interpretation of public international law to the text of the AD Agreement. Therefore, the United States requests that this Panel remain faithful to the standard of review under Article 17.6(ii) of the AD Agreement by finding that the U.S. actions in

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<sup>92</sup>EC Answer to Panel Question 8, para. 48.

<sup>93</sup> EC Answer to Panel Question 10, para. 66.

<sup>94</sup> EC Answer to Panel Question 11(b), para. 73.

the assessment proceedings at issue rest upon a permissible interpretation of the AD Agreement under the customary rules of interpretation of public international law.

#### IV. The EC Has Distorted the Negotiating History of the AD Agreement

68. The EC stated at the first meeting with the Panel that “*all* of the interpretive elements in the Vienna Convention support the position of the EC.”<sup>95</sup> Among these elements is the recourse to negotiating history. The EC, however, relies on an inaccurate and revisionist version of that history to support its argument that “zeroing” is prohibited in all contexts. The United States would like to set the record straight and discuss the proper version of the negotiating history of the AD Agreement.

69. Zeroing is not a new subject for the GATT/WTO system. It was discussed extensively during the Uruguay Round. It was also the subject of two major disputes under the Tokyo Round Antidumping Code. On July 8, 1991, Japan initiated a dispute settlement proceeding challenging an EC antidumping decision in *EC – Audiocassettes*.<sup>96</sup> A short time later, in November 1991, Brazil requested consultations regarding an EC antidumping decision in *EC – Cotton Yarn*.<sup>97</sup> Both cases challenged numerous aspects of the EC’s antidumping methodology, including zeroing. Both Japan’s and Brazil’s zeroing claims turned on a now familiar argument that zeroing violated the “fair comparison” requirement of Article 2.6 of the Tokyo Round Antidumping Code, the predecessor to Article 2.4 of the AD Agreement. In both cases, the panels rejected Japan’s and Brazil’s claims. The panels found no basis in Article 2.6 of the Tokyo Round Antidumping Code to support an expansive reading of “fair comparison.” As a result, they concluded that the EC’s zeroing practices were not a violation of the Code. As the *EC – Cotton Yarn* panel stated:

In the view of the Panel the argument of Brazil was that the requirement to make due allowance for differences affecting price comparability had to be interpreted in light of the object and purpose of Article 2.6, which was to effect a fair comparison. However Brazil had not made any independent arguments designed to establish that apart from the requirements of the first sentence, and the allowances required by the second sentence of Article 2.6, there was a further requirement that any comparison of normal value and export price must be “fair.” The Panel was of the view that although the object and purpose of Article 2.6 is to effect a fair comparison, the wording of Article 2.6 “[i]n order to effect a fair comparison” made clear that if the requirements of that Article were to be met, any comparison thus undertaken was deemed to be “fair”.

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<sup>95</sup>EC First Opening Statement, para. 22.

<sup>96</sup>*EC – Audiocassettes*, para. 360.

<sup>97</sup>*EC – Cotton Yarn*, para. 502.

70. In this regard, Brazil noted at the outset that it “was not arguing against zeroing per se.”<sup>98</sup> Instead, Brazil conceded that “zeroing” is normally permissible, but argued that in an environment of high inflation like Brazil the EC’s zeroing methodology had an especially prejudicial effect on the calculation of dumping margins.<sup>99</sup>

71. The Panel, however, rejected Brazil’s expansive reading of “fair comparison.” Instead, it read “fair comparison” narrowly as relating strictly to allowances and adjustments:

The Panel noted that the first sentence of Article 2.6 concerned the actual comparison of prices at the same level of trade and in respect of sales made as nearly as possible the same time. The Panel considered that the second sentence of Article 2.6 concerned allowances to be made for the relevant differences in the factors that affected price determination in the respective markets sufficient to ensure the required comparability of prices. The Panel took the view that the second sentence of Article 2.6 required that allowances necessary to eliminate price comparability be made prior to the actual comparison of the prices, in order to eliminate the differences which could affect the subsequent comparison. The Panel considered that “zeroing” did not arise at the points at which the actual determination of the relevant prices was undertaken pursuant to the second sentence of Article 2.6. In the Panel’s view, “zeroing” was undertaken subsequently to the making of allowances necessary to ensure price comparability in accordance with the obligation contained in the second sentence of Article 2.6. It related to the subsequent stage of comparison of prices; a stage which was not governed by the second sentence of Article 2.6. Therefore, the Panel dismissed Brazil’s argument that the EC had failed to make due allowances for the effects of its so-called “zeroing” methodology.<sup>100</sup>

72. In other words, the *EC – Cotton Yarn* panel did not agree with Brazil’s contention that the term “fair comparison” in Article 2.6 of Tokyo Round Antidumping Code<sup>101</sup> incorporates a broad prohibition zeroing. Instead, the panel interpreted “fair comparison” as referring only to the use of adjustments or allowances for purposes of facilitating price comparability.

