

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

(WT/DS350)

**Comments of the United States of America
on the European Communities' Answers
to Questions from the Panel to the Parties
in Connection With the Second Substantive Meeting of the Panel**

May 9, 2008

Table of Reports

Short Form	Full Citation
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>US – Corrosion-Resistant Steel CVD (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, adopted 19 December 2002
<i>US – Softwood Lumber Dumping (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004

ZEROING IN PERIODIC REVIEWS

EUROPEAN COMMUNITIES

Q1. The Panel needs to clarify the facts relating to the EC's claims concerning the 37 administrative reviews at issue. In that regard, the Panel notes the US' response to Question 7(b) sent by the Panel following the First Meeting. With regard to Exhibit EC-31, which contains documentation pertaining to the administrative review on *Ball Bearings and Parts Thereof from Italy*, the United States acknowledges that the documents submitted in Appendixes I and II have been produced by the USDOC during the administrative review at issue and that they demonstrate that the USDOC did apply simple zeroing. The United States, however, casts doubt as to whether the documents presented in the subsequent appendixes have also been produced by the USDOC. The United States argues that "the burden is on the EC to prove its case, including demonstrating the accuracy, source, and relevance of its exhibits."

a) What is your reaction to the US' argument concerning the Exhibits submitted by the European Communities in connection with the administrative reviews at issue?

1. The United States does not contest the accuracy of documents submitted by the EC that were generated by the United States Department of Commerce ("Commerce"), and further does not contest the EC's descriptions with respect to Exhibit EC-31, in which the EC differentiates between documents generated by Commerce, and those that were not. However, the EC's answer only provides this pertinent information as to Exhibit EC-31, and is silent as to the remaining exhibits concerning the assessment reviews it seeks to challenge.

2. As set forth in the United States' May 2, 2008 answer to Panel Question 1(b), because each assessment review involves a distinct product, country, period of time and sales data, findings, statements or conclusions made within the context of an individual assessment review are not relevant or applicable to any other proceeding before Commerce. As such, the EC's descriptions and citations to the appendices in Exhibit EC-31 only provide information with respect to the assessment review addressed in Exhibit EC-31, and offer no indication or evidence as to whether the United States provided offsets in any of the other challenged proceedings.

3. The EC's claim is that the United States acted inconsistently with its WTO obligations when it applied "zeroing" in individual assessment reviews addressed in Exhibits EC-31 and Exhibits EC-33-68. It is the EC's burden, not that of the United States, to demonstrate that the evidence submitted to the Panel supports its factual allegation that zeroing was employed in each of the individual measures it seeks to challenge.¹ It is inadequate for the EC to attempt to shift its burden to the United States by simply claiming that the United States possesses "all documents

¹ *US – Corrosion-Resistant Steel CVD (AB)*, paras. 156-57.

necessary to demonstrate the methodology used.”² This is particularly true when the EC was able to provide further explanation as to Exhibit EC-31 upon prompting from the Panel, and it has not explained why it cannot complete the simple exercise of explaining the source of each of its own exhibits, or how those documents demonstrate zeroing was employed in the calculations it seeks to challenge. Furthermore, because the United States is only in a position to verify the accuracy of documents generated by Commerce, it cannot confirm the accuracy of documents, program logs, printouts or margins produced by the EC’s legal advisors, which the EC claims are the result of Commerce’s program without the application of the zeroing methodology.³

UNITED STATES

b) The Panel notes that the Issues and Decision Memorandum in Appendix II of Exhibit EC-31 provides in relevant parts:

"Department's Position: We have not changed our methodology with respect to the calculation of the weighted-average dumping margins for the final results. We included U.S. sales that were not priced below normal value in the calculation of the weighted-average margin as sales with no dumping margin. The value of such sales is included with the value of dumped sales in the denominator of the calculation of the weighted-average margin. We do not allow U.S. sales that were not priced below normal value, however, to offset dumping margins we find on other U.S. sales."⁴ (emphasis added)

The Panel also notes that 29 of the 36 remaining Exhibits (EC-33 through EC-68) concerning the administrative reviews at issue contain language identical, or similar, to the above quotation. Specifically, the Panel notes that such language is found in the following parts of the mentioned exhibits:

