

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

*Report of the Panel*



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## I. INTRODUCTION

1.1 On 2 October 2006, the European Communities ("EC") requested consultations<sup>1</sup> with the United States of America ("United States" or "US") pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"); Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"); and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "Agreement") with regard to the practice and methodologies for calculating dumping margins involving the use of zeroing, and the application of zeroing in certain specified anti-dumping measures. In its request for further consultations<sup>2</sup>, dated 9 October 2006, the European Communities added two measures to its initial request.

1.2 On 10 May 2007, the European Communities requested the Dispute Settlement Body ("DSB") to establish a panel pursuant to Articles 2.1 and 6.1 of the DSU; Article XXII:2 of the GATT 1994; and Articles 17.4 and 17.5 of the Anti-Dumping Agreement "with regard to an 'as such' measure or measures providing for the practice or methodologies for calculating dumping margins involving the use of zeroing, and the application of zeroing in certain specified anti-dumping measures maintained by the United States...".<sup>3</sup>

1.3 At its meeting on 4 June 2007, the DSB established a panel pursuant to the request of the European Communities in document WT/DS350/6, in accordance with Article 6 of the DSU.

1.4 The Panel's terms of reference are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS350/6, the matter referred to the DSB by the European Communities in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 29 June 2007, the European Communities requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

"If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.6 On 6 July 2007, the Director-General accordingly composed the Panel as follows:

Chairperson: Dr. Faizullah Khilji

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<sup>1</sup> WT/DS350/1.

<sup>2</sup> WT/DS350/1/Add.1.

<sup>3</sup> WT/DS350/6.

Members: Mr. Michael Mulgrew  
Ms Lilia R. Bautista

1.7 Brazil, China, Egypt, India, Japan, Korea, Mexico, Norway, Chinese Taipei and Thailand reserved their rights to participate in the panel proceedings as third parties.

1.8 Following the resignation on 8 November 2007 of Ms Lilia R. Bautista, the parties, on 27 November 2007, appointed a new Panel Member. Accordingly, the composition of the Panel is as follows:

Chairperson: Dr. Faizullah Khilji

Members: Mr. Michael Mulgrew  
Ms Andrea Marie Brown

1.9 The Panel met with the parties on 29-30 January 2008 and on 22 April 2008. The meetings with the parties were opened to public viewing. The Panel met with the third parties on 30 January 2008. A portion of the Panel's meeting with the third parties was also opened to public viewing.

1.10 Following the second meeting with the parties, and pursuant to a request from the United States made on 2 May 2008, to which the European Communities did not object, the Panel provided the parties with the opportunity to make comments on the relevance of the Appellate Body report in *US – Stainless Steel (Mexico)* to this dispute as well as to comment on each other's comments.

## II. FACTUAL ASPECTS

2.1 This dispute involves the EC's claims regarding the continued application by the United States of anti-dumping duties resulting from the anti-dumping orders enumerated in 18 cases<sup>4</sup>, as calculated or maintained in place at a level in excess of the margin of dumping that in the EC's view would have resulted from the correct application of the relevant provisions of the Anti-Dumping Agreement. The European Communities also challenges the specific instances of application of what it describes as the "zeroing methodology" in 4 anti-dumping investigations, 37 periodic reviews and

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<sup>4</sup> The EC's panel request describes this measure as "[t]he 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..." In its submissions to the Panel, the European Communities uses slightly different descriptions to refer to the measure at issue. Although it generally refers to this measure as "the application or continued application" of the 18 anti-dumping duties at issue, in some instances it only uses the term "continued application". In response to questioning, the European Communities stated that "the use of this slightly different phrasing is for ease of reference and ease of understanding only, and has no incidence on the legal assessment to be conducted by the Panel". Response of the European Communities to Question 1(b) from the Panel Following the First Meeting. For ease of reference, in our report, we also refer to this measure as "the continued application" of the 18 duties at issue. The United States acknowledges that for ease of reference the Panel may choose to use the term "continued application" as a shortcut for "continued application or application". Regarding the second component of the term that the Panel prefers to use, however, the United States notes that the European Communities challenges "the continued application or application of anti-dumping duties in 18 cases", not "the continued application or application of 18 anti-dumping duties", and requests the Panel to use a description that conveys this difference. Put differently, the United States emphasises the difference between the continued application of duties *per se* and the continued application of duties arising from different anti-dumping cases. Request by the United States for the Review of Precise Aspects of the Interim Report of the Panel, paras. 3-6. We would like to reiterate that the abbreviated description that we use to refer to the measure at issue is for ease of reference only and by no means prejudices our legal reasoning (*supra*, paras. 7.40-7.67) regarding the WTO-compatibility of such measure.

11 sunset reviews pertaining to the same 18 cases. The 18 cases and the 52 proceedings pertaining to such cases are listed in the annex to the EC's panel request. The European Communities does not challenge the zeroing methodology "as such" in this dispute.<sup>5</sup>

2.2 Zeroing, according to the European Communities, is a methodology that fails to take into consideration the totality of export transactions in the calculation of margins of dumping for the product under consideration as a whole. Specifically, the European Communities takes issue with the use of zeroing in investigations where the normal value and the export price are compared on a weighted average-to-weighted average ("WA-WA") basis (referred to by the European Communities as "model zeroing")<sup>6</sup>, periodic reviews where margins are calculated on the basis of a weighted average normal value and individual export transactions ("WA-T") (referred to by the European Communities as "simple zeroing")<sup>7</sup>, and sunset reviews where the investigating authorities rely on previous margins obtained through either model or simple zeroing.

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 The European Communities requests the Panel to find that:

- "(a) The United States failed to comply with Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement since it continues applying duties which were calculated by using zeroing in the 18 anti-dumping measures mentioned in the Annex to the EC's Panel request.
- (b) The United States violated Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994 when applying model zeroing in the 4 original investigation proceedings mentioned in the Annex to the EC's Panel request.
- (c) The United States violated Articles 2.4, 2.4.2, 9.3 and 11.2 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT when using zeroing in the 37 administrative review proceedings included in the Annex to the EC's Panel request.
- (d) The United States violated Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the Anti-Dumping Agreement in the sunset review proceedings mentioned in the Annex to the EC's Panel request when relying on margins of dumping calculated in prior investigations using the zeroing methodology."<sup>8</sup>

3.2 The European Communities also requests the Panel to suggest, pursuant to Article 19 of the DSU, that the United States cease using zeroing when calculating dumping margins in any anti-dumping proceeding in connection with the 18 cases identified in the annex to the EC's panel request.

3.3 The United States asks the Panel to reject the EC's "as applied" claims regarding periodic reviews, sunset reviews, and investigations<sup>9</sup> and find that the United States has not acted

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<sup>5</sup> First Written Submission of the European Communities, para. 2.

<sup>6</sup> See para. 7.7 below for an explanation of the term "model zeroing".

<sup>7</sup> See paras. 7.159-7.160 below for an explanation of the term "simple zeroing".

<sup>8</sup> First Written Submission of the European Communities, para. 264.

<sup>9</sup> The United States, in these proceedings, does not contest the alleged inconsistency with Article 2.4.2 of the Agreement of zeroing in investigations where the weighted average normal value is compared with the weighted average export price. It, however, disagrees with the claims developed by the European Communities under other provisions of the Agreement and Article VI of the GATT 1994 regarding such zeroing. Thus, the

inconsistently with the Anti-Dumping Agreement and the GATT 1994. The United States also raises three preliminary objections regarding the Panel's terms of reference.<sup>10</sup> First, the United States asks the Panel to find that 14 of the 52 anti-dumping determinations, and the continued application of the 18 anti-dumping duties at issue are outside the Panel's terms of reference because they were not included in the EC's consultations request. Second, the United States requests that the Panel find that the EC's reference in its panel request to the continued application of the 18 anti-dumping duties does not meet the specificity requirement of Article 6.2 of the DSU. Third, the United States asks the Panel to find that four preliminary measures identified in the EC's panel request are not within the Panel's terms of reference because the identification of the mentioned measures did not meet the conditions laid down in Article 17.4 of the Agreement.

#### **IV. ARGUMENTS OF THE PARTIES**

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and their answers to questions. The parties' submissions and oral statements are attached to this report as annexes (see List of Annexes, pages iv and v).

#### **V. ARGUMENTS OF THE THIRD PARTIES**

5.1 Brazil, China, Egypt, India, Japan, Korea, Mexico, Norway, Chinese Taipei and Thailand reserved their rights to participate in the Panel proceedings as third parties. Brazil, China, Egypt, India and Mexico did not present written submissions and China, Egypt and Thailand did not submit oral statements to the Panel. The arguments of Japan, Korea, Norway and Chinese Taipei are set out in their written submissions and oral statements, the arguments of Brazil, India and Mexico are set out in their oral statements, while Thailand's arguments are set out in its written submission to the Panel. The third parties' written submissions and oral statements are attached to this report as annexes (see List of Annexes, pages iv and v).

#### **VI. INTERIM REVIEW**

6.1 On 27 June 2008, we submitted our interim report to the parties. On 11 July 2008, both parties submitted written requests for the review of precise aspects of the interim report. On 25 July 2008, both parties submitted their comments on the other party's request for review. None of the parties requested an interim review meeting.

6.2 We set out our treatment of the parties' requests below. In addition to the changes explained in the following paragraphs, we have, where necessary, made technical revisions to our report and corrected typographical and other minor errors found in the interim report.

##### **A. REQUEST OF THE EUROPEAN COMMUNITIES**

6.3 First, the European Communities requests the Panel to reconsider its assessment of the evidence submitted by the European Communities regarding the seven periodic reviews discussed in paragraphs 7.151-7.157 below and to find that the European Communities has shown *prima facie* that the USDOC used the simple zeroing methodology in the mentioned reviews. The United States argues that the European Communities should not be provided an opportunity to make a *prima facie* case at this late stage of the proceedings. The United States submits that the interim review stage is

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US request that the Panel dismiss the EC's "as applied" claims regarding zeroing in investigations where the weighted average normal value is compared with the weighted average export price pertains to claims other than the one under Article 2.4.2. See, Response of the United States to Question 15 from the Panel following the First Meeting.

<sup>10</sup> First Written Submission of the United States, paras. 42-46.

only for parties to make comments on precise aspects of the Panel's interim report, not for a party to make a *prima facie* case that it failed to make until that point in time. The United States recalls the opportunities that the Panel provided for the European Communities to explain the factual bases of its assertions regarding the seven reviews at issue. Since the European Communities failed to take advantage of those opportunities to demonstrate the factual bases of its claims regarding the seven reviews at issue, it should not be given another chance to do that at the interim review stage.

6.4 Although we understand the US concern regarding the relative lateness in the EC's attempt to explain the factual bases of its claims regarding the seven periodic reviews at issue, we see no provision in the DSU that would preclude us from assessing the EC's explanations. Nor has the United States cited such a legal provision in its argumentation in this regard. We therefore proceed to our assessment of the EC's comments.

6.5 The European Communities first makes general comments concerning all seven periodic reviews, followed by comments specifically addressing evidence submitted in connection with five of the seven reviews at issue.

6.6 The European Communities commences its general comments by recalling the USDOC notice published on 27 December 2006, which reads in relevant parts:

"In its March 6, 2006 **Federal Register** notice, the Department proposed only that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding."<sup>11</sup> (emphasis in original)

6.7 According to the European Communities, this part of the USDOC's notice means that:

"[T]he USDOC expressly stated that it was *not modifying* any aspect of its comparison methodologies for calculating dumping, other than the abandonment of zeroing when making average-to-average comparisons in original investigations. Thus, since the results of all the administrative reviews covered by this dispute were published before the date of the publication of the USDOC Notice (*i.e.*, 27 December 2006), it should be concluded that the European Communities has made a *prima facie* case that the United States actually applied simple zeroing also in those seven administrative reviews."<sup>12</sup> (footnote omitted, italic emphasis in original, underline emphasis added)

6.8 In the view of the European Communities, this Federal Register notice creates a presumption that simple zeroing was used in the seven reviews at issue because they were conducted before the issuance of the notice.<sup>13</sup> In this regard, the European Communities also notes our reasoning in paragraph 7.200 below as to whether the same notice showed that the USDOC had used model zeroing in the four investigations at issue in these proceedings. The United States responds that such a broad statement cannot be evidence of the fact that zeroing was used in each of the seven periodic reviews at issue. "To the contrary, because each assessment review involves a distinct product,

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<sup>11</sup> Exhibit EC-90, p. 77724.

<sup>12</sup> Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, p. 2.

<sup>13</sup> Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, p. 6.

country, period of time, and sales data, the [European Communities] must demonstrate that zeroing occurred in each of the individual administrative reviews challenged."<sup>14</sup>

6.9 We note that the context in which we accepted the inference made by the European Communities in paragraph 7.200 below is remarkably different from the context in connection with the EC's claims regarding the alleged use of simple zeroing in the seven periodic reviews at issue. The part of the USDOC's notice quoted in paragraph 7.200 makes a specific reference to investigations where a particular comparison methodology is used and states that the USDOC will no longer use that methodology without taking into consideration the results of all comparisons. Logically, this means that until the date of the policy change, the methodology at issue was used by the USDOC without considering the results of all comparisons. Because the particular comparison methodology described there, WA-WA, was the methodology in which what we call "model zeroing" was routinely used in investigations, and the investigations at issue were completed before the policy change, we concluded that the European Communities had showed *prima facie* that the USDOC used model zeroing in investigations completed before this policy change. By contrast, the USDOC's policy change makes no specific reference to periodic reviews and the methodologies that may be used in such reviews. It simply mentions that the USDOC is not changing the methodologies it uses in investigations where methodologies other than WA-WA are used, and in other anti-dumping proceedings. As such, we find this statement to be too broad to support the EC's argument that the USDOC used simple zeroing in all periodic reviews carried out before the effective date of the policy change at issue. We therefore reject the EC's contention in this regard.

6.10 The European Communities argues that the fact that the USDOC's Issues and Decision Memoranda pertaining to the seven periodic reviews at issue do not mention the methodology used is not determinative of whether simple zeroing was used in such reviews. We agree with the European Communities. Nowhere in our report do we imply that such memoranda constitute the only way through which the European Communities could demonstrate that the USDOC used the simple zeroing methodology in the seven reviews at issue. In paragraphs 7.151-7.157 below, we only note that the USDOC's Issues and Decision Memoranda pertaining to the mentioned reviews do not shed light on the methodology used.

6.11 The European Communities also asserts that given the several years of WTO litigation against the United States regarding the zeroing methodology, it should not be disputed that simple zeroing was used in the seven periodic reviews at issue. The United States responds that prior dispute settlement reports are only binding with regard to the resolution of the disputes they concern and that the US response or reaction to such reports is irrelevant for purposes of these proceedings. We disagree with the EC's contention. We do not consider that the existence of past disputes against the United States regarding zeroing discharges the European Communities' burden of proving in this dispute that the simple zeroing methodology was used in specific periodic reviews challenged. We consider that whether the United States complied with the DSB recommendations and rulings in past disputes is irrelevant to our task in these proceedings, since every dispute stands on its own merits. This is so, even if, as the European Communities argues, such past disputes concern the same measure that is at issue in these proceedings.

6.12 The EC's general comments are followed by specific comments regarding five of the seven periodic reviews at issue. These reviews are: *Steel Concrete Reinforcing Bars From Latvia (Period of Review: 1 September 2002 – 31 August 2003)*, *Stainless Steel Bar From Germany (Period of Review: 1 March 2004 – 28 February 2005)*, *Stainless Steel Bar From Germany (Period of Review: 2 August 2001 – 28 February 2003)*, *Stainless Steel Bar From Italy (Period of Review: 2 August 2001 – 28 February 2003)* and *Certain Pasta From Italy (Period of Review: 1 July 2004 – 30 June 2005)*.

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<sup>14</sup> Comments of the United States on the Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, para. 6.

6.13 Regarding the periodic review in *Steel Concrete Reinforcing Bars From Latvia (Period of Review: 1 September 2002 – 31 August 2003)*, the European Communities asserts that the calculation tables submitted in Exhibit EC-35 show that zeroing was used because the percentage of value with anti-dumping margins and the percentage of quantity with anti-dumping margins used was not 100 per cent. This means that "for the remaining transactions, no 'dumping' was found and no 'offsets' were provided."<sup>15</sup> The European Communities also argues that the standard programme used by the USDOC in the review at issue contained the zeroing line which excluded the comparisons with negative results. According to the European Communities, when read together, the tables and the standard programme show that simple zeroing was used in the periodic review at issue.

6.14 Regarding the periodic reviews in *Stainless Steel Bar From Germany (Period of Review: 1 March 2004 – 28 February 2005)* and *Stainless Steel Bar From Germany (Period of Review: 2 August 2001 – 28 February 2003)*, the European Communities refers to the calculation tables submitted in Exhibits EC-57 and EC-58 and argues that such tables show that zeroing was used in the two reviews at issue. The European Communities also draws attention to the fact that the columns in the mentioned two tables, which show calculations with zeroing, correspond to the margins calculated by the USDOC and hence the figures in such columns are accurate. The European Communities contends that the standard computer programme used by the USDOC in these reviews contained the zeroing line which would eliminate comparisons with negative results.

6.15 Regarding the periodic review in *Stainless Steel Bar From Italy (Period of Review: 2 August 2001 – 28 February 2003)*, the European Communities submits that the calculation table submitted in Exhibit EC-62 shows that the percentage of value with anti-dumping margins and the percentage of quantity with anti-dumping margins used was not 100 per cent. This means that zeroing was used in this review because "for the remaining transactions, no 'dumping' was found and no 'offsets' were provided."<sup>16</sup> The European Communities also argues that the standard programme used by the USDOC in the review at issue contained the zeroing line which excluded the comparisons with negative results. According to the European Communities, when read together, the table and the standard programme show that simple zeroing was used in the periodic review at issue.

6.16 Regarding the periodic review in *Certain Pasta From Italy (Period of Review: 1 July 2004 – 30 June 2005)*, the European Communities submits that the calculation table submitted in Exhibit EC-65 shows that the percentage of value with anti-dumping margins and the percentage of quantity with anti-dumping margins used was not 100 per cent. This means that zeroing was used in this review because "for the remaining transactions, no 'dumping' was found and no 'offsets' were provided."<sup>17</sup> The European Communities also argues that the standard programme used by the USDOC in the review at issue contained the zeroing line which excluded the comparisons with negative results. According to the European Communities, when read together, the table and the standard programme show that simple zeroing was used in the periodic review at issue.

6.17 The United States objects to the EC's arguments. The US comments in this regard apply to all five periodic reviews with respect to which the European Communities asks the Panel to change its findings. The United States submits that because the calculation tables submitted by the European Communities in connection with the five reviews at issue were not generated by the USDOC, the United States is not in a position to confirm their accuracy. Such tables, therefore, do not show that zeroing was applied in the periodic reviews at issue. The United States also asserts that there is no

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<sup>15</sup> Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, pp. 2-3.

<sup>16</sup> Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, p. 5.

<sup>17</sup> Request by the European Communities for the Review of Precise Aspects of the Interim Report of the Panel, p. 6.

such thing as a "standard computer programme" that the USDOC uses in every periodic review, nor is there a programme that requires zeroing. The United States, therefore, invites the Panel to reject the EC's request with regard to the five periodic reviews at issue.

6.18 Having carefully considered the EC's comments regarding the five periodic reviews addressed in the preceding paragraphs, we do not see any reason to change our conclusion that the European Communities failed to show *prima facie* that the USDOC used simple zeroing in such reviews. We have, however, modified paragraph 7.151 and paragraphs 7.154 through 7.157 of our report in order to reflect certain concerns mentioned in the EC's comments and to set out our reasoning in more detail.

6.19 The European Communities asserts that there are no other documents available regarding the five periodic reviews at issue and therefore it is for the United States to rebut the *prima facie* case made by the European Communities. The European Communities contends that the United States has failed to unconditionally accept the prior adopted Appellate Body reports regarding zeroing and asserts that the United States should not be allowed to evade its international obligations by withholding information from the exporters, the European Communities and the Panel in these proceedings. The United States objects, arguing that it has not contested documents that it was able to authenticate in these proceedings and that it cannot confirm the accuracy of other documents contained in the EC's exhibits. The United States recalls that the European Communities has the burden of making a *prima facie* case to the effect that the USDOC used simple zeroing in the five periodic reviews at issue.

6.20 We recall that according to the principles concerning burden of proof applicable in WTO dispute settlement,<sup>18</sup> it is for each party to submit evidence of factual assertions that it makes. In order to make out a *prima facie* case that the USDOC acted inconsistently with the Anti-Dumping Agreement by using simple zeroing in the five periodic reviews at issue, therefore, the European Communities must submit evidence of the underlying factual assertion. The European Communities has met that burden with regard to 29 of the 37 periodic reviews which are within our terms of reference in these proceedings. It has not, however, done so with regard to the five reviews that the European Communities addresses in its request for review of the interim report. The European Communities having failed in this regard, there is nothing for the United States to rebut - we cannot expect the United States to rebut a *prima facie* case that has not been made by the European Communities. With regard to the EC's assertion that the United States withholds information from the exporters, the European Communities and the Panel, we recall that pursuant to Article 13 of the DSU, the Panel has the right to seek information from any individual or body it deems appropriate, including the parties to a dispute.<sup>19</sup> If the European Communities believed that the United States was withholding necessary information, it could have asked the Panel to seek such information from the United States. It did not do so.<sup>20</sup> We make no representations as to whether such a request would

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<sup>18</sup> See *infra*, para. 7.6.

<sup>19</sup> Considering Article 13.1 of the DSU, and other provisions, the Appellate Body concluded in *Canada – Aircraft* that "a panel has broad legal authority to request information from a Member that is a party to a dispute, and ... a party so requested has a legal duty to provide such information." Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft ("Canada – Aircraft")*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 197.

<sup>20</sup> In its response to a question from the Panel following the Second Meeting with the Parties, the European Communities stated that "in case the Panel would consider it necessary to obtain the detailed margin calculations for each of the cases covered by these seven exhibits, it should request copy of these detailed calculations from the [United States]." Response of the European Communities to Question 1(c) From the Panel Following the Second Meeting. Such a general statement clearly does not suffice as a request to the Panel to seek specific factual information from the USDOC pursuant to its authority under Article 13. Moreover, we consider that it would be inappropriate for a panel to exercise its authority to seek information based on its own

have been granted had it been made in a timely fashion. What is clear is that in the absence of such a request, there is in our view no basis upon which to conclude that the United States improperly withheld information, thereby preventing the European Communities from making out its *prima facie* case. Thus, we can see no reason why the United States should be expected to rebut a factual assertion unsupported by relevant evidence from the party making the assertion. In effect, this would be much the same as drawing an adverse inference against the United States in this regard. While a panel has the authority to draw such inferences where information it requested is not provided,<sup>21</sup> such an inference should not be drawn by a panel lightly, and only where the circumstances warrant, which they do not in this case.

6.21 The European Communities contends that should the Panel reject the EC's request with regard to the above-mentioned five periodic reviews, the Panel should refer to 30 periodic reviews, not 29, in paragraphs 7.183 and 8.2(b) below. The United States objects, arguing that the European Communities fails to exclude from 37 the one review which the Panel excluded from the scope of its terms of reference on the grounds that the European Communities challenged a preliminary determination in connection with the mentioned review. As the United States argues, and as explained in paragraph 7.158 below, we have found that the periodic review in *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands (Period of Review: 1 November 2004 – 31 October 2005)* is not within the scope of our terms of reference on the grounds that the review at issue involved a preliminary determination made by the USDOC. Together with our other conclusions concerning reviews not properly before us, it therefore follows that our conclusions regarding the use of simple zeroing in periodic reviews only apply to 29 of the 37 periodic reviews challenged by the European Communities in these proceedings.

6.22 Second, the European Communities requests the Panel to change the second sentence in paragraph 7.179 to "Such an objective assessment, *including the standard of review pursuant to Article 17.6(ii) of the Anti-Dumping Agreement*, does not, of course, occur in a vacuum". According to the European Communities, this would reconcile different statements found in our report regarding permissible interpretations of a treaty provision. The United States disagrees with the EC's request. The United States argues that paragraph 7.179 addresses the Panel's duty to carry out an objective assessment pursuant to Article 11 of the DSU and that the additional phrase requested by the European Communities concerns the standard of review. While acknowledging that Article 17.6(ii) of the Anti-Dumping Agreement supplements Article 11 of the DSU, the United States contends that it would be incorrect to state that the "objective assessment" obligation includes the standard of review under Article 17.6(ii). We see no legal basis for the change proposed by the European Communities. Nor would such a modification serve to clarify our reasoning. We therefore decline to modify our finding in this regard.

6.23 Third, the European Communities invites the Panel to reconsider its finding in paragraph 8.7 below not to make a suggestion as to how the United States has to bring its measures into compliance with its WTO obligations. The European Communities argues that making suggestions as provided for under the second sentence of Article 19.1 of the DSU would contribute to the prompt resolution of this dispute. The European Communities also draws attention to the fact that the United States has failed to implement DSB recommendations and rulings in the past disputes where the use of the zeroing methodology in various contexts was condemned. The United States submits that the authority given to panels under Article 19.1 of the DSU should not be lightly exercised by panels. The United States reiterates its argument that the DSU does not allow a suggestion of the kind requested by the European Communities, *i.e.*, one that would clarify the scope of a potential compliance panel that may or may not be established in the future for the resolution of this dispute.

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judgement as to what information is necessary for a party to prove its case, as opposed to seeking information in order to elucidate its understanding of the facts and issues in the dispute before it.

