WORLD TRADE ORGANIZATION

WT/DS294/R
31 October 2005

(05-4933)

Original: English

UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

Report of the Panel

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US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481.
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I. INTRODUCTION

A. COMPLAINT OF THE EUROPEAN COMMUNITIES

1.1 On 12 June 2003 and 8 September 2003, the European Communities requested consultations with the United States of America (the "United States") under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"); Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "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 (the "*AD Agreement*") with regard to certain laws, regulations and methodologies for calculating dumping margins including so-called zeroing.[1] Consultations were held on 17 July 2003 and 6 October 2003, but failed to result in a mutually satisfactory resolution of the matter.

1.2 On 5 February 2004, the European Communities requested the establishment of a Panel to examine the matter.[2] This request was revised on 16 February 2004.[3]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.3 At its meeting on 19 March 2004, the Dispute Settlement Body ("DSB") established a Panel pursuant to the request of the European Communities in document WT/DS294/7/Rev.1, in accordance with Article 6 of the DSU.

1.4 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS294/7/Rev.1, 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 27 October 2004, the parties agreed to the following composition of the Panel:

Chairman: Mr. Crawford Falconer

Members: Mr. Hans-Friedrich Beseler
Mr. William Davey

1.6 Argentina; Brazil; China; Hong Kong, China; India; Japan; Korea, Rep. of; Mexico; Norway; Chinese Taipei; and Turkey reserved their third-party rights.

C. PANEL PROCEEDINGS

1.7 On 7 February 2005, the Panel received an *amicus curiae* brief from the Committee to Support US Trade Laws ("CSUSTL"). Recalling the statement of the Appellate Body that a panel has "the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not",[4] the Panel invited the parties and third parties to express their views on how it should handle CSUSTL's brief. After reviewing the comments of the parties and third parties, the Panel decided that it would not further consider the arguments in the CSUSTL

[1] WT/DS294/1 of 19 June 2003 and WT/DS294/1/Add.1 of 15 September 2003.
[2] WT/DS294/7.
[3] WT/DS294/7/Rev.1.
[4] Appellate Body Report, *US – Shrimp*, para. 108.

brief except to the extent that the parties reflected those arguments in their written submissions and/or oral statements.[5]

1.8 The Panel met with the parties on 16-17 March 2005 and on 26-27 April 2005. The Panel met with the third parties on 17 March 2005.

1.9 The Panel submitted the Interim Report to the parties on 4 August 2005. The Panel submitted the Final Report to the parties on 28 September 2005.

II. FACTUAL ASPECTS

2.1 This dispute concerns the application by the United States of the so-called zeroing methodology when determining dumping margins in anti-dumping proceedings, including proceedings resulting in the imposition of anti-dumping measures and proceedings relating to the collection of anti-dumping duties.

2.2 The imposition and collection of anti-dumping duties in the United States can be broadly described in the following terms. In order to determine whether the imposition of anti-dumping measures on known exporters of a product under consideration may be justified, the United States examines whether dumping existed during a given period of investigation. This determination is made by the United States Department of Commerce ("USDOC") and is published in a Notice of Final Determination of Sales at Less Than Fair Value. The Notice of Final Determination of Sales at Less Than Fair Value sets out USDOC's assessment of the existence and level of dumping. The United States International Trade Commission ("USITC") will then determine whether the relevant United States industry was injured by reason of the dumped imports. When USDOC finds dumping and USITC finds that such dumping caused injury to the domestic industry, USDOC issues a Notice of Antidumping Duty Order imposing final measures, including a cash-deposit rate equivalent to the margin of dumping found to exist for each known exporter.

2.3 When calculating the magnitude of any margin of dumping in order to determine whether the imposition of anti-dumping measures on known exporters of a product under consideration may be justified, the United States uses a method that the European Communities refers to as model zeroing. The investigating authority, as well as determining the overall product scope of the proceeding (also referred to as subject product or subject merchandise)[6], will, in applying the weighted average-to-weighted average comparison method, identify those sales of sub-products in the United States considered "comparable", and will include such sales in an "averaging group".[7] An averaging group consists of merchandise that is identical or virtually identical in all physical characteristics.[8] Each category of sub-product within the subject merchandise is assigned a control number, or CONNUM.[9] The weighted-average-to-weighted-average comparison between normal value and export price is made within each averaging group.[10] The amount by which normal value exceeds export price is considered by the United States to be a "dumping margin"[11] or dumped amount – referred to by the

[5] A similar approach of considering arguments in *amicus curiae* briefs to the extent that such arguments were adopted by the parties to the dispute was taken by the panels in *EC – Asbestos*; *US – Softwood Lumber IV*; and *US – Softwood Lumber VI*.

[6] Tariff Act, Section 771(25).

[7] Regulations, Section 351.414(d)(1).

[8] Regulations, Section 351.414(d)(2).

[9] Manual, Chapter 4, pp. 8 and 9 ; Chapter 5, page 9, second paragraph; Chapter 9, pp. 23 and 27.

[10] Regulations, Section 351.414(d)(1); Manual, Chapter 7, pp. 27 and 28; Chapter 9, pp. 23 and 27.

[11] The European Communities considers that this concept does not correspond to the term "margin of dumping" as used in, for example, Articles 2.4.2 and 9.3 of the *AD Agreement* (see *infra*.).

United States as the Potential Uncollectible Dumping Duties, or PUDD.[12] If export price exceeds normal value (the margin is negative), the "dumping margin" or dumped amount or PUDD for that averaging group is considered to be zero. The margin of dumping for the overall product is calculated by combining the averaging group results. The total of the dumped amounts or PUDDs (excluding the negative amounts or treating them as zero) is expressed as a percentage of the total export prices (including all averaging groups). An averaging group, as well as consisting of merchandise that is identical or virtually identical in all physical characteristics, also consists of merchandise that is sold at the same level of trade. In identifying sales to be included in an averaging group, the United States also takes into account, where appropriate, the region of the United States in which the merchandise is sold, and such other factors as are considered relevant.[13]

2.4 Subsequently, the United States will assess the liability for anti-dumping duties on specific entries of the subject product by individual importers. The United States system of duty assessment operates on a retrospective basis. Under this system, an anti-dumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Rather, the United States collects security in the form of a cash deposit at the time of entry, and determines the amount of duties due on the entry at a later date. Specifically, once a year (during the anniversary month of the orders) interested parties may request a review to determine the amount of duties owed on entries made during the previous year.[14] The amount of anti-dumping duties owed by each individual importer (the assessment rate) is calculated on the basis of a comparison of each individual import to a contemporaneous average normal value. The total amount of dumping associated with each importer is then aggregated and expressed as a percentage of that importer's United States imports. This assessment rate is then applied to imports during the period reviewed. The amount of dumping found on all imports from a given exporter (regardless of the importer) is also used to derive a cash-deposit rate that will apply on future entries from that exporter. If no review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties. The final anti-dumping duty liability for past entries and the new cash-deposit rate for future entries is calculated by USDOC and published in a Notice of Final Results of Antidumping Duty Administrative Reviews.

2.5 When calculating the magnitude of any margin of dumping for the purpose of assessing an importer's final liability for paying anti-dumping duties and any future cash-deposit rate, the United States normally uses the average-to-transaction method[15] and applies, what the European Communities refers to as, simple zeroing. When comparing a weighted-average normal value with an individual export transaction, the amount by which normal value exceeds export price is considered to be the "dumping margin"[16] or "dumped" amount for that export transaction.[17] If export

[12] Manual, Chapter 6, p. 9: "The PUDD is the amount of dumping duties that would have been collected from the U.S. sales under investigated [sic] had an antidumping duty order been in effect during the period investigation [sic] (i.e., before the investigation began). The PUDD is used to establish a dumping margin which will remain in effect until the annual reviews established [sic] rates based upon the entries for which liquidation was suspended pursuant to the preliminary determination and for the year following the Antidumping Duty Order. … The calculation of the PUDD is, in effect, a two-step process. First, PUDD is determined for each U.S. sale by multiplying the per unit dollar margin for that sale by the total number of items sold. Second, the PUDD for each of the U.S. sales are summed to arrive at a total PUDD. The total PUDD is then used to calculate a weighted-average margin for the investigation …"

[13] Regulations, Section 351.414 (d)(2).