Exhibit EC-33	Appendix II, Issues and Decision Memorandum, p. 29-30
Exhibit EC-34	Appendix II, Issues and Decision Memorandum, p. 15-16
Exhibit EC-35	NONE
Exhibit EC-36	Appendix II, Issues and Decision Memorandum, p. 10
Exhibit EC-37	Appendix II, Issues and Decision Memorandum, p. 12
Exhibit EC-38	Appendix II, Issues and Decision Memorandum, p.14
Exhibit EC-39	Appendix II, Issues and Decision Memorandum, p. 11
Exhibit EC-40	Appendix II, Issues and Decision Memorandum, p. 10
Exhibit EC-41	Appendix II, Issues and Decision Memorandum, p. 12

² EC Answer to Panel Question 1(a), para. 1 (May 2, 2008).

³ EC Answer to Panel Question 1(a), paras. 7, 8 (May 2, 2008).

⁴Exhibit EC-31, Appendix II, p. 11.

Exhibit EC-42	Appendix II, Issues and Decision Memorandum, p. 14
Exhibit EC-43	Appendix II, Issues and Decision Memorandum, p. 10
Exhibit EC-44	Appendix II, Issues and Decision Memorandum, p. 11
Exhibit EC-45	Appendix II, Issues and Decision Memorandum, p. 12
Exhibit EC-46	Appendix II, Issues and Decision Memorandum, p. 14
Exhibit EC-47	NONE
Exhibit EC-48	NONE
Exhibit EC-49	Appendix II, Issues and Decision Memorandum, p. 10
Exhibit EC-50	Appendix II, Issues and Decision Memorandum, p. 16
Exhibit EC-51	Appendix II, Issues and Decision Memorandum, p. 13
Exhibit EC-52	Appendix II, Issues and Decision Memorandum, p. 11
Exhibit EC-53	Appendix II, Issues and Decision Memorandum, p. 11
Exhibit EC-54	Appendix II, Issues and Decision Memorandum, p. 24
Exhibit EC-55	Appendix II, Issues and Decision Memorandum, p. 10
Exhibit EC-56	Appendix II, Issues and Decision Memorandum, p. 12
Exhibit EC-57	NONE
Exhibit EC-58	NONE
Exhibit EC-59	Appendix II, Issues and Decision Memorandum, p. 13
Exhibit EC-60	Appendix II, Issues and Decision Memorandum, p. 5
Exhibit EC-61	Appendix II, Issues and Decision Memorandum, p. 14
Exhibit EC-62	NONE
Exhibit EC-63	Appendix II, Issues and Decision Memorandum, p. 16-17
Exhibit EC-64	Appendix II, Issues and Decision Memorandum, p. 16
Exhibit EC-65	NONE
Exhibit EC-66	Appendix II, Issues and Decision Memorandum, p. 6
Exhibit EC-67	Appendix II, Issues and Decision Memorandum, p. 13
Exhibit EC-68	Appendix II, Issues and Decision Memorandum, p. 8

Does the United States argue that the copies of the Memoranda cited in the table are not accurate? If not, do, in your view, the USDOC's statements in the Issues and Decision Memorandum in Exhibit EC-31 and in those in 29 of the 36 Exhibits contained in the table above show that the USDOC did indeed apply simple zeroing in the relevant administrative reviews? Please elaborate in connection with each Exhibit cited above.

EUROPEAN COMMUNITIES

c) Please explain the reason why the European Communities has not submitted a copy of the USDOC's Issues and Decision Memorandum in relation to 7 of the 36 Exhibits contained in the table above. You may, if you so wish, submit copies of the Memoranda pertaining to the mentioned 7 administrative reviews, along with your answers to these questions.

4. The Panel made a simple request that the EC explain “why the European Communities has not submitted a copy of the USDOC’s Issues and Decision Memorandum in relation to 7 of the 36 Exhibits,” and invited the EC to “submit copies of the Memoranda pertaining to the mentioned 7 administrative reviews” with the EC’s answers. In response, the EC explained that the omitted “memoranda did not discuss the use of zeroing methodologies in the margin calculation,” and submitted copies of the omitted memoranda.⁵ This part of the EC’s response was proper.