73. In sum, these panel decisions provide important context on the meaning of the term “fair comparison” in the Tokyo Round Code. In these disputes, Tokyo Round Antidumping Code panels did not interpret identical language in the Code as a prohibition on zeroing or a

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<sup>98</sup>*EC – Cotton Yarn*, para. 486.

<sup>99</sup>The Panel noted: “Brazil argued that even if so-called “zeroing” could be defended in most circumstances, it could not be defended in cases where due to high inflation very high fluctuations in positive and negative dumping margins occurred.” *EC – Cotton Yarn*, para. 498.

<sup>100</sup>*EC – Cotton Yarn*, para. 500.

<sup>101</sup>This provision was incorporated in Article 2.4 of the AD Agreement, which deals with adjustments.

requirement to average negative antidumping margins. Both panels rejected Japan's and Brazil's attempts to give this term the expansive meanings sought by the EC in this case. It is also noteworthy that Brazil was prepared to admit at the outset that zeroing is permissible in "most" cases, and thus did not challenge zeroing *per se*. In short, a prohibition on zeroing, if it exists, must have come into being in the Uruguay Round, since it did not exist in the Tokyo Round Antidumping Code. This would have required a textual change, but where is that change? As we now show, the Uruguay Round did not result in any new "common understanding" on a broad-based zeroing prohibition. Instead, the key textual provisions that have been cited by the Appellate Body in its previous findings remained virtually unchanged from GATT 1947 Article VI, the Kennedy Round Antidumping Code, and the Tokyo Round Antidumping Code, including such phrases as "product," "products," "margin of dumping," and "fair comparison."

74. During the Uruguay Round negotiations, Japan, Norway, Hong Kong, and Singapore repeatedly sought to add a ban on "zeroing" to the draft AD Agreement text. They argued vehemently that zeroing is inherently unfair; provided lengthy negotiating proposals discussing the treatment of "negative dumping" and "non-dumped sales" under GATT Article VI and the Tokyo Round Antidumping Code; and submitted detailed textual proposals to ban zeroing or require consideration of non-dumped sales. Their proposals, however, were strongly opposed at that time by the EC, the United States, and Canada, and were not incorporated into the final AD Agreement. As a result, as we now show, careful analysis of the negotiating history pursuant to Article 32 of the Vienna Convention demonstrates conclusively that the AD Agreement does not incorporate a broad ban on zeroing or a requirement to aggregate individual transactions under Article 9.3.

75. In September 1987, Japan submitted an initial proposal to the Uruguay Round Negotiating Group on MTN Agreements and Arrangements ("MTN Negotiating Group"), which had jurisdiction over the Tokyo Round Antidumping Code. The Japanese proposal called attention to the need to build a "common understanding" to address the role of "non-dumped" sales in calculating the "export price," as follows:

Although the Code states that, in order to effect a fair comparison between export price and domestic price, two prices are to be compared at the same level of trade and due allowance be made for the differences in conditions of sale, it is still susceptible of authority's subjective discretion. To clarify elements to be counted for adjustment in order to assure the same level of trade and to enumerate the content of the differences in conditions of sale would help the authorities to assure a fair comparison.

Certain Signatories use the weighted average of prices in all transactions in calculating the "normal value" whereas they use the weighted average of dumped prices exclusively in calculating the "export price". There is a need, therefore, to build a common understanding on the calculation of dumping margin in order to

eliminate such an arbitrary calculation.<sup>102</sup>

76. The Japanese submission is noteworthy because it underscores that at that time Japan fully recognized that: (1) there was no “common understanding” on zeroing and (2) the Tokyo Round language on “fair comparison” did not incorporate a “common understanding” to prohibit “zeroing” or to require the inclusion of “non-dumped sales” in the export price.

77. Japan submitted a second “zeroing” proposal to the Uruguay Round Negotiating Group on MTN Agreements and Arrangements in June 1988:

In cases where sales prices vary among many transactions, certain signatories, using the weighted-average of domestic sales price as the normal value with which each export price is compared, calculate the average dumping margin in such a way that the sum of the dumping margins of transactions the export prices of which are lower than normal value is divided by total amount of export prices. In this method, however, negative dumping margins, i.e., the amount by which export price exceeds normal value, are ignored.