[14] The period of time covered by United States duty assessment proceedings is normally twelve months. However, in the case of the first assessment proceeding following the issuance of the Notice of Antidumping Duty Order, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures.

[15] Regulations, Section 351.414 (c)(2); Manual, Chapter 6, p. 7.

[16] The European Communities considers that this concept does not correspond to the term "margin of dumping" as used in, for example, Articles 2.4.2 and 9.3 of the *AD Agreement* (see *infra*.).

price exceeds normal value (the margin is negative), the "dumping margin" or "dumped" amount for that export transaction is considered to be zero. The overall margin of dumping is calculated by combining the results of each comparison. The total dumping amount (excluding the negative amounts or treating them as zero) is expressed as a percentage of the total export price (including all export transactions). The importer is liable to pay the final anti-dumping duty. USDOC sends appraisement instructions to the US Bureau of Customs and Border Protection ("USCBP"), determining "an assessment rate" and thus the final anti-dumping duty to be paid.[18] When USDOC gives percentage instructions, it calculates an assessment rate, to be applied by USCBP to all entries during the relevant period.[19] For the purpose of calculating an assessment rate, USDOC divides the total margin or amount of dumping calculated during the period of review, by the entered values of the products sold.[20]

2.6 The European Communities challenges certain United States legal instruments, procedures, methodologies and practice, "as such" and "as applied". In the 15 "as applied" cases, referred to by the European Communities as "original investigations", the challenged measures are: the 15 Notices of Final Determinations of Sales at Less Than Fair Value, including any amendments, and including all the Issues and Decision Memoranda to which they refer, and all the Final Margin Program Logs and Outputs to which they in turn refer, for all the firms investigated; each of the 15 Anti-dumping Duty Orders; each of the assessment instructions issued pursuant to any of the 15 Anti-dumping Duty Orders; and each of the USITC final injury determinations.[21] In the 16 "as applied" cases, referred to by the European Communities as "periodic reviews", the challenged measures are: the 16 Notices of Final Results of Antidumping Duty Administrative Reviews, including any amendments, and including all the Issues and Decision Memoranda to which they refer, and all the Final Margin Program Logs and Outputs to which they in turn refer, for all the firms investigated; and each of the assessment instructions issued pursuant to any of the 16 Notices of Final Results.[22] The legal instruments, procedures, methodologies and practice challenged by the European Communities "as such" are the following:

(a) Sections 731, 751(a)(2)(A)(i) and (ii), 771(35)(A) and (B), and 777A(d) of the Tariff Act of 1930, as amended;

(b) Section 351.414(c)(2) of the United States Department of Commerce Regulations;

(c) certain provisions of the "1997 edition of the Import Administration Anti-Dumping Manual";

(d) the "Standard AD Margin Program", which includes the "Standard Zeroing Procedures"; and

(e) the United States practice or methodology of zeroing.[23]

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[17] Tariff Act, Section 751(a)(2)(A); Section 777A(d)(2).

[18] Regulations, Section 351.212(b)(1).

[19] Manual, Chapter 18, pp. 11 and 12; Regulations, Section 351.212(b)(1).

[20] Regulations, Section 351.212(b)(1).

[21] Exhibits EC-1 to EC-15; EC-First Written Submission, paras. 48-56, 63 and 102; EC-Rebuttal Submission, para. 55.

[22] Exhibits EC-16 to EC-31; EC-First Written Submission, paras. 57-61, 148 and 211.; EC-Rebuttal Submission, para. 91.

[23] In response to a question from the Panel, the European Communities indicated that it was not challenging the United States' Statement of Administrative Action as a separate measure. EC-Response to Panel Question 50.

2.7 The European Communities considers the above legal instruments, procedures, methodologies and practice, as well as each of the identified measures at issue in the 31 "as applied" cases, to be inconsistent with the United States' obligations under the *AD Agreement*, the *GATT 1994* and the *WTO Agreement*.

2.8 The European Communities sets out its claims and arguments with respect to the 31 "as applied" cases by first presenting certain general facts and evidence of relevance to each case. Secondly, the European Communities presents its claims and arguments with respect to the specific facts of two sample "as applied" cases. It then alleges that the same claims and arguments apply, *mutatis mutandis*, with respect to the measures at issue in the 29 other determinations it is challenging.

2.9 The first sample case presented by the European Communities is with respect to the Notice of Final Determination of Sales at Less Than Fair Value regarding stainless steel bar from Italy, issued by the USDOC on 23 January 2002 [24], including the related Notice of Antidumping Duty Order issued by USDOC on 7 March 2002.[25] The rates of *ad valorem* anti-dumping duty applied in this case were 2.50 per cent for Acciaierie Valbruna Srl/Acciaierie Bolzano D.p.A, 7.07 per cent for Acciaiera Foroni SpA, 3.83 per cent for Rodacciai S.p.A, 33 per cent for Cogne Acciai Speciali Srl and 3.81 per cent for all others.[26]

2.10 In calculating the dumping margins applied in this case, the USDOC identified sub-groups of products within the product under investigation ("averaging groups") on a per model basis. Within each of the averaging groups, a weighted average export price was established and compared to the corresponding weighted average normal value. The results of these comparisons on an "averaging group" basis were added up to establish the dumping margin of the product under investigation as a whole for each individual exporter. In this process, any negative margins or negative amounts of "dumping" resulting from the comparison of weighted average normal values with weighted average export prices on an "averaging group" basis were, through application of the "Standard Zeroing Procedures", equated with zero. The European Communities describes this methodology as model zeroing.[27] Exhibits EC-2 to EC-15 include the final determinations and facts with respect to 14 other Notices of Final Determinations of Sales at Less Than Fair Value and Notices of Antidumping Duty Orders made between 24 July 1996 and 24 April 2003 where the same methodology described above, including the "Standard Zeroing Procedures", was applied.[28]

2.11 The second sample case presented by the European Communities is with respect to the Notice of Final Results of Antidumping Duty Administrative Reviews regarding ball bearings from Italy, issued by the USDOC on 30 August 2002.[29] The dumping margin calculated by USDOC in these proceedings was 3.70 per cent for SKF Industrie SpA and 1.42 per cent for FAG Italia SpA.

2.12 In calculating the relevant dumping margins in this case, the USDOC identified sub-groups of products of normal vale sales based on physical characteristics and level of trade. Within each of the sub-groups, a weighted average normal value was compared to individual export prices. When adding up the results of the comparisons to determine the total amount or margin of dumping of the product under investigation, any negative amounts of "dumping" were, through application of the

[24] Exhibits EC-1.1.1-1.1.2, USDOC case number A-475-829, 67 Fed. Reg. 3159 of 23 January 2002 (amended: 67 Fed. Reg. 8228, 22 February 2002).

[25] Exhibits EC-1.2.1-1.2.2, USDOC case number A-475-829, 67 Fed. Reg. 10384 of 7 March 2002 (amended: 68 Fed. Reg. 58660, 10 October 2003).

[26] Ibid.

[27] EC-First Written Submission, paras. 21-24, 48-55; EC-Request for the Establishment of a Panel, p. 1.

[28] EC-First Written Submission, para. 56.

[29] Exhibit EC-16, USDOC case number A-475-801, 67 Fed. Reg. 55780, 30 August 2002.

"Standard Zeroing Procedures", counted as zero. The European Communities describes this methodology as simple zeroing.[30] Exhibits EC-17 to EC-31 include the final determinations and facts with respect to 15 other Notices of Final Results of Antidumping Duty Administrative Reviews issued between 26 October 2001 and 24 March 2003 where the same methodology described above, including the "Standard Zeroing Procedures", was applied.[31]

III. REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. THE EUROPEAN COMMUNITIES

3.1 The European Communities requests the Panel to make the following findings:[32]

(a) As a consequence of the use of model zeroing in the *original investigations* identified in Exhibits EC-1 to EC-15, the United States acted inconsistently with Articles 2.4 and 2.4.2 of the *AD Agreement* and Articles 3.1, 3.2, 3.5 and 5.8 and Articles 9.3, 1 and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement. The European Communities states that the Panel need make no findings with regard to Articles 3.1, 3.2 and 3.5 of the *AD Agreement* where the corrected margin of dumping for individual exporters is not less than 2 per cent; and Article 5.8 of the *AD Agreement* in cases where the corrected margin of dumping for the exporting country is not less than 2 per cent.