5. The EC also submitted “two margin programs” to supplement Exhibit EC-57 that had never previously been submitted.⁶ Paragraph 14 of the Panel’s Working Procedures permits the submission of new factual evidence after the first written submissions only for “evidence necessary for purposes of rebuttals or answers to questions,” or “upon a showing of good cause.”⁷ The Panel’s question and suggestion to submit additional evidence is expressly limited to “Issues and Decisions Memorandum,” and did not invite the submission of other evidence. The EC also does not demonstrate that this evidence is submitted in rebuttal, nor does it provide any reason as to why good cause justified an exception to Paragraph 14 of the Working Procedures. Accordingly, this additional new factual submission (i.e., Exhibits EC-88 and EC-89) violates paragraph 14 of the Working Procedures.

6. The United States further reiterates that the burden is on the EC to demonstrate a *prima facie* showing of its claims. It is inadequate for the EC, as the complainant, to attempt to shift its burden to the responding Member by offering that if “the Panel would consider it necessary to obtain the detailed margin calculations for each of the cases [for which exhibits have not been provided by the EC], it should request copy of these detailed instructions from the United States.”⁸

ZEROING IN SUNSET REVIEWS

UNITED STATES

Q2. The Panel needs to clarify the facts pertaining to the 11 sunset reviews at issue in this case. Specifically, the Panel needs to know which past margins were relied upon by the USDOC in its determinations in the sunset reviews at issue, and whether those margins

⁵ EC Answer to Panel Question 1(c), para 10 (May 2, 2008). The EC mistakenly numbered its answer in response to Panel Question 1(c) as in response to Panel Question 1(b); the United States uses the proper citation in these comments.

⁶ EC Answer to Panel Question 1(c), para. 11 & nn.3-4 (May 2, 2008) (stating “the EC now attaches a copy of the two margin programs used in this review,” and attaching Exhibits EC-88 and EC-89).

⁷ Working Procedures for the Panel, para 14.

⁸ EC Answer to Panel Question 1(c), para 11 (May 2, 2008).

were obtained through either model zeroing in investigations or simple zeroing in periodic reviews. To this end, the Panel directed Question 13 to the United States after the First Meeting. In its response, the United States argues that it is unable to confirm the accuracy of those documents, presented in Exhibits EC-69 through EC-79, that were not issued by the USDOC in the relevant sunset reviews. The United States also contends that in some cases it is not possible to determine whether the documents presented in the EC's exhibits were issued by the USDOC. The United States also takes issue with the fact that the European Communities has not submitted program logs that, in the US' view, would have clarified whether zeroing had been applied in respect of the margins relied upon by the USDOC in the sunset reviews at issue. The United States acknowledges that the European Communities provided program logs in Exhibits EC-69 and EC-70, but contends that it is not clear whether such logs had been generated by the USDOC.

a) Please explain the legal basis of your argument that the European Communities has to provide the program logs pertaining to the calculation of the margins relied upon by the USDOC in the sunset reviews at issue.

EUROPEAN COMMUNITIES

b) Please show to the Panel, with respect to each sunset review at issue, which zeroed margins the USDOC relied upon in its sunset determination.

7. The EC argues that the U.S. determinations in the challenged sunset reviews are inconsistent with Articles 11.1 and 11.3 of the Antidumping Agreement because when making its determinations that removal of the antidumping duty would likely lead to a continuation or recurrence of dumping, the United States relied upon margins that were calculated in “proceedings using model zeroing,” and therefore “did not comply with its obligations pursuant to Articles 2.1, 2.4 and 2.4.2.”⁹ In order to prove the factual component of its claim, the EC must provide evidence indicating that the United States relied upon margins that were calculated using zeroing.¹⁰ Moreover, the Panel specifically asked that the EC “show to the Panel, *with respect to each sunset review at issue*, which zeroed margins the USDOC relied upon” (italics added). The evidence submitted by the EC does not show that Commerce relied upon margins that were calculated by using zeroing in all of the sunset determinations challenged by the EC.

⁹ EC First Written Submission, para. 259.

¹⁰ Even were the EC to show that zeroing was used in each sunset review, the EC still has not demonstrated that any reliance in these sunset reviews on margins calculated using zeroing is inconsistent with the Antidumping Agreement. See, e.g., U.S. First Written Submission, Part C; U.S. Answer to Panel Question 12, para. 35 (February 22, 2008). For zeroing to taint the likelihood of dumping determination, the EC must show, first, that the margin would have been zero or *de minimis* without the use of zeroing, and that therefore there were no past margins that could have been relied on, and second, that no other evidence on the record before Commerce would have supported a likelihood of dumping determination. Only then could the EC claim that zeroing had an actual impact on the actual sunset review determination.