Consequently, dumping margins occur in cases where export prices vary over time ... or where export prices vary due to different routes of sale ..., even if the average level of export prices is equal to that of domestic sales prices.<sup>103</sup>

Accordingly, the second Japanese proposal explicitly referenced the role of “negative dumping margins.”

78. In July 1989, Hong Kong submitted a competing proposal to address “zeroing” in what was then Article 2.6 of the “Carlisle draft”<sup>104</sup> (and would later become Article 2.4 of the AD Agreement) as follows:<sup>105</sup>

Negative dumping margin (Article 2.6)

14. In calculating the overall dumping margin of the producer under investigation, certain investigating authorities compare the normal value (calculated on a weighted average basis) with the export price on a transaction by transaction basis. For transactions where normal value is higher than the export

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<sup>102</sup> *Communication From Japan*, MTN.GNG/NG8/W/11, at item II.1(4) (Sept. 18, 1987) (emphasis added).

<sup>103</sup> *Communication From Japan*, MTN.GNG/NG8/W/30, at item I.4(3) (June 20, 1988) (emphasis added).

<sup>104</sup> Referring to the then Deputy Director General of the GATT, Charles Carlisle.

<sup>105</sup> MTN.GNG/NG8/W/51/Add. 1, p. 3 (22 Dec. 1989) (emphasis added).

price (i.e. dumping occurs), the dumping margin by which the normal value exceeds the export price of each transaction in value terms will be added up. The grand total will then be expressed as a percentage of the total value of the transactions under investigation. This will then represent the overall dumping margin in percentage terms. For transactions where normal value is lower than the export price (i.e. no dumping occurs) the “negative” dumping margin by which the normal value falls below the export price in value terms will be treated as zero instead of being added to the other transactions to offset the dumping margin. As a result, it would be technically easy to find dumping with an inflated overall dumping margin in percentage terms.

79. In a separate communication entitled “Principles and Purposes of Anti-Dumping Provisions,” Hong Kong discussed the imposition of duties on an individual transaction basis:

The second way in which anti-dumping duties are imposed on goods which are not dumped, arises out of the tendency to apply an anti-dumping duty as though it were an import levy on all imports from a named country because certain suppliers from that country have been found to have dumped at some time in the past. This ignores the fact that under Article VI, an anti-dumping duty is a levy on dumped imports of products, not on all such products from a named source which may be found to be dumping such products in the past. *By a strict interpretation, it would appear that only an entry-by-entry system is fully consistent with Article VI; and any variations to such a system to address administrative difficulties must be carefully assessed as to whether this basic requirement of Article VI is still met.*<sup>106</sup>

80. Similar concerns about “negative dumping” were expressed by Singapore in a paper regarding “Proposed Elements for a Framework for Negotiations, Principles and Objectives for Antidumping Rules.”<sup>107</sup> Singapore argued that: “In calculating dumping margins, “negative” dumping should be taken into account i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value.”

81. On November 15, 1989, the GATT Secretariat summarized the status of discussions in the

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<sup>106</sup>MTN.GNG/NG8/W/46, p.8 (underlining in original; italics added). This communication represents the view not just of one participant in the MTN Agreements negotiations, but the statement by a skilled and sophisticated WTO Member. This Member’s view that ideally the imposition of dumping should apply at an individual importer level based on individual entries suggests that the findings in *US – Zeroing (EC) (AB)* and *US – Zeroing (Japan) (AB)* that the calculation of a dumping margin must be done on the basis of the “product as a whole” are misplaced.

<sup>107</sup>MTN.GNG/NG8/W/55, p.7 (13 Oct. 1989).



Negotiating Group as follows:<sup>108</sup>

13. Use of weighted averages in the comparison of export price and normal value

29. The following were among comments made:

- the problem arose from practices where the normal value, established on a weighted-average basis, was compared to the export price on a transaction-by-transaction basis. Thereby, dumping might be found merely because a company's export price varied in the same way as its own domestic price. Even when domestic profit margin was the same as in the export market, any variations in the export price would, due to the disregard of negative dumping margins, cause dumping to be found, or a dumping margin to be increased;

- if negative margins were included in the calculation, one would not deal with instances in which dumping was targeted to a particular portion of a product line or to a particular region; sales at fair value in one region or in one portion of a product line did not offset injury caused in the other;

- given the definition of like products in Article 2:2, it was difficult to see the relevance of the product line argument. Injury to producers in certain areas presupposed market segmentation which was dealt with in Article 4:1(ii);

- the issue at stake was masked, selective dumping, the effects of which could be considerable;

- an important question was whether non-dumped imports should also have to be included in the examination of injury.