(b) The "Standard Zeroing Procedures" used in *original investigations* (or the United States practice or methodology of zeroing) and Sections 771(35)(A) and (B), 731 and 777A(d) of the Tariff Act are "as such" inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement* and Articles 5.8, 9.3, 1 and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.

(c) As a consequence of comparing a weighted average normal value with individual export transactions, without explanation or justification, and the use of simple zeroing in the *periodic reviews* listed in Exhibits EC-16 to EC-31, the United States acted inconsistently with Articles 2.4, 2.4.2 and 9.3 of the *AD Agreement* and Articles 11.1, 11.2, 1 and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.

(d) The "Standard Zeroing Procedures" used in *periodic reviews* (or the United States practice or methodology of zeroing) and Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(A)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the Regulations are "as such" inconsistent with Articles 2.4, 2.4.2 and 9.3 of the *AD Agreement* and Articles 11.1, 11.2, 1 and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.

(e) The "Standard Zeroing Procedures" used or relied upon in *new shipper, changed circumstances reviews and sunset review*s (or the United States practice or methodology of zeroing) and Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(A)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the Regulations are

[30] EC-First Written Submission, paras. 37-38, 57-60; EC-Request for the Establishment of a Panel, pp. 1-2.

[31] EC-First Written Submission, para. 61. The European Communities asserts that this same methodology is systematically applied by the United States "in all reviews including so-called newcomer review investigations, changed circumstances review investigations and sunset review investigations". EC-Request for the Establishment of a Panel, p. 2.

[32] EC-First Written Submission, para. 226.

"as such" inconsistent with Articles 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2 and 11.3 of the *AD Agreement* and Articles 1 and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.

B. UNITED STATES

3.2 The United States requests that the Panel reject the claims of the European Communities in their entirety.[33]

IV. ARGUMENTS OF THE PARTIES

A. BURDEN OF PROOF AND STANDARD OF REVIEW

1. Burden of Proof

(a) The United States[34]

4.1 The United States submits that the *AD Agreement* imposes obligations on investigating authorities that they must satisfy, but the burden of proving that those obligations have not been satisfied is on the complaining party. Accordingly, in this dispute, the burden is on the European Communities to prove that the United States acted in a WTO-inconsistent manner with respect to both its "as applied" and its "as such" claims. The burden is not on the United States to prove that it acted in a WTO-consistent manner.

(b) The European Communities[35]

4.2 The European Communities argues that it has presented facts and evidence more than sufficient to make out a *prima facie* case, in relation to both its "as applied" and "as such" claims, and has fully explained what specific obligations in the *AD Agreement* it considers the United States has failed to comply with, and why. In the light of these circumstances, the European Communities argues that it is incumbent on the United States to substantiate its defence, failing which the claims of the European Communities must prevail. In particular, the European Communities submits that, where the United States has not contested the facts and adduced evidence, the Panel must base itself on the facts and evidence presented by the European Communities. The European Communities also notes that the United States' first written submission did not contest claims nor respond to arguments presented by the European Communities in relation to the "as applied" cases in original investigations. The European Communities further argues that the burden of establishing that the phrase "the existence of margins of dumping during the investigation phase" has the special meaning asserted by the United States, as provided for in Article 31(4) of the *Vienna Convention*, falls on or has been shifted to the United States, and has not been discharged by the United States.

2. Standard of Review

(a) The United States[36]

4.3 The United States recalls that the standard of review with respect to a panel's task of assessing an investigating authority's establishment and evaluation of facts, and its interpretation of the

[33] US-First Written Submission, paras. 25-28; US-Second Written Submission, para. 97.
[34] US-First Written Submission, paras. 16-17.
[35] EC-Oral Statement at the First Substantive Meeting of the Panel, paras. 12 to 14; EC-Rebuttal Submission, paras. 11-19, 42-44, 56-63 and 65-66; EC-Oral Statement at the Second Substantive Meeting of the Panel with Parties, paras. 2-5; EC-Response to Panel Question 2.
[36] US-First Written Submission, paras. 18-19; US-Second Written Submission, paras. 38-39.

provisions of the *AD Agreement*, is set forth in Articles 17.6(i) and 17.6(ii) of the *AD Agreement*. The United States highlights that the standard of review described in Article 17.6(i) has been interpreted by several panels as prohibiting a panel from engaging in *de novo* review. As regards the standard of review expressed in Article 17.6(ii), the United States asserts that the question it poses is whether an investigating authority's interpretation of the *AD Agreement* is a permissible interpretation. According to the United State, Article 17.6(ii) acknowledges that there may be provisions of the *AD Agreement* that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the *AD Agreement*.

4.4 For the reasons discussed elsewhere, interpreting "during the investigation phase" under Article 2.4.2 as referring to an investigation under Article 5 is a permissible interpretation. Likewise, interpreting Article 2.4 as containing no independent and overarching requirements with respect to offsetting and symmetry is a permissible interpretation. Therefore, because the challenged measures rest on permissible interpretations, Article 17.6(ii) of the *AD Agreement* requires the Panel to find that those measures are in conformity with the *AD Agreement*. As found by the panel in *Argentina – Poultry*, "[I]n accordance with Article 17.6(ii) of the *AD Agreement*, if an interpretation is "permissible", then we are compelled to accept it."[37]

(b) The European Communities[38]

4.5 The European Communities argues that the submissions of the United States on the question of the standard of review for facts do not appear to serve any useful purpose. In particular, the European Communities argues that it has presented facts and evidence more than sufficient to make out a *prima facie* case, which facts and evidence have not for the most part been contested by the United States. Furthermore, the submissions of the United States are irrelevant to the "as such" claims, with respect to which the facts concern United States municipal anti-dumping law "as such", and have not been "established" by an investigating authority.

4.6 Second, on the questions of law, the European Communities argues that it is highly significant that the United States refers, in its first written submission, to "the possibility that customary rules of interpretation would not always yield definitive meanings of particular provisions of the *AD Agreement*."[39] The European Communities agrees with this statement of the United States, and ascribes to it particular relevance in the context of its claims with respect to Article 2.4.2. In particular, the European Communities argues that the statement effectively amounts to an admission from the United States that, after applying customary rules of interpretation of international law to the interpretation of the word "investigation" in Article 2.4.2, the conclusion must be that that word does not have the limited or defined meaning argued for by the United States in these panel proceedings. This being so, for a Member to give that word such a limited or defined meaning, and apply the *AD Agreement* accordingly, would not be a permissible interpretation of Article 2.4.2.

[37] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341, footnote 223.
[38] EC-Rebuttal Submission, paras. 45-54.
[39] US-First Written Submission, para. 22.

B. "AS APPLIED" CLAIMS

1. Claims with respect to Article 2.4 of the *AD Agreement*

(a) The European Communities[40]

4.7 The European Communities argues that, because of the use of model zeroing, each of the measures at issue in the cases identified in Exhibits EC-1 to EC-15 (described by the European Communities as "original investigations"), violated United States' obligations under Article 2.4 of the *AD Agreement*; and that because of the use of simple zeroing, each of the measures at issue in the cases identified in Exhibits EC-16 to EC-31 (described by the European Communities as "periodic reviews"), similarly violated United States' obligations under Article 2.4 of the *AD Agreement*. The European Communities presents essentially the same claims and arguments, *mutatis mutandis*, with respect to both "original investigations" and "periodic reviews", namely, that, in each of the "as applied" cases, the United States violated (first claim) the first sentence of Article 2.4 because model zeroing and simple zeroing (absent targeted dumping) are unfair; and (second claim) the third to fifth sentences of Article 2.4 because model zeroing and simple zeroing (absent targeted dumping) effectively result in an impermissible adjustment to export price.