8. As with the assessment reviews challenged, the United States does not contest the accuracy of documents submitted by the EC that were generated by Commerce or the accuracy of any of the EC’s citations thereto. However, with respect to the sunset reviews challenged, it is the EC’s burden to provide evidence with respect to *each* sunset review, that the United States relied upon margins that were calculated using zeroing. It is not the United States’ burden to demonstrate zeroing was not employed. Furthermore, the EC cannot discharge its burden by simply claiming that the “original documentation should . . . be available to the US Department of Commerce.”¹¹

9. In support of its claims as to the challenged sunset reviews, the EC first relies on Commerce’s broad change in practice announced on December 27, 2006, and asks the Panel to infer from a broad statement regarding what would not be done in the future that zeroing must have been employed in all of the margins relied upon in the sunset reviews it challenges. Such a general statement, however, does not provide specific evidence as to whether zeroing was employed in the margins relied upon in each of the challenged sunset reviews.

10. The EC next cites to Commerce’s Issues and Decision Memorandum for the Sunset Reviews of the Antidumping Orders on Antifriction Bearings and Parts Thereof from France, Germany, Italy, and the United Kingdom as evidence that zeroing was employed in the margins relied upon in the challenged sunset reviews.¹² While the United States does not contest the accuracy of the EC’s citation, the cited Issues and Decision Memorandum provides information *only* as to the margins relied upon in those particular sunset proceedings, and provides no broader indication as to whether zeroing was employed.

11. Additionally, the EC references certain evidence applicable to particular sunset reviews challenged, and erroneously suggests that this evidence is somehow indicative of all of the challenged sunset reviews:

*As an illustration of how zeroing methodologies were applied in practice, the EC refers to the computer programs used by the USDOC for the margin calculations in the original investigations In particular, the USDOC program attached as Appendix V of Exhibit EC-69 [contains a zeroing code] Likewise, a similar zeroing code can be found in [EC-70]. . . . The result of the use of the zeroing methodology is in general a substantial increase in the dumping margin found . . . [t]his is demonstrated by . . . the analysis [concerning the] sunset review which forms the subject of Exhibit EC-79*¹³

¹¹ EC Answer to Panel Question 2(b), para. 17 (May 2, 2008).

¹² EC Answer to Panel Question 2(b), para. 14 (May 2, 2008).

¹³ EC Answer to Panel Question 2(b), paras. 15, 16 (May 2, 2008) (emphasis added).

12. As explained above, the facts and analysis of each proceeding before Commerce are unique to that individual proceeding. The EC's citations to the program logs pertaining to sunset reviews addressed in Exhibits 69 and 70 do not provide any evidence as to the other challenged sunset reviews. Similarly, any reference with respect to Exhibit EC-79 does not demonstrate that zeroing was either applied or germane to the outcome in any other sunset review challenged by the EC.

13. Furthermore, because the United States cannot confirm the accuracy of margins not calculated by Commerce, it cannot confirm, as a factual matter, that the overall margin for the German exporter, Wieland Werke AG, would have been "negative if no zeroing had been used in the original investigation."¹⁴

14. Additionally, in its response to Panel Question 2(b), the EC submitted new evidence, which consisted of "the analysis carried out by the legal counsel of the German exporters affected by the sunset review which forms the subject of Exhibit EC-79," purportedly demonstrating that "[t]he result of the use of the zeroing methodology is in general a substantial increase in the dumping margin found."¹⁵ The Panel's question asks only "which zeroed margins the USDOC relied upon in its sunset determination," and does not seek the EC's opinion on "the result of the use of the zeroing methodology." Thus, this additional new factual evidence (contained in Exhibits EC-92 to EC-96) is beyond the scope of the question posed by the Panel, and, without an accompanying showing of good cause, was submitted in contravention of paragraph 14 of the Working Procedures.

c) The Panel notes that the order in the sunset review for which evidence has been submitted in Exhibit EC-77 has been revoked. Please clarify what findings the European Communities seeks from the Panel in connection with the mentioned sunset review.