<sup>21</sup> Appellate Body Report, *Canada – Aircraft*, *supra*, note 19, para. 203.

6.24 Having analyzed the arguments presented in the EC's comments on our interim report, we consider that it fully and clearly expresses our views, and therefore see no reason to change our analysis regarding the suggestion requested by the European Communities. We therefore reject the EC's request.

B. REQUEST OF THE UNITED STATES

6.25 First, the United States requests that we modify paragraph 1.10 of our report to reflect the fact that it was following a request by the United States that the Panel invited parties to make comments on the relevance to this dispute of the Appellate Body report in *US – Stainless Steel (Mexico)*. In case the US request is granted, the European Communities requests that we also mention that the European Communities did not object to the US request. We have modified paragraph 1.10 in order to accommodate both parties' requests.

6.26 Second, the United States requests the Panel to change the description used for the measure at issue in connection with the EC's claim regarding the continued application of the duties resulting from 18 cases specified in the EC's panel request. The United States notes that the EC's panel request takes issue with the continued application of, or the application of the specific anti-dumping duties resulting from 18 different cases identified in the annex thereto. The United States therefore argues that the Panel should describe the measure at issue in this regard as "the continued application or application of anti-dumping duties in 18 cases" throughout this report, instead of "continued application of 18 anti-dumping duties". The United States, however, considers that for ease of reference, the Panel may prefer to use "continued application". That is, the United States does not take issue with the Panel using "the continued application" instead of "continued application or application" in the description of the measure at issue. The United States, however, requests the Panel to refer to "anti-dumping duties in 18 cases" instead of "18 anti-dumping duties" in the description of this measure. In other words, the United States argues that the Panel should use, at a minimum, "continued application of anti-dumping duties in 18 cases" instead of "continued application of the 18 anti-dumping duties". Although the United States raises this issue in connection with paragraph 3.3 of our report, it requests the Panel to apply this change to the entirety of the report.

6.27 The European Communities objects to the US request. The European Communities, however, argues that should the Panel agree to change the description used to refer to the measure at issue, it should use the actual language found in the EC's panel request, *i.e.*, "the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders in 18 cases".

6.28 We recall, and the United States also acknowledges, that in footnote 4 of our report, we observe that the European Communities uses different formulations to describe the measure at issue in its panel request and in different places of its submissions to the Panel, and explain that for ease of reference we refer to this measure as "the continued application of the 18 duties" at issue. It is therefore clear that the term that we use is only intended to facilitate the multiple references that we make to the measure at issue throughout our report, and by no means prejudices the legal significance that different descriptions for the same measure might have. We have nevertheless changed the placement of footnote 4 and modified its content in order to further clarify this point.

6.29 Third, the United States requests the Panel to modify paragraph 7.8 to clarify that the terms mentioned in that paragraph were used by past panels and the Appellate Body to describe the measures at issue in other disputes. The European Communities did not object to this request, and we have made the requested modification.

6.30 Fourth, the United States contends that the Panel should change the sixth sentence of paragraph 7.12 to clarify that the US argument concerned the EC's addition of 14 measures in its

panel request, rather than the description of "the matter" in general. The European Communities argues that there is no need for such a change because the sentence at issue provides an accurate description of the US argument and the modification sought by the United States would repeat what the last sentence of the paragraph at issue says.

6.31 We agree with the European Communities that the sentence at issue correctly describes the US argument. We recall that this sentence finds basis in the US submissions to the Panel.<sup>22</sup> We also note that the gist of the modification sought by the United States, *i.e.*, the argument that measures not identified in the EC's consultations request fall outside the Panel's terms of reference, is already conveyed in the last sentence of paragraph 7.12. We therefore decline to make the modification requested by the United States.

6.32 Fifth, the United States refers to paragraph 7.25 of our report and argues that it would be inaccurate to consider that the United States does not dispute the similarity between the EC's claims in connection with the 38 determinations identified in the EC's consultations request and the claims in connection with the 14 determinations identified for the first time in the EC's panel request. Because each determination is separate and distinct from the others, so are claims pertaining to such determinations. The United States therefore requests that we modify the mentioned paragraph to eliminate this inaccuracy. The European Communities argues that the United States misconstrues the Panel's statement in the mentioned paragraph and contends that there is no need to modify it.

6.33 We note that the relevant part of paragraph 7.25 notes the similarity between the claims that the European Communities raises in connection with the 38 determinations identified in the EC's consultations request and the claims raised in connection with the additional 14 determinations identified in its panel request. The paragraph at issue then mentions that the United States does not contest this similarity. This statement thus does not address the similarities or dissimilarities between the 38 and the 14 determinations, but rather between the claims concerning those determinations. We have nevertheless modified paragraph 7.25 in order to further clarify this point.

6.34 Sixth, the United States argues that it would not be accurate to state that as part of its request for a preliminary ruling in connection with the 14 additional measures identified in the EC's panel request, the United States cited the Appellate Body decision in *US – Certain EC Products* without elaboration. The United States requests the Panel to correct the relevant part of paragraph 7.26 in order to eliminate this inaccuracy. The European Communities did not object to this request, and we have modified paragraph 7.26 in order to more accurately reflect the US argument in this regard.

6.35 Seventh, the United States requests the Panel to change the phrase "indeterminate number of measures", used in paragraphs 7.31, 7.34 and 7.42 below, to "indeterminate measures" because the latter explains the US arguments more accurately. The European Communities contends that the phrase at issue, which is frequently used in the US submissions, accurately reflects the US position and invites the Panel to decline the US request. We note that the phrase at issue has been used by the United States itself in its submissions to the Panel.<sup>23</sup> Furthermore, we are not convinced that this change would have any significance in our assessment of the EC's claims regarding the continued application of the 18 anti-dumping duties. We therefore decline to make a modification to our findings in this regard.

6.36 Eighth, the United States argues that paragraph 7.32 contains two different arguments that the United States made in its Second Written Submission and requests that this paragraph be modified in order to better reflect those arguments. The European Communities contends that should the Panel agree to make the requested modification it should use the actual language found in the US

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<sup>22</sup> First Written Submission of the United States, paras. 55-58.

<sup>23</sup> See, for instance, First Written Submission of the United States, paras. 44, 51, 66, 67 and 69.

submission. We have modified paragraph 7.32 and added paragraph 7.53 in order to provide a more accurate description of the US arguments.

6.37 Ninth, the United States argues that paragraph 7.33 fails to fully reflect the US argument regarding the EC's characterization of the continuation of the 18 duties as a measure and requests that this paragraph be modified. The European Communities did not object to this request, and we have made the requested modification to the mentioned paragraph.

6.38 Tenth, the United States contends that the last two sentences of paragraph 7.44 do not accurately reflect the US argument concerning the nature of the EC's claims on the continued application of the 18 duties and invites the Panel to modify it. The European Communities submits that the Panel should reject the US request since the language that the United States suggests renders the meaning of the sentences at issue confusing. The European Communities requests the Panel to take this into consideration should the Panel consider to make the requested modification. We have modified paragraph 7.44 taking into consideration the views of both parties.

6.39 Eleventh, the United States argues that paragraph 7.71 of our report does not reflect accurately the US arguments regarding the preliminary determinations that the European Communities challenges in these proceedings. The United States requests that we change the last sentence of the mentioned paragraph to clarify that the United States asserts that the European Communities failed to comply with any one of the two conditions set out under Article 17.4 of the Agreement. The European Communities objects to the US request and argues that the paragraph at issue should not be modified as it accurately describes the US argument. Furthermore, the European Communities recalls that it did address the issue of the significant impact of the preliminary determinations at issue. We have modified paragraph 7.71 in order to reflect the US arguments regarding the preliminary determinations at issue, and in addition, have modified paragraph 7.73 in order to clarify that the European Communities raised the issue of the impact of preliminary determinations made by the USDOC.

6.40 Twelfth, the United States takes issue with the statement in paragraph 7.80 of our report that the United States has not made substantive counter-arguments regarding the EC's claims on the continued application of the 18 duties. The United States argues that because the European Communities stated that the legal basis of its claims regarding the continued application of the 18 duties was identical to that of its claims regarding the 52 determinations, the US arguments concerning the EC's claims with respect to the 52 determinations equally respond to the EC's claims with respect to the continued application of the 18 duties. In addition, the United States directs the Panel's attention to the substantive arguments it made regarding the EC's claim under Article XVI:4 of the WTO Agreement in connection with the continued application of the 18 duties. The European Communities submits that where the United States intended to incorporate parts of its previous submissions in these proceedings, it did so explicitly. There is, however, no such reference in the US submissions that would make the US arguments with respect to the 52 determinations equally applicable to the continued application of the 18 duties. The European Communities therefore requests the Panel to reject the US request.

6.41 We agree with the European Communities that there is no indication in the US submissions that the US arguments with respect to the EC's claim concerning the 52 determinations were also applicable to the EC's claims with respect to the continued application of the 18 duties. In any event, we recall that we have not addressed any of the EC's claims regarding the continued application of the 18 duties since we have concluded that this measure falls outside our terms of reference. We have, however, modified paragraph 7.80 to reflect the US arguments regarding the EC's claim under Article XVI:4 of the WTO Agreement in connection with the continued application of the 18 duties.

6.42 The United States also requested that we delete paragraph 6.78 of our interim report because it did not reflect the arguments it had made regarding the EC's claim under Article XVI:4 of the WTO Agreement. The European Communities objected and argued that the Panel should only modify this paragraph to reflect the US arguments in this regard. Since we have summarized these US arguments in the new paragraph 7.80 of our report, we have deleted paragraph 6.78 of our interim report.

6.43 Thirteenth, the United States requests the Panel to replace the word "concedes" with "recognizes" in the second sentence of paragraph 7.88 because the United States did not concede the WTO-inconsistency of model zeroing in investigations, it simply recognized the Appellate Body's findings in *US – Softwood Lumber V* and acknowledged that the same reasoning was applicable to the EC's claim in this dispute. For the same reasons, the United States requests the Panel to modify paragraphs 7.105 and 7.120 of the report. The European Communities objects to the US request. The European Communities notes that the United States did not contest the WTO-inconsistency of model zeroing in investigations and acknowledged that the Appellate Body's reasoning in *US – Softwood Lumber V* was "equally applicable" with respect to the EC's claims in this dispute.

6.44 We have modified paragraphs 7.88, 7.105 and 7.120 in order to more accurately describe the US position with regard to the WTO-consistency of model zeroing in investigations.

6.45 Fourteenth, the United States requests three modifications to paragraph 7.123 of our report so that the US arguments regarding zeroing in periodic reviews are better reflected. The European Communities did not object to this request, and we have made the requested modifications.

6.46 Fifteenth, the United States argues that the last sentence of paragraph 7.127 does not accurately reflect the US position regarding the WTO-consistency of model zeroing in investigations and requests the Panel to modify the mentioned sentence. The European Communities did not object to this request, and we have modified the sentence at issue in order to better reflect the US position.

6.47 Sixteenth, the United States requests the Panel to make three changes in paragraph 7.129 of our report in order to more accurately reflect the US arguments. The European Communities did not object to this request, and we have made the requested changes to paragraph 7.129.

6.48 Seventeenth, the United States requests the Panel to make modifications to paragraphs 7.159 and 7.161 so that the calculation methodology used by the USDOC in periodic reviews is better described. The European Communities did not object to this request, and we have made the requested modifications.

6.49 Eighteenth, the United States requests that a modification be made to paragraph 7.162 of our report to more accurately reflect the basis of one of the aspects of the Appellate Body's reasoning in *US – Stainless Steel (Mexico)*. More specifically, the United States takes issue with the use of the phrase "product as a whole" and submits that because the Appellate Body in the mentioned decision did not rely on this phrase, the Panel should also refrain from using it. The European Communities objects to the US request. The European Communities contends that because the Appellate Body in *US – Stainless Steel (Mexico)* did use the concept of "product as a whole" in its reasoning, the Panel can also use it when referring to the Appellate Body decision. To support this contention, the European Communities refers to paragraphs of the Appellate Body decision other than those cited in paragraph 7.162 of our report. In paragraph 7.162 of our report, we cite specific paragraphs of the Appellate Body decision at issue where, strictly speaking, the concept of "product as a whole" is not mentioned. We have therefore modified paragraph 7.162 in order to more accurately reflect the Appellate Body's decision in this regard.

6.50 Nineteenth, the United States requests the Panel to modify the third sentence of paragraph 7.180 to clarify that security and predictability for the multilateral trading system may be

provided if panels undertake an objective examination and do not add to or diminish the rights and obligations of Members. According to the United States, "providing security and predictability to the multilateral trading system" is not distinct from "not adding to or diminishing the rights and obligations of Members". The European Communities submits that the Panel should reject the US request. The European Communities considers the statement in the sentence at issue to be correct. We consider that while the proposition that when panels do not add to or diminish the rights and obligations of Members, this provides security and predictability to the multilateral trading system may be true in a general sense, it is not a proposition which can be discerned from the text of the DSU. Furthermore, we do not consider that the modification requested by the United States would clarify our reasoning or facilitate the resolution of this dispute. We therefore reject the US request.

6.51 Twentieth, the United States contends that the Panel should modify its statement in paragraph 7.194 to state that it was not clear whether the past dumping margins relied upon by the investigating authorities in the sunset review at issue in *US – Corrosion-Resistant Steel Sunset Review* had been calculated inconsistently with Article 2.4 of the Anti-Dumping Agreement. The European Communities did not object to this request, and we have modified paragraph 7.194 in order to more accurately reflect the facts pertaining to the sunset review at issue in the mentioned dispute.

6.52 Twenty-first, the United States submits that the Panel should modify the third sentence of paragraph 8.4 below in order to better describe the US argument regarding the suggestion that the European Communities seeks from the Panel. The European Communities did not object to this request, and we have made the requested modification in order to better reflect the US argument.

6.53 We have also corrected some minor errors in our interim report, which the United States brought to our attention.

## VII. FINDINGS

### A. RELEVANT PRINCIPLES REGARDING STANDARD OF REVIEW, TREATY INTERPRETATION AND BURDEN OF PROOF

#### 1. Standard of Review

7.1 Article 11 of the DSU, which provides the standard of review for WTO panels in general, requires panels to carry out an "objective assessment of the matter", an obligation that applies to all aspects of a panel's examination of the "matter", both factual and legal.<sup>24</sup>

7.2 Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review that applies in dispute settlement proceedings under the Anti-Dumping Agreement. This provision reads:

"In examining the matter referred to in paragraph 5:

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even

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<sup>24</sup> Article 11 of the DSU provides in part:

"The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

though the panel might have reached a different conclusion, the evaluation shall not be overturned;

- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

Thus, taken together, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement establish the standard of review that we must apply with respect to both the factual and the legal aspects of this dispute.

## 2. Rules of Treaty Interpretation

7.3 Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that these customary rules are reflected in Articles 31-32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). Article 31(1) of the *Vienna Convention* provides:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.4 In the context of disputes under the Anti-Dumping Agreement, the Appellate Body has stated that:

"The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* 'shall' interpret the provisions of the *AD Agreement* 'in accordance with customary rules of interpretation of public international law'. Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (*Vienna Convention*). Clearly, this aspect of Article 17.6(ii) involves no 'conflict' with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *AD Agreement*. ...

The *second* sentence of Article 17.6(ii) ... *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *AD Agreement*, which, under that Convention, would both be '*permissible* interpretations'. In that event, a measure is deemed to be in conformity with the *AD Agreement* 'if it rests upon one of those permissible interpretations'.<sup>25</sup> (emphasis in original)

7.5 Thus, under the Anti-Dumping Agreement, the same rules of treaty interpretation apply as in other disputes, with one distinction being that Article 17.6(ii) provides explicitly that if we find more than one permissible interpretation of a provision of the Anti-Dumping Agreement, we are required to uphold a measure that rests on one of those interpretations.

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<sup>25</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, paras. 57 and 59.

### 3. Burden of Proof

7.6 In WTO dispute settlement, a party claiming a violation of a provision of the WTO Agreement by another Member has the burden to assert and prove its claim.<sup>26</sup> The European Communities, as the complaining party, must therefore make a *prima facie* case of violation of the relevant provisions of the agreements at issue, which the United States must refute. We also note that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.<sup>27</sup> It follows that it is also for the United States to provide evidence for the facts which it asserts. In this regard, we recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

#### B. THE TERMS "MODEL ZEROING" AND "SIMPLE ZEROING"

7.7 This dispute concerns the application in certain anti-dumping proceedings of a certain methodology that the European Communities describes as "zeroing". This particular methodology, which is used in the calculation of the margin of dumping, in the view of the European Communities, does not reflect all the export transactions. More specifically, the European Communities takes issue with the use of the zeroing methodology in three different contexts. First, the European Communities challenges the use of zeroing in the context of investigations where the WA normal value is compared with the WA export price for different models of the product under consideration and where such model-specific results are subsequently aggregated in the calculation of the margin for the product under consideration. The European Communities describes this methodology as "model zeroing". Second, the European Communities challenges the use of zeroing in periodic reviews where the WA normal value is compared with individual export transactions. The European Communities calls this "simple zeroing". Finally, the European Communities takes issue with the use in sunset reviews of dumping margins calculated either through model zeroing in prior investigations and/or through simple zeroing in prior periodic reviews.

7.8 We note that the terms used by the European Communities to describe different calculation methodologies are not found in the Anti-Dumping Agreement or the GATT 1994. We also note, however, that these terms have been used by prior panels and the Appellate Body in the description of the specific measures at issue in those disputes. We will, therefore, also use the same terms in describing the methodologies at issue in this dispute. We would like to underline, however, that such use is for ease of reference only, and does not prejudice our assessment of the WTO-compatibility of the measures at issue.

#### C. TERMS OF REFERENCE

7.9 The European Communities does not raise any "as such" claims in this dispute.<sup>28</sup> That is, the European Communities does not challenge the WTO-consistency of the zeroing methodology *per se*. All of the EC's claims are "as applied" claims, *i.e.*, they concern the use of the zeroing methodology in connection with certain anti-dumping duties or in certain anti-dumping proceedings. The EC's claims relate to two sets of measures adopted by the United States:

"First, the European Communities challenges the application or continued application of specific anti-dumping duties resulting from the 18 anti-dumping orders in the

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<sup>26</sup> Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("US – Wool Shirts and Blouses"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323 at 337.

<sup>27</sup> *Ibid.*

<sup>28</sup> First Written Submission of the European Communities, para. 2.

Annex to the Panel request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding, since these anti-dumping duties are calculated and are maintained in place at a level in excess of the dumping margin which would result from the correct application of the Anti-Dumping Agreement.

Second, the European Communities challenges the application of zeroing (i.e., either using the model or simple zeroing technique) as applied in 52 anti-dumping proceedings, including original proceedings, administrative review proceedings and sunset review proceedings listed in the Annex to the Panel request."<sup>29</sup> (emphasis added)

7.10 The United States presents three preliminary objections regarding the claims that the European Communities raises in connection with certain measures and requests the Panel to find that such claims fall outside the Panel's terms of reference. Our assessment with regard to each one of these three preliminary objections is provided below.

## **1. Measures Not Included in the European Communities' Consultations Request**

### **(a) Arguments of the Parties**

#### *(i) United States*

7.11 The United States argues that the EC's panel request contains measures not included in its consultations request. In this respect, the United States takes issue with two sets of measures. First, the United States contends that the EC's consultations request does not reference the continued application of 18 specific anti-dumping duties. Second, the United States argues that some of the 52 measures that reflect the specific instances of application of the zeroing methodology were not included in the EC's consultations request. More specifically, the United States recalls that the EC's initial consultations request<sup>30</sup> was limited to 38 specific measures, i.e., 33 periodic reviews, four original investigations and one sunset review. The EC's additional consultations request<sup>31</sup> added two additional periodic reviews of which one was then ongoing. The EC's panel request, however, identifies 52 measures, adding 14 measures to the 38 that were subjected to consultations. The 14 new measures were seven final and three then-ongoing sunset reviews and three final and one then-ongoing periodic reviews.

7.12 The United States notes that under Article 7.1 of the DSU, it is the complaining party's panel request that determines a panel's terms of reference. Article 4.7 of the DSU, however, stipulates that the complaining Member may request the establishment of a panel only with respect to measures that have been subjected to consultations between the parties. Furthermore, the United States notes that Article 4.4 of the DSU requires that the consultations request identify the specific measures at issue. According to the United States, there is a clear progression between the measures discussed in consultations and those that appear in the panel request. In this regard, the United States finds support in the Appellate Body's finding, in *Brazil – Aircraft*, that "Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."<sup>32</sup> The United States is of the view that the matter which determines a panel's terms of reference, both in the context of the DSU

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<sup>29</sup> First Written Submission of the European Communities, paras. 34-35.

<sup>30</sup> WT/DS350/1.

<sup>31</sup> WT/DS350/1/Add.1.

<sup>32</sup> Appellate Body Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para. 131.

and Articles 17.3 through 17.5 of the Anti-Dumping Agreement, is the matter that is raised in the complaining party's consultations and panel requests. Hence, measures not identified in the consultations request cannot subsequently be brought into the scope of a dispute through the panel request.

7.13 Based on this reasoning, the United States requests the Panel to rule that the 14 of the 52 measures raised in the EC's panel request, and the measure described as "the application or continued application of the 18 anti-dumping duties," which were identified for the first time in the EC's panel request, are not within the Panel's terms of reference, and to refrain from making findings with regard to such measures.

(ii) *The European Communities*

7.14 The European Communities notes that the subject matter of this dispute has been described as the "continued existence and application of the zeroing methodology" in its request for consultations, and remained unchanged afterwards. The EC's consultations request refers to the country and the product concerned in describing 18 anti-dumping duties, which the United States argues are outside the Panel's terms of reference. It also cites, with reference to the country and the product concerned, specific anti-dumping proceedings where the contested zeroing methodology was used by the USDOC. The description in the EC's panel request follows the same approach, *i.e.*, it identifies both the continued application of the 18 anti-dumping duties and the specific proceedings where zeroing was used, by reference to the country and the product at issue.

7.15 The European Communities acknowledges that some of the specific anti-dumping proceedings identified in its panel request did not appear in its consultations request. It asserts, however, that such measures are nevertheless within the Panel's terms of reference. According to the European Communities, as long as the consultations and the panel requests concern essentially the same matter, Articles 4 and 6 of the DSU, as interpreted in the relevant case law, do not require that the measures identified in these two documents be the same. Since the measures identified in the EC's consultations request and the 14 measures identified in its panel request are defined by reference to the relevant countries and the products, the European Communities contends that they concern essentially the same matter. Furthermore, the European Communities asserts that the 14 measures at issue fall within the Panel's terms of reference since they have a direct relationship with the measures listed in the consultations request. According to the European Communities, therefore, its claims pertaining to the 14 measures that appear for the first time in its panel request and the claims regarding the continued application of the 18 anti-dumping duties are within the Panel's terms of reference.

(b) Evaluation by the Panel

7.16 The US request for a preliminary ruling regarding measures that are allegedly not identified in the EC's consultations request concerns two sets of measures: a) the 14 additional specific anti-dumping proceedings, and b) the continued application of the 18 anti-dumping duties. Below, we provide our evaluation of the US request regarding these two sets of measures, respectively.

(i) *The 14 Additional Anti-Dumping Proceedings*

7.17 There is no disagreement between the parties that 14 specific anti-dumping proceedings that were identified in the EC's panel request had not been identified in its consultations request. The United States argues that claims pertaining to measures not identified in the EC's consultations request fall outside the Panel's terms of reference. The European Communities argues that its claims in connection with the 14 proceedings at issue are within the Panel's terms of reference because its consultations and panel requests concern essentially the same matter, *i.e.*, continued existence and

application of the zeroing methodology. The European Communities contends that its claims in connection with the 14 proceedings fall under the Panel's terms of reference also because the 14 proceedings have a direct relationship to the 38 proceedings identified in its consultations request.

7.18 Since it is factually undisputed that the EC's panel request refers to 14 proceedings that were not identified in its consultations request, the issue to be resolved in this regard is the extent to which the EC's consultations request affects our terms of reference. In other words, the basic issue is whether the fact that certain measures were not identified in the EC's consultations request precludes us addressing claims raised in the EC's panel request in connection with such measures. If we find that claims pertaining to measures not identified in the EC's consultations request fall outside the Panel's terms of reference, we shall refrain from addressing such claims. If not, we have to address these claims.

7.19 We note that pursuant to Article 7.1 of the DSU, the terms of reference of a panel are governed by the matter referred to the DSB in the complaining Member's panel request.<sup>33</sup> Article 6.2 of the DSU sets out the requirements that apply to requests for the establishment of a panel:

"The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."

According to Article 6.2, therefore, a panel request must identify *the specific measures at issue* and must provide a *brief summary of the legal basis of the complaint*. Together, these two elements comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU. It is important that the panel request be sufficiently clear for two reasons: First, it defines the scope of the dispute. Second, it serves the *due process* objective of notifying the parties and third parties of the nature of a complainant's case.<sup>34</sup>

7.20 The US request for a preliminary ruling concerns the significance, if any, that a complaining party's consultations request has on a panel's terms of reference. We generally note that the DSU does not contain a provision that addresses this specific issue. Article 4 of the DSU, entitled "Consultations", provides in relevant parts:

"Article 4

*Consultations*

...

4. ... Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

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<sup>33</sup> That a panel's terms of reference are determined by the complaining Member's panel request is a well established canon of WTO dispute settlement. See, for instance, Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("US – Carbon Steel"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779, para. 124.