4.8 The European Communities contends that Article 2.4 of the *AD Agreement* establishes an overarching and independent obligation to make a fair comparison between export price and normal value. In contrast with the Tokyo Round *Anti-Dumping Code*, in the Uruguay Round *AD Agreement*, the words "fair comparison … between the export price and the normal value" were lifted up and placed on their own in a new first sentence of Article 2.4. According to the European Communities, the drafters would not have done this without a purpose. Thus, the change introduced in the Uruguay Round confirms that Article 2.4 contains an overarching and independent obligation to make a fair comparison that goes beyond the obligations to make due adjustment described in Article 2.4.

4.9 The European Communities does not consider that the meaning of the first sentence of Article 2.4 is limited by the second sentence of Article 2.4. In other words, the European Communities does not consider that the fair comparison referred to in the first sentence of Article 2.4 is only what is contemplated in the second sentence of Article 2.4. Rather, the European Communities considers that the first sentence of Article 2.4 contains an obligation that is overarching – in the sense that it is further elaborated in the other provisions of Article 2.4, including Articles 2.4.1 and 2.4.2; and independent – in the sense that the other provisions of Article 2.4, including Articles 2.4.1 and 2.4.2, do not exhaust the fair comparison requirement in the first sentence of Article 2.4.

4.10 The third sentence of Article 2.4 is a development of the first and second sentences of Article 2.4. Read in isolation, the third sentence would make little sense. The words "price comparability" that appear twice in the third sentence relate to the "fair comparison" between export price and normal value referred to in the first and second sentences. The third sentence, like the second sentence, refers expressly to "level[s] of trade". The word "allowances" in the fourth sentence refers back to "due allowance" in the second sentence. The fifth sentence also refers to "price comparability" and "level of trade" (twice), and to the making of a "due allowance as warranted under this paragraph". The words "this paragraph" refer to all of Article 2.4. The fifth sentence, as well as the third sentence, contain obligations regarding allowances or "adjustments" (to use the vocabulary of footnote 7), whether made to normal value or export price. The final sentence of Article 2.4 expressly refers again

[40] EC-First Written Submission, paras. 64-74, 149-160; EC-Rebuttal Submission, paras. 92-106; EC-Oral Statement at the First Substantive Meeting of the Panel, paras. 10-11; EC-Oral Statement at the Second Substantive Meeting of the Panel, paras. 44-47; EC-Responses to Panel Questions 23-25, 27, 33, 35, 37-38, 42 and 47; and EC-Responses to Questions Posed by the Panel at the Second Substantive Meeting paras. 1.27.

to the "fair comparison" obligation in the first sentence of Article 2.4; and the procedural rules it contains regulate all of the substantive obligations set out in the first to final sentences of Article 2.4.

4.11 If the meaning of the first sentence of Article 2.4 would be considered to be limited by the second sentence of Article 2.4, or for that matter the remainder of Article 2.4, or Article 2.4 including Articles 2.4.1 and 2.4.2, then the first sentence would serve no purpose. It could just as well be deleted without changing the obligations of Members. That would be to render the first sentence of Article 2.4 a nullity – which would not be a permissible interpretation.

4.12 The European Communities argues that model zeroing and simple zeroing (absent targeted dumping) fail to fully and duly account for actual prices of export transactions that take place during a period of investigation and thereby result in an inflated dumping margin. To the extent that they inflate the margin of dumping or convert a negative dumping margin into a positive dumping margin, such methodologies are inherently biased and therefore unfair within the meaning of Article 2.4 of the *AD Agreement*. The European Communities finds support for this conclusion in the findings of the Appellate Body in *EC-Bed Linen*[41], *US – Corrosion Resistant Steel Sunset Review*[42], and *US – Softwood Lumber V.*[43]

4.13 Given the common and ordinary meaning of the word "fair", the European Communities argues that the obligation to make a fair comparison under Article 2.4 must necessarily normally involve a fairly balanced comparison, being one based on equivalent methodologies – that is, a symmetrical comparison. A symmetrical comparison for the purposes of calculating a margin of dumping and eventually imposing a duty, in relation to a given product or time, is necessarily one that precludes model zeroing and simple zeroing. Thus, the European Communities contends that the obligation imposed by Article 2.4 to conduct a fair comparison precluded the model zeroing and simple zeroing methodologies applied by the United States in the cases in dispute.

4.14 In this context, the European Communities refers to the language of Article VI of the GATT 1994, the preamble to the *AD Agreement*, and various provisions of the *AD Agreement*, such as Articles 2.1, 2.6 and 4, supporting the view that the various parameters by which markets are generally defined, namely, physical characteristics, geography and time, play a central role in the *AD Agreement*. This also reflects a general requirement that permeates the entire *AD Agreement*, according to which investigating authorities must apply basic economic concepts in a consistent manner. The method used by the United States is actually incapable of measuring international price discrimination, because it is internally inconsistent, and thus unfair.

4.15 In addition, the European Communities also argues that the practice of zeroing involves effectively making an adjustment to export price that is impermissible under Article 2.4, third to fifth sentences, and thus also Article 2.4, first sentence. Such an adjustment is not allowed because it is based on a factor which does not affect price comparability. Indeed, the fact that the "export price" is above the comparable "normal value" is not a difference which affects price comparability. It is actually part of the very price difference that the investigating authorities have to establish. The practice of zeroing involves an adjustment for "non-dumping", which Article 2.4 does not, in general, permit.

4.16 The European Communities does not consider that it is possible to read the second to fifth sentences of Article 2.4 as *only* imposing obligations on Members to make allowance or adjustment for differences that affect price comparability. These provisions also impose an obligation *not* to make an allowance or adjustment when there is *no* such difference. Otherwise, faced with differences

[41] Appellate Body Report, *EC – Bed Linen.*
[42] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*.
[43] Appellate Body Report, *US – Softwood Lumber V*.

affecting price comparability, a Member would first be required to make a series of due allowances or adjustments, in order to render normal value and export price comparable; but having done that, the Member would then be free to make further allowances or adjustments, even if not for differences affecting price comparability, and even if *reversing the effects* of the first set of allowances or adjustments – without acting inconsistently with Article 2.4. That would introduce a distortion or inherent bias in the comparison and would be to render the provisions of Article 2.4 a nullity.

4.17 This is exactly what the United States practice of zeroing at issue in these proceedings does. After making adjustments for differences affecting price comparability, the investigating authority makes certain intermediate comparisons between export transactions and a "normal value"; and then makes further adjustments if the value of the export transaction exceeds that of the normal value. Thus, to the extent that the United States applied model zeroing or simple zeroing in the cases in dispute, the United States effectively made an improper adjustment to export price and violated its obligations under Article 2.4.

4.18 In response to the United States invocation of the second sentence of Article 2.4.2 as context – a provision that, in the view of the European Communities, the United States has never claimed that it was applying in the cases before the Panel – the European Communities considers that an adjustment or allowance in the context of targeted dumping might be "due", within the meaning of the third sentence of Article 2.4, if it is made under the conditions laid out in the second sentence of Article 2.4.2. According to the European Communities, if two distinct patterns of export prices are identified, in accordance with the second sentence of Article 2.4.2, then there is a difference. Article 2.4.2 refers expressly to "a pattern of export prices which differ"; and to "differences" that cannot otherwise be taken into account. Such differences may affect price comparability. It is self-evident that prices in what has been identified as distinct market A cannot – without some further consideration and explanation - necessarily simply be directly compared with prices in what has been identified as distinct market B; and that an investigating authority would be justified if it decided that the data from markets A and B could not be simply lumped together and compared with market C. An adjustment in such circumstances would be made for a difference (between markets A and B) that affected price comparability (between markets A and B; *and* between A, B and C). This is also clear from Article 2.4.2, which uses the words "compared" and "comparison". Thus, according to the European Communities, to the extent that the United States applied simple zeroing in the cases at issue, without justifying resort to an asymmetrical comparison methodology, the United States effectively made an improper adjustment to export price and violated Article 2.4, third to fifth sentences, and thus also Article 2.4, first sentence.

4.19 The European Communities does not agree that its interpretation of the *AD Agreement* renders the words: "Subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2 redundant. The "provisions governing fair comparison" are sentences 2 to 6 of paragraph 4 of Article 2. The first sentence of Article 2.4 sets forth the fair comparison obligation itself – it does not contain provisions governing that comparison. The words "subject to" simply indicate that the rules in Article 2.4.2 are subject to sentences 2 to 6 of Article 2.4. In other words, in case of conflict, the provisions of sentences 2 to 6 of Article 2.4 prevail over those of Article 2.4.2. To put matters another way, the rules in Article 2.4.2 cannot be applied in such a way as to frustrate or compromise the fair comparison required by Article 2.4.