82. In short, there was no consensus. The Secretariat's report underscores the lack of agreement within the Negotiating Group on modifying Article 2.6 to prohibit "zeroing." While some participants, *e.g.* Japan, Hong Kong, Singapore, and the Nordics strongly supported such a proposal, others were concerned that it would facilitate "selective dumping" into specific markets or for specific product lines.

83. When the negotiations shifted to the drafting of a proposed text, the Nordic Countries

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<sup>108</sup> *Meeting of 16-18 October 1989 of the Negotiating Group on MTN Arrangements*, MTN.GNG/NG8/13, at para. 29 (Nov. 15, 1989) (emphasis added).

submitted proposed amendments to the Code as follows:<sup>123</sup>

Due allowances and fair comparison

Amend present Article 2.6 (i.e. new Article 2.7) to read as follows and add a footnote: In order to effect a fair comparison between the normal value, as determined in accordance with paragraphs 4 and 5 above and the export price, both prices shall be calculated in a uniform and consistent manner\*

...

(Footnote) \* A uniform and consistent manner of calculation implies that when normal value is determined, e.g. by calculating the weighted or arithmetical averages, the export price shall also be determined by similar weighted or arithmetical average calculations. . .

Nothing even vaguely resembling the Nordic footnote appears in the final text of the AD Agreement.

84. An alternative proposal to revise Article 2.6 of the Tokyo Round Antidumping Code was offered by Singapore, as follows:

E. Determination of normal value and comparison between normal value and export price

- (a) [T]here should be no asymmetrical adjustment. Comparisons between the export price and the normal value should be conducted on a fair and symmetrical basis in determining the dumping margin.
- (b) Normal value should reflect the normal costs in the country of origin or exportation, plus profits which are commercially acceptable.
- (c) If Normal Value is to be constructed, the investigating authorities should reflect as closely as possible the real conditions in the country of export. In particular, they should reflect the actual production costs and the commercially accepted profit margin in that exporting country. Cost allocation rules should follow the generally-accepted accounting practices in the country of export. Furthermore, the cost-of-production provisions should recognize the need to amortize “start-up” costs and extraordinary costs, such as R&D development costs.

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<sup>123</sup>MTN.GNG/NG8/W/76 (11 April 1990) (underlining in original).

(d) In calculating dumping margins, “negative” dumping should be taken into account i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value. . . .

Again, none of the language in Singapore’s proposed text appears in the final Uruguay Round AD Agreement.

85. Finally, in December 1989, Hong Kong submitted a textual proposal to address “negative dumping.” Like Japan’s and Singapore’s, the Hong Kong proposal was framed as a revision to Article 2.6 of the Tokyo Round Antidumping Code, which became Article 2.4 of the AD Agreement, as follows:

In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provision of Article VI:1(b) of the General Agreement, the prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. The investigating authorities shall give due allowance [shall be made] in each case [, on the merits] for the differences in conditions and terms of sale, for the differences in taxation, and for [the] all other differences affecting price comparability in order to put normal value and the export price on a comparable basis and effect a fair comparison. In the cases referred to in paragraph 5 of Article 2 allowance for costs, including duties and taxes, incurred between importation and sale, and for profits accruing, should also be made. Normal value and export price shall be established on a weighted average basis of all sales on the relevant markets for purposes of determining the dumping margin.

(Explanatory note – To ensure that comparison between the normal value and export price be made on an equal basis. Please refer to paragraphs 15 and 15 of paper W/51/Add.1.)

*Underlined text is new language proposed by Hong Kong. Bracketed language reflects deletions from Article 2.6 of the Tokyo Round Antidumping Code.*

Accordingly, like Japan and Singapore, Hong Kong did not view the existing Tokyo Round Antidumping Code provisions regarding “fair comparison” or “margin of dumping” as incorporating a ban on zeroing, but instead sought to introduce new obligations to the text through the addition of new language. Again, Hong Kong’s language did not appear in the final AD Agreement text.