<sup>34</sup> Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut* ("Brazil – Desiccated Coconut"), WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167, p. 22.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute." (emphasis added)

7.21 Article 17 of the Anti-Dumping Agreement which contains parallel provisions regarding consultations between Members of the WTO regarding matters that arise under the mentioned agreement, provides in relevant parts:

*"Article 17*

*Consultation and Dispute Settlement*

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

...

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure 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, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

(i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and

(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

..." (emphasis added)

Article 4.4 of the DSU provides that a consultations request has to identify the measures at issue and indicate the legal basis of the complaint. Article 4.7 of the DSU, in turn, stipulates that if the parties fail to settle the dispute within 60 days from the receipt of the consultations request, the complaining Member may request the establishment of a panel. Article 17.1 of the Anti-Dumping Agreement provides that the DSU applies to the consultations and the settlement of disputes that arise under the

Anti-Dumping Agreement. Article 17.3 of the Anti-Dumping Agreement states that if a Member considers that any benefit accruing to it, directly or indirectly, under the mentioned Agreement is nullified or impaired, or that the achievement of any objective is impeded by another Member, it may request consultations with the Member concerned. Article 17.4 states that if the parties fail to settle the dispute through consultations, the complaining Member may refer the matter to the DSB to seek the establishment of a panel. Finally, Article 17.5 stipulates that the DSB shall, in such a situation, establish a panel to resolve the dispute.

7.22 The provisions cited above do not directly address the issue of whether a complaining Member is barred from raising claims in connection with measures identified in its panel request, which were not identified in its consultations request. Article 6.2, entitled "Establishment of Panels", requires that a panel request mention whether consultations were held, but it does not stipulate that the scope of the consultations request limits the scope of the claims that may subsequently be raised before a panel. Article 4.7 of the DSU provides that if parties fail to settle "the dispute" within 60 days, the complaining Member may request the establishment of a panel. Similarly, Article 17.4 of the Anti-Dumping Agreement provides that if consultations fail, the complaining Member may refer "the matter" to the DSB. These provisions, in our view, support the argument that as long as the consultations request and the panel request concern the same matter, or dispute, claims raised in connection with measures identified in the complaining Member's panel request would fall within a panel's terms of reference even if those precise measures were not identified in the consultations request.

7.23 We note that this issue also arose in some prior disputes and that our reasoning in this case finds support in the reasoning developed by panels and the Appellate Body in those disputes. In *Canada – Aircraft*, the panel reasoned that as long as the consultations and panel requests refer to the "same dispute", claims pertaining to that dispute would fall under the panel's terms of reference.<sup>35</sup> According to that panel, this approach would observe the defendant's due process rights and at the same time recognize that the nature of the dispute could change between consultations and the establishment of a panel.<sup>36</sup> It follows that the scope of a consultations request and that of a panel request do not necessarily have to be identical. This reasoning was also followed by the panel in *Brazil – Aircraft*. The panel in that case underlined the fact that a WTO panel's terms of reference are governed by the complaining Member's panel request, as opposed to its consultations request.<sup>37</sup> While acknowledging

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<sup>35</sup> The panel in *Canada – Aircraft* held:

"Accordingly, our terms of reference are determined by document WT/DS70/2, *i.e.*, Brazil's request for establishment of this Panel. This document refers expressly to "financing ... provided by the Export Development Corporation ...". In principle, therefore, EDC "financing" falls within our jurisdiction. As noted above, EDC "financing" would only fall outside our jurisdiction if EDC "financing" were not part of the "dispute" on which Brazil had requested consultations. In our view, Brazil requested consultations in respect of a "dispute" concerning prohibited export subsidies allegedly provided to the Canadian civil aircraft industry by *inter alia* EDC. This "dispute" is also the subject of Brazil's request for establishment of this Panel. Since the EDC "financing" identified in Brazil's request for establishment of a panel was part of the same "dispute" with respect to which consultations were requested, we find that EDC "financing" falls within the Panel's jurisdiction." (emphasis added)

Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443, para. 9.14.

<sup>36</sup> *Ibid.*, para. 9.12.

<sup>37</sup> The panel in *Brazil – Aircraft* held:

"We recall that our terms of reference are based upon Canada's request for establishment of a panel, and not upon Canada's request for consultations. These terms of reference were established by the DSB pursuant to Article 7.1 of the DSU and establish the parameters for our work. Nothing in the text of the DSU or Article 4 of the SCM Agreement provides that

that the complaining Member should seek the establishment of a panel with regard to the same dispute that was subjected to consultations, the panel in *Brazil – Aircraft* reasoned that this does not require a precise identity between the matter that was subject to consultations and that with respect to which the establishment of a panel was requested.<sup>38</sup> On appeal, the Appellate Body upheld the panel's reasoning and reiterated the fact that the DSU does not require precise identity between the measures identified in the complaining Member's consultations request and those identified in its panel request.<sup>39</sup>

7.24 The United States contends that the ruling of the Appellate Body in *Brazil – Aircraft* is not relevant to the issue presented in this case. In the view of the United States, although the new measures in *Brazil – Aircraft* were regulatory instruments that entailed periodic re-enactments of identical measures, the measures added to the EC's panel request in this case are new and legally distinct determinations by the USDOC. Although the 14 new measures concern the same products originating in the same countries, they resulted from proceedings that are independent from those identified in the EC's consultations request.<sup>40</sup>

7.25 In our view, whether the new measures were taken in proceedings that, as a matter of US law, are independent from one another is but one relevant consideration in deciding whether such new measures are within our terms of reference. We note that the 14 and the 38 measures concern different determinations pertaining to the same products originating in the same countries. Furthermore, these two groups of measures entail the alleged use of the same methodology, zeroing, which is the gist of the EC's claims before us. In terms of the formulation of the EC's claims, there is no difference whatsoever between these two sets of measures. That is, the claims that the European

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the scope of a panel's work is governed by the scope of prior consultations." (footnote omitted, emphasis added)

Panel Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221, para. 7.9.

<sup>38</sup> "Accordingly, we consider that a panel may consider whether consultations have been held with respect to a 'dispute', and that a preliminary objection may properly be sustained if a party can establish that the required consultations had not been held with respect to a dispute. We do not believe, however, that either Article 4.7 of the DSU or Article 4.4 of the SCM Agreement requires a precise identity between the matter with respect to which consultations were held and that with respect to which establishment of a panel was requested." (footnote omitted)

Panel Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221, para. 7.10.

<sup>39</sup> "We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel... We are confident that the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that were referred to the DSB for the establishment of a panel. We emphasize that the regulatory instruments that came into effect in 1997 and 1998 did not change the essence of the export subsidies for regional aircraft under PROEX." (footnote omitted, italic emphasis in original, underline emphasis added)

Appellate Body Report, *Brazil – Aircraft*, *supra*, note 32, para. 132. We also note that the panels in *Japan – Agricultural Products II*, *Mexico – Anti-Dumping Measures on Rice* and *US – Steel Plate* also made similar findings. See, Panel Report, *Japan – Measures Affecting Agricultural Products* ("*Japan – Agricultural Products II*"), WT/DS76/R, adopted 19 March 1999, as modified by Appellate Body Report, WT/DS76/AB/R, DSR 1999:I, 315, para. 8.4(i); Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice* ("*Mexico – Anti-Dumping Measures on Rice*"), WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report, WT/DS295/AB/R, DSR 2005:XXIII, 11007, para. 7.41; Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("*US – Steel Plate*"), WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, 2073, para. 7.18.

<sup>40</sup> Second Written Submission of the United States, para. 13.

Communities raises in connection with the 38 and the 14 measures at issue are identical. The United States does not dispute this similarity between the claims. In our assessment of the US request for a preliminary ruling, we consider that the substantive similarity between the two sets of measures at issue, and the fact that they concern the same country and the same product outweigh the fact that they represent independent determinations under US law.

7.26 The United States maintains that its arguments on this issue are supported by the reasoning of the Appellate Body in *US – Certain EC Products*. Specifically, the United States cites paragraphs 70 and 82 of that report.<sup>41</sup> The Appellate Body's reasoning in that case, however, shows that it carried out a very detailed analysis regarding the relationship between the two measures at issue in that dispute and came to the conclusion that these measures were not sufficiently related so as to allow the complaining party to raise claims in connection with the (new) measure that was identified for the first time in its panel request. Among others, the Appellate Body analysed differences regarding: (a) the content of the measures<sup>42</sup>, (b) the government agencies that issued the measures<sup>43</sup> and (c) the legal linkage between the measures.<sup>44</sup>

7.27 Given the striking similarities between the 14 new measures and the 38 measures identified in the EC's consultations request, however, we do not agree that the Appellate Body's reasoning in *US – Certain EC Products* undermines our reasoning outlined above.

7.28 We recall that there is a considerable similarity between the 38 measures that were identified in the EC's consultations request and those that appeared for the first time in the EC's panel request. These two sets of measures relate to the same products originating in the same countries. More importantly, the legal nature of the EC's claims regarding the additional 14 measures does not in any way differ from that of the 38 measures identified in the EC's consultations request. The 14 measures entailed the same types of zeroing methodology as the 38 measures. Hence, it is clear that the EC's consultations request and its panel request refer to the same subject matter, the same dispute. We therefore reject the US request for a preliminary ruling in this regard and find that the 14 measures at issue are within our terms of reference.

(ii) *Continued Application of 18 Anti-Dumping Duties*

7.29 We recall that in addition to the 14 new measures that we have discussed, the United States also requests that the Panel find that the EC's claims pertaining to the continued application of the 18 anti-dumping duties also fall outside the Panel's terms of reference because this measure was identified for the first time in the EC's panel request. Parties disagree as to whether the continued application of the 18 anti-dumping duties was identified in the EC's consultations request. The United States asserts that this measure was identified for the first time in the EC's panel request whereas the European Communities contends that it was also identified in its consultations request. We note our finding below (para. 7.61) that the EC's claims regarding the continued application of the 18 anti-dumping duties fall outside our terms of reference because this purported measure does not meet the specificity requirement set out under Article 6.2 of the DSU. We therefore need not, and do not, address the US assertion that the continued application of the 18 duties at issue also falls outside our terms of reference on the grounds that it was not raised in the EC's consultations request.

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<sup>41</sup> First Written Submission of the United States, paras. 59-60; Second Written Submission of the United States, para. 11.

<sup>42</sup> Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities* ("US – Certain EC Products"), WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373, para. 74.

<sup>43</sup> *Ibid.*, para. 75.

<sup>44</sup> *Ibid.*, paras. 76-77.

## 2. Specificity of the European Communities' Reference to 18 Cases

### (a) Arguments of the Parties

#### (i) *United States*

7.30 The United States recalls that the Panel's terms of reference are set by the claims raised in the EC's panel request. Pursuant to Article 6.2 of the DSU, the EC's panel request has to identify, *inter alia*, the specific measures at issue. The United States notes that the EC's panel request refers to the continued application of 18 specific anti-dumping duties resulting from anti-dumping orders enumerated in the Annex to its panel request, as calculated or maintained in the most recent periodic review or, as the case may be, original proceeding or changed circumstances or sunset review proceeding. The United States contends that as far as the EC's claim regarding the application or continued application of the 18 duties is concerned, the panel request fails to identify the specific measures at issue, as required under Article 6.2 of the DSU. According to the United States, it is not clear which specific measure this claim refers to.

7.31 The United States notes the EC's statement that "the application or continued application of the 18 duties" would also cover any subsequent proceeding that would modify such duty levels and argues that this formulation effectively requests the Panel to make findings on measures that are not in existence as of the date of the Panel's establishment. The United States asserts that such a description fails to meet the specificity standard of Article 6.2 of the DSU. The United States argues that the European Communities asks the Panel to make findings that would apply to an indeterminate number of measures, which, according to the United States, the DSU does not allow.

7.32 The United States also points out that the European Communities seems to indicate that the 18 measures cover the application or continued application of the "zeroing" methodology in 18 cases. According to the United States, to the extent the European Communities 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 United States argues that "[t]he [European Communities] cannot make a generalized reference to the application of zeroing in 18 broadly-defined cases without indicating the exact determinations where 'zeroing' was applied."<sup>45</sup>

7.33 The United States objects to the EC's argument asking the Panel to treat each duty as a free-standing measure. According to the United States, "the [European Communities] 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>46</sup> The United States contends that "the [European Communities] 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."<sup>47</sup> The United States finds inconsistency in the European Communities arguing on the one hand that it does not raise any "as such" claims in this case and on the other hand presenting the application of a duty as a self-standing measure.<sup>48</sup>

7.34 The United States argues that permitting the European Communities to submit claims in connection with an indeterminate number of measures would seriously prejudice the US right of defence in these proceedings. The United States also contends that the European Communities has to

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<sup>45</sup> Second Written Submission of the United States, para. 23.

<sup>46</sup> (footnote omitted) Second Written Submission of the United States, para. 25.

<sup>47</sup> *Ibid.*

<sup>48</sup> Second Written Submission of the United States, para. 26.

comply with the requirements of the DSU regarding the identification of the specific measure at issue irrespective of whether failure to do so would prejudice the US due process rights since the DSU contains no such requirement.

(ii) *European Communities*

7.35 The European Communities disagrees with the US assertion that the EC's panel request refers to an indeterminate number of measures. The European Communities notes that, with regard to the continued application of the 18 duties, the EC's panel request identifies the measures at issue with adequate precision: "a duty rate based on the use of the zeroing methodology which is being applied against imports of a specific product from a specific country".<sup>49</sup> The European Communities argues that this description is consistent with the requirements of the DSU just as the description of the practice of "zeroing" was considered to be so by the Appellate Body in previous zeroing disputes. According to the European Communities, as long as the cases from which arose the 18 duties at issue are described in the EC's panel request by reference to the countries, products and duty levels concerned, the fact that reference is not made to the last proceeding where such duties were modified, is irrelevant.<sup>50</sup>

7.36 The European Communities notes, and disagrees with, the US point of view that measures challenged in WTO dispute settlement should either be a framework law, or a specific anti-dumping proceeding such as an investigation, a periodic review or a sunset review. According to the European Communities, as long as the content of the measure is properly described in the complaining Member's panel request, the form in which the measure manifests itself is irrelevant.<sup>51</sup>

7.37 The European Communities submits that, as elaborated in the WTO jurisprudence, a measure which is closely related to the measure identified in the complaining party's panel request also falls within a panel's terms of reference. Accordingly, measures introduced subsequent to the EC's panel request would fall in this Panel's terms of reference to the extent that they are related to the 18 anti-dumping duties specifically cited in such request.

7.38 The European Communities posits that the rationale behind the specificity requirement of Article 6.2 of the DSU is to protect the parties' due process rights in dispute settlement proceedings. It follows from the EC's argument that the United States has to show that the alleged lack of specificity with regard to the 18 duties at issue has prejudiced its due process rights. The European Communities contends, however, that the United States has failed to show such prejudice.

(b) *Arguments of Third Parties*

(i) *Japan*

7.39 Japan submits that the EC's panel request defines with sufficient clarity the measure at issue with regard to the 18 anti-dumping duties applied by the United States. Japan asserts that the practice of zeroing is applied in all proceedings pertaining to an anti-dumping duty, including duty assessment proceedings, changed circumstances reviews and sunset reviews. It follows that the application or continued application of the 18 anti-dumping duties at issue constitutes a measure for purposes of WTO dispute settlement. Japan recalls the US argument with regard to the implementation of the DSB recommendations and rulings in the past zeroing disputes that since the periodic reviews, found to be WTO-inconsistent, were superseded by subsequent periodic reviews, the United States did not have to take any step with regard to the implementation of such rulings and recommendations. Japan

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<sup>49</sup> Second Written Submission of the European Communities, para. 53.

<sup>50</sup> Response of the European Communities to the US Request for Preliminary Rulings, para. 37.

<sup>51</sup> Second Written Submission of the European Communities, para. 55.

argues that this approach undermines the effectiveness of WTO dispute settlement and that the EC's description of the measure at issue in this dispute effectively precludes this possibility.

(c) Evaluation by the Panel

7.40 We recall that it is the EC's panel request that determines our terms of reference in these proceedings. Article 6.2 of the DSU stipulates that a panel request has to identify the *specific measures at issue* and provide a *brief summary of the legal basis* of the complaint. We note that the controversy regarding the EC's claim in connection with the continued application of the 18 anti-dumping duties at issue concerns the identification of the specific measures at issue. There is no disagreement between the parties regarding the inclusion in the EC's panel request of a brief summary of the legal basis of the complaint.

7.41 At the outset, we would like to address an argument raised by the European Communities, which concerns the burden of proof. The European Communities argues that the United States does not dispute that the measure identified by the European Communities exists, nor does it contest the precise content of such measure as described by the European Communities. The European Communities therefore contends that the US preliminary objection in this regard lacks merit.<sup>52</sup> We note, however, that the United States does object to the identification of the specific measures at issue and that is the very reason why it has raised this preliminary objection. Furthermore, we recall that in accordance with the rules governing the burden of proof which we have to apply in this case (*supra*, para. 7.6), it is for the European Communities to make a *prima facie* case before the burden shifts to the United States to rebut it.

7.42 The European Communities explicitly states that it is not raising any "as such" claims in this dispute.<sup>53</sup> That is, the European Communities is not challenging the zeroing methodology "as such", because, according to the European Communities, this has already been decided by the Appellate Body. All of the EC's claims, therefore, are to be considered as challenging particular instances of application of the zeroing methodology. There is no disagreement between the parties that the EC's claims regarding the 52 proceedings concern the application of the zeroing methodology in specific instances. The nature of the EC's claims regarding the continued application of the 18 duties, however, has not been made clear. The United States argues that the way this measure is described in the EC's panel request amounts to challenging an indeterminate number of measures and requests the Panel to find, on the grounds of lack of specificity, that the EC's claims in connection with the continued application of the 18 duties fall outside the Panel's terms of reference. The European Communities, however, contends that its description of the measures at issue is in compliance with the DSU since it identifies the countries and the products concerned in connection with each one of the 18 duties at issue.

7.43 The issue therefore is whether the continued application of the 18 duties at issue has been identified in the EC's panel request in a manner that meets the specificity standard set out under Article 6.2.

7.44 We note that the discussions between the parties in this regard partly focus on whether the EC's claims regarding the continued application of the 18 duties are "as such" or "as applied" claims. The European Communities argues that the measures at issue with regard to its claim regarding the continued application of the 18 duties are instances of application of the zeroing methodology, not the methodology "as such". According to the European Communities, in order to be subject to dispute settlement, a measure needs not be "a norm or instrument". The European Communities contends that

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<sup>52</sup> Response of the European Communities to Question 1(a) from the Panel Following the First Meeting.

<sup>53</sup> First Written Submission of the European Communities, para. 2.

"the mere fact that ... the measure has a life stretching an indeterminate time into the future, is no bar to the measure being subject to dispute settlement".<sup>54</sup> The United States, for its part, recalls that the European Communities argues that it is not raising any "as such" claims in this case which, according to the United States, means that all of the EC's claims should be considered "as applied" claims. The United States argues that the EC's attempt to describe a duty as a free-standing measure creates, by the EC's own admission, some sort of ambiguous "as applied/as such" measure. According to the United States, it is not clear whether the European Communities is in fact making an "as such" claim.<sup>55</sup>

7.45 At the outset, we recall the Appellate Body's pronouncement that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".<sup>56</sup> We note that the distinction between "as such" and "as applied" claims is not found in the text of the DSU. It has been developed in the jurisprudence. It is well known that some GATT panels, as well as WTO panels and the Appellate Body, have examined not only measures consisting of acts that apply to particular situations, but also those consisting of acts setting forth rules or norms that have general and prospective application.<sup>57</sup> Claims taking issue with measures of general and prospective application are generally called "as such" claims, whereas those targeting acts that apply to specific situations are called "as applied" claims.

7.46 In our view, the distinction between "as such" and "as applied" claims does not govern the definition of a measure for purposes of WTO dispute settlement, nor is this distinction intended to replace or override the requirements of Article 6.2 of the DSU as to how measures have to be identified in a panel request. In principle, the mere fact that a measure does not fall under either of these categories should not determine whether the identification of that measure conforms to the requirements of Article 6.2 of the DSU. Consequently, even if we refer to this distinction in our assessment of the issue before us, we shall refrain from attributing a decisive function to it. Rather, we shall base our assessment on the provisions of the DSU, Article 6.2 thereof in this instance, and evaluate the text of the EC's panel request in light of the cited provision.

7.47 With that in mind, we now turn to the EC's panel request. The EC's panel request identifies the specific measures at issue in this dispute in the following manner:

"The measures at issue and the legal basis of the complaint include, but are not limited to, the following:

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 at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure).

In addition to these measures, the administrative reviews, or, as the case may be, original proceedings or changed circumstances or sunset review proceedings listed in

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<sup>54</sup> Response of the European Communities to Question 3 From the Panel Following the First Meeting.

<sup>55</sup> Closing Statement of the United States at the First Meeting, paras. 11-13; Second Written Submission of the United States, para. 26.

<sup>56</sup> Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("US – Corrosion-Resistant Steel Sunset Review"), WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3, para. 81.

<sup>57</sup> For a comprehensive citation of such panel and Appellate Body reports, see Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *Ibid.*, footnote 80.

the Annex (numbered 1 to 52) with the specific anti-dumping orders and are also considered by the EC to be measures subject to the current request for establishment of the panel in addition to the anti-dumping orders."<sup>58</sup> (footnote omitted, emphasis added)

7.48 We note that the panel request, and the EC's submissions, take issue with two different sets of measures. First, the European Communities identifies 18 cases by reference to the country and the product involved and argues that the continued application of the duties calculated through zeroing in such cases violates the Anti-Dumping Agreement. Second, the European Communities challenges the use of zeroing in 52 specific anti-dumping proceedings (investigations, duty assessment proceedings and sunset reviews) that pertain to these 18 cases.

7.49 We note that the part of the EC's panel request challenged by the United States takes issue with the continued application of the 18 anti-dumping duties listed in the annex to the panel request, as calculated or maintained in the most recent proceeding pertaining to such duties. On its face, we find this description ambiguous, particularly because the panel request does not sufficiently distinguish between the continued application of the 18 duties and the use of zeroing in the 52 specific proceedings at issue. Clearly, the continued application of the 18 duties does not take issue with zeroing *per se* because, as the European Communities acknowledges, the zeroing methodology "as such" is not challenged in this dispute. Nor does it seem to take issue with specific proceedings, such as investigations, different types of reviews, where zeroing has allegedly been applied. Otherwise, there would have been no need to also challenge 52 specific proceedings that pertain to the same duties.

7.50 We recall the Appellate Body's pronouncement that any act or omission can, in principle, constitute a measure for purposes of WTO dispute settlement.<sup>59</sup> In our view, this statement clarifies that the concept of a measure for purposes of WTO law covers a wide range of acts or instruments. The fact remains, however, that in order to successfully raise claims against a measure, the complaining Member must in the first place demonstrate the existence and the precise content of such measure, consistently with the requirements of Article 6.2 of the DSU. Unless the measure is adequately identified in the complaining Member's panel request, therefore, that Member cannot raise claims in connection with that purported measure.

7.51 The European Communities argues that as long as its panel request identifies the measure at issue with reference to the country and the product concerned, such description would meet the requirements of Article 6.2 of the DSU. The European Communities cites the panel reports in *Argentina-Footwear* and *Canada-Wheat* to support the view that it is the identification of the measure at issue, not the exact description of the legal instrument in which the measure is found, that matters for purposes of Article 6.2 of the DSU.<sup>60</sup> As the European Communities notes, the issue in the cited two cases was whether Article 6.2 of the DSU required, in addition to the description of the specific measure at issue, a full description of the legal instrument in which the measure was found. In this regard, we see a significant difference between the issue presented in those cases and the one before us in this dispute. The issue in this case does not concern the description of the legal instrument that embodies the challenged measure. Rather, the issue here is the identification of the measure itself. Hence, we do not consider the references to *Argentina – Footwear* and *Canada – Wheat* pertinent.

7.52 The European Communities contends that measures that are subsequent or closely related to those identified in the complaining Member's panel request also fall within a panel's terms of

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<sup>58</sup> WT/DS350/6, p. 3.

<sup>59</sup> *Supra*, note 56.

<sup>60</sup> Response of the European Communities to the US Request for Preliminary Rulings, paras. 37-38.

reference.<sup>61</sup> The European Communities provides examples from the jurisprudence in order to support this proposition. For instance, the European Communities cites the panel decision in *Japan – Film*. Regarding the specificity requirement of Article 6.2, that panel reasoned:

"The question thus becomes whether the ordinary meaning of the terms of Article 6.2, i.e., that "the specific measures at issue" be identified in the panel request, can be met if a "measure" is not explicitly described in the request. To fall within the terms of Article 6.2, it seems clear that a "measure" not explicitly described in a panel request must have a clear relationship to a "measure" that is specifically described therein, so that it can be said to be "included" in the specified "measure". In our view, the requirements of Article 6.2 would be met in the case of a "measure" that is subsidiary or so closely related to a "measure" specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements -- close relationship and notice -- are inter-related: only if a "measure" is subsidiary or closely related to a specifically identified "measure" will notice be adequate. For example, we consider that where a basic framework law dealing with a narrow subject matter that provides for implementing "measures" is specified in a panel request, implementing "measures" might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2. Such circumstances include the case of a basic framework law that specifies the form and circumscribes the possible content and scope of implementing "measures". As explained below, this interpretation of Article 6.2 is consistent with the context and the object and purpose of Article 6.2, as well as past panel practice."<sup>62</sup> (emphasis added)

"In our view, "measures" that are subsidiary or closely related to specified "measures" can be found to be "adequately identified" as that concept was applied in the *Bananas III* case."<sup>63</sup> (emphasis in original)

7.53 The United States argues that the EC's challenge to the application or continued application of duties related to all subsequent and previously unidentified proceedings is not the equivalent of the situation in *Japan – Film*, as the European Communities claims. According to the United States, the application or continued application of anti-dumping 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 United States argues that this is not the equivalent of the situation in *Japan – Film*, which involved a challenge to subsequent regulations issued under a law of general application.<sup>64</sup>

7.54 We have two observations regarding the EC's reference to this panel report. First, the factual circumstances of *Japan – Film* were considerably different from those before us. In *Japan – Film*, a measure was identified in the complaining Member's panel request consistently with Article 6.2, and another measure which was closely related to the measure already identified in the panel request was raised in the subsequent panel proceedings. The issue in the present dispute, however, centres on whether the description of the measure in the EC's panel request meets the requirements of Article 6.2. Second, the measures that the panel in *Japan – Film* found to be closely related to the measures specifically raised in the complaining party's panel request were in existence during the

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<sup>61</sup> *Ibid.*, para. 43.