4.20 In addition, the European Communities argues that Articles 2.4 and 9.3 require that the total amount of duty collected with respect to exports made by one specific exporter during the assessment period must not exceed the relevant margin of dumping of the same exporter. The only relevant margin of dumping permitted to be calculated under the *AD Agreement*, whether in an original investigation or a periodic review, is that pertaining to the exporter, not that pertaining to individual importers.

4.21 The European Communities rejects the contention of the United States that importer-specific *final* assessment on a transaction by transaction basis involving zeroing is contemplated under the *AD Agreement* by virtue of Article 9.4(ii). First, the European Communities notes that the prospective normal value or variable duty methodology recognised in Article 9.4(ii) is not in fact what was applied in any of the periodic reviews at issue. Secondly, Article 9.4 is not concerned directly with the concept of "a prospective normal value and variable duty". Rather, it sets out specific obligations concerning imposition and collection where the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6 – that is, when sampling has been used. Article 9.4(ii) mentions in passing the situation where the liability for payment of anti-dumping duties has been calculated on the basis of a prospective normal value – but that is not what the provision is directly concerned with. As such, all that Article 9.4(ii) does is to confirm that a prospective normal value and variable duty is possible.

4.22 In any event, the collection of anti-dumping duties on the basis of prospective normal values is only one possible intermediate stage of the prospective system since it is subject to "a prompt refund, upon request" under Article 9.3.2 of the *AD Agreement*, which is itself subject to the full disciplines of Article 2. Thus, it is legally erroneous to rely on one possible intermediate stage of the prospective system, to justify the final result reached by the United States in the application of its retrospective system. There is nothing in Article 9.4 that releases authorities from the obligations in Article 9.3, including Articles 9.3.1 or 9.3.2. Thus, Members must ensure that the obligations in Article 9.3.2 are complied with whenever the "amount of the anti-dumping duty is assessed on a prospective basis". Provision must be made for a prompt refund; and in any re-calculation of the exporter specific margin of dumping the authorities must ensure that the amount of the anti-dumping duty does not exceed the margin of dumping as established under Article 2, including Article 2.4.2.

4.23 The reason why Article 9.3.2 provides for the possibility of refund in a prospective system is simply that the initial anti-dumping duty is based on the margin of dumping or normal value established during the original investigation. Therefore, there will be excess collection whenever the amount of duty collected exceeds the actual margin of dumping. The possibility of excess collection arises for all forms of duty (*ad valorem*, variable or other) and for a number of reasons. This is why Article 9.3.2 obliges Members applying the prospective system to put in place a mechanism of prompt refund. The mechanism is available irrespective of the form of the duty (*ad valorem*, variable or other). If the amount of duty collected is higher than the new dumping margin, the difference will be repaid.

4.24 Viewed in this light, the prospective system is no different from the retrospective system. The retrospective system also requires the calculation of a new margin of dumping in order to establish the final duty liability on the basis of current data.

4.25 There are, however, some important differences between the prospective system and the retrospective system operated by the United States. The prospective refund system can only result in a reduction of the total duty paid. On the other hand, the retrospective system, at least as applied by the United States, may lead to either a decrease or an increase in the margin of dumping, resulting in a decrease or increase of the total duty payable. Another difference is that a request for refund in the prospective system will, as a matter of logic, only ever be made by the exporter/importers, whereas, in the United States retrospective system, a revised determination of the dumping margin may also be requested by the domestic industry.

4.26 The type of duty has no bearing on the requirement to provide for a prompt refund mechanism. As a previous Panel stated: "*(…), a properly designed variable duty system would include a refund mechanism consistent with Article 9.3.2, (…)*".[44] The European Communities agrees.

[44] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.362.

The European Communities does not see how the choice of a specific form of duty could in any way alter a Member's obligation under Article 9.3 of the *AD Agreement* not to collect in excess of the actual exporter specific margin of dumping. Thus, the obligation applies with equal force to variable duties. To decide otherwise would imply that the choice of a particular form of duty entitles Members to collect anti-dumping duties irrespective of the actual margin of dumping and even in cases where the exporter has eliminated its margin of dumping.

4.27 Finally, the European Communities argues that if simple zeroing is allowed in periodic reviews conducted under Article 9.3.1, it would effectively open up a gross distortion between prospective and retrospective systems of duty assessment. The position being advocated by the European Communities, on the other hand, would maintain the situation in which the two systems lead to an equal amount of duty collected in identical situations. The European Communities does not agree with the United States that it would be possible for the European Communities to achieve the same result as the United States in an assessment proceeding by conducting a changed circumstances review where, according to the United States, the prohibition of zeroing would not apply. The European Communities disagrees, first, with the assertion that the prohibition of zeroing does not apply in a changed circumstances review – the entire discipline of Article 2 is applicable in all margin of dumping calculations. Second, the European Communities notes that, in any event, a changed circumstances review would only cover future shipments whereas an assessment proceeding covers past sales.

(b) The United States[45]

4.28 The United States argues that the "fair comparison" language of Article 2.4 refers to price adjustments and does not create an "overarching and independent" obligation that applies beyond the content of Article 2.4 itself. The text of Article 2.4 establishes the obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make the appropriate adjustments for differences that affect price comparability. As the panel in *Egypt – Steel Rebar* explained: "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value."[46] Thus, the United States contests the suggestion of the European Communities that the first sentence of Article 2.4 creates an obligation – the extent of which is unstated in the *AD Agreement*– that is independent of the remainder of Article 2.4, that applies after the comparisons between normal value and export price are made, and that is results-oriented.

4.29 The United States argues that the "fair comparison" referred to in Article 2.4, first sentence, is informed by the second sentence of Article 2.4, which provides that "[t]his comparison shall be made ...". In this way, the second sentence of Article 2.4 describes the basic framework by which fair comparisons between export price and normal value must be made. However, the remaining sentences of Article 2.4 also inform the meaning of the first sentence of Article 2.4. Those remaining sentences of Article 2.4 (dealing, *inter alia*, with terms of sale, taxation, and physical characteristics) provide additional, relevant discussion of allowances that may be due in order that the comparison to be made between export price and normal value will be fair. Thus, the second sentence, along with the remaining sentences, "limit" the first sentence.

[45] US-First Written Submission, paras. 59-69; US-Second Written Submission, paras. 18-29; US-Opening Statement at the First Substantive Meeting of the Panel, paras. 8-9, 11 and 13; US-Opening Statement at the Second Substantive Meeting of the Panel, paras. 66-7; US-Responses to Panel Questions 22, 26, 29-30, 34, 36-37 and 39-40; US-Responses to Questions Posed by the Panel at the Second Substantive Meeting, paras. 1-4.

[46] Panel Report, *Egypt – Steel Rebar*, para. 7.335.

4.30 The United States argues that its interpretation of Article 2.4 is supported by the rationale underlying the introduction of the provision following the Uruguay Round. Article 2.6 of the Tokyo Round Antidumping Code ("AD Code") stated, "In order to effect a fair comparison ... ." While the United States agrees that Article 2.6 of the AD Code addressed how to make a fair comparison, according to the United States, the language was ambiguous as to whether a fair comparison was required. Thus, all of Article 2.6 of the AD Code could have been read as non-mandatory.

4.31 The ambiguity contained in Article 2.6 of the AD Code was eliminated in the *AD Agreement* by separating and revising the first sentence of Article 2.4 of the *AD Agreement* so as to make explicit the requirement to make a fair comparison. However, the remainder of Article 2.4 of the *AD Agreement*, like its predecessor, defines the elements of a fair comparison. Thus, Article 2.4 of the *AD Agreement* is clearly mandatory – it requires Members to make a fair comparison and instructs them how to do so.

4.32 This interpretation of Article 2.4 is consistent with its drafting history. In what is known as the "Dunkel Draft", Article 2.4 read as follows:

> "A fair comparison shall be made between the export price and the normal value. The two prices shall be compared at the same level of trade ... ."