15. The United States does not disagree with the EC that as a general matter, a panel may examine a measure that has expired during the course of panel proceedings. However, such a measure must properly be before the panel in the first instance.¹⁶

16. As the United States explained in its answer of May 2, 2008 to Question 2(d), the EC's claim as to the sunset review determination on Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands is not properly before the Panel because that sunset review determination was not included in the EC's request for consultations,¹⁷ nor was it final at the time of panel

¹⁴ EC Answer to Panel Question 2(b), para. 16 (May 2, 2008).

¹⁵ EC Answer to Panel Question 2(b), para. 16 & n.9 (May 2, 2008) (referencing "Exhibits EC-92 to EC-96").

¹⁶ U.S. Answer to Panel Question 2(d), para. 6 (May 2, 2008).

¹⁷ U.S. First Written Submission, para. 49 n.49.

establishment, as required by Article 17.4 of the Antidumping Agreement.¹⁸ For these reasons, the sunset review determination on Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands falls outside the Panel’s terms of reference, and the Panel cannot make findings concerning it.

BOTH PARTIES

d) Please clarify the date of revocation of the order addressed in Exhibit EC-77, and explain whether a WTO panel can address claims pertaining to measures that expire before the completion of panel proceedings.

17. The United States first refers the Panel to its comments on the EC’s answer to Panel Question 2(c) above.

18. In addition, we note that the EC specifically argues that the Panel should make a finding on an expired measure because “[a] finding that such a measure violated a Member’s WTO obligations may still have legal consequences, e.g. in proceedings before the municipal courts of WTO Members.”¹⁹ The United States disagrees with this rationale offered by the EC. Nothing in the DSU suggests that a panel is to consider the municipal law consequences of the findings that it may or may not make. To the contrary, DSU Article 11 provides that a panel is to make an “objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” A panel is responsible for resolving a particular dispute between Members over the consistency of a measure with the covered agreements. A panel is not charged with taking into account how legal systems outside the WTO may react to its findings, or how its findings will affect the position of private litigants in the domestic courts of Members.

19. This interpretation is supported by other provisions of the DSU. For example, a WTO Member may initiate WTO dispute settlement proceedings by requesting consultations “concerning measures *affecting the operation of any covered agreement*.”²⁰ Furthermore, “the aim of the dispute settlement mechanism is to secure a positive solution to the dispute,”²¹ and by making findings as to the consistency of those measures with the covered agreements, a panel carries out its task to help to “secure a positive solution” to the dispute it is examining. Nothing in these provisions contemplates that a panel may or should consider the consequences of its findings on expired measures in the municipal courts of a Member.

UNITED STATES

¹⁸ U.S. First Written Submission, para. 73 n.70.

¹⁹ EC Answer to Panel Question 2(d), para. 21 (May 2, 2008).

²⁰ DSU Art. 4.2 (emphasis added).

²¹ DSU Art. 3.7.

e) The Panel notes that the Issues and Decision Memoranda, provided in the table below, prepared by the USDOC and submitted in Exhibits EC-69 through EC-79, show that in all of the 11 sunset reviews at issue, the USDOC used margins from the relevant prior investigations and/or administrative reviews. Does the United States argue that the copies of the Memoranda cited in the table are not accurate? If not, would the United States agree that the mentioned memoranda demonstrate that in the 11 sunset reviews at issue, the USDOC did indeed use margins from prior investigations and/or administrative reviews? Please elaborate in connection with each Exhibit cited above.