<sup>62</sup> Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* ("*Japan – Film*"), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, para. 10.8.

<sup>63</sup> *Ibid.*, para. 10.10.

<sup>64</sup> Second Written Submission of the United States, paras. 21-22.

panel proceedings.<sup>65</sup> In other words, there was no disagreement regarding the existence of the subsequent measures. The issue was whether the subsequent measures were sufficiently related to those identified in the panel request such that they could properly be considered within the panel's terms of reference. The same applies to the measures challenged in *EC – Bananas III*<sup>66</sup> and *Argentina – Footwear*<sup>67</sup>, also cited by the European Communities. In the dispute at hand, however, parties disagree as to the very existence of the measure identified in the EC's panel request, *i.e.*, the continued application of the 18 duties. We therefore do not consider the reasoning of the panel in *Japan – Film* to be relevant to the issue presented in these proceedings.

7.55 The European Communities argues that the measures to which the phrase "continued application of the 18 duties" refers, are duties. In this regard, a duty refers to "an anti-dumping duty on a particular product exported from the [European Communities] and imported into the [United States]"<sup>68</sup> which remains in place from imposition until termination. The European Communities describes the content of the duty as being duty rates calculated on the basis of zeroing. The European Communities provides an explanation of what zeroing is. The European Communities refers to the past Appellate Body reports on zeroing and contends that:

*"In US – Zeroing (EC) and in US – Zeroing (Japan), the Appellate Body has accepted that both the EC and Japan have described the "precise content" in the context of the methodology itself. It necessarily follows that what the EC has described in each of the 18 measures – which is the same – also meets the "precise content" requirement."*<sup>69</sup> (footnotes omitted, italic emphasis in original, underline emphasis added)

We note that the European Communities argues that the content of the specific measures at issue in connection with the continued application of the 18 duties is the same as the content of the measures addressed by the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*. This argument equates the continued application of the 18 duties at issue with the zeroing methodology "as such", addressed in the cited two prior disputes. Given the EC's clear statement that it is not challenging zeroing "as such" in this case, we find this proposition to be internally inconsistent and reject it.

7.56 The European Communities also asserts:

"The "norm or instrument" in this context is the zeroing methodology "as such" – although it is not necessary to demonstrate that a "measure" is a "norm or instrument" in order for it to be subject to dispute settlement. The 18 measures are instances of the application of the zeroing methodology. In the view of the EC, in order for the 18 measures to be measures for the purposes of dispute settlement, they do not need to be characterised as "norms or instruments". However, they are as much "norms or instruments" as is, for example, a programme under the SCM Agreement. The mere fact that duties (or subsidies) vary over time; and that the measure has a life stretching

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<sup>65</sup> *Ibid.*, paras. 10.12-10-19.

<sup>66</sup> Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador ("EC – Bananas III (Ecuador)")*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:III, 1085, para. 7.27.

<sup>67</sup> Panel Report, *Argentina – Safeguard Measures on Imports of Footwear ("Argentina – Footwear (EC)")*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575, para. 8.37.

<sup>68</sup> Response of the European Communities to Question 1(a) from the Panel Following the First Meeting.

<sup>69</sup> *Ibid.*

an indeterminate time into the future, is no bar to the measure being subject to dispute settlement."<sup>70</sup> (emphasis added)

We note that the European Communities attempts to categorize the continued application of the 18 duties somewhere in between zeroing "as such" and zeroing "as applied". In principle, we agree with the EC's proposition that in order for the continued application of the 18 duties to constitute a measure, it need not constitute a norm or instrument. In our view, the title attributed to a measure has no bearing on whether it constitutes a measure for purposes of WTO dispute settlement. The fact remains, however, that the European Communities has to demonstrate the existence and the precise content of the purported measure. In this regard, we also do not consider pertinent the fact that the European Communities places the continued application of the 18 duties between an "as such" and an "as applied" claim. Such categorization in the abstract does not provide sufficient explanation regarding the existence and the precise content of the alleged measure. We also disagree with the analogy that the European Communities makes between the continued application of the 18 duties at issue and a subsidy programme. A subsidy programme may be identified through different means, including the relevant legal instruments, payments made by the governments, etc. In this case, however, the European Communities challenges the continued application of 18 duties, which, in and of itself, does not amount to the identification of a measure. We recall that zeroing "as such" and "as applied" in various types of anti-dumping proceedings may be, and has been, challenged in WTO dispute settlement. We note, however, that what the European Communities describes as a measure in these proceedings is the continued application of 18 duties, in isolation from any proceeding in which such duties have been calculated, allegedly through zeroing. As such, we do not consider this to represent a measure in and of itself.

7.57 Regarding the difference between the continued application of the 18 duties and the use of zeroing in the 52 anti-dumping proceedings identified in its panel request, the European Communities argues:

"Finally, the Panel asks the EC to explain the difference between the 18 measures at issue and the 52 measures at issue. As noted above, the first set of measures disputed by the EC constitute the application or continued application of the zeroing methodology in the form of anti-dumping duties which are calculated with zeroing in the 18 cases referred to in the Annex – each of which has a specific US DOC reference number. The 52 measures at issue constitute documents pursuant to which the duty is first imposed, or varied and/or finally collected. There may be a partial overlap between the two sets of measures in the sense that the 52 measures may be regarded as specific documentary manifestations of, or instances of the application of, the 18 measures. However, the two sets of measures are different since the 18 measures are defined at a more general level than the 52 measures. As a result, the EC considers that findings concerning the 18 measures will have a broader impact than those concerning the 52 measures."<sup>71</sup> (emphasis added)

7.58 The European Communities acknowledges that there is some overlap between these two sets of measures. We recall that Article 6.2 of the DSU requires that the specific measures at issue be identified in the complaining Member's panel request. This obligation, in our view, applies to each and every measure regarding which the complaining Member considers to raise claims. In the dispute at hand, this means that if the European Communities wishes to raise claims in connection with the continued application of the 18 duties at issue, it has to, in the first place, identify that measure independently from other measures with regard to which it raises other claims. In the face of the EC's

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<sup>70</sup> Response of the European Communities to Question 3 from the Panel Following the First Meeting.

<sup>71</sup> Response of the European Communities to Question 1(a) from the Panel Following the First Meeting.

acknowledgement that there is overlap between the continued application of the 18 duties and the 52 proceedings, we find illogical the EC's argument that the former is within the Panel's terms of reference.

7.59 In our view, another flaw in the EC's arguments regarding the continued application of the 18 duties at issue is that the European Communities seems to seek a remedy which would affect anti-dumping proceedings that the USDOC may conduct in the future. Indeed, the European Communities does not deny this fact:

"The EC is not asking the Panel to make findings about "future measures", any more than a Member that seeks findings about an *SCM programme* is seeking findings about future instances of the application of such programme. Rather, the EC is seeking findings with respect to a measure that, by its own terms, has a life (that is, a period of time during which it is destined to be in force) that stretches into the future. That is no bar to the measure being the subject of dispute settlement."<sup>72</sup> (italic emphasis in original, underline emphasis added)

"However, the two sets of measures are different since the 18 measures are defined at a more general level than the 52 measures. As a result, the EC considers that findings concerning the 18 measures will have a broader impact than those concerning the 52 measures."<sup>73</sup> (emphasis added)

We note that the remedy sought by the European Communities will affect the determinations that the USDOC might make in anti-dumping proceedings that may be conducted in the future. In other words, if granted, the findings sought by the European Communities will have an impact on measures that did not exist at the time of the establishment of the Panel, nor during the panel proceedings. In our view, Article 6.2 of the DSU, in principle, does not allow a panel to make findings regarding measures that do not exist as of the date of the panel's establishment. There may be exceptional cases where panels may consider to make findings on measures not identified in the complaining party's panel request if circumstances justify it. For that to happen, however, the new measure or measures have to constitute "a measure" within the meaning of Article 6.2 of the DSU and have to come into existence during the panel proceedings.

7.60 We note that the European Communities repeatedly refers to the US alleged failure to implement the DSB recommendations and rulings in the past zeroing cases. This suggests that the European Communities somehow links its claims regarding the continued application of the 18 duties at issue to the US alleged failure to implement the DSB recommendations and rulings in the past zeroing cases. The European Communities does not argue that the measures at issue in this dispute are measures taken to comply with the DSB recommendations and rulings in previous zeroing cases within the meaning of Article 21.5 of the DSU.<sup>74</sup> It, however, submits that the fact that the United States failed to implement the DSB recommendations and rulings in previous zeroing cases is relevant to the Panel's assessment of the EC's claims in this case:

"From the perspective of the need for security and predictability, the fact that past Appellate Body Reports have already decided the issues before the Panel, and that the

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<sup>72</sup> Response of the European Communities to Question 5(b) from the Panel Following the First Meeting.

<sup>73</sup> Response of the European Communities to Question 1(a) from the Panel Following the First Meeting.

<sup>74</sup> Response of the European Communities to Question 4(a) from the Panel Following the First Meeting.

entire US defence is premised on rejecting those past Appellate Body Reports, is legally relevant to the Panel's assessment of all the EC claims."<sup>75</sup>

The European Communities does not, however, articulate how exactly the US alleged failure to implement the DSB recommendations and rulings in the past zeroing cases is legally relevant to the present dispute. In our view, each dispute settlement proceeding at the WTO is independent from others, except proceedings initiated under Article 21.5 of the DSU which are naturally linked to the relevant original proceedings. Under Article 21.5 of the DSU, a Member is entitled to bring a case against another Member that fails to comply with the DSB recommendations and rulings following an original proceeding.<sup>76</sup> The European Communities clearly points out that it does not see these panel proceedings as a forum where the alleged non-compliance in some past cases may be discussed. Yet, it argues, without convincing reasoning, that such non-compliance is somehow relevant to the Panel's evaluation of the EC's claims in this case. For the reasons that we have explained, this proposition lacks a legal basis.

7.61 On the basis of the foregoing considerations, we find that the European Communities failed to identify the specific measure at issue in connection with its claims regarding the continued application of the 18 anti-dumping duties at issue. Consequently, we find that such claims do not fall within our terms of reference in these proceedings.

7.62 The European Communities contends that the purpose of the specificity requirement embodied in Article 6.2 of the DSU is to protect the defendant's due process rights. Thus, in order to prevail in its request for a preliminary ruling with regard to the continued application of the 18 duties at issue, the United States has to show that the alleged imperfection in the EC's panel request has prejudiced the US due process rights. Since the United States has not shown such prejudice, the Panel should find the EC's claims in connection with the continued application of the 18 duties to be within its terms of reference. The European Communities cites the Appellate Body reports in *EC – Computer Equipment* and *Korea – Dairy*, and the panel report in *Canada – Wheat* to support its argument.<sup>77</sup> The United States disagrees with the EC's contention and maintains that neither Article 6.2 of the DSU nor any other provision of the WTO Agreement contains such a prejudice requirement. According to the United States, if the complaining Member's panel request fails to identify the specific measures at issue, claims in connection with such measures would fall outside a panel's terms of reference.<sup>78</sup>

7.63 We recall that a panel can only address claims that are raised in the complaining Member's panel request, consistently with the requirements of Article 6.2 of the DSU. We note that neither Article 6.2 of the DSU nor any other provision of the WTO Agreement supports the argument that the defendant has to show prejudice in cases where the complaining Member's panel request falls short of the requirements of Article 6.2. Such argument would undermine the due process objective embodied in Article 6.2 because it would allow the complaining Member to correct the inadequacies in its panel request, during panel proceedings.<sup>79</sup>

7.64 We note that the Appellate Body's statement in *EC – Computer Equipment*, which the European Communities cites, was made in the particular circumstances of that dispute. The main

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<sup>75</sup> Response of the European Communities to Question 4(a) from the Panel Following the First Meeting.

<sup>76</sup> Indeed, the European Communities used this option in the *US – Zeroing (EC)* dispute and initiated a proceeding against the United States under Article 21.5 of the DSU. See, WT/DS294/25.

<sup>77</sup> Response of the European Communities to the US Request for Preliminary Rulings, paras. 40-42.

<sup>78</sup> Second Written Submission of the United States, para. 28.

<sup>79</sup> Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* ("*Japan – DRAMs (Korea)*"), WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report, WT/DS336/AB/R, para. 7.9.

issue in that dispute concerned the meaning of a specific term that was used in the complaining Member's panel request. The Appellate Body noted that this term had a generic meaning in the relevant industry and that it had been used in the consultations between the parties prior to the filing of the complaining Member's panel request. On that basis, the Appellate Body concluded that because the defendant's right to defend itself had not been prejudiced by the alleged lack of clarity in the text of the panel request, the fundamental due process right had not been violated.<sup>80</sup>

7.65 In our view, the Appellate Body's reasoning in *Korea – Dairy* also related to the particular circumstances of that dispute. In that dispute, the Appellate Body addressed the issue of whether or not mere citation in a panel request of the relevant treaty articles would meet the requirements of Article 6.2 of the DSU, and reasoned that this issue should be assessed on a case by case basis. In resolving that issue in that particular dispute, the Appellate Body inquired whether the defendant's right to defend itself had been prejudiced by the mere citation of the relevant treaty articles in the complaining Member's panel request.<sup>81</sup>

7.66 We do not read the Appellate Body's reasoning in these two disputes to mean that Article 6.2 of the DSU contains a prejudice requirement. As far as the preliminary ruling made by the panel in *Canada – Wheat Exports and Grain Imports* is concerned, we note that the issue in that case was the kind of information that the complaining Member's panel request has to contain "in the absence of an explicit identification of a measure of general application by name".<sup>82</sup> We do not see anything in that ruling which would suggest that Article 6.2 should be interpreted as containing a prejudice requirement.

7.67 We therefore do not agree with the EC's argument that the United States has to demonstrate that the flaw in the EC's panel request has prejudiced its right to defend itself in these proceedings.

### **3. Inclusion of Ongoing Proceedings in the European Communities' Panel Request**

(a) Arguments of the Parties

(i) *United States*

7.68 The United States points out that four of the measures identified in the EC's panel request were preliminary results of periodic or sunset reviews. Such preliminary results, in the US view, do not constitute "final action" within the meaning of Article 17.4 of the Anti-Dumping Agreement. The United States notes that Article 17.4 allows the initiation of dispute settlement proceedings with regard to provisional measures if certain criteria are met, and asserts that the European Communities has not shown that these criteria have been met in this case. The United States therefore requests the Panel to decide that these four preliminary determinations do not fall within its terms of reference.

(ii) *European Communities*

7.69 The European Communities acknowledges that four of the measures identified in its panel request, *i.e.*, three preliminary sunset determinations and one preliminary determination in a periodic review, did not constitute final measures. The European Communities contends, however, that,

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<sup>80</sup> Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("EC – Computer Equipment"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, para. 70.

<sup>81</sup> Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea – Dairy"), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 127.

<sup>82</sup> Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* ("Canada – Wheat Exports and Grain Imports"), WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report, WT/DS276/AB/R, DSR 2004:VI, 2817, para. 6.10.

whether preliminary or definitive, any measure adopted subsequent to the specific measures identified in the EC's panel request, falls within the Panel's terms of reference.

(b) Evaluation by the Panel

7.70 It is factually uncontested that four of the 52 measures identified in the EC's panel request were preliminary determinations made by the USDOC. These include three preliminary results of sunset reviews and one preliminary result of a periodic review. These four preliminary determinations are:

Type of Proceeding	Product and Country	Relevant Exhibits
Sunset review	Steel concrete reinforcing bars from Latvia A-449-804	EC-70
Periodic review	Certain hot rolled carbon steel flat products from the Netherlands A-421-807 (Period of Review: 1 November 2004 - 31 October 2005)	EC-59
Sunset review	Certain hot rolled carbon steel flat products from the Netherlands A-421-807	EC-77
Sunset review	Certain Pasta from Italy A-475-818	EC-78

7.71 The United States contends that the four preliminary determinations at issue are outside the Panel's terms of reference because they do not constitute final action within the meaning of Article 17.4 of the Anti-Dumping Agreement. The United States recalls the two conditions set out under Article 17.4 of the Agreement which have to be met in proceedings challenging preliminary determinations and argues that none of them were met by the European Communities with regard to the four preliminary determinations at issue. That is, the United States contends that the European Communities did not raise a claim against the preliminary determinations under Article 7.1 of the Agreement nor demonstrate a significant impact of those determinations.<sup>83</sup>

7.72 Article 17.4 of the Anti-Dumping Agreement provides:

"If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure 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, that Member may also refer such matter to the DSB." (emphasis added)

7.73 Article 17.4 generally stipulates that a Member may challenge definitive measures imposed by other Members. It states that exceptionally a provisional anti-dumping measure may be challenged if it has a significant impact and if the complaining Member shows that the provisional measure was

<sup>83</sup> First Written Submission of the United States, footnote 69.

taken inconsistently with the provisions of Article 7.1 of the Agreement. Article 7.1 lays down three conditions for the imposition of a provisional anti-dumping measure.<sup>84</sup> Thus, the EC's claim regarding the four preliminary measures at issue may be accepted only if the European Communities proves that the conditions set out under Article 7.1 of the Agreement have not been met with regard to such measures. Although the European Communities generally argues that "the preliminary determinations carried out by the USDOC have an impact on the final duty level which may result from the latest proceeding"<sup>85</sup>, it does not raise any claim under Article 7.1 in these proceedings. This indicates that the EC's claims regarding the four preliminary measures at issue are not within the Panel's terms of reference.

7.74 The European Communities cites the panel report in *Mexico – Corn Syrup* in support of its argument. We note, however, that the only claim regarding provisional measures in that case related to an alleged violation of Article 7.4 of the Agreement that sets the maximum duration of such measures. In other words, there was no allegation in *Mexico – Corn Syrup* regarding a violation of Article 7.1.<sup>86</sup> The panel in *Mexico – Corn Syrup* was of the view that "a claim regarding the duration of a provisional measure relates to the definitive anti-dumping duty".<sup>87</sup> This explains why the panel did not expect the complaining Member in that case to demonstrate the existence of the two conditions set out under Article 7.4 for challenging a provisional anti-dumping measure. Thus, the panel report in *Mexico – Corn Syrup* does not support the EC's position in this dispute.

7.75 In response to questioning, the European Communities contends that it is not challenging provisional measures within the meaning of Article 7.4 of the Anti-Dumping Agreement in this case. The EC's panel request describes the measure at issue as the continued application of anti-dumping duties resulting from the anti-dumping orders annexed to its panel request "as calculated or maintained in place pursuant to the most recent [anti-dumping proceedings]".<sup>88</sup> In the view of the European Communities, this description "comprises any subsequent measure adopted by the [United States], including preliminary determinations setting out the duty levels (wrongly calculated by applying zeroing) and insofar as those duties are still in place".<sup>89</sup> The European Communities contends that the Panel should take into consideration the specific circumstances of this dispute in resolving this issue. According to the European Communities, such specific circumstances include the nature of the zeroing methodology and the fact that the United States refuses to implement the DSB recommendations and rulings pertaining to past zeroing disputes.<sup>90</sup>

7.76 We note that the EC's response is internally inconsistent. On the one hand, the European Communities argues that the four preliminary measures have to be considered as "subsequent measures" to the general description of the measure in its panel request and therefore fall

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<sup>84</sup> Article 7.1 of the Agreement provides:

"Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and

(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation."

<sup>85</sup> Response of the European Communities to the US Request for Preliminary Rulings, para. 54.

<sup>86</sup> Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States ("Mexico – Corn Syrup")*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345, para. 7.48.

<sup>87</sup> *Ibid.*, para. 7.53.

<sup>88</sup> Response of the European Communities to Question 6 from the Panel Following the First Meeting.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

within the terms of reference of the Panel. On the other hand, it contends that this dispute presents special circumstances with regard to the identification of the specific measures at issue and invites the Panel to take into consideration such circumstances.

7.77 Both arguments offered by the European Communities in this regard lack a legal basis in the Agreement. We are also of the view that the alleged special circumstances of this dispute cannot override the plain text of Article 17.4 which subjects the claims against provisional measures to certain conditions. We therefore conclude that the EC's claims regarding the four preliminary measures at issue are outside our terms of reference in these proceedings.

#### D. CONTINUED APPLICATION OF 18 ANTI-DUMPING DUTIES

##### 1. Arguments of the Parties

###### (a) European Communities

7.78 The European Communities does not challenge the practice of zeroing "as such" because it argues that zeroing as such has already been condemned in previous cases. The European Communities challenges the continued application of the 18 duties stemming from the 18 cases listed in the annex to its panel request. According to the European Communities, in addition to the alleged WTO-inconsistency of applying zeroing in the calculation of dumping margins in various proceedings pertaining to these 18 cases, the continued application of the duties resulting from such proceedings itself constitutes a measure. The European Communities contends that these duties are applied at rates that exceed the real margins that would have been obtained without zeroing. The European Communities asserts that the continued application of these 18 duties is inconsistent with Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 because they reflect margins obtained through zeroing. The European Communities argues that for the same reasons that zeroing in the context of investigations, periodic reviews and sunset reviews is inconsistent with Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994, the continued application of the duties resulting from the application of zeroing is inconsistent with the same provisions.

7.79 The European Communities also argues that the continued application of these 18 duties is inconsistent with Article XVI:4 of the WTO Agreement. The EC's argumentation in this regard is two-fold. First, the European Communities submits that because the continued application of the 18 duties at issue violates Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994, it also violates Article XVI:4 of the WTO Agreement. This, according to the European Communities, indicates that the United States failed to ensure the consistency of its laws, regulations and administrative procedures with its WTO obligations. Second, the European Communities contends that by continuing to apply model and simple zeroing procedures – which are administrative procedures within the meaning of Article XVI:4 of the WTO Agreement – in proceedings initiated after the date of adoption of the first Appellate Body report finding zeroing to be WTO-inconsistent, the United States has violated its obligation under Article XVI:4 of the WTO Agreement.

###### (b) United States

7.80 The United States argues that the EC's claim under Article XVI:4 of the WTO Agreement depends on a finding of inconsistency in connection with the other claims that the European Communities raises. It suggests that since the United States has not acted inconsistently with the other WTO obligations cited by the European Communities, the Panel must find no violation of Article XVI:4 of the WTO Agreement. The United States also counters the EC's argument that the United States is in violation of Article XVI:4 of the WTO Agreement because it continues to apply

measures that have been found to be WTO-inconsistent by the WTO Appellate Body in some past disputes. In this regard, the United States recalls the Appellate Body's own pronouncement that Appellate Body and panel reports are only binding with respect to the resolution of the disputes that they concern.<sup>91</sup> In the view of the United States, the approach advocated by the European Communities would make Appellate Body and panel reports binding on all Members, a result that would have no basis in legal texts. The United States has not submitted arguments regarding the claims that the European Communities raised under Articles 2.4, 2.4.2, 9.3, 11.1, 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 concerning the continued application of the 18 duties.

## **2. Arguments of Third Parties**

### **(a) Japan**

7.81 Japan notes that under US law, anti-dumping orders provide the legal basis for the imposition of anti-dumping duties following an investigation. The amounts of the duty may subsequently change depending on different types of reviews. Japan argues that pursuant to Article 6.2 of the DSU, such an order constitutes a measure susceptible to a challenge in WTO dispute settlement. Similarly, it constitutes "final action" within the meaning of Article 17.4 of the Anti-Dumping Agreement.

## **3. Evaluation by the Panel**

7.82 We note that, except for the claim under Article XVI:4 of the WTO Agreement, the substantive legal basis of the EC's claims regarding the continued application of the 18 duties at issue does not differ from its claims with regard to the 52 measures imposed in investigations, periodic reviews or maintained following sunset reviews. In response to questioning, the European Communities argues that the Panel should refrain from applying judicial economy with regard to the claims in connection with the continued application of the 18 duties. Applying judicial economy with regard to the EC's claims concerning the continued application of the 18 duties at issue would, in the EC's view, constitute false judicial economy.<sup>92</sup> On the other hand, the European Communities states that if the Panel finds for the European Communities with regard to its claims concerning the continued application of the 18 duties, it may apply judicial economy with regard to the EC's claims regarding the use of zeroing in the 52 specific proceedings.

7.83 We recall our finding above (para. 7.61) that the EC's claims in connection with the continued application of the 18 duties at issue do not fall within our terms of reference in these proceedings. We therefore decline to address such claims.