Arguably, that formulation was ambiguous as to the elements that make up a fair comparison. That ambiguity was eliminated in the final draft, however, by revising the text to read as follows:

> "A fair comparison shall be made between the export price and the normal value. *This comparison* shall be *made* at the same level of trade ... ." (Emphasis added).

Substitution of the phrase "this comparison" establishes a reference back to the subject of the prior sentence – i.e., a fair comparison – which is what is being defined.

4.33 Further support for this reading of Article 2.4 is found in the first sentence of Article 2.4.2 of the *AD Agreement* which refers to "the provisions governing fair comparison in paragraph 4." The plural term "provisions," as well as the reference to "paragraph 4," rather than a particular portion of paragraph 4, clarify that the entirety of Article 2.4 constitutes the provisions "governing fair comparison."

4.34 To the extent that the European Communities argues that a requirement to make "symmetrical" comparisons between normal values and export prices can be found in the fair comparison language of Article 2.4, the United States contends that such an argument cannot be reconciled with the text of Article 2.4.2. The first sentence of Article 2.4.2 provides that those "symmetrical" comparisons are "subject to" the provisions governing "fair comparison." In the view of the United States, the drafters never intended "fair comparison" to cover symmetrical comparisons, because such coverage would have rendered this language superfluous. Furthermore, according to the United States, the *AD Agreement* explicitly provides for the use of asymmetrical comparisons in at least two places, neither of which is identified as an exception to the "fair comparison" requirement of Article 2.4. First, asymmetrical comparisons are expressly provided for in the targeted dumping provision – the second sentence of Article 2.4.2. While this provision is an express exception to the symmetry requirements of the first sentence of Article 2.4.2, there is no basis for interpreting it to be an exception to the fair comparison requirements of Article 2.4. Second, in the application of antidumping duties to imports from producers for which an individual dumping margin has not been separately calculated, Article 9.4(ii) of the *AD Agreement* expressly provides for the use of asymmetric comparisons by Members with prospective normal value systems. Nothing in Article 9.4 suggests that this methodology was provided as an exception to the fair comparison requirement of Article 2.4 or the criteria for using the targeted dumping methodology of Article 2.4.2.

4.35 The United States argues that the European Communities' claim that zeroing is permissible, when the conditions under Article 2.4.2 for conducting a targeted dumping analysis are fulfilled, cannot be squared with the European Communities' contention that zeroing is prohibited under Article 2.4 because it amounts to "an arbitrary and artificial reduction" of the export price and that "an adjustment to export price, normal value or otherwise for differences that do not affect price comparability is inconsistent with Article 2.4." The United States contends that the targeted dumping methodology is not an exception to the "fair comparison" requirement of Article 2.4; it is an exception to the symmetrical comparison requirements for investigations set forth in the first sentence of Article 2.4.2. According to the United States, having asserted that zeroing is an "impermissible adjustment to export price" not related to a difference that affects price comparability as provided in Article 2.4, the European Communities has failed to explain how this "adjustment" becomes "permissible" when the targeted dumping methodology is used. In any case, the United States is of the view that the so-called zeroing does not constitute an adjustment to price within the meaning of Article 2.4.

2. Claims with respect to Article 2.4.2 of the *AD Agreement*

(a) The European Communities[47]

4.36 The European Communities argues that, because of the use of model zeroing, each of the measures at issue in the cases identified in Exhibits EC-1 to EC-15 (described by the European Communities as "original investigations"), violated United States' obligations under Article 2.4.2 of the *AD Agreement*; and that because of the use of simple zeroing, each of the measures at issue in the cases identified in Exhibits EC-16 to EC-31 (described by the European Communities as "periodic reviews"), similarly violated United States' obligations under Article 2.4.2 of the *AD Agreement*.

(i) Article 2.4.2 prohibits model zeroing

4.37 The European Communities argues that the wording of Article 2.1 of the *AD Agreement* implies that an anti-dumping proceeding concerns a product (the subject product), and that, therefore, the margin of dumping to which Article 2.4.2 refers must be the margin of dumping for the subject product. According to the European Communities, this means that "dumping" for the purposes of the *AD Agreement* can be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model or category of that product.

4.38 In the original investigations at issue, the United States established "averaging groups" and made a separate calculation of "dumping" for each one. While the use of averaging groups is *permissible* under Article 2.4.2 of the *AD Agreement*, it is not a *requirement*. Article 2.4 of the *AD Agreement* requires only that due allowance and a fair comparison be made. Due allowance could have been made by adjusting the relevant prices to take account of differences in physical characteristics affecting price comparability, before making the (single) comparison referred to in Article 2.4 of the *AD Agreement*, and thus before calculating a (single) margin of dumping.

4.39 Having decided to establish *averaging groups* in the original investigations at issue, the United States considered itself under an obligation to compare weighted-average "normal value" with a weighted-average of prices of all comparable export transactions, for each averaging group. For this purpose, the United States considered that the weighted-average "normal value" was that for the relevant *averaging group*. The "comparable export transactions" were those relating to the same

[47] EC-First Written Submission, paras. 75-89, 161-182; EC-Second Written Submission, paras. 112-218; EC-Responses to Panel Questions 4, 6, 9, 11-12, 14-18, 20 and 21; EC-Closing Statement at the First Substantive Meeting of the Panel, paras. 2-7; EC-Opening Oral Statement at the Second Substantive Meeting of the Panel, paras. 1-40; EC-Closing Oral Statement at the Second Substantive Meeting of the Panel, paras. 1-21.

averaging group, country and exporter. The "weighted-average of prices of all comparable export transactions" was calculated in respect of *all* export transactions, including export transactions that exceeded the "normal value" used for that *averaging group*. There was no zeroing within an averaging group. Export prices in excess of normal value were fully incorporated, before the comparison between "normal value" and export price, mathematically, in the calculation of the weighted-average export price.

4.40 The United States then combined the margins calculated for each averaging group, in order to calculate the *margin of dumping* for the *subject product*. In this second stage of the calculation the weighted-average normal value was that for the *subject product*. The comparable export transactions must, by definition, *necessarily* have been those that related to the same *subject product*, country and exporter. The "prices" of those export transactions were reflected in the total value of exports, which total value was incorporated, mathematically, in the margins calculated for each averaging group, whether *positive* or *negative*. Just as in the first stage, in the second stage "negative margins" for averaging groups should have been incorporated, mathematically, in the calculation of the weighted-average of prices of all comparable export transactions for the *subject product* before the comparison between normal value and export price.

4.41 Further support for this view may be found in a consideration of the ordinary meanings of the words "comparison" and "margin" in Article 2.4.2 of the *AD Agreement* – at least to the extent that the United States asserts that the results of intermediate comparisons are "margins" within the meaning of that provision. Article 2.4.2 requires a simple *comparison* between normal value and export price. If there is a difference, according to the text, that difference is a margin. A margin is the amount by which one thing differs from another. Normal value may exceed export price. Or export price may exceed normal value. In both cases there is a *margin*. It is not possible to conclude in either case that there is no margin, or that the margin is zero. That would only be the case if normal value and export price were equal. Article 2.4.2 does not prejudge how the two elements to be compared are juxtaposed, nor, thus, whether each one of a series of intermediate "margins" is expressed as positive or negative.

4.42 Nor is it possible to prematurely conclude, before the final calculation is complete, that, in relation to some discrete model or type or category of exports, when "export price" exceeds "normal value", there is no or a zero *margin of dumping*, because Article 2.4.2 of the *AD Agreement* is precisely concerned with determining whether or not there *is* a margin of dumping for the subject product.

4.43 In summary, the European Communities submits that, in the second stage of the calculation, the United States was bound by the obligations contained in Article 2.4.2 of the *AD Agreement*, and particularly the obligation to make a *fair comparison* between a weighted-average normal value and a weighted-average of prices of *all comparable export transactions*. The European Communities argues that in the *EC – Bed Linen*[48] and *US – Softwood Lumber V*[49] cases, the Appellate Body rejected the notion that, in circumstances where there is more than one averaging group based on differences in physical characteristics, and two stages to the calculation, the second stage falls outside Article 2 of the *AD Agreement* and indeed outside the *AD Agreement* altogether. The precise and detailed rules set out in the *AD Agreement* would be pointless if, in the final step of the calculation, the importing Member would be free to make an unfair comparison.