Exhibit EC-69	"The Department conducted three administrative reviews since issuance of the order in which it found that dumping continued..." "After considering the dumping margins determined in the investigation and subsequent reviews...."	Issues and Decision Memorandum, Appendix III, p. 4.
Exhibit EC-70	"There is no basis to reject margins we calculated in the investigation..." "LM's administrative review margins have been lower than the investigation margin....Therefore, for these final results, we will continue to use the margin from the investigation for LM"	Issues and Decision Memorandum, Appendix II, pp. 5-6.
Exhibit EC-71	"We disagree with ... claim that the margins calculated during the original investigations are invalid..." "Thus, we conclude that the rates we calculated at the investigations and in administrative reviews demonstrate that..."	Issues and Decision Memorandum, Appendix II, pp. 7-8.
Exhibit EC-72	"Thus, we conclude that the rates we calculated at the investigations and in administrative reviews demonstrate that..."	Issues and Decision Memorandum, Appendix III, p. 8.
Exhibit EC-73	"Thus, we conclude that the rates we calculated at the investigations and in administrative reviews demonstrate that..."	Issues and Decision Memorandum, Appendix III, p. 8.
Exhibit EC-74	"The Department has conducted three administrative reviews since issuance of the order in which it found that dumping continued at levels above <i>de minimis</i> ." "After considering the weighted-average dumping margins determined in the investigation and subsequent reviews, the Department determines ..."	Issues and Decision Memorandum, Appendix III, pp. 4-5.
Exhibit EC-75	"The preference for selecting a margin from the investigation is because it is the only calculated rate that reflects the behaviour or exporters without the discipline of an order in place. As discussed below, the Department believes it is appropriate to report those figures to the ITC as the magnitude of the margin likely to prevail if the orders were	Issues and Decision Memorandum, Appendix III, p. 6.

	revoked...."	
Exhibit EC-76	"We disagree with NSK Corp.'s claim that the margins calculated during the original investigations are invalid..." "Therefore, the methodologies we used to calculate the margins in the original investigations and subsequent administrative reviews were and remain valid under U.S. law."	Issues and Decision Memorandum, Appendix III, pp. 7-8.
Exhibit EC-77	ORDER REVOKED.	
Exhibit EC-78	"In the investigation and in each of the three administrative reviews of these orders, dumping margins were found." "[T]he Department finds that the margins from the original investigation are probative of the behaviour of Italian and Turkish producers and exporters of pasta if the orders were revoked."	Issues and Decision Memorandum, Appendix III, pp. 4-5.
Exhibit EC-79	"In this second sunset review the Department again finds that it is appropriate to provide the ITC with the rate from the investigation for Wieland because it is the only calculated rate that reflects the behaviour of exporters without the discipline of an order in place."	Issues and Decision Memorandum, Appendix III, p. 7.

PREJUDICE

EUROPEAN COMMUNITIES

Q3. Regarding the alleged inconsistency of the EC's panel request with Article 6.2 of the DSU, the Panel notes the US' contention that the DSU does not require the defending Member to show that the lack of precision in the complaining Member's panel request has prejudiced its right of defence.²² What is the EC's reaction to this argument? Please explain the legal basis of your argument that the United States has to show that the alleged lack of precision in the EC's panel request with regard to the continued application of the 18 anti-dumping duties has prejudiced the US' right of defence.

20. The EC at the Panel's second substantive meeting was unable to articulate a legal basis for its assertion that the United States is required to show that the lack of precision in the EC's panel request prejudiced the U.S. rights of defense. Now the EC would like the Panel to believe that such a requirement is "based on Article 6.2 of the DSU as properly interpreted on the basis of the principles of the Vienna Convention on the Law of Treati[es]."²³ It is the EC, however, which misapplies the customary rules of interpretation, and ignores the ordinary meaning of

²²Second Written Submission of the United States, para. 28.

²³ EC Answer to Panel Question 3, para. 25 (May 2, 2008).

Article 6.2, which imposes no burden on a party to show that it was prejudiced by the lack of specificity in a panel request. And no such requirement is found in any other provision of the DSU, or anywhere else in the covered agreements. The requirements of Article 6.2 of the DSU are clear – the panel request must “identify the *specific* measures at issue.” Measures not so identified do not fall within the panel’s terms of reference. As the United States has demonstrated, the EC failed to identify with specificity the application or continued application of antidumping duties in 18 separate cases, and this is all that the United States was required to show in order to prevail on its preliminary objection under Article 6.2 of the DSU.²⁴

21. The EC cites to “the clear and constant case-law of the Appellate Body” in support of its argument that Article 6.2 imposes a prejudice requirement.²⁵ However, the WTO is not a common law system, and prior Appellate Body reports are neither “case law” nor binding, except with respect to resolving the particular dispute between the parties to that dispute, including disagreements over the specificity of panel requests.²⁶ And while the Appellate Body said that one of the purposes served by the specificity requirement is to “inform[] the defending party and the third parties of the legal basis of the complaint,”²⁷ it was not thereby reading Article 6.2 as imposing a burden on a defending party to demonstrate that its defense was prejudiced by the lack of precision in a panel request. Indeed, the EC’s response is troubling in that it seems to imply that where a panel request fails to meet the requirements of the DSU, that failure may be excused by the lack of prejudice. There is no such exception to Article 6.2 in the DSU.