## **E. ZEROING IN INVESTIGATIONS**

### **1. Arguments of the Parties**

#### **(a) European Communities**

7.84 The European Communities challenges the use of zeroing in four investigations. The European Communities develops its arguments on the basis of the specifics of one of these investigations, *Purified Carboxymethylcellulose from the Netherlands*, but argues that the same arguments also apply to the other three investigations. The European Communities argues that in the dumping calculations in the mentioned investigation, the USDOC used a methodology which the European Communities refers to as "model zeroing". Under this methodology, the USDOC

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<sup>91</sup> First Written Submission of the United States, para. 159.

<sup>92</sup> Response of the European Communities to Question 2 from the Panel Following the First Meeting.

categorized the subject product into models, and made calculations for each model through the WA-WA method. In the aggregation of such model-specific calculations, however, the USDOC ignored the results where the WA export price exceeded the WA normal value. This, in the EC's view, inflated the margin of dumping for the product under consideration as a whole. According to the European Communities, the 14.88 per cent margin of dumping calculated by the USDOC, in *Purified Carboxymethylcellulose from the Netherlands*, would have been 12.15 per cent without model zeroing.

7.85 The European Communities submits that the USDOC acted inconsistently with Article 2.4.2 of the Agreement by using model zeroing in the four investigations at issue. According to the European Communities, the definition of dumping found in Article 2.1 of the Agreement and Article VI:1 of the GATT 1994 applies to the product under consideration as a whole, and not to a type, model or category of that product. Article 2.4.2 also requires dumping determinations to be made with regard to the product under consideration as a whole. Investigating authorities may categorize the product into models in the process of calculating the margin of dumping for the product under consideration as a whole. Such model-specific calculations, however, are not margins of dumping, but results that have to be used in the calculation of the margin of dumping for the product under consideration as a whole. The authorities, therefore, must take into consideration the results of all model-specific calculations in the calculation of the margin of dumping for the product under consideration as a whole. The USDOC acted inconsistently with the obligation set out under Article 2.4.2 of the Agreement by excluding the results of model-specific comparisons where the WA export price exceeded the WA normal value.

7.86 The European Communities also contends that model zeroing used by the USDOC in the four investigations at issue is inconsistent with Article 2.4 of the Agreement. The European Communities asserts that the requirement to carry out a fair comparison between the normal value and the export price pursuant to Article 2.4 constitutes an independent and overarching obligation. That is, the general obligation laid down in the first sentence of Article 2.4 is independent from the more specific obligations found elsewhere in that article. Thus, the obligation to make a fair comparison applies not only to price comparability but also to subparagraphs 2.4.1 and 2.4.2. According to the European Communities, model zeroing is inherently biased and unfair because it inflates the margin of dumping. As a methodological choice that systematically favours the interests of petitioners and prejudices the interests of exporters, model zeroing cannot be considered as allowing a fair comparison within the meaning of Article 2.4.

7.87 The European Communities also contends that the use of model zeroing in the four investigations at issue conflicted with the obligations set out under Articles VI:1 and VI:2 of the GATT 1994.

(b) United States

7.88 The United States acknowledges that the USDOC applied model zeroing in the four anti-dumping investigations at issue. The United States also recognizes that in *US – Softwood Lumber V*, the Appellate Body found the use of this type of zeroing to be inconsistent with Article 2.4.2 of the Agreement and that this reasoning is equally applicable to the EC's claim in these proceedings. The US acknowledgement, however, is limited to the EC's claim under Article 2.4.2 of the Agreement. The United States rejects other claims that the European Communities raises regarding zeroing in investigations. Specifically, the United States contests the EC's claims under Articles 2.1 and 2.4 of the Agreement because these are definitional provisions which do not impose independent obligations. The

United States asserts that a finding under Article 2.4.2 would suffice to resolve the EC's claim regarding the four investigations at issue.<sup>93</sup>

## 2. Arguments of Third Parties

### (a) India

7.89 India notes that despite past panel and Appellate Body rulings that found zeroing to be inconsistent with Articles 2.4.2, 9.3, 11.2 and 11.3 of the Agreement, the United States continues to use this methodology in the calculation of dumping margins, with the exception of investigations where the WA-WA method is used. In India's view, zeroing inflates dumping margins, leads to a positive finding of dumping in cases where there would have been no dumping absent zeroing and taints the investigating authorities' evaluation of the impact of dumped imports. India therefore requests the Panel to reiterate the conclusion that the use of zeroing in connection with all comparison methodologies and all anti-dumping proceedings is WTO-inconsistent.

### (b) Japan

7.90 Japan bases its arguments regarding the use of zeroing in investigations on the Appellate Body reports in the past zeroing disputes. Japan contends that Article 2.1 and the first sentence of Article 2.4.2 of the Agreement require investigating authorities to calculate dumping with respect to the product under consideration as a whole. The zeroing methodology applied by the USDOC in investigations fail to meet this requirement because in the aggregation of model-specific calculations it ignores the intermediate results where the export price exceeds the normal value. According to Japan, the comparison results pertaining to models of the product under consideration do not constitute margins of dumping. They are merely intermediate results that have to be aggregated in the calculation of the margin of dumping for the product under consideration as a whole. Hence, the USDOC's use of zeroing in investigations is inconsistent with the obligations set forth in Articles 2.1 and 2.4.2 of the Agreement.

7.91 Japan submits that the zeroing methodology that the USDOC uses in investigations inflates the margin of dumping by ignoring intermediate results where the export price exceeds the normal value. Hence it does not provide for an impartial, even-handed and unbiased dumping determination. It follows that the USDOC's dumping determinations in investigations are inconsistent with the fair comparison obligation found under Article 2.4 of the Agreement.

### (c) Korea

7.92 Korea notes that the Appellate Body has found zeroing to be WTO-inconsistent in all anti-dumping proceedings and invites the Panel to reiterate this general finding. More specifically, Korea recalls that the Appellate Body has found the use of zeroing in investigations where the normal value and the export price are compared on a WA-WA basis to be inconsistent with Articles 2.4.2 and 2.4 of the Agreement. Korea invites the Panel to also find that the use of zeroing in investigations where the normal value and the export price are compared on a WA-WA basis is inconsistent with Articles 2.4.2 and 2.4 of the Agreement.

### (d) Norway

7.93 Norway recalls that in the previous zeroing cases, the Appellate Body found zeroing to be inconsistent with the requirements of the Anti-Dumping Agreement. Although the doctrine of *stare decisis* does not apply in WTO dispute settlement, Norway argues that in the interest of certainty,

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<sup>93</sup> First Written Submission of the United States, paras. 155-156.

foreseeability and equality before the law, panels and the Appellate Body should not depart from precedents without showing good reason. Norway submits that adopted reports create legitimate expectations among WTO Members and should therefore be followed by panels to the extent the issues are similar. Norway argues that this case does not present factual or legal arguments different from those in the past zeroing cases. The Panel should therefore not depart from the precedents in making its findings and recommendations.

7.94 Furthermore, Norway contends that adopted panel and Appellate Body reports affect the WTO Members' obligations within the meaning of Article XVI:4 of the WTO Agreement. According to Norway, although the DSB recommendations and rulings in a given case only affect parties to that dispute, such rulings and recommendations also explain the obligations of all Members in general. Hence, according to Norway, WTO Members have to take into consideration adopted panel and Appellate Body reports in adopting or maintaining their domestic laws and regulations.<sup>94</sup>

7.95 Norway notes the Appellate Body's findings regarding zeroing and considers that the prohibition in this regard is not limited to investigations and to the WA-WA methodology. In Norway's view, zeroing is prohibited in all anti-dumping proceedings and with regard to all comparison methodologies because: a) Article 2.1 requires dumping determinations to be made for the product under consideration as a whole and b) zeroing is contrary to the fair comparison requirement under Article 2.4.

7.96 With regard to WTO panels' task as treaty interpreters, Norway argues that the purpose of treaty interpretation is to reach "the one and only interpretation of a term".<sup>95</sup> According to Norway, panels in *US – Stainless Steel (Mexico)* and *US – Zeroing (Japan)* committed certain legal errors in their interpretation of the relevant treaty provisions. First, they did not base their interpretation of the terms "product" and "margin of dumping" on the relevant treaty provisions, as required by the principles laid down in Articles 31 and 32 of the Vienna Convention. Instead, they came up with their own interpretation, which they then considered as a permissible interpretation within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement. Second, these panels resorted to Article 17.6(ii) without first exhausting all possible means in order to achieve one possible interpretation for the legal provisions before them. Norway invites this Panel not to commit the same errors and to follow the persuasive reasoning of the Appellate Body that has found zeroing to be inconsistent in all anti-dumping proceedings and in connection with all types of comparison methodologies.

(e) The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

7.97 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM") argues that the definition of dumping under Article 2.1 of the Agreement applies to all anti-dumping proceedings, including duty assessment proceedings. The TPKM therefore asserts that the dumping determinations in such proceedings should also conform with the disciplines set forth under Article 2, including subparagraphs 2.4 and 2.4.2 thereof.

7.98 According to the TPKM, dumping has to be established with respect to the product under consideration as a whole. It follows that any calculation that omits some export transactions will be inconsistent with the Anti-Dumping Agreement. The TPKM contends that the term "investigation" under Article 2.4.2 does not relate solely to original investigations conducted under Article 5 of the Agreement. This expression does not have the same meaning in all instances where it appears in the Agreement. The TPKM argues that the term "investigation", as used under Article 2.4.2, refers to the investigative activity undertaken in all kinds of anti-dumping proceedings. According to the TPKM,

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<sup>94</sup> Written Submission of Norway, para. 18.

<sup>95</sup> Oral Statement of Norway, para. 14.

the object and purpose of Article 2 would be undermined if Articles 2.4 and 2.4.2 were interpreted as being applicable to original investigations only.

7.99 The TPKM asserts that Article 2.4 of the Agreement contains an obligation to carry out a fair comparison between the normal value and the export price by taking into account the prices of all sales pertaining to the product under consideration. The authorities cannot disregard some of these transactions. The omission of certain export prices amounts to overcorrecting the injury caused by dumping and goes beyond the limits of the permission for resorting to anti-dumping measures. This obligation applies to all types of anti-dumping proceedings.

7.100 The TPKM concludes that the US application of the zeroing methodology in all anti-dumping proceedings under its law, including reviews, is inconsistent with Articles 2.1, 2.4, 2.4.2, 9.3, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement, as well as Articles VI:1 and VI:2 of the GATT 1994. The TPKM invites the Panel to follow the Appellate Body's jurisprudence and find zeroing to be WTO-inconsistent in all anti-dumping proceedings and in connection with all types of comparison methodologies.

(f) Thailand

7.101 Thailand submits that zeroing is inconsistent with both the letter and the spirit of the Anti-Dumping Agreement and Article VI of the GATT 1994. Zeroing either gives rise to a finding of dumping in cases where there is no dumping, or inflates the true margin of dumping. Thailand generally agrees with the European Communities with regard to the claims raised in this dispute. Thailand contends that this Panel should follow the reasoning of the Appellate Body enunciated in the past zeroing cases and find the measures at issue to be inconsistent with the Anti-Dumping Agreement. Otherwise, argues Thailand, the security and predictability that the dispute settlement mechanism is to provide to the multilateral trading system would be undermined. There is, in Thailand's view, no counterargument presented in this case that would justify a departure from the Appellate Body's jurisprudence on zeroing.

7.102 Thailand also disagrees with the US view that dumping may be determined with regard to a specific import transaction. Nor does Thailand agree with the proposition that the payment of the duty in a prospective normal value system constitutes final liability. Thailand argues that the calculation of the amount of the duty to be paid by an importer in the context of a prospective normal value system does not entail a calculation of a margin of dumping. It would therefore be illogical to compare the determination made in a duty assessment proceeding with the calculation of the duty to be paid in a prospective normal value system.

### 3. Evaluation by the Panel

7.103 The four investigations at issue are the following:

<b>Product and Country Involved</b>	<b>Relevant Exhibits</b>
Purified carboxymethylcellulose from Sweden USDOC Case No: A-401-808	EC-28
Purified carboxymethylcellulose from the Netherlands USDOC Case No: A-421-811	EC-26
Purified carboxymethylcellulose from Finland USDOC Case No: A-405-803	EC-29
Chlorinated Isocyanurates from Spain USDOC Case No: A-469-814	EC-30

7.104 The United States concedes that the USDOC applied model zeroing in these investigations. Furthermore, the United States acknowledges that the reasoning of the Appellate Body in *US – Softwood Lumber V*, which found model zeroing in investigations to be inconsistent with Article 2.4.2 of the Agreement, applies to the EC's claim at issue.<sup>96</sup> The United States has not submitted any argument to counter the EC's proposition that model zeroing is inconsistent with Article 2.4.2 of the Agreement.

7.105 Given the US acknowledgement that the Appellate Body's reasoning *US – Softwood Lumber V* regarding the WTO-compatibility with Article 2.4.2 of the Agreement of model zeroing in investigations is equally applicable with regard to the contested investigations in these proceedings, the issue of burden of proof becomes particularly important with regard to the assessment of the claim at issue. We recall that pursuant to the principles governing the burden of proof which we follow in these proceedings (*supra*, para. 7.6), it is for the complaining Member to make a *prima facie* case with regard to a claim that it asserts, before the burden shifts to the defendant to rebut such case. The United States does not contest the EC's claim under Article 2.4.2 against model zeroing in investigations. In our view, however, the US acknowledgement does not discharge the European Communities from its obligation to present a *prima facie* case regarding the alleged inconsistency with Article 2.4.2 of the Agreement of model zeroing in investigations.<sup>97</sup> Regardless of the US acknowledgement, therefore, we have to assess whether the EC's arguments are sufficient to make a *prima facie* case. It is only then that we can find that the United States acted inconsistently with its WTO obligations. In our view, our obligation to carry out an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as set forth in Article 11 of the DSU lends support to the approach that we are taking in this regard. With this in mind, we now proceed to assess the claim presented by the European Communities.

7.106 The European Communities argues that model zeroing in investigations is inconsistent with the obligation set forth under 2.4.2 of the Agreement because it precludes the investigating authorities from making a determination of dumping for the product under consideration as a whole. This occurs through the exclusion, from the ultimate calculation made for the product under consideration as a whole, of the results of model-specific comparisons where the WA export price exceeded the WA normal value. The European Communities also asserts that model zeroing in investigations is inconsistent with Article 2.4 of the Agreement because it represents a methodology that is inherently biased and unfair. Finally, the European Communities contends that model zeroing in investigations contradicts the obligations set forth under Articles VI:1 and VI:2 of the GATT 1994.

7.107 We consider it appropriate to commence our analysis with the alleged violation of Article 2.4.2 of the Agreement and then move on to the other allegations to the extent necessary to resolve the dispute. Article 2.4.2 provides:

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<sup>96</sup> First Written Submission of the United States, paras. 155-156.

<sup>97</sup> We note that this very issue arose in the last two zeroing disputes and the panels reasoned that the defendant's acknowledgement regarding the WTO-inconsistency of the measure at issue did not discharge the complaining Member from its obligation to make a *prima facie* case. See, Panel Report, *United States – Anti-Dumping Measures on Shrimp from Ecuador* ("*US – Shrimp (Ecuador)*"), WT/DS335/R, adopted 20 February 2007, para. 7.9; Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* ("*US – Stainless Steel (Mexico)*"), WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report, WT/DS344/AB/R, para. 7.52.

"Article 2

*Determination of Dumping*

...

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

7.108 Article 2.4.2 permits the use of three different methodologies for dumping determinations in anti-dumping investigations. The first two, *i.e.*, the WA-WA and the transaction-to-transaction methodologies, are set out in the first sentence and the third, *i.e.*, the WA-T methodology, in the second sentence. The claim at issue concerns the use of the WA-WA methodology. The first sentence of Article 2.4.2 provides that in investigations where dumping determinations are based on the WA-WA methodology, the WA normal value has to be compared with the WA of prices of "all comparable export transactions". This, in our view, suggests that the authorities cannot exclude from their calculations any export transaction made during the relevant period of investigation. The European Communities articulates its claim under Article 2.4.2 in parallel to the reasoning of the Appellate Body in the past zeroing cases, including *US – Softwood Lumber V*. We recall the US acknowledgement that the Appellate Body's reasoning in *US – Softwood Lumber V* is equally applicable to the EC's claim under Article 2.4.2 in these proceedings.

7.109 In *US – Softwood Lumber V*, the Appellate Body started out by clarifying that Article 2.4.2 permits multiple averaging.<sup>98</sup> This means that the investigating authorities may categorize the subject product under different models, carry out a comparison on the basis of a WA normal value and a WA export price for each such model, and then aggregate such model-specific results in the calculation of the margin of dumping for the product under consideration as a whole. The Appellate Body opined that where the WA-WA methodology is used, Article 2.4.2 requires the investigating authorities to take into consideration the average of prices of all comparable export transactions.<sup>99</sup> The Appellate Body then moved on to the issue of whether this obligation was limited to model-specific comparisons or whether it also applied to the aggregation of such comparisons. In the view of the Appellate Body, this hinged upon the interpretation of the terms "dumping" and "margins of dumping" in the Anti-Dumping Agreement.<sup>100</sup> According to the Appellate Body, the definition of the term "dumping" under Article 2.1 refers to the product under consideration as a whole as defined by the investigating authorities in the relevant investigation. Furthermore, the phrase "[f]or the purpose of this Agreement" in Article 2.1 indicates that this definition of dumping applies throughout the Anti-Dumping Agreement, including in the context of Article 2.4.2. Thus, the Appellate Body came to the

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<sup>98</sup> Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("US – Softwood Lumber V"), WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875, para. 81.

<sup>99</sup> *Ibid.*, para. 86.

<sup>100</sup> *Ibid.*, para. 90.

conclusion that dumping can be found to exist only "for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product".<sup>101</sup>

7.110 The Appellate Body expressed the view that the obligation set forth under Article 2.4.2, to take into account the weighted average of prices of all comparable export transactions, applies not only to the model-specific comparisons, but also to their aggregation for purposes of establishing the margin of dumping for the product under consideration as a whole.<sup>102</sup> According to the Appellate Body, the results of model-specific comparisons are not margins of dumping within the meaning of Article 2.4.2, but rather constitute intermediate calculations that need to be taken into consideration in the calculation of the margin of dumping for the product under consideration as a whole.<sup>103</sup> Consequently, when authorities use multiple averaging in their dumping determinations in investigations, Article 2.4.2 requires the inclusion of all model-specific comparisons in the calculation of the margin of dumping for the product under consideration as a whole.

7.111 We agree with the Appellate Body's view that the phrase "all comparable export transactions" in Article 2.4.2 requires the authorities to take into consideration the WA of the prices of all comparable export transactions in the calculation of dumping margins in investigations where the WA-WA methodology is used. Model zeroing conflicts with this obligation because it excludes from the calculation of the margin of dumping for the product under consideration as a whole the results of model-specific comparisons where the WA export price exceeds the WA normal value. Thus, we find that model zeroing is inconsistent with the obligation set out under Article 2.4.2 of the Agreement. It follows that the United States acted inconsistently with the obligation set out under Article 2.4.2 by using model zeroing in the four investigations at issue.<sup>104</sup>

7.112 Having found model zeroing in investigations to be inconsistent with the obligation set out under Article 2.4.2 of the Agreement, we need not, and do not, address the EC's claims under Article 2.4 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994.

## F. ZEROING IN PERIODIC REVIEWS

### 1. Arguments of the Parties

#### (a) European Communities

7.113 The European Communities argues that the USDOC applied what the European Communities calls "simple zeroing" in 37 periodic reviews listed in the annex to the EC's panel request. The European Communities develops its arguments in this regard on the basis of the specifics of one of these periodic reviews, *Ball Bearings from Italy*, and points out that the same arguments also apply with regard to the remaining periodic reviews. In the periodic review at issue, the USDOC calculated assessment rates for the entries made during the period of review and the new cash deposit rate for future entries. In so doing, the USDOC used the WA-T methodology. Hence, the USDOC started its dumping calculations by making various comparisons between a WA normal value and individual export transactions. The results of these comparisons were then aggregated in order to obtain the overall WA dumping margin. In this aggregation, the USDOC ignored the results of comparisons where the export price exceeded the WA normal value. This, in the view of the European Communities, inflated the overall margin of dumping. In the periodic review of *Ball*

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<sup>101</sup> *Ibid.*, para. 96.

<sup>102</sup> *Ibid.*, para. 98.

<sup>103</sup> *Ibid.*, para. 97.

<sup>104</sup> We would like to note that the views of the majority of the Panel regarding the Appellate Body's interpretation on the issue of "the product under consideration as a whole" are subject to the comments found in paras. 7.162-7.169 below.

*Bearing from Italy*, for instance, both margins calculated for the two respondents, 2.52 and 7.65 per cent, would have been negative had the USDOC not applied simple zeroing.

7.114 The European Communities submits that by using simple zeroing in the 37 periodic reviews at issue, the USDOC acted inconsistently with the obligations set out under Articles 2.1, 2.4, 2.4.2 and 9.3 of the Anti-Dumping Agreement as well as Articles VI:1 and VI:2 of the GATT 1994. The European Communities argues that although Article 9.3 of the Agreement does not prescribe a specific method for the assessment of duties, as pointed out by the Appellate Body, the margin of dumping calculated for the product under consideration as a whole operates as a ceiling for the duty assessed under Article 9.3. In the view of the European Communities, simple zeroing applied by the USDOC in the 37 periodic reviews at issue lead to margins that were higher than the exporters' true margins because this method ignored the results of comparisons where the export price exceeded the WA normal value. Hence, according to the European Communities, the USDOC acted inconsistently with Articles 2 and 9.3 of the Agreement.<sup>105</sup>

7.115 The European Communities argues that, as reasoned by the Appellate Body, the fair comparison requirement embodied in Article 2.4 applies to duty assessment proceedings under Article 9.3 of the Agreement. The simple zeroing methodology used by the USDOC in periodic reviews is inherently biased and unbalanced. It systematically and inevitably results in a higher margin. It follows that simple zeroing in periodic reviews is inconsistent with Article 2.4 of the Agreement.

7.116 The European Communities characterizes all anti-dumping proceedings as an investigation and argues that Article 2.4.2 applies not only to original investigations, but to all anti-dumping proceedings, including periodic reviews. Hence, margins of dumping in periodic reviews have to be calculated consistently with the provisions of Article 2.4.2, *i.e.*, for the product under consideration as a whole.

7.117 The European Communities contends that the use of simple zeroing in the periodic reviews at issue was inconsistent with Article 2.4.2 of the Agreement, for two reasons. First, the European Communities argues that the USDOC acted inconsistently with Article 2.4.2 by using the third comparison methodology without observing the conditions laid down in the second sentence of Article 2.4.2. Second, the European Communities posits that the USDOC acted inconsistently with Article 2.4.2 by ignoring the results of intermediate comparisons where the export price exceeded the WA normal value.

7.118 Finally, the European Communities asserts that the USDOC acted inconsistently with Article 11.2 of the Agreement in the periodic reviews at issue. According to the European Communities, the calculation of the new cash deposit rate in a periodic review constitutes a review into whether the continued imposition of the duty is necessary within the meaning of Article 11.2. The European Communities argues that the effects of the calculation of the new cash deposit rates and the reviews under Article 11.2 are the same. The European Communities contends that the USDOC acted inconsistently with the obligation set out under Article 11.2 because it failed to determine whether the continued imposition of the duty was necessary to offset "dumping" within the meaning of Article 2, *i.e.*, as calculated for the product under consideration as a whole. Instead, the USDOC analyzed the need for the continued imposition of the duty against something that did not constitute "dumping" within the meaning of Article 2.

7.119 Regarding the Appellate Body report in *US – Stainless Steel (Mexico)*, the European Communities notes that the report once again confirms the WTO-inconsistency of simple zeroing in periodic reviews and invites the Panel to take the same approach.

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<sup>105</sup> First Written Submission of the European Communities, para. 197.

(b) United States

7.120 The United States argues that a general prohibition on zeroing applicable in the context of periodic reviews cannot be reconciled with the interpretation articulated by the Appellate Body in *US – Softwood Lumber V*, wherein the Appellate Body found that zeroing was prohibited in the context of WA-WA comparisons because the phrase "all comparable export transactions" in Article 2.4.2 meant that dumping must be determined for the "product as a whole". The United States contends that the Appellate Body subsequently, erroneously, extended the concept of "product under consideration as a whole" beyond this narrow context and ruled that dumping cannot be determined for individual transactions. The United States invites the Panel to make its own objective assessment of the matter before it and to refrain from adopting the Appellate Body's reasoning that fails to accept a permissible interpretation of the relevant treaty provisions, inconsistently with the standard of review laid down in Article 17.6(ii) of the Anti-Dumping Agreement.

7.121 The United States asserts that Article 2.1 of the Agreement and Article VI:1 of the GATT 1994 contain definitional provisions that do not impose independent legal obligations. They are, however, important tools for the interpretation of the other relevant treaty provisions. The United States submits that dumping may occur in a single export transaction. There is no support in the GATT 1994 or the Anti-Dumping Agreement for the proposition that injurious dumping that occurs in a single transaction is mitigated by another transaction made at a non-dumped price. The United States finds support for this reading of the concept of dumping in the GATT practice as well as the negotiating history of the Uruguay Round Anti-Dumping Agreement. The United States submits that the Appellate Body in *US – Softwood Lumber V* interpreted the expression "all comparable export transactions" under Article 2.4.2 of the Agreement to mean that when multiple averaging is used in an investigation, the results of all comparisons have to be taken into account in the aggregation of such comparisons. Subsequently, however, the Appellate Body ruled that zeroing is prohibited whenever multiple comparisons are made.