4.44 The European Communities considers that the use of the plural "margins of dumping" in Article 2.4.2 reflects the possibility of different margins for different countries and exporters. The European Communities further considers that an investigating authority is not entitled to consider

[48] Appellate Body Report, *EC – Bed Linen.*
[49] Appellate Body Report, *US – Softwood Lumber V.*

certain transactions to have become "non-comparable" simply because the results of certain intermediate comparisons are negative. There are other types of non-comparable transactions, such as : transactions in relation to merchandise outside the scope of the proceedings; transactions made at a time outside the investigation period; transactions in relation to another geographical region; transactions that relate to another exporting country; etc.

4.45 The European Communities considers that the view that "dumping" and "margins of dumping" can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping investigation. Thus, having defined the product under investigation, the investigating authority must treat that product as a whole for, *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. Furthermore, according to Article VI:2 of the GATT 1994 and Articles 9.2 and 9.3 of the *AD Agreement*, an anti-dumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole, and so-called "non-dumped" export transactions should not be excluded. There is no basis in the *AD Agreement* for treating a transaction as "non-dumped" for one purpose and "dumped" for other purposes, as the United States did in the cases subject to this dispute.

4.46 The European Communities considers that, unlike other provisions of the *AD Agreement* that are explicit regarding the permissibility of disregarding certain matters (such as Article 2.2.1; Article 9.4; Article 2.7 and Annex II, paragraph 5) Article 2.4.2 contains no express language permitting an investigating authority to disregard certain results of multiple comparisons at the aggregation stage.

4.47 For all of these reasons, the European Communities concludes that, having defined the subject product in the original investigations at issue, the United States was not entitled to set at zero the negative margins calculated for certain averaging groups based on differences in physical characteristics. The United States had become bound by its own logic. The use of such a method by the United States in this case was not in conformity with obligations imposed on the United States by Article 2.4.2 of the *AD Agreement*.

(ii) Article 2.4.2 is not limited to original investigations

4.48 The European Communities argues that Article 2.4.2 applies to all types of investigations undertaken pursuant to Article VI of the GATT 1994 and the *AD Agreement* in which margins of dumping are calculated or relied upon, including, original investigations, periodic reviews, new shipper reviews, changed circumstances reviews and sunset reviews. The European Communities argues that the United States has failed to establish that the word "investigation" or the phrase "existence of margins of dumping during the investigation phase" in Article 2.4.2 is limited to original investigations.

4.49 The European Communities observes that the term "margin of dumping" is *defined* in Article VI:2 of the GATT 1994, which definition is implemented and further elaborated in Article 2. The *same* defined term, "margin of dumping", is also used in Article 9.3, which cross-refers to *all* of Article 2. It also appears in Articles 9.1 and 9.5.

4.50 Article 2.4.2 states what it applies to, not what it does not apply to. Unlike the United States Statement of Administrative Action ("SAA"), it does not contain the words "(not reviews)". The United States is therefore using *a contrario* reasoning in an attempt to defeat the definition of "margin of dumping" and the cross-reference in Article 9.3. If the Members had really wanted to achieve what the United States asserts, it would have been a simple matter for them to have used express

exclusionary language, such as that in Article 2.2.1; Article 2.7; Article 9.4(ii); or Annex II, paragraph 5. The Members did not do that.

4.51 The GATT 1994 and the *AD Agreement* define eight terms, but do not define the word "investigation". Its meaning in Article 2.4.2 must be determined in accordance with the rules of treaty interpretation found in customary international law. According to the European Communities, the ordinary meaning of the word "investigation", referring to The New Shorter Oxford English Dictionary, indicates a systematic examination or inquiry or a careful study of or research into a particular subject. The European Communities believes that what makes an "investigation" an "investigation" is the nature of the activity carried out by the investigating authority, not the material scope of what is examined. For example, a cursory glance is not an investigation. The random or capricious fabrication of a margin of dumping would not be based on an investigation. On the other hand, an "objective examination" of "positive evidence", involving the "considerations", "assessments", "evaluations", "demonstrations", "determinations" and "special care", as for example, expressly referred to and required by Article 3 of the *AD Agreement*, does involve an "investigation". The European Communities is of the view that this type of activity takes place not only during an original investigation, but also in a periodic review, a new shipper review, a changed circumstances review and a sunset review.

4.52 The European Communities contests the United States assertion that the term "investigation" has a particular meaning – namely original investigation - throughout the *AD Agreement*.[50] Rather, the European Communities considers that the word "investigation" is used in different senses (such as: review investigation; injury investigation; country specific investigation; company specific investigation; on-the-spot investigation; preliminary investigation; etc.) in the *AD Agreement* and in past panel, Appellate Body and GATT panel reports, as well as by USDOC, the ITC and in United States municipal anti-dumping law.

4.53 The European Communities contests the United States assertion that the meaning of the word "investigation" or the phrase "existence of margins of dumping during the investigation phase" in Article 2.4.2 is limited by the context of Article 5.1. To this end, the European Communities argues that the obligations set out in Article 5.1 of the *AD Agreement* apply only to an investigation to determine the existence, degree and effect of any alleged dumping – that is, an original investigation. The European Communities is of the view that it is precisely the presence of the words "to determine the existence, degree and effect of any alleged dumping" that limit the meaning of the word "investigation" in Article 5.1 of the *AD Agreement* and in the other paragraphs of that article. The absence of these words in Article 2.4.2 confirms that the word "investigation" or the phrase "existence of margins of dumping during the investigation phase" in Article 2.4.2 does not have the limited or defined meaning that the United States asserts. The European Communities contends that if the United States would be correct in its assertions, the words "to determine the existence, degree and effect of any alleged dumping" in Article 5.1 would be redundant and without meaning.

4.54 The European Communities considers that Article 2.2, which is also part of Article 2, and thus also part of the implementation of the definition of "margin of dumping", is more immediate and relevant context. It points to the use – eight times – of the word "investigation" in Article 2.2. It notes that these are provisions in respect of which implementation in the United States also for retrospective assessments was, according to the SAA, "required or appropriate". It particularly notes the use of the phrases "in the course of the investigation" in Article 2.2.1.1 and "during the investigation" in footnote 6. The European Communities also cites as relevant context the repeated use of the word "investigation" in Article 6.

[50] US-First Written Submission, footnote 31.

4.55 Similarly, the European Communities contests the United States assertion that Article 1 of the *AD Agreement* means that the word "investigation" in Article 2.4.2 refers to an "original investigation" only. First, according to the European Communities Article 1 does not exhibit the characteristics of a definition. Secondly, the word "original" does not appear in Article 1. Likewise, the European Communities also contests that footnote 1 of Article 1 defines the term "investigation" for the purpose of the entire *AD Agreement*, including Article 2.4.2. Rather, it defines the word "initiated" – other types of investigation, such as sunset reviews, changed circumstances reviews, new shipper reviews and periodic reviews also being "initiated". Footnote 1 refers to Article 5.1 only for the purposes of determining what is "the procedural action by which a Member formally commences an investigation".

4.56 With respect to the word "phase" in Article 2.4.2, and considering its ordinary meaning, especially in conjunction with the word "during", referring to the New Shorter Oxford English Dictionary, as indicating a stage in the passage of time, the European Communities argues that it has no incidence on the meaning of the word "investigation" in Article 2.4.2. The European Communities points to several other words that are used only once in the *AD Agreement* without that having any legal significance. It also points to several other concepts that are referred to in the *AD Agreement* in different ways (as in "period" and "phase") without that having any legal significance. Thus, according to the European Communities, the word "phase" cannot, as a matter of law, lead to the conclusion that the term "investigation" is defined in Article 5.1 or elsewhere for the purposes of the entire *AD Agreement*, including Article 2.4.2. Finally, the European Communities points out that the word "phase" does not appear in Article 2.4.1 – which is treated the same way by the United States, simply on the basis of an erroneous assumption that "investigation" always means "not reviews".