Q4. The Panel notes the phrase "or any other" in paragraph 266 of the EC's First Written Submission. Please explain the significance of this term, if any, with regard to the findings and recommendations that the European Communities seeks from the Panel in these proceedings.

22. As an initial matter, the United States reiterates its preliminary objection that 14 of the 52 determinations in the panel request, and the application or continued application of antidumping duties in the 18 cases listed in the panel request, are not properly before the Panel.²⁸ Moreover, once the Panel makes a finding that the United States has acted consistently with the Antidumping Agreement and GATT 1994 as to the 38 measures that are properly within the scope of this proceeding, there will be no need for the Panel to make recommendations or suggestions. Nevertheless, as we stated at the second substantive meeting, the United States would like to offer a few comments concerning the EC’s request that the Panel make suggestions

²⁴ See, e.g., U.S. Second Written Submission, paras. 18-28; U.S. Opening Statement at Second Substantive Meeting, paras. 18-20.

²⁵ EC Answer to Panel Question 3, para. 25 (May 2, 2008).

²⁶ *US–Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan–Alcohol Taxes (AB)* and *US–Shrimp (Art. 21.5)(AB)*).

²⁷ *EC – Bananas III (AB)*, para. 142.

²⁸ U.S. First Written Submission, paras. 42-74; U.S. Second Written Submission, paras. 9-35.

on the application or continued application of duties in 18 cases, as well as on the 52 determinations listed in the panel request.

23. The EC asked in its closing statement at the Panel’s second substantive meeting that the Panel make a suggestion “not, as is typically done, in order to make a substantive proposal to the defending Member as to how to implement But rather to avoid unnecessary discussions about what might or might not fall within the scope of a compliance panel.”²⁹ There is no basis in the text of the DSU for the EC’s proposed approach. The second sentence of DSU Article 19.1 states that panels “may suggest ways in which the Member concerned could implement,” but says nothing about making suggestions to deal with potential future disputes concerning the scope of compliance proceedings under Article 21.5 of the DSU. This Panel is charged with resolving the dispute within its terms of reference, and does not have the duty, obligation, or responsibility of predicting whether or what compliance issues may arise under Article 21.5, and crafting suggestions to address such hypothetical scenarios. It is unreasonable that the EC is even asking this Panel to start from the premise that there would be a dispute as to compliance.

24. Furthermore, the EC’s request also appears to go beyond the limits set by the second sentence of DSU Article 19.1 in another way. That sentence allows panels to make suggestions concerning “ways in which the Member concerned could implement *the recommendations*” (italics added). However, the EC’s request asks the Panel “to suggest to the US that, when implementing, the US should take all necessary steps of a general or particular nature to ensure that any further specific action against dumping by the US in relation to the same products from the EC as referenced in the present dispute, be WTO consistent, and specifically with reference to the question of zeroing.”³⁰ First, when read literally, the EC seems to be asking for a broad suggestion that goes beyond the alleged measures in its panel request to cover any and all future “specific action against dumping” related to the products from the EC involved in this dispute, even though such future actions may bear no relationship to any specific findings and recommendations that the Panel would make. Second, even if the proposed suggestion is read more narrowly, it appears that the EC is trying once again to have the Panel treat any and all subsequent determinations related to the 18 cases as falling within the scope of the panel proceeding. Such indefinite future measures were not in existence at the time of panel establishment, nor were they consulted upon by the parties, which is a prerequisite for requesting a panel with respect to any measure.³¹ They therefore fall outside the Panel’s terms of reference, and the Panel cannot make any findings or recommendations concerning them. As a result, under Article 19.1 of the DSU, the Panel also can make no suggestions concerning them.

²⁹ EC Closing Statement at the Second Substantive Meeting.

³⁰ EC Closing Statement at the Second Substantive Meeting.

³¹ See, e.g., U.S. Opening Statement at the Second Substantive Meeting, para. 20 (citing *US – Upland Cotton (Panel)*, paras. 7.158-7.160 and DSU Art. 4.7).