7.122 According to the United States, the Agreement does not support the argument that the word "product" generally refers to the "product under consideration as a whole". The United States argues that in certain instances under the Anti-Dumping Agreement and the GATT 1994, the word "product" is used to refer to individual transactions, rather than the product under consideration as a whole. In the same vein, the United States argues that in a prospective normal value system, the word "product" necessarily refers to a single transaction.

7.123 The United States submits that the phrase "investigation phase" in Article 2.4.2 limits the application of this provision to investigations. Interpreting Article 2.4.2 as applying to duty assessment proceedings under Article 9.3 would, therefore, render the terms of Article 2.4.2, which expressly limit its application to investigations, *inutile*. The United States contends that numerous provisions in the Anti-Dumping Agreement, as well as previous panel and Appellate Body findings invalidate the contention that every anti-dumping proceeding, including duty assessment proceedings under Article 9.3, constitutes an investigation within the meaning of Article 2.4.2. The United States argues that because the application of Article 2.4.2 is limited to the investigation phase of the proceeding, the Anti-Dumping Agreement does not support a prohibition on zeroing within the context of Article 9 periodic reviews.

7.124 The United States also disagrees with the EC's assertion that Article 2.4.2 applies to periodic reviews by virtue of the cross-reference found in Article 9.3 to Article 2. According to the United States, this cross-reference is subject to the limitations that Article 2 itself contains. It follows that Article 2.4.2 does not apply to periodic reviews since its text limits its application to investigations. The United States notes that the European Communities implies that the USDOC should have shown that the conditions, laid down in the second sentence of Article 2.4.2, for the use of the asymmetrical third methodology were met before using it in periodic reviews. The

United States disagrees with this proposition because Article 2.4.2 itself limits its application to investigations. Furthermore, the United States submits that Article 9.4(ii) specifically allows the use of the WA-T methodology in duty assessment proceedings.

7.125 The United States submits that an interpretation that extends the prohibition on zeroing beyond the context of investigations where the WA-WA methodology is used would strip the second sentence of Article 2.4.2 of the Agreement of any meaning. More specifically, the United States contends that if zeroing is prohibited in all contexts, the exceptional WA-T methodology provided for in the second sentence of Article 2.4.2 would mathematically yield the same result as the WA-WA methodology. Such an approach would be inconsistent with the principle of effective treaty interpretation. In this regard, the United States notes that the European Court of First Instance approved zeroing in the context of the WA-T methodology based on the "mathematical equivalence" argument.

7.126 The United States argues that the EC's interpretation of the word "product" in the context of periodic reviews under Article 9.3 would render the prospective normal value systems retrospective. It would also preclude the achievement of the purpose of imposing an anti-dumping duty, *i.e.*, counteracting injury caused by dumping.

7.127 The United States contends that zeroing in periodic reviews is not inconsistent with Article 2.4 of the Agreement. According to the United States, the EC's claim under Article 2.4 is built on the presumption that the term "margin of dumping" as used under Article 9.3 cannot be interpreted to refer to individual transactions. Because Article 9.3 does not exclude such an interpretation, the EC's claim under Article 2.4 cannot be sustained. The United States also disagrees with the EC's proposition that zeroing is inherently unfair. There is, according to the United States, no support in the Agreement for this proposition. A method cannot be labelled as fair or unfair simply because it gives rise to a higher or lower margin of dumping. The United States argues that interpreting Article 2.4 as generally prohibiting zeroing would render the distinctions between WA-WA and WA-T methodologies found in Article 2.4.2 meaningless and would thus be inconsistent with the principle of effective treaty interpretation.<sup>106</sup>

7.128 Finally, the United States asserts that Article 11.2 does not apply to periodic reviews. A periodic review carried out under Article 9.3 of the Agreement does constitute a review of the continued need for the imposition of the anti-dumping duty. The United States argues that a review under Article 11.2 focuses on the continuation or recurrence of injury if the duty is removed, whereas a periodic review is simply about determining a varying duty rate.

7.129 Regarding the Appellate Body report in *US – Stainless Steel (Mexico)*, the United States submits that this report is "deeply flawed" and that this Panel should not follow the reasoning in it. More specifically, the United States contends that the Appellate Body's reasoning regarding the WTO-inconsistency of simple zeroing in periodic reviews lacks a legal basis. Furthermore, the United States asserts that the Appellate Body improperly attaches a binding effect to adopted Appellate Body reports. According to the United States, the drafters of the WTO Agreement had no such intention. In this regard, the United States recalls that the WTO Agreement empowers the Ministerial Conference and the General Council, not the Appellate Body, to provide authoritative interpretation of the provisions of the WTO Agreement. The United States also notes that Articles 3.2 and 19.2 of the DSU provide that the recommendations and rulings of the DSB, and the findings and recommendations of panels and the Appellate Body cannot add to, or diminish, the rights and obligations of WTO Members. The United States maintains that the obligation laid down in Article 11 of the DSU requires this Panel to carry out its own objective assessment of the matter before it. In this regard, the United States notes that the panel in *US – Stainless Steel (Mexico)*

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<sup>106</sup> First Written Submission of the United States, para. 145.

concluded that the concern over a consistent line of jurisprudence should not override a panel's task to carry out an objective assessment through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law. The United States considers that an objective assessment should lead the Panel to depart from the Appellate Body's reasoning regarding the WTO-consistency of simple zeroing in periodic reviews.

## 2. Arguments of Third Parties

### (a) Brazil

7.130 Brazil notes that despite numerous findings of inconsistency regarding the practice of zeroing, the United States continues to apply it. According to Brazil, rulings in the past zeroing cases against the United States have reaffirmed the WTO-inconsistency of this methodology. Brazil also notes that most of the arguments put forward by the United States in this case have been tested and rejected by panels and the Appellate Body. Brazil disagrees with the main arguments on which the US defence is based in this case. Brazil generally contends that the main concepts of Article 2 of the Agreement, *i.e.*, "product", "margins of dumping" and "fair comparison" apply to dumping determinations in all anti-dumping proceedings. In Brazil's view, the Agreement links the concept of "dumping" to "product", not to "transaction". Thus, there is no support in the Agreement for the US argument that dumping can be defined with respect to individual import transactions. Dumping is defined in relation to the product as a whole and this definition applies to all kinds of anti-dumping investigations, be it original investigations, review investigations or sunset investigations. Like "dumping", the concept of "margins of dumping" is also defined in relation to the product under consideration as a whole. The margin of dumping may not be properly established without taking into consideration results of all intermediate calculations made for the product under consideration as a whole. The margin of dumping established on the basis of all such intermediate calculations operates as a ceiling at which the resulting anti-dumping duty may be collected. In this regard, Brazil submits that the concepts of "dumping", "margins of dumping" and "product under consideration as a whole" are interlinked. Brazil also argues that zeroing runs counter to the fair comparison requirement of Article 2.4 of the Agreement because it results in artificially high margins of dumping and therefore makes a finding of dumping more likely.

7.131 Brazil disagrees with the US arguments regarding the last sentence of Article 2.4.2. This article lays down an exceptional methodology. This methodology, however, cannot run counter to the principles underlying the Anti-Dumping Agreement which, according to Brazil, do not endorse zeroing *per se*. Brazil also disagrees with the argument that because different anti-dumping proceedings have different purposes, they are not necessarily subject to the same disciplines. No matter what the purpose of each of these proceedings is, the bottom line for Brazil is that they all deal with some sort of dumping margin calculation and that calculation has to be carried out in accordance with the disciplines of Article 2 of the Agreement. Furthermore, Brazil notes that even assuming that these proceedings have different purposes, the flaws in the determinations made in one proceeding necessarily affect the determinations in subsequent proceedings.

7.132 Brazil does not find convincing the arguments presented by the United States regarding the negotiating history of the Agreement. According to Brazil, the main issue underlying this dispute is the US consistent failure to abide by the DSB rulings that have condemned zeroing. Brazil therefore invites the Panel to reiterate that zeroing is inconsistent with the Agreement in all anti-dumping proceedings and irrespective of the methodology applied.

### (b) Japan

7.133 Japan bases its arguments regarding the use of zeroing in periodic reviews on the Appellate Body reports in the past zeroing disputes. Japan notes the chapeau of Article 9.3 of the Agreement

which provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". This, in Japan's view, parallels the text of Article VI:2 of the GATT 1994. It also reinforces the provision of Article 9.1 that the amount of the duty cannot be more than the margin of dumping. According to Japan, the cross-reference in Article 9.3 to Article 2 indicates that the authorities have to calculate the margin of dumping in administrative reviews with regard to the product under consideration as a whole. It follows that if the authorities decide to carry out intermediate comparisons in the course of their dumping determinations in such reviews, they have to take into account the results of all such comparisons in the calculation of the margin of dumping for the product under consideration as a whole. Japan argues that Article 6.10 of the Agreement precludes the calculation of margins of dumping for individual import transactions. It also requires that margins be calculated for foreign producers or exporters, not for importers. Japan considers that authorities may assess duties on the basis of import transactions as long as such assessment does not lead to a duty above the margin of dumping calculated for the product under consideration as a whole and with respect to the exporter or foreign producer at issue.

7.134 Japan disagrees with the US argument that Article 9.4(ii) of the Agreement which allows prospective normal value systems, lends support to the view that dumping margins may be calculated for individual import transactions. In this regard, Japan asserts that the concept of "margin of dumping" should not be confused with "amount of the duty". Members may apply different methods with regard to assessing the amount of the duty to be paid. The margin of dumping calculated in conformity with the disciplines of Article 2, however, operates as a ceiling on duty assessment. Hence, the duty assessed cannot go beyond the margin of dumping calculated for the product under consideration as a whole and with regard to the exporter or foreign producer at issue. Japan therefore concludes that the use of zeroing in periodic reviews is inconsistent with Articles 2.1 and 9.3 of the Agreement. Japan, however, does not take any position with regard to the alleged inconsistency of such zeroing with Articles 2.4.2 and 11.2 of the Agreement.

7.135 Japan argues that the use of zeroing in periodic reviews is also inconsistent with the fair comparison obligation under Article 2.4 of the Agreement because it leads to a margin in excess of the true margin of the relevant exporters or foreign producers.

7.136 Japan recalls that the Appellate Body is hierarchically superior to panels and that it has consistently held in the past cases that dealt with zeroing that such practice is WTO-inconsistent irrespective of the proceeding where it is used and the comparison methodology applied by the investigating authorities. Japan argues that the need to provide security and predictability to the multilateral trading system, set forth in Article 3.2 of the DSU, requires this Panel to follow the Appellate Body's reasoning. Japan recognizes that panels may, in exceptional circumstances, depart from the Appellate Body's reasoning, but argues that this dispute presents no such circumstances. Japan therefore contends that in order to discharge its obligation to carry out an objective examination of the matter before it, the Panel should rely on the Appellate Body's reasoning.

(c) Korea

7.137 Korea contends that Article 2.4 of the Agreement contains an obligation which is independent from the rest of Article 2. This obligation applies to all anti-dumping proceedings, including periodic reviews. According to Korea, a comparison that fails to take into consideration all export transactions cannot constitute fair comparison within the meaning of Article 2.4. Such a method, in Korea's view, leads to an unfair comparison. The use of zeroing by the USDOC in periodic reviews, therefore, is inconsistent with the fair comparison requirement embodied in Article 2.4, because it disregards the results of intermediate comparisons where the export price exceeds the normal value.

7.138 Korea further submits that the term "investigative phase" under Article 2.4.2 has a broad scope that covers periodic reviews. According to Korea, the word "investigation" within the meaning

of Article 2.4.2 refers to the inquiry carried out by the authorities, rather than to a particular segment of the proceedings. It follows that the use of the zeroing methodology in periodic reviews also conflicts with Article 2.4.2. Korea rejects the US arguments that purport to distinguish periodic reviews from investigations. Since both of these proceedings entail dumping margin calculations, they have to be subjected to the same legal disciplines. Korea therefore argues that the USDOC's margin calculations in periodic reviews is WTO-inconsistent both with regard to the final liability of importers and the new cash deposit rate for exporters or foreign producers.

7.139 Korea agrees with the EC's argument that Article 11.2 applies to periodic reviews and that the use of zeroing in such reviews also conflicts with the obligation set forth under the mentioned Article. Korea also argues that the use of zeroing in periodic reviews is inconsistent with Article 9.3 of the Agreement.

7.140 Regarding the relevance of past Appellate Body reports on the issue of zeroing, Korea contends that the Panel should follow the reasoning developed and repeated in such reports. This, in Korea's view, is critical with regard to maintaining the integrity of WTO dispute settlement. On this issue, Korea also draws attention to the fact that the United States asserts that the Panel should refrain from following the Appellate Body's reasoning on zeroing, while at the same time citing Appellate Body's other reports in order to strengthen its legal arguments presented to the Panel.

(d) Mexico

7.141 Mexico generally agrees with the European Communities with regard to the relevance to these proceedings of past Appellate Body reports on the issue of zeroing. Mexico recalls the Appellate Body's reports that found zeroing "as such" to be WTO-inconsistent and argues that the position taken by the United States in this case frustrates the purpose of allowing "as such" claims in WTO dispute settlement, which is to eliminate the root of WTO-inconsistent behaviour. Mexico notes that the measures at issue in this case and the arguments presented by the United States are the same as those in the past zeroing cases and therefore invites the Panel to follow the Appellate Body's reasoning. This, in Mexico's view, would also be consistent with the Panel's obligation to carry out an objective examination of the matter before it, as required under Article 11 of the DSU. Mexico argues that not following the Appellate Body's reasoning in this case would undermine the need to provide security and predictability to the multilateral trading system as set forth under Article 3.2 of the DSU.

7.142 Mexico disagrees with the US assertion that the Appellate Body's legal reasoning in the past zeroing cases has shifted over time. According to Mexico, the Appellate Body's reasoning has been the same starting from the first zeroing case, *i.e.*, *EC – Bed Linen*. The Appellate Body based its reasoning on Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement which define "dumping", for purposes of all anti-dumping proceedings, with reference to the product under consideration as a whole. The Appellate Body recognized that the authorities could carry out multiple comparisons in the calculation of the margin of dumping but noted that the results of all such comparisons had to be taken into account in determining the final margin for the product under consideration as a whole. Furthermore, it held that it was exporters or foreign producers, not importers, that dumped. Finally, the Appellate Body opined that this would ensure consistency in anti-dumping proceedings in the sense that the definition of "dumped imports" would be the same for purposes of dumping and injury determinations. Mexico therefore disagrees with the US argument that the Appellate Body's reasoning is based on the phrase "all comparable export transactions" under Article 2.4.2 of the Agreement.

7.143 Mexico draws attention to the difference between duty collection systems and the calculation of margins of dumping. Mexico acknowledges that the Agreement provides discretion as to different duty collection systems that Members may adopt. Regardless of the system chosen, however, duties

collected continue to be subject to Article 9.3 of the Agreement which stipulates that duties cannot exceed the margin of dumping established under Article 2.

(e) Norway

7.144 Norway contends that the three comparison methodologies provided for under Article 2.4.2 of the Agreement constitute the only methods that may be used in all anti-dumping proceedings, including assessment reviews. Norway notes that Article 9.3 does not prescribe a methodology regarding duty assessment proceedings. According to Norway, however, the cross-reference to Article 2 should be interpreted to mean that the authorities have to observe the disciplines of Article 2 in their determinations in duty assessment proceedings. Furthermore, Norway asserts that Article 2.4.2 also applies to duty assessment proceedings. Norway agrees with the EC's proposition that the word "investigation" within the meaning of Article 2.4.2 does not refer to original investigations. Rather, it refers to the inquiry carried out by investigating authorities in different anti-dumping proceedings, including assessment proceedings. Limiting the scope of application of Article 2.4.2 to original investigations would, in Norway's view, lead to absurd results.

### 3. Evaluation by the Panel

(a) Relevant Facts

7.145 The European Communities provided copies of the USDOC's Issues and Decision Memoranda for 30 of the 37 periodic reviews at issue. The United States agrees that these memoranda show that simple zeroing was used in the relevant 30 periodic reviews.<sup>107</sup> The EC's claims regarding simple zeroing in periodic reviews concern the following 37 periodic reviews:

Number	Product and Country Involved	Period of Review	Relevant Exhibits
1	Steel Concrete Reinforcing Bars From Latvia USDOC No: A-449-804	1 September 2004 – 31 August 2005	EC-33
2	Steel Concrete Reinforcing Bars From Latvia USDOC No: A-449-804	1 September 2003 – 31 August 2004	EC-34
3	Steel Concrete Reinforcing Bars From Latvia USDOC No: A-449-804	1 September 2002 – 31 August 2003	EC-35&EC-81
4	Ball Bearings and Parts Thereof From Italy USDOC No: A-475-801	1 May 2004 – 30 April 2005	EC-31
5	Ball Bearings and Parts Thereof From Italy USDOC No: A-475-801	1 May 2003 – 30 April 2004	EC-36
6	Ball Bearings and Parts Thereof From Italy USDOC No: A-475-801	1 May 2002–30 April 2003	EC-37
7	Ball Bearings and Parts Thereof From Italy USDOC No: A-475-801	1 May 2001 – 30 April 2002	EC-38
8	Ball Bearings and Parts Thereof From Germany USDOC No: A-428-801	1 May 2004 – 30 April 2005	EC-39
9	Ball Bearings and Parts Thereof From Germany USDOC No: A-428-801	1 May 2003 – 30 April 2004	EC-40
10	Ball Bearings and Parts Thereof From Germany	1 May 2002 – 30 April 2003	EC-41

<sup>107</sup> Response of the United States to Question 1(b) From the Panel Following the Second Meeting.

Number	Product and Country Involved	Period of Review	Relevant Exhibits
	USDOC No: A-428-801		
11	Ball Bearings and Parts Thereof From Germany USDOC No: A-428-801	1 May 2001 – 30 April 2002	EC-42
12	Ball Bearings and Parts Thereof From France USDOC No: A-427-801	1 May 2004 – 30 April 2005	EC-43
13	Ball Bearings and Parts Thereof From France USDOC No: A-427-801	1 May 2003 – 30 April 2004	EC-44
14	Ball Bearings and Parts Thereof From France USDOC No: A-427-801	1 May 2002 – 30 April 2003	EC-45
15	Ball Bearings and Parts Thereof From France USDOC No: A-427-801	1 May 2001 – 30 April 2002	EC-46
16	Stainless Steel Bar From France USDOC No: A-427-820	1 March 2004 – 28 February 2005	EC-47&EC-82
17	Stainless Steel Bar From France USDOC No: A-427-820	1 March 2003 – 29 February 2004	EC-48&EC83
18	Stainless Steel Sheet And Strip In Coils From Germany USDOC No: A-428-825	1 July 2004 – 30 June 2005	EC-49
19	Stainless Steel Sheet And Strip In Coils From Germany USDOC No: A-428-825	1 July 2003 – 30 June 2004	EC-50
20	Stainless Steel Sheet And Strip In Coils From Germany USDOC No: A-428-825	1 July 2002 – 30 June 2003	EC-51
21	Stainless Steel Sheet And Strip In Coils From Germany USDOC No: A-428-825	1 July 2001 – 30 June 2002	EC-52
22	Stainless steel plate in coils From Belgium USDOC No: A-423-808	1 May 2003 – 30 April 2004	EC-53
23	Stainless steel plate in coils From Belgium USDOC No: A-423-808	1 May 2002 – 30 April 2003	EC-54
24	Ball Bearings and Parts Thereof From the United Kingdom USDOC No: A-412-801	1 May 2003 – 30 April 2004	EC-55
25	Ball Bearings and Parts Thereof From the United Kingdom USDOC No: A-412-801	1 May 2002 – 30 April 2003	EC-56
26	Stainless Steel Bar From Germany USDOC No: A-428-830	1 March 2004–28 February 2005	EC-57 & EC-84& EC-88&EC-89
27	Stainless Steel Bar From Germany USDOC No: A-428-830	2 August 2001–28 February 2003	EC-58&EC-85
28	Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands USDOC No: A-421-807 <b>(PRELIMINARY RESULTS)</b>	1 November 2004 – 31 October 2005	EC-59
29	Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands USDOC No: A-421-807	1 November 2002 – 31 October 2003	EC-60

Number	Product and Country Involved	Period of Review	Relevant Exhibits
30	Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands USDOC No: A-421-807	3 May 2001 – 31 October 2002	EC-61
31	Stainless Steel Bar From Italy USDOC No: A- 475-829	2 August 2001 – 28 February 2003	EC-62&EC86
32	Stainless Steel Sheet & Strip In Coils From Italy USDOC No: A-475-824	1 July 2002 – 30 June 2003	EC-63
33	Stainless Steel Sheet & Strip In Coils From Italy USDOC No: A-475-824	1 July 2001 – 30 June 2002	EC-64
34	Certain Pasta From Italy USDOC No: A-475-818	1 July 2004 – 30 June 2005	EC-65&EC-87
35	Certain Pasta From Italy USDOC No: A-475-818	1 July 2003 – 30 June 2004	EC-66
36	Certain Pasta From Italy USDOC No: A-475-818	1 July 2002 – 30 June 2003	EC-67
37	Certain Pasta From Italy USDOC No: A-475-818	1 July 2001 – 30 June 2002	EC-68

7.146 As far as the remaining seven periodic reviews are concerned, the European Communities initially did not submit copies of the USDOC's Issues and Decision Memoranda. Following the second meeting with the parties, the Panel asked the European Communities why the copies of such memoranda had not been submitted for the seven periodic reviews at issue and invited it, if it so wished, to do so. In response, the European Communities stated that the copies of the memoranda in connection with the seven periodic reviews at issue had not been submitted because, unlike those submitted in connection with the other 30 periodic reviews, the memoranda pertaining to the seven reviews did not contain any discussion on the issue of simple zeroing.<sup>108</sup> The European Communities attached to its response copies of the memoranda that belonged to the seven reviews. In addition, the European Communities submitted, along with its response to the Panel's question, copies of the two margin programmes used in one of the seven reviews, *i.e.*, *Stainless Steel Bar From Germany (Period of Review: 1 March 2004 – 28 February 2005)*.

7.147 With regard to the submission by the European Communities of the two margin programmes pertaining to the periodic review in *Stainless Steel Bar From Germany*, the United States argues that such submission runs counter to paragraph 14 of the Panel's Working Procedures because this constitutes new factual evidence which may only be submitted in the circumstances described in paragraph 14. The United States contends that the Panel gave the European Communities the opportunity to submit copies of the relevant Issues and Decision Memoranda, and argues that the submission of margin programmes fell outside the scope of such opportunity.<sup>109</sup>

7.148 Paragraph 14 of our Working Procedures provides:

"Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of

<sup>108</sup> Response of the European Communities to Question 1(c) From the Panel Following the Second Meeting.

<sup>109</sup> Comment of the United States on the Response of the European Communities to Question 1(c) From the Panel Following the Second Meeting.

rebuttals or answers to questions. Exceptions to this procedure will be granted upon a showing of good cause. The other party shall be accorded a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting."

Paragraph 14 provides that all factual evidence has to be submitted not later than during the Panel's first substantive meeting. However, it also contains certain exceptions. Thus, paragraph 14 allows for the submission of factual evidence after the first substantive meeting of the Panel: a) when this is necessary for purposes of rebuttals and answers to questions, or b) upon good cause shown. Paragraph 14 also stipulates that where additional factual evidence is submitted after the first substantive meeting, the other party shall be given an opportunity to comment on it. We disagree with the narrow interpretation presented by the United States regarding the language in our question to the European Communities. The question at issue reads in relevant parts:

"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."<sup>110</sup>

The reason why we invited the European Communities to submit copies of the relevant Issues and Decision Memoranda pertaining to the seven periodic reviews at issue is because that was the document that the European Communities had submitted in connection with the other 30 reviews. We anticipated that the same memoranda pertaining to the seven reviews would also contain discussions regarding the methodology used in such reviews. We did not intend to limit the submission of evidence along with the EC's response to the question at issue to such memoranda.

7.149 We note that the European Communities submitted the additional factual information at issue along with its response to the Panel's question. We also note that the United States has had an opportunity to comment on the documents submitted along with the EC's response. We therefore disagree with the US view that the submission of the two calculation tables conflicted with paragraph 14 of our Working Procedures. In any event, as explained in para. 7.154 below, we have found that the two computer programmes submitted by the European Communities have not demonstrated that simple zeroing was used in the periodic review at issue.

7.150 We now turn to our assessment of the evidence submitted by the European Communities with regard to the seven periodic reviews in which the Issues and Decision Memoranda do not contain any discussion on the methodology used by the USDOC.

(i) *Steel Concrete Reinforcing Bars From Latvia (Period of Review: 1 September 2002 – 31 August 2003)*

7.151 In order to demonstrate that the USDOC used simple zeroing in this periodic review, the European Communities submitted, in Exhibit EC-35, the copy of the Federal Register where the Final Results of the USDOC's determinations were published, documents showing the standard computer programme that the USDOC used in this review, the application of that programme to the producer subject to this review and tables that show the results of the calculations with and without zeroing. We note that the Final Results published by the USDOC in the Federal Register do not mention whether simple zeroing was used in the review at issue. We also note that none of the other documents submitted by the European Communities were issued by the USDOC during the review at issue. The relevant parts of the programmes that were allegedly used in the review at issue contain

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<sup>110</sup> Question 1(c) From the Panel Following the Second Meeting.

certain computer commands which do not necessarily show that the simple zeroing methodology was used by the USDOC. We do not consider that tables that allegedly contain results with and without zeroing necessarily show that simple zeroing was actually used in the periodic review at issue. The European Communities also submitted, in Exhibit EC-81, the copy of the USDOC's Issues and Decision Memorandum. This Memorandum, however, does not mention whether simple zeroing was applied. We therefore consider that the European Communities has failed to demonstrate as a matter of fact that simple zeroing was used by the USDOC in this periodic review.