86. In sum, the negotiating history of the Uruguay Round shows that the negotiators were well aware of zeroing. Japan and Brazil had already initiated GATT disputes challenging the EC’s

zeroing practices under the Tokyo Round Antidumping Code. Japan, Singapore, Hong Kong, and the Nordic Countries had submitted negotiating proposals to prohibit zeroing, and Japan, Singapore, and the Nordic Countries had submitted textual language to implement such a ban. The negotiators from Japan, Singapore, Hong Kong, Brazil, and the Nordic Countries were some of the most skilled and sophisticated in the GATT. Given past practice, they were also well aware that they needed to secure major changes in the existing language of GATT 1947 Article VI and the Tokyo Round Antidumping Code in order to achieve their objective of banning zeroing. It was no secret that there was no “common understanding” under GATT 1947 Article VI and the Tokyo Round Antidumping Code of such terms as “fair comparison,” “margin of dumping,” “product,” or “products.” As a result, they sought to introduce new obligations to the WTO Agreement through the addition of new textual provisions to mandate A-to-T comparisons and require averaging in all contexts. Unfortunately, none of the language cited above appeared in the final WTO AD Agreement. Instead, the key terms of the WTO text (apart from the “all comparable export transactions” provision which is limited to A-to-A comparisons in investigations and is not at issue here) were virtually identical to GATT 1947 Article VI and the Tokyo Round Antidumping Code. Accordingly, an analysis of the “preparatory work of the treaty and the circumstances of its conclusion” for purposes of Article 32 of the Vienna Convention shows beyond doubt that there was no common understanding in the Uruguay Round to bar zeroing.

87. While the panel reports in *EC – Cassettes* and *EC – Cotton Yarn* were issued after the conclusion of the Uruguay Round, Japan, Brazil, Singapore, Hong Kong, and the Nordics were well aware that the EC was contesting Japan and Brazil’s claims that the Tokyo Round Code prohibited zeroing, because they, like other Members of the Antidumping Code Committee, participated in discussions of the consultation request and the decisions to establish Antidumping Code Panels. In other words, it would have been foolish for Japan, Brazil, Singapore, Hong Kong, and the Nordics to count on some “hidden meaning” in the text being carried over to the WTO AD Agreement from the same terms in its GATT 1947/Tokyo Round predecessors, when they knew the meaning of these terms was cloudy and in dispute. To the extent that they made a bet that they would succeed in inserting a zeroing prohibition into the existing “fair comparison” language of the Tokyo Round Code through the dispute settlement process, the panel reports in *EC – Audiocassettes* and *EC – Cotton Yarn* indicate that this was a wager that they lost. Indeed, the *EC – Cotton Yarn* panel report, upon its adoption by the Antidumping Committee, represented an important interpretation of the Tokyo Round Antidumping Code under the dispute settlement procedures in effect at that time. This phrase, as discussed above, did not change in any material way when it was carried over to the WTO AD Agreement.

88. In short, the lack of any explicit textual reference in the Uruguay Round AD Agreement to prohibiting zeroing, or any meaningful elaboration on the longstanding GATT 1947 and Tokyo Round Antidumping Code terms relating to the “margin of dumping,” “fair comparison,” “product,” or “products,” speaks for itself. No common understanding was reached on zeroing in the Uruguay Round. No consensus could be reached because despite extensive efforts by Japan, Hong Kong, Singapore, and the Nordic Countries, their proposals were firmly opposed by the EC,

the United States and Canada,<sup>124</sup> who had long used zeroing in their antidumping programs under GATT Article VI and the Tokyo Round Code, and continued to use zeroing after the WTO entered into force (and in the case of the EC and Canada continue to use zeroing today, despite their protestations otherwise). Any effort by the EC to read a “zeroing” prohibition into the WTO AD Agreement, therefore, flies in the face of reality.

## **V. Conclusion**

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

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<sup>124</sup>See e.g., “Meetings of 31 January - 2 February and 19-20 February 1990, MTN/GNG/NG8/15, p. 19 (March 15, 1990) (discussing problem of targeted dumping); Meeting of 23 July 1990 MTN/GNG/NG8/19, p. 5 (U.S. delegation expresses concern regarding “the use of average export values”); Meeting of 16-18 October 1989, pp. 13-14, MTN/GNG/NG8/13 (Nov. 15, 1989) (noting that negative comments included “if negative margins were included in the calculation, one could not deal with instances in which dumping was targeted to a particular portion of a product line or to a particular region” and another delegation commented that “the issue at stake was masked, selective dumping”).