(ii) *Stainless Steel Bar From France (Period of Review: 1 March 2004 – 28 February 2005)*

7.152 With regard to this periodic review, the European Communities submitted, in Exhibit EC-47, the copy of the Federal Register where the Final Results of the USDOC's determinations were published and, in Exhibit EC-82, the copy of the USDOC's Issues and Decision Memorandum. None of these two documents shows that simple zeroing was used in this review. We therefore consider that the European Communities has failed to demonstrate that simple zeroing was used by the USDOC in this periodic review.

(iii) *Stainless Steel Bar From France (Period of Review: 1 March 2003 – 29 February 2004)*

7.153 With regard to this periodic review, the European Communities submitted, in Exhibit EC-48, the copy of the Federal Register where the Final Results of the USDOC's determinations were published and, in Exhibit EC-83, the copy of the USDOC's Issues and Decision Memorandum. Neither of these documents demonstrates that simple zeroing was used in this review. We therefore consider that the European Communities has failed to demonstrate that simple zeroing was used by the USDOC in this periodic review.

(iv) *Stainless Steel Bar From Germany (Period of Review: 1 March 2004 – 28 February 2005)*

7.154 With regard to this periodic review, the European Communities submitted, in Exhibit EC-57, the copy of the Federal Register where the Final Results of the USDOC's determinations were published, the standard programme used by the USDOC in the margin calculations in this periodic review, and a table showing the results with and without zeroing. We note that the Final Results published by the USDOC in the Federal Register do not mention whether simple zeroing was used in the review at issue. The tables showing margin calculations with and without zeroing were not generated by the USDOC during the review at issue. The European Communities also submitted, along with its Response to Question 1(c) From the Panel Following the Second Meeting, Exhibits EC-88 and EC-89 containing two margin programmes used in this periodic review and Exhibit EC-84 containing the copy of the USDOC's Issues and Decision Memorandum. The documents containing the margin programmes were not generated by the USDOC during the review at issue. Nor is it readily discernable from these documents that the simple zeroing methodology was used in this periodic review. The USDOC's Issues and Decision Memorandum does not shed light on this issue either. We therefore consider that the European Communities has failed to demonstrate that simple zeroing was used by the USDOC in this periodic review.

(v) *Stainless Steel Bar From Germany (Period of Review: 2 August 2001 – 28 February 2003)*

7.155 With regard to this periodic review, the European Communities submitted, in Exhibit EC-58, the copy of the Federal Register where the Final Results of the USDOC's determinations were published, the standard programme used by the USDOC in the margin calculations in this review as well as two tables showing the results with and without zeroing. We note that the Final Results published by the USDOC in the Federal Register do not mention whether simple zeroing was used in the review at issue. The tables showing margin calculations with and without zeroing were not generated by the USDOC during the review at issue. Nor does the copy of the USDOC's Issues and

Decision Memorandum, submitted in Exhibit EC-85, demonstrate that simple zeroing was used. We therefore consider that the European Communities has failed to demonstrate as a matter of fact that simple zeroing was used by the USDOC in this periodic review.

(vi) *Stainless Steel Bar From Italy (Period of Review: 2 August 2001 – 28 February 2003)*

7.156 With regard to this periodic review, the European Communities submitted, in Exhibit EC-62, the copy of the Federal Register where the Final Results of the USDOC's determinations were published, a copy of the application of the USDOC's standard computer programme and a table showing the results of the calculations with zeroing. We note that the Final Results published by the USDOC in the Federal Register do not mention whether simple zeroing was used in the review at issue. We also note that the calculation table allegedly showing the results of calculations with zeroing was not produced by the USDOC. Nor does the copy of the USDOC's Issues and Decision Memorandum, submitted in Exhibit EC-86, demonstrate that simple zeroing was used. We therefore consider that the European Communities has failed to demonstrate that simple zeroing was used by the USDOC in this periodic review.

(vii) *Certain Pasta From Italy (Period of Review: 1 July 2004 – 30 June 2005)*

7.157 With regard to this periodic review, the European Communities submitted, in Exhibit EC-65, the copy of the Federal Register where the Final Results of the USDOC's determinations were published, a table that shows the application of the USDOC's computer programme to one of the exporters in this review and another table that allegedly shows the results of margin calculations without zeroing. We note that the Final Results published by the USDOC in the Federal Register do not mention whether simple zeroing was used in the review at issue. The calculation tables submitted by the European Communities were not produced by the USDOC during the periodic review at issue. Nor is it readily discernable from such tables that simple zeroing was used. None of them, in our view, shows that the simple zeroing methodology at issue in these proceedings was used by the USDOC in the review at issue. Nor does the copy of the USDOC's Issues and Decision Memorandum, submitted in Exhibit EC-87, show that simple zeroing was used. We therefore consider that the European Communities has failed to demonstrate that simple zeroing was used by the USDOC in this periodic review.

7.158 The European Communities has not shown that simple zeroing was used in the seven reviews discussed above. The Panel's findings regarding the use of simple zeroing in periodic reviews shall, therefore, not affect such reviews.<sup>111</sup> Furthermore, we recall our finding above (para. 7.77) that the preliminary determinations identified in the EC's panel request are not within our terms of reference. Hence, the periodic review on *Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands (Period of Review: 1 November 2004 – 31 October 2005)* (Exhibit EC-59) is not within our terms of reference. Consequently, our reasoning below regarding the use of simple zeroing in periodic reviews only applies to 29 of the 37 reviews challenged by the European Communities.

(b) Is Simple Zeroing in Periodic Reviews WTO-Inconsistent?

(i) *Description of the Calculation Methodology Used By the USDOC in Periodic Reviews*

7.159 We note that the parties do not disagree over the description of the calculation methodology used by the USDOC to calculate margins of dumping in periodic reviews. The United States has a retrospective duty assessment system. Under the US system, the anti-dumping duty imposed following an investigation does not constitute the final determination of liability for anti-dumping

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<sup>111</sup> The shaded lines in the table in para. 7.145 above represent the periodic reviews in which the Panel considers that the European Communities has not demonstrated that simple zeroing was used.

duties on imports of the subject product into the United States. Rather, in the US system, an importer deposits a security in the form of a cash deposit at the time of importation. Subsequently, the importer may, on an annual basis, ask the USDOC to calculate the importer's final liability for anti-dumping duties on all the imports made during the previous year. Such a request may also be made by a domestic producer or a foreign exporter or producer. In such a periodic review, the USDOC carries out two calculations: it calculates the final liability for anti-dumping duties for the importer on its imports during the period under review, and it calculates a new cash deposit rate for each exporter's future entries. The first is an importer-specific calculation whereas the second is exporter-specific. Both calculations are based on normal value and export price data pertaining to the period under review.

7.160 The method used by the USDOC with regard to the calculation of these two margins is the same. The product under consideration is separated into model groups and a monthly WA normal value is determined for each model exported by each exporter subject to the review. Each export transaction is compared against the relevant monthly WA normal value. These comparisons are then aggregated, with the results of comparisons where the export price exceeds the WA normal value treated as zero. A WA margin of dumping is calculated for each exporter by dividing the aggregated total by the total value of exports, and this becomes the cash deposit rate for that exporter for the subsequent period. The calculation of the importer-specific assessment rate is similar. The USDOC compares the exporter-specific WA normal value for each model with the export price in each transaction involving that exporter's product by the importer. These comparisons are then aggregated, with the results of comparisons where the export price exceeds the WA normal value treated as zero. The aggregate total for all transactions is then divided by the total value of imports made by the importer. In other words, the numerator for the exporter's WA dumping margin for the period of review, *i.e.*, the future cash deposit rate, is the total of the comparisons where the normal value exceeds the export price and the denominator is the value of all exports from that exporter during the period of review. The numerator for the importer-specific assessment rate is the total of comparisons for all transactions where the normal value exceeds the export price for all imports by that particular importer, and the denominator is the total value of all imports by the importer.

7.161 If the final importer-specific duty calculated in a periodic review exceeds the original cash deposit, the importer has to pay the difference plus interest. When the opposite is the case, the difference is reimbursed with interest. Where no periodic review is requested, the initial cash deposit made at the time of importation is assessed as final duty.

(ii) *Legal Analysis*

7.162 The EC's claim regarding simple zeroing in periodic reviews raises a number of important issues of treaty interpretation. The first is whether dumping may be determined on the basis of an individual export transaction or whether it requires an aggregation of all export transactions made within the period of review. The European Communities argues that dumping can only be determined for the product under consideration as a whole, *i.e.*, that all export transactions pertaining to the product subject to a periodic review have to be taken into consideration in the calculation of the margin of dumping. According to the European Communities, simple zeroing in periodic reviews is inconsistent with Articles 2.1, 2.4, 2.4.2 and 9.3 of the Agreement because it precludes a dumping determination for the product under consideration as a whole. The United States disagrees and maintains that this proposition does not have a basis in the Agreement. According to the United States, it is a permissible interpretation of the Agreement that dumping may be determined for individual export transactions. We are inclined to agree with this conclusion, for the reasons stated most recently by the panel in *US – Stainless Steel (Mexico)* case.<sup>112</sup> We note, however, that the

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<sup>112</sup> We recall that the WTO-consistency of simple zeroing in periodic reviews has been raised in three disputes so far, *i.e.* in *US – Zeroing (EC)*, *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)*. In all three

Appellate Body reversed the panel's findings in this regard. Drawing on its previous reasoning, the Appellate Body emphasized that dumping cannot be determined on the basis of individual export transactions. According to the Appellate Body, "if it were permissible to determine a separate margin of dumping for each individual transaction, several margins of dumping would exist for each exporter and for the product under consideration".<sup>113</sup> This, in the Appellate Body's view, cannot be reconciled with the interpretation and application of several provisions of the Agreement, including a determination of injury under Article 3, the acceptance of price undertakings under Article 8 and the conduct of reviews provided for under Articles 11.2 and 11.3.<sup>114</sup>

7.163 A second issue, related to the first, is whether dumping is necessarily an exporter-specific concept or whether it may also be determined for individual importers. The European Communities maintains that dumping is an exporter-specific concept. The United States, however, disagrees and asserts that this approach does not have a basis in the Agreement. We tend toward the view that dumping is not necessarily and exclusively an exporter-specific concept, finding the reasoning of the panel in *US – Stainless Steel (Mexico)* to be persuasive. That panel drew attention, *inter alia*, to the importer-specific nature of the payment of anti-dumping duties. According to the panel, the proposition that a margin of dumping can be determined for individual importers represents a permissible interpretation of the relevant treaty provisions within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement.<sup>115</sup> We note, however, that on this point also, the Appellate Body in *US – Stainless Steel (Mexico)* reversed the panel, reiterating that dumping necessarily is an exporter-specific concept. The Appellate Body reasoned that certain elements of the definitional provisions contained in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 compel the notion that dumping reflects the exporter's behaviour. The Appellate Body found contextual support for its interpretation in other provisions of the Agreement, including Articles 2.3, 5.2(ii), 6.1.1, 6.7, 5.8, 6.10, 9.5, 8.1, 8.2, 8.5 and 9.4(i) and (ii).<sup>116</sup> The Appellate Body also restated the overarching requirement of Article 9.3 that the level of anti-dumping duty cannot exceed the margin of dumping as established under Article 2 of the Agreement. The Appellate Body reasoned that dumping can only be determined for the exporter and in connection with the product under consideration as a whole, and considered that this definition of "dumping" applies throughout the Agreement. Therefore, the Appellate Body reasoned, the margin of dumping calculated in accordance with Article 2 establishes a ceiling for the total amount of anti-dumping duties that may be levied on the imports of the subject product. The Appellate Body concluded that there is "no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the *Anti-Dumping Agreement* for disregarding the results of comparisons where the export price exceeds the normal value when calculating the margin of dumping for an exporter."<sup>117</sup>

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disputes, panels found simple zeroing in periodic reviews to be permissible under the Anti-Dumping Agreement. All three panel reports were appealed and the Appellate Body reversed the panels on this issue in all three cases. We also note that in these cases the reasoning, respectively, of panels and the Appellate Body has generally been consistent on the legal issues concerning simple zeroing in periodic reviews. The panels and the Appellate Body have generally developed their reasoning based on previous reports. We note that the most recent dispute in which simple zeroing in periodic reviews was at issue, *US – Stainless Steel (Mexico)*, provides a comprehensive summary of the main legal issues and arguments raised by parties in disputes concerning this type of zeroing. For ease of reference, therefore, we have cited to the panel and the Appellate Body reports in *US – Stainless Steel (Mexico)*, which reflect these previous panel and Appellate Body reports, rather than citing *seriatim* all earlier reports reaching similar conclusions.

<sup>113</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* ("US – Stainless Steel (Mexico)"), WT/DS344/AB/R, adopted 20 May 2008, para. 99.

<sup>114</sup> *Ibid.*

<sup>115</sup> Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, paras.7.124-7.128.

<sup>116</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, paras. 83-96.

<sup>117</sup> *Ibid.*, para. 103. The Appellate Body noted, *inter alia*, that if simple zeroing in periodic reviews were allowed under Article 9.3 of the Agreement, this would allow Members to circumvent the prohibition,

7.164 The United States argues that prohibiting simple zeroing in periodic reviews would favour importers with high margins *vis-à-vis* importers with low margins. We share these concerns and we note that the panel in *US – Stainless Steel (Mexico)* agreed with the US arguments in this regard.<sup>118</sup> The Appellate Body, however, reversed the panel, observing that the prohibition of simple zeroing in periodic reviews does not preclude Members from carrying out an importer-specific inquiry in determining liability for the collection of anti-dumping duties, as long as the duty collected does not exceed the exporter-specific margin of dumping established for the product under consideration as a whole.<sup>119</sup>

7.165 The United States directs our attention to the fact that a Group of Experts convened in 1960 to consider certain issues regarding the operation of Article VI of the GATT 1947. This Group, according to the United States, pointed out that the "ideal method" for the imposition of anti-dumping duties would be based on an importer-specific determination of dumping and injury.<sup>120</sup> In our view, the opinion presented in that report supports the conclusion that dumping could be determined for individual importers. The Appellate Body in *US – Stainless Steel (Mexico)*, however, rejected this argument, finding that interpretation of the Agreement in this regard does not necessitate an analysis of supplementary means of interpretation provided for under Article 32 of the Vienna Convention. Furthermore, the Appellate Body reasoned that the report does not clarify whether simple zeroing in periodic reviews is allowed under the Anti-Dumping Agreement because it only reflects the views of some of the negotiating parties well before the Anti-Dumping Agreement came into force.<sup>121</sup>

7.166 The United States asserts that Article 9.4 (ii) of the Agreement which provides for the prospective normal value systems, lends support to the proposition that dumping may be interpreted in relation to individual export transactions. We tend to agree with the proposition that the recognition in the Agreement of a prospective normal value system reinforces the argument that dumping may be determined on the basis of individual export transactions, and note that the panel in *US – Stainless Steel (Mexico)* also agreed with this point of view.<sup>122</sup> The Appellate Body, however, disagreed, stating that "the Panel has failed to distinguish between duty 'collection' at the time of importation, on the one hand, and determinations of the final duty liability of an importer and the margin of dumping for an exporter, on the other hand".<sup>123</sup> The Appellate Body highlighted the fact that the duty collected at the time of importation under a prospective normal value system does not represent the margin of dumping within the meaning of Article 9.3 and noted that such duty is subject to review under Article 9.3.2.<sup>124</sup>

7.167 The United States asserts that if the Agreement is interpreted in a way that generally prohibits zeroing, the third methodology provided for under the second sentence of Article 2.4.2 would yield the same mathematical result as the first methodology.<sup>125</sup> This, according to the United States and the

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under Article 2.4.2, on zeroing in investigations. According to the Appellate Body, "this means that the mere act of conducting a periodic review would introduce zeroing following imposition of the anti-dumping duty order". *Ibid.*, para. 109.

<sup>118</sup> Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, para. 7.146.

<sup>119</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 113.

<sup>120</sup> First Written Submission of the United States, para. 86.

<sup>121</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, paras. 128-132.

<sup>122</sup> Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, paras. 7.130-7.133.

<sup>123</sup> (footnote omitted) Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 120.

<sup>124</sup> *Ibid.*

<sup>125</sup> We recall that the text of Article 2.4.2 reads:

"Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a

panel in *US – Stainless Steel (Mexico)*, would render the second sentence of Article 2.4.2 *inutile* and therefore run counter to the principle of effective treaty interpretation. On this issue, we tend to agree with the views expressed by the United States, as did the panel in *US – Stainless Steel (Mexico)*.<sup>126</sup> The Appellate Body dismissed this concern, noting that "if the determination of weighted average normal values was based on *different time periods*, dumping margin calculations under these two methodologies would yield different mathematical results".<sup>127</sup> The Appellate Body also reiterated its view that "[b]eing an exception, the comparison methodology in the second sentence of Article 2.4.2 (weighted average-to-transaction) alone cannot determine the interpretation of the two methodologies provided in the first sentence".<sup>128</sup> Furthermore, the Appellate Body reasoned that "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern".<sup>129</sup>

7.168 With regard to this last point, we note that the panel in *US – Stainless Steel (Mexico)* had pointed out:

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

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transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

<sup>126</sup> Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, paras. 7.130-7.133.

<sup>127</sup> (footnote omitted) Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 126.

We note that the Appellate Body's rationale in this regard rests on the use of different data and must logically yield a different mathematical result.

<sup>128</sup> (footnote omitted) Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 127.

<sup>129</sup> (footnote omitted) *Ibid.*

consider that the Appellate Body's approach invalidates the mathematical equivalence problem."<sup>130</sup> (footnote omitted)

The panel in that case expressed the view that the Appellate Body's reasoning regarding the mathematical equivalence argument in earlier reports was not internally consistent. According to the panel, although the Appellate Body expressed the view that while using the third methodology the authorities would limit their dumping determinations to the subset of export transactions that fall within the relevant price pattern, it did not explain how the export transactions outside that pattern would have to be treated. We share the concern raised by that panel in this regard and note that the Appellate Body in *US – Stainless Steel (Mexico)* did not address this concern.

7.169 Having identified the issues raised by the EC's claim regarding simple zeroing in periodic reviews, and having reviewed the arguments of the parties and the reports of previous panels and the Appellate Body, we have generally found the reasoning of earlier panels on these issues to be persuasive.<sup>131</sup> We are, however, faced with a situation where the Appellate Body reports, adopted by the DSB, have consistently reversed the findings in the mentioned panel reports that simple zeroing in periodic reviews is not WTO-inconsistent. Therefore, before setting out any definitive findings on the claim before us, we turn to an important systemic question.

(iii) *The Role of Jurisprudence*

7.170 Given the consistent line of reasoning underlying the Appellate Body's conclusion regarding simple zeroing in periodic reviews, resolution of the EC's claim before us necessarily requires consideration of the role of adopted Appellate Body reports. We note that the net effect of adopted Appellate Body or panel reports is not directly addressed in the DSU or in any covered agreement. This issue, however, has arisen in past disputes and the Appellate Body has addressed it. In *Japan – Alcoholic Beverages II*, the Appellate Body opined:

"Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*."<sup>132</sup> (footnote omitted, italic emphasis in original, underline emphasis added)

The Appellate Body made this statement in the context of assessing the importance of adopted GATT panel reports.<sup>133</sup> Its reasoning, however, also addresses the status of WTO panel reports. In its reasoning, the Appellate Body underlines the fact that adopted panel reports create legitimate expectations among WTO Members and opines that they should be taken into consideration by

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<sup>130</sup> Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, para. 7.139.

<sup>131</sup> We note, as the Appellate Body has recognized (Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 76), that Article 17.6(ii) of the Anti-Dumping Agreement allows for the possibility of more than one permissible interpretation of its provisions. We are of the view that the position of the United States, as reflected in the aforementioned panel reports, reflects at least one permissible interpretation of the relevant provisions of the Anti-Dumping Agreement. While the interpretation presented by the European Communities, and reflected in the Appellate Body reports on zeroing and the separate opinion of one Member of the Panel, (*infra* paras. 9.1-9.10), may also be a permissible interpretation, we do not believe that it is the only one.

<sup>132</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 14.

<sup>133</sup> *Ibid.*, pp. 12-13.

subsequent panels where the legal issues are similar, noting however, that such reports are not binding outside the scope of the relevant dispute.

7.171 In the subsequent *US – Shrimp (Article 21.5 – Malaysia)* dispute, the Appellate Body extended this reasoning to adopted Appellate Body reports.<sup>134</sup> The Appellate Body endorsed the reference that the panel in that case made to the Appellate Body's report and pointed out that "[the Appellate Body] would have expected the [p]anel to do so".<sup>135</sup> Subsequently, in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body went further regarding the role of adopted Appellate Body reports and expressed the view that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".<sup>136</sup>

7.172 The panel in *US – Stainless Steel (Mexico)* addressed the Appellate Body findings on the issue of simple zeroing in periodic reviews in reaching its conclusion. In reaching its conclusion, which did not follow these Appellate Body reports, the panel observed that although the DSU does not attribute a binding effect to adopted panel or Appellate Body reports, "the Appellate Body *de facto* expects them to do so to the extent that the legal issues addressed are similar".<sup>137</sup> The panel recalled and endorsed the view expressed by the panel in *US – Zeroing (Japan)* that "the concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it" as required under Article 11 of the DSU.<sup>138</sup>

7.173 On appeal, the Appellate Body recalled its previous findings in *Japan – Alcoholic Beverages II*, *US – Shrimp (Article 21.5 – Malaysia)* and *US – Oil Country Tubular Goods Sunset Reviews* and reiterated that "Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties".<sup>139</sup> Nonetheless, the Appellate Body noted, "[a]dopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes".<sup>140</sup> Furthermore, the Appellate Body pointed out, while enacting or modifying their national legislation, Members often take into consideration the interpretation of the covered agreements developed in such reports.<sup>141</sup> According to the Appellate Body, therefore, "the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system".<sup>142</sup>

7.174 In the view of the Appellate Body, the objective examination obligation that Article 11 of the DSU imposes on WTO panels is informed by the general provisions of Article 3 of the DSU, including paragraph 2 thereof which provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system".<sup>143</sup> According to the Appellate Body, ensuring "security and predictability" in the dispute settlement

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<sup>134</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*"), WT/DS58/AB/RW, adopted 21 November 2001, para. 109.

<sup>135</sup> *Ibid.*, para. 107.

<sup>136</sup> Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257, para. 188.

<sup>137</sup> (emphasis in original) Panel Report, *US – Stainless Steel (Mexico)*, *supra*, note 97, para. 7.105.

<sup>138</sup> *Ibid.*

<sup>139</sup> (footnote omitted) Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra*, note 113, para. 158.

<sup>140</sup> *Ibid.*, para. 160.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*, para. 157.

system, in turn, requires the development of a consistent body of case law and applying it to the same legal questions, absent cogent reasons.<sup>144</sup>

7.175 In addition, the Appellate Body underlined the hierarchical structure provided for in the DSU and opined:

"The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU."<sup>145</sup> (emphasis added)

The Appellate Body's views in this regard, particularly of the phrase "security and predictability", imply that the development of a consistent body of case law in order to clarify the rights and obligations of WTO Members is necessary. The Appellate Body pointed out that any panel report that fails to follow the case law developed through adopted panel and Appellate Body reports would undermine this important function of jurisprudence.

7.176 Furthermore, the Appellate Body held:

"Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case."<sup>146</sup> (emphasis added)

In this part of its report, the Appellate Body expressed the view that the legal interpretation contained in adopted Appellate Body reports has implications that go beyond the specifics of the relevant dispute. That is, according to the Appellate Body, such interpretation has to be taken into consideration in interpreting the rights and obligations of WTO Members.

7.177 The Appellate Body expressed deep concern that the panel in *US – Stainless Steel (Mexico)* failed to follow the legal interpretation developed in the prior Appellate Body reports regarding simple zeroing in periodic reviews. According to the Appellate Body, "[t]he [p]anel's approach has serious implications for the proper functioning of the WTO dispute settlement system[.]".<sup>147</sup> Nonetheless, although Mexico had asked the Appellate Body to find that the panel's failure to follow established Appellate Body reasoning on simple zeroing in periodic reviews was inconsistent with the obligation to carry out an objective examination, as required under Article 11 of the DSU, the Appellate Body declined to make such a finding, concluding that "the [p]anel's failure flowed, in essence, from its misguided understanding of the legal provisions at issue".<sup>148</sup>

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<sup>144</sup> *Ibid.*, para. 160.

<sup>145</sup> *Ibid.*, para. 161.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*, para. 162.

<sup>148</sup> *Ibid.*

7.178 In light of this recent report, we consider it necessary to review our obligations regarding decision-making. We therefore start with the general obligations on panels set out in Article 11 of the DSU, which provides in relevant part:

*"Function of Panels*

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

7.179 Clearly, the guiding principle for the work of this or any other panel is the injunction that a panel undertake an "objective assessment" with regard to both the facts and the law relevant to the dispute before it. Such an objective assessment does not, of course, occur in a vacuum. Other provisions of the DSU give context to this task. Important contextual elements which must be taken into account are found in Article 3.2 of the DSU, which provides:

"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." (emphasis added)

Thus, Article 3.2 establishes that the WTO dispute settlement system is intended to provide security and predictability to the multilateral trading system. In this regard, of particular relevance among the elements that the WTO dispute settlement system comprises are the consultations process, examination of facts and law by panels, appeal on issues of law, and disciplines on the implementation of DSB recommendations and rulings following a dispute, including recourse to proportioned retaliation. All of these elements operate together to provide security and predictability to the multilateral trading system. The Appellate Body suggests that security and predictability in the dispute settlement system *per se* is a purpose served by the development of a consistent body of case law based on panels following the reasoning of adopted Appellate Body reports.<sup>149</sup> We agree that security and predictability in the multilateral trading system may also be furthered by the development of consistent jurisprudence and applying it to the same legal questions, absent cogent reasons to do otherwise. In our view, it is obviously incumbent upon any panel to consider prior adopted Appellate Body reports, as well as adopted panel reports, and adopted GATT panel reports, in undertaking the objective assessment required by Article 11. Prior adopted reports form part of the GATT/WTO *acquis*, and, as stated by the Appellate Body, create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant.<sup>150</sup> However, we do not consider that the development of binding jurisprudence is a contemplated element to enable the dispute settlement system to provide security and predictability to the multilateral trading system.

7.180 Clearly, it is important for a panel to have cogent reasons for any decision it reaches, regardless of whether or not there are any relevant adopted reports, and whether or not the panel follows such reports. An essential part of a panel's task under Article 11 is to explain its objective assessment of the matter before it. Such explanation, as well as the reasons given, serve to ensure that

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<sup>149</sup> *Ibid.*, para. 160.

<sup>150</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra*, note 132, p. 14.

panels do not add to or diminish the rights and obligations of Members, while at the same time furthering the goal of providing security and predictability to the multilateral trading system through the operation of the dispute settlement system. In our view, however, a panel cannot simply follow the adopted report of another panel, or of the Appellate Body, without careful consideration of the facts and arguments made by the parties in the dispute before it. To do so would be to abdicate its responsibilities under Article 11. By the same token, however, neither should a panel make a finding different from that in an adopted earlier panel or Appellate Body report on similar facts and arguments without careful consideration and explanation of why a different result is warranted, and assuring itself that its finding does not undermine the goals of the system.

7.181 As discussed above, we share a number of concerns raised by the panel in *US – Stainless Steel (Mexico)*, particularly with regard to the US mathematical equivalence argument. We recognize, however, that the Appellate Body in its report reversed the panel's findings and this report gained legal effect through adoption by the DSB. We note that this continues a series of consistent recommendations made by the DSB over the past several years following reports that addressed the same issues based largely on the same arguments.

7.182 In addition to the goal of providing security and predictability to the multilateral trading system, we recall that Article 3.3 of the DSU provides that "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Given the consistent adopted jurisprudence on the legal issues that are before us with respect to simple zeroing in periodic reviews, we consider that providing prompt resolution to this dispute in this manner will best serve the multiple goals of the DSU, and, on balance, is furthered by following the Appellate Body's adopted findings in this case.

(iv) *Conclusion*

7.183 Based on the foregoing considerations, we conclude that the United States acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement by applying simple zeroing in the 29 periodic reviews at issue. Having found that the United States acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement, we decline to make findings with regard to the EC's claims under Articles 2.1, 2.4, 2.4.2 and 11.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

G. ZEROING IN SUNSET REVIEWS

**1. Arguments of the Parties**

(a) European Communities

7.184 The European Communities challenges the use of zeroing in 11 sunset reviews carried out by the USDOC. The European Communities elaborates its claims regarding the use of zeroing in sunset reviews, with reference to one specific sunset review, *Stainless Steel Sheet & Strip in Coils – Italy*, but argues that the same claims apply to the other sunset reviews at issue. The European Communities argues that as part of its sunset determinations, the USDOC relies on previously-calculated dumping margins. Hence, it relies on margins calculated through zeroing. In the sunset review of *Stainless Steel Sheet & Strip in Coils – Italy*, based on the existence of dumping in the original investigation and the subsequent reviews, which had been calculated through zeroing, the USDOC determined that dumping would likely continue or recur should the duty be terminated.

7.185 The European Communities notes that Article 11.3 of the Agreement does not define the word "dumping". The definition of dumping under Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, therefore, applies to sunset reviews. It follows that dumping margins used in sunset reviews must conform to the provisions of the Agreement, including Article 2. The European Communities asserts that the margins used by the USDOC in the sunset review at issue had been calculated inconsistently with Articles 2.1, 2.4 and 2.4.2 of the Agreement. For this reason, the sunset determination reached through the USDOC's reliance on these WTO-inconsistent margins is also inconsistent with the same provisions. Consequently, argues the European Communities, the USDOC also acted inconsistently with its obligations under Articles 11.1 and 11.3 of the Agreement.

(b) United States

7.186 The United States argues that the EC's claims regarding the use of zeroing in sunset reviews has to be rejected because "[t]he [European Communities] has not demonstrated that a calculation done in accordance with the EC's approach would result in zero or *de minimis* dumping margins in the cited cases, leading to a revocation of the order".<sup>151</sup>

## 2. Arguments of Third Parties

(a) Japan

7.187 Japan contends that sunset determinations are inconsistent with the disciplines of the Anti-Dumping Agreement to the extent they are based on past margins calculated through zeroing. Japan does not take any position with regard to the factual circumstances surrounding the sunset determinations challenged by the European Communities in these proceedings. Japan argues, however, that to the extent that the USDOC used past margins established through zeroing, it acted inconsistently with Articles 2.1, 2.4, 11.3 of the Anti-Dumping Agreement and VI:1 and VI:2 of the GATT 1994.

(b) Korea

7.188 In Korea's view, sunset reviews are the continuation of the previous anti-dumping proceedings and cannot be separated from them. It follows that to the extent that the USDOC in its sunset determinations relies on past margins calculated through zeroing, it violates the obligations set forth under Articles 2.4, 2.4.2, 11.1 and 11.3 of the Agreement.

(c) Norway

7.189 Norway recalls the relevant Appellate Body reports and submits that to the extent that the authorities in a sunset review rely on past dumping margins obtained through zeroing, such reliance taints their sunset determinations. Norway disagrees with the US argument that the European Communities has to demonstrate that a calculation without zeroing would result in zero or *de minimis* margins. According to Norway, the EC's obligation is to show a breach of Article 11.3 of the Agreement. It does not have to demonstrate what the past margins would have been without zeroing. Nor does the Panel have to make such a determination for the United States.

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<sup>151</sup> First Written Submission of the United States, para. 154.

### 3. Evaluation by the Panel

(a) Relevant Facts

7.190 The EC's claims regarding the use of zeroing in sunset reviews concern the following 11 sunset reviews:

Number	Country and Product Involved	USDOC Final Determination	Relevant Exhibits
1	Steel Concrete Reinforcing Bars From Latvia USDOC No: A-449-804	72 FR 16767 5 April 2007 <b>(PRELIMINARY RESULTS)</b>	EC-70
2	Ball Bearings and Parts Thereof From Italy USDOC No: A-475-801	70 FR 58183 5 October 2005	EC-71
3	Ball Bearings and Parts Thereof From Germany USDOC No: A-428-801	70 FR 58183 5 October 2005	EC-72
4	Ball Bearings and Parts Thereof From France USDOC No: A-427-801	70 FR 58183 5 October 2005	EC-73
5	Stainless Steel Sheet And Strip In Coils From Germany USDOC No: A-428-825	69 FR 67896 22 November 2004	EC-74
6	Stainless steel plate in coils From Belgium USDOC No: A-423-808	69 FR 61798 21 October 2004	EC-75
7	Ball Bearings and Parts Thereof From the United Kingdom USDOC No: A-412-801	70 FR 58183 5 October 2005	EC-76
8	Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands USDOC No: A-421-807	72 FR 7604 16 February 2007 <b>(PRELIMINARY RESULTS)</b> <b>(ORDER REVOKED)</b>	EC-77
9	Stainless Steel Sheet & Strip In Coils From Italy USDOC No: A-475-824	69 FR 67894 22 November 2004	EC-69
10	Certain Pasta From Italy USDOC No: A-475-818	72 FR 5266 5 February 2007 <b>(PRELIMINARY RESULTS)</b>	EC-78
11	Brass Sheet & Strip From Germany USDOC No: A-428-602	71 FR 4348 26 January 2006	EC-79

7.191 We recall our finding above (para. 7.77) that the preliminary determinations identified in the EC's panel request fall outside our terms of reference in these proceedings. The three sunset reviews in the table above in connection with which the European Communities is challenging the USDOC's preliminary determinations, therefore, will not be affected by our findings regarding zeroing in sunset

reviews.<sup>152</sup> Our findings will only apply to eight of the 11 sunset determinations in the mentioned table.

(b) Legal Analysis

7.192 We note that the resolution of the EC's claim regarding the USDOC's determinations in the eight sunset reviews at issue raises two issues: (a) Can the authorities rely on past dumping margins obtained through zeroing, in making their determination regarding the likelihood of continuation or recurrence of dumping in a sunset review? and (b) Did the USDOC rely on past dumping margins obtained through zeroing in making its likelihood determinations in the sunset reviews at issue in these proceedings?

7.193 With regard to the first issue, we shall commence our analysis with the text of Article 11.3 of the Agreement. Article 11.3 reads:

"Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review." (footnote omitted)

7.194 Article 11.3 provides that an anti-dumping duty shall terminate after five years from its imposition unless the authorities determine, before the expiry of the five-year period, that such termination would lead to continuation or recurrence of dumping and injury. It does not, however, clarify the nature of such determination. Specifically, it does not mention whether the authorities can rely on past dumping margins in determining whether the termination of the duty would lead to continuation or recurrence of dumping and injury. This particular issue has arisen in WTO dispute settlement and the Appellate Body has made findings on it. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body held that "authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination".<sup>153</sup> The Appellate Body also reasoned that the authorities are not required to calculate, or rely on, dumping margins in making their likelihood determination. If, however, they choose to do so, such margins have to conform to the disciplines embodied in Article 2 of the Agreement. Otherwise, the likelihood determination would

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<sup>152</sup> The order in *Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands* (Exhibit EC-77) was revoked on 23 April 2007. The effective date of revocation was subsequently changed to 29 November 2006. See, Response of the United States to Question 2(d) from the Panel Following the Second Meeting. Both parties, in their Responses to Question 2(d) from the Panel Following the Second Meeting, expressed agreement that the Panel could, in principle, make findings on a revoked measure. The European Communities further stated that it would suffice if the Panel only made findings regarding this measure and not made recommendations. As stated in para. 7.77 above, the order at issue is not within our terms of reference because it is one of the four preliminary measures identified in the EC's panel request. We therefore need not, and do not, assess the issue of whether it would be appropriate to make findings and/or recommendations with regard to this revoked order.

<sup>153</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, note 56, para. 111.

be inconsistent with Article 11.3 of the Agreement.<sup>154</sup> That is, reliance on WTO-inconsistent margins would, in the Appellate Body's view, taint the authorities' sunset determination.<sup>155</sup>

7.195 The Appellate Body also applied this reasoning in the subsequent *US – Zeroing (Japan)* dispute and held:

"In the present case, the Panel found, as a matter of fact, that, in its likelihood-of-dumping determination, the USDOC relied 'on margins of dumping established in prior proceedings'. The Panel further found that these margins were calculated during periodic reviews 'on the basis of simple zeroing'."<sup>156</sup> (footnotes omitted)

"We have previously concluded that zeroing, as it relates to periodic reviews, is inconsistent, as such, with Article 2.4 and Article 9.3. As the likelihood-of-dumping determinations in the sunset reviews at issue in this appeal relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they are inconsistent with Article 11.3 of that Agreement."<sup>157</sup> (footnote omitted, emphasis in original)

7.196 We find convincing the Appellate Body's reasoning that to the extent margins relied on in sunset determinations are WTO-inconsistent the resulting sunset determination is also rendered WTO-inconsistent. We have found model zeroing in investigations to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, and simple zeroing in periodic reviews to be inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* (paras. 7.111 and 7.183, respectively). We shall, therefore, find that the USDOC's determinations in the eight sunset reviews at issue were inconsistent with the USDOC obligation under Article 11.3 of the Agreement, if we find that the USDOC in those determinations relied on margins obtained through model zeroing in prior investigations or simple zeroing in prior periodic reviews.

7.197 This brings us to the second issue that we have identified at the outset of our analysis, *i.e.*, whether the European Communities has demonstrated as a matter of fact that the USDOC relied, in the sunset reviews at issue, on prior margins obtained through zeroing.

7.198 The European Communities generally argues that in the sunset reviews at issue, the USDOC used zeroed margins from prior investigations and periodic reviews.<sup>158</sup> We note, however, that the European Communities builds its claim mainly on the use of margins obtained through model zeroing in the underlying investigations.<sup>159</sup> As the factual basis of this assertion, the European Communities submitted to the Panel copies of the Issues and Decision Memoranda issued by the USDOC in the sunset reviews at issue. The European Communities argues, and the United States acknowledges<sup>160</sup>, that in the sunset reviews at issue, the USDOC used margins obtained in the underlying investigations. The European Communities recalls that on 22 February 2007, the United States formally changed its calculation methodology in investigations and abolished model zeroing. The European Communities contends that since the investigations from which the USDOC took margins

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<sup>154</sup> *Ibid.*, para. 127.

<sup>155</sup> *Ibid.*

<sup>156</sup> Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/AB/R, adopted 23 January 2007, para. 184.

<sup>157</sup> *Ibid.*, para. 185.

<sup>158</sup> See, for instance, First Written Submission of the European Communities, paras. 242 and 263.

<sup>159</sup> See, for instance, Comments of the European Communities on the US Response to Question 2(a) from the Panel Following the Second Meeting.

<sup>160</sup> Response of the United States to Question 2(e) from the Panel Following the Second Meeting.

in the sunset reviews at issue were carried out before this date, it is clear that such margins were calculated through model zeroing.<sup>161</sup>

7.199 The mentioned policy change, published in the Federal Register, provides in relevant parts:

"The Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons."<sup>162</sup>

7.200 The United States does not deny this policy change. Nor does it contest the EC's argument that the investigations at issue were carried out before the effective date of the mentioned policy change. It asserts, however, that "[s]uch a general statement ... does not provide specific evidence as to whether zeroing was employed in the margins relied upon in each of the challenged sunset reviews".<sup>163</sup> We disagree with the United States. We note that the European Communities has submitted copies of the Memoranda prepared by the USDOC, which show that the latter used margins obtained in the underlying investigations, carried out before the effective date of the USDOC's policy change regarding margin calculations in investigations. Thus, the European Communities has shown *prima facie* that the margins in the investigations at issue were obtained through model zeroing. The United States has not, however, submitted evidence to rebut this assertion. We therefore consider that the European Communities has demonstrated that in the eight sunset reviews at issue, the USDOC relied, either exclusively or along with margins obtained in prior periodic reviews, on margins obtained through model zeroing in prior investigations.

7.201 The United States posits that "[t]he [European Communities] has not demonstrated that a calculation done in accordance with the EC's approach would result in zero or *de minimis* dumping margins in the cited cases, leading to a revocation of the order".<sup>164</sup> The issue that the US argument raises is whether the impact of zeroing on the margins used by the USDOC in the sunset reviews at issue has any bearing on the consistency with Article 11.3 of the USDOC's sunset determinations. In our view, the impact of zeroing on the magnitude of margins obtained in the original investigations or periodic reviews is not relevant to the WTO-consistency of a subsequent sunset review where such zeroed margins are used. To the extent that a sunset determination is based on previous margins obtained through a methodology that is WTO-inconsistent, the resulting sunset determination would also become WTO-inconsistent.

7.202 Based on the foregoing, we find that the United States acted inconsistently with its obligations under Article 11.3 of the Agreement by relying, in the eight sunset reviews at issue, on margins obtained through model zeroing in prior investigations. Having found that the United States violated Article 11.3 of the Agreement in the sunset reviews at issue, we need not, and do not, make findings with regard to the EC's claims under Articles 2.1, 2.4, 2.4.2 and 11.1 of the Agreement.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 On the basis of the above findings, we conclude that:

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<sup>161</sup> Response of the European Communities to Question 2(b) from the Panel Following the Second Meeting.

The United States argues that the EC's submission of new evidence, along with its Response to Question 2(b) from the Panel Following the Second Meeting, was inconsistent with Article 14 of our Working Procedures. Comment of the United States on the EC's Response to Question 2(b) from the Panel Following the Second Meeting. For the reasons that we have explained in paras. 7.147-7.149 above, we reject the US contention. In any event, we note that we have not relied on the information at issue in our report.

<sup>162</sup> Exhibit EC-90, p. 77722.

<sup>163</sup> Comment of the United States on the EC's Response to Question 2(b) from the Panel Following the Second Meeting.

<sup>164</sup> First Written Submission of the United States, para. 154.

- (a) The 14 anti-dumping proceedings that were identified in the EC's panel request but not in its consultations request are within our terms of reference,
- (b) The EC's claims in connection with the continued application of the 18 anti-dumping duties are not within our terms of reference,
- (c) The EC's claims regarding the four preliminary determinations identified in its panel request are outside our terms of reference,
- (d) The United States acted inconsistently with the obligation set out under Article 2.4.2 by using model zeroing in the four investigations at issue in this dispute,
- (e) The United States acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement by applying simple zeroing in the 29 periodic reviews at issue in this dispute,
- (f) The United States acted inconsistently with its obligations under Article 11.3 of the Agreement by using, in the eight sunset reviews at issue in this dispute, dumping margins obtained through model zeroing in prior investigations.

8.2 We have applied judicial economy with regard to:

- (a) The EC's claims under Article 2.4 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 regarding the use of model zeroing in the four investigations at issue in this dispute,
- (b) The EC's claims under Articles 2.1, 2.4, 2.4.2 and 11.2 of the Anti-Dumping Agreement regarding the use of simple zeroing in the 29 periodic reviews at issue in this dispute,
- (c) The EC's claims under Articles 2.1, 2.4, 2.4.2 and 11.1 of the Agreement regarding the use, in the eight sunset reviews at issue in this dispute, of margins obtained in prior proceedings through the zeroing methodology.

8.3 We recommend that the DSB request the United States to bring its measures mentioned in paragraphs 8.1(d), 8.1(e) and 8.1(f) above into conformity with its obligations under the WTO Agreement.

8.4 The European Communities requests that we make a suggestion under the second sentence of Article 19.1 of the DSU. The European Communities asks the Panel to suggest that the steps that the United States might take in the implementation of the DSB recommendations and rulings following this dispute should be WTO-consistent, particularly with regard to the issue of zeroing.<sup>165</sup> The United States submits that there is no basis in the DSU for a panel to make a suggestion for the purposes of avoiding unnecessary discussions about what might or might not fall within the scope of a compliance panel. According to the United States, "[i]t is unreasonable that the [European Communities] is even asking this Panel to start from the premise that there would be a dispute as to compliance".<sup>166</sup>

8.5 Article 19.1 of the DSU provides:

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<sup>165</sup> Closing Statement of the European Communities at the Second Meeting.

<sup>166</sup> Comment of the United States on the EC's Response to Question 4 from the Panel Following the Second Meeting.

"Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations." (footnotes omitted)

8.6 Article 19.1 stipulates that when a panel or the Appellate Body finds a measure to be inconsistent with a covered agreement, it shall recommend that the measure be brought into conformity with the relevant agreement. Furthermore, it states that the panel or the Appellate Body may suggest ways in which such recommendation may be implemented.

8.7 Having found that the United States acted inconsistently with certain obligations that it assumed under the Anti-Dumping Agreement and the GATT 1994 and having made our recommendation as stipulated under Article 19.1, we decline to make a suggestion on how the DSB recommendations and rulings may be implemented by the United States. In our view, it is evident under the DSU, particularly Article 19.1 thereof, that Members must implement DSB recommendations and rulings in a WTO-consistent manner. We cannot presume that Members might act inconsistently with their WTO obligations in the implementation of DSB recommendations and rulings. We therefore reject the EC's request.

#### **IX. SEPARATE OPINION BY ONE MEMBER OF THE PANEL WITH REGARD TO THE EUROPEAN COMMUNITIES' CLAIMS REGARDING ZEROING IN INVESTIGATIONS AND ZEROING IN PERIODIC REVIEWS**

9.1 I agree with the conclusions reached by the majority of the Members of this Panel regarding all the claims raised by the European Communities in this dispute. I, however, disagree with the legal reasoning developed by the majority regarding the EC's claims on simple zeroing in periodic reviews, and, in part<sup>167</sup>, model zeroing in investigations and provide my opinion below.

9.2 I recall that zeroing disputes now have a long history in WTO dispute settlement and that different panels and the Appellate Body have expressed their views on different types of zeroing on multiple occasions.<sup>168</sup> Although my views generally overlap with the Appellate Body's reasoning on zeroing, I would like to emphasize that they reflect my objective examination of the facts and the legal issues presented in this case, as required under Article 11 of the DSU, and not a simple acceptance of the Appellate Body's opinion.

9.3 Considering that the approach that I take with regard to model zeroing in investigations and simple zeroing in periodic reviews has been analysed in great detail by the Appellate Body, I do not intend to address all such details here. Instead, I shall emphasize the main points of my disagreement with the majority's reasoning in this dispute.

9.4 The majority considers that a permissible interpretation of the Anti-Dumping Agreement is that dumping may be determined in connection with individual export transactions. I note, however, that the majority also considers the alternative interpretation, *i.e.*, that dumping may be determined for the product under consideration as a whole, to be permissible within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement.<sup>169</sup> The issue, therefore, is whether the relevant provisions of the

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<sup>167</sup> My legal reasoning regarding model zeroing in investigations differs from that of the majority in that, unlike the majority, I consider that model zeroing in investigations is inconsistent with Article 2.1 of the Agreement because it precludes a determination of dumping for "the product under consideration as a whole", in addition to being inconsistent with Article 2.4.2 as reasoned by the majority.

<sup>168</sup> I would like to note that the approach described in footnote 112 above, also applies to my separate opinion.

<sup>169</sup> *Supra*, footnote 131.

Agreement allow more than one permissible interpretation regarding the WTO-consistency of model zeroing in investigations and simple zeroing in periodic reviews.

9.5 In this regard, I agree with the view expressed by the Appellate Body that under Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, "dumping" and "margins of dumping" can only be found for the product under consideration as a whole. Like the Appellate Body, I am of the view that there would be an anomaly if multiple margins were calculated for the same exporter. In my view, a determination of dumping for the product under consideration as a whole is also necessary in order to make a determination regarding the volume of dumped imports, injury and causal link.<sup>170</sup>

9.6 In addition, I disagree with the majority's opinion that dumping is not necessarily and exclusively an exporter-specific concept and that one can calculate an importer-specific margin of dumping. In this regard, I find convincing the Appellate Body's point of view that both Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement support the notion that dumping necessarily reflects the exporter's behaviour. Furthermore, I agree with the contextual support that the Appellate Body found in Articles 2.3, 5.2(ii), 6.1.1, 6.7, 5.8, 6.10, 9.5, 8.1, 8.2, 8.5 and 9.4(i) and (ii) of the Anti-Dumping Agreement for the exporter-specific nature of dumping. In my view, no provision in the Agreement suggests that dumping margins may be established for individual importers. Furthermore, I am of the view that the reference to "margin of dumping" in Article 9.3 indicates that dumping may only be determined consistently with the provisions of Article 2 and in relation to the product under consideration as a whole for an exporter.

9.7 I disagree with the concerns expressed by the majority in this case that the prohibition of simple zeroing in periodic reviews would favour importers with high margins *vis-à-vis* importers with low margins. How an anti-dumping duty is to be collected is for the authorities to determine, the only requirement is that the duty collected not exceed the exporter-specific margin of dumping calculated for the product under consideration as a whole.

9.8 Although the majority refers to the report of a Group of Experts that convened in 1960, I do not consider that it is necessary to have recourse to supplementary means of interpretation for the textual interpretation makes it sufficiently clear that dumping may only be determined for exporters and in connection with the product under consideration as a whole.

9.9 I do not agree with the majority that the recognition of a prospective normal value system in Article 9.4(ii) of the Anti-Dumping Agreement reinforces the argument that dumping may be determined on the basis of individual export transactions. This reasoning mixes duty collection at the time of importation with a determination of final duty liability. Article 9.3 of the Agreement makes it clear that the amount of the duty collected at the time of importation does not represent a margin of dumping. The duty collected at the time of importation, in my view, is subject to review under Article 9.3.2. I see nothing in the Agreement to suggest that the duty collected in a prospective normal value system is exempt from a review under Article 9.3.

9.10 The majority expresses the view that certain questions relating to the alleged mathematical equivalence between the first and the third methodologies, in case zeroing is generally prohibited, have not been addressed by the Appellate Body. In this regard, I would recall, and agree with, the Appellate Body's explanation that, being an exception to the two methodologies set out under the first sentence of Article 2.4.2, the third methodology cannot be used as a basis to interpret such other methodologies. Secondly, as noted by the Appellate Body, one could argue that if zeroing was

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<sup>170</sup> I would like to note that my views regarding "product under consideration as a whole" apply both to model zeroing in investigations and simple zeroing in periodic reviews.

permitted under the first sentence of Article 2.4.2, this would enable investigating authorities to capture pricing patterns constituting targeted dumping, thus rendering the third methodology *inutile*.

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