4.57 The European Communities makes similar arguments with respect to the word "existence". The European Communities contends that it is simply not possible to entirely dissociate the "existence" of dumping and the "degree" of dumping. The ordinary meaning of "exist" being "having *objective* reality", it does not, when used in conjunction with the phrase "dumping *margin"*, encompass the concept of an amount or margin somewhere between zero and infinity. In this respect, the European Communities points to the references in Article 7 to the "amount" of dumping; and in Article 9.1 to the "amount" and "full margin of dumping"; and in Article 3.4 to the "magnitude of the margin of dumping". The *AD Agreement* uses the word "existence" in other provisions, without that being of any legal consequence, as does the *SCM Agreement*, including in the provisions relating to imposition and collection. The proposition that this one word in Article 2.4.2 could have as a consequence that the basic principles for calculating a margin of dumping should be rendered entirely worthless in a system applying retrospective assessment is tenuous and implausible. In any event, the European Communities argues that the United State is wrong to assert that the only time that the "existence" of a margin of dumping is determined is in an original investigation. Issues relating to the "existence" of dumping may also arise, for example, in the context of a changed circumstances review, or in a sunset review. The European Communities requests the Panel not to base itself on the esoteric mathematical and philosophical *combination* dictionary meanings referred to by the United States. The European Communities also invites the Panel to pay due regard to the French and Spanish texts of the *AD Agreement*, the titles of which make it clear that *all* of the provisions of Article 2 – including those that the United States admits apply in a retrospective assessment – are concerned with the "existence" of dumping. Finally, the European Communities points out that the word "existence" does not appear in Article 2.4.1 – which is treated the same way by the United States, simply on the basis of an erroneous assumption that "investigation" always means "not reviews".

4.58 The European Communities points to the object and purpose of retrospective assessment, as it appears from the *AD Agreement*, and as set out in the Manual and confirmed by the United States in these proceedings: it is just a temporal up-date. The European Communities also points to the object and purpose of the *AD Agreement*, which at the very least requires basic consistency in the application

of economic concepts. The European Communities considers that the United States has failed to articulate any alleged object or purpose to explain why, at the moment of final payment, the basic method for calculating a margin of dumping should suddenly change, and be substantially unregulated by the *AD Agreement.*

4.59 The European Communities considers that since the United States has failed to establish that the word "investigation" or the phrase "existence of margins of dumping during the investigation phase" has the limited meaning argued for by the United States – and that since a consideration of the ordinary meaning, context, and object and purpose confirms that there is no such limited meaning – there is no need to have recourse to the preparatory work. In these circumstances, the preparatory work could only ever be used to confirm the meaning resulting from Article 31 of the *Vienna Convention*. That is precisely what it does. The negotiators were acutely aware of and sensitive to the issue of definitions: it really matters whether or not something is defined; and the fact that some terms are defined and others not must be given meaning. There was general consensus on the need for a consistent, balanced and fair application of anti-dumping measures. There was broad consensus on both sides of the debate that international markets and business had evolved, and that the *AD Agreement* should be up-dated accordingly. At no point in the debate was it ever suggested that there should be different treatment for original investigations and retrospective assessments on the fundamental question of how to calculate a margin of dumping. This is so notwithstanding the fact that assessment and refund issues were repeatedly discussed in detail and at length, with regard to the "duty as a cost" and "lesser duty" issues. There is a clear and strong indication of consensus that the interests of both parties in the asymmetry and zeroing debate could be accommodated in the targeted dumping provisions that eventually became the second sentence of Article 2.4.2 of the *AD Agreement*. There is an overwhelming indication of consensus that the presence of the word "investigation", used repeatedly in what was to become Article 2.2 of the *AD Agreement*, did not mean that those provisions were to be irrelevant when a margin of dumping was calculated in retrospective assessments. Right from the start, there was a "strong convergence of views" on the need to strengthen the rules applicable to the pre-investigation phase, without, however, placing an unreasonable burden on complainants or authorities.

4.60 The European Communities considers that the negotiating history of Article 2.4.2 does not record which Member or Members – if any – proposed the particular form of words "during the investigation phase" or why. However, had the United States actually put to the other Members, during the negotiations, an express provision excluding the disciplines of Article 2.4.2 from retrospective assessments – the European Communities contends that there is no doubt at all, based on a fair consideration of the negotiations, that the other Members would never have agreed to it. This was confirmed by each of the 11 third parties in response to a question posed by the European Communities during the meeting with the third parties: none of them thought that the *AD Agreement* means that investigating authorities are free to calculate margins of dumping in all reviews and all retrospective assessments as they wish, and free from the disciplines of Article 2, including Article 2.4.2. Furthermore, the European Communities argues that subsequent practice of the Members with respect to the implementation of Article 2.4.2 is supportive of its case. In this regard, the European Communities notes that its review of the notifications of the anti-dumping legislation of 105 Members indicates that no Members take the view being advocated by the United States in the present dispute. The European Communities cites this in support of its case as "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*; and also as evidence of the intention of the Members, within the meaning of Article 31(4) of the *Vienna Convention*.

4.61 The European Communities does not consider that its interpretation of the word "investigation" in Article 2.4.2 renders the words "during the investigation phase" in Article 2.4.2 meaningless. In this regard, the European Communities suggests four different alternative, but not necessarily mutually exclusive, possible meanings of these terms: during the investigation period;

during the period in which the particular type of investigation must be concluded; not during the pre-investigation phase; or that the words are merely descriptive, in the sense that the United States considers the words "to determine the existence, degree and effect of any alleged dumping" in Article 5.1 to be merely descriptive.

4.62 With regard to the first meaning, if, referring to a dictionary, "phase" indicates a distinct period in a process of change or development, and "during" indicates a temporal connotation, then an investigation phase is something that spans a period of time, such as the "investigation period". The word "phase" and the word "period" have very similar meanings, especially when the word "phase" is associated with the word "during", giving it a temporal connotation. The two words may be considered synonymous in the context of Article 2 of the *AD Agreement*, referring to a "stage" in the passage of time.

4.63 The most natural reading of Article 2.4.2, and the reading that is grammatically correct, is that the words "during the investigation phase" are associated with the word "existence" rather than with the word "established". In other words, the provision does not refer to something that has to happen (the "establishment" of the margins of dumping) during the period of time in which an investigating authority must normally make its determination (generally 12 to 18 months). Rather, it refers to something that has to be established (whether or not there is dumping, and if so, what the margin of dumping is) by reference to a certain period of time: the investigation period. If the drafters had intended to associate the phrase "during the investigation phase" with the word "established", the provision could have been drafted differently. For example, it could have read "… the existence of margins of dumping shall normally be established during the investigation phase …".

4.64 Contextual support for such an approach may be found in various other provisions of Article 2 of the *AD Agreement*. Article 2 provides valuable and persuasive context, because Article 2.4.2 is part of Article 2, and because Article 2 implements the definitions of dumping and margin of dumping set out in Article VI of the GATT 1994. Article 2.2.1 imposes obligations on investigating authorities concerning the circumstances in which sales of the like product in the domestic market "may be disregarded" as below cost. As such, it is of double interest as context, given that the practice of zeroing with which these proceedings are concerned also involves the investigating authority disregarding or adjusting, at least in part, certain export sales or other data. The object and purpose of this rule is clear. By requiring an investigating authority to consistently use data arising during the investigation period, the *AD Agreement* is imposing basic obligations of consistency, objectivity and fairness. Precisely the same is true of Article 2.4.2 of the *AD Agreement*. If the data used to establish normal value arose during the investigation period, but, in the final step of comparison, the existence of margins of dumping were permitted to be established by reference to another period, there would clearly be a rupture in the basic structure and continuity of the method for establishing whether or not there is dumping, and if so what the margin of dumping is, in conformity with the definitions set out in Article VI of the GATT 1994, as implemented in Article 2 of the *AD Agreement*. It is thus entirely consistent with the object and purpose of Article 2.4.2 of the *AD Agreement* that it should continue to require at the comparison stage, just as at the normal value stage, that the margins of dumping must be established by reference to data arising *during the investigation period (or phase)*. Precisely the same observations may be made with respect to the references to the investigation period in Article 2.2.1.1, final sentence; footnote 6, second phrase; and Article 2.4.1, final phrase of the *AD Agreement*.

4.65 Other references in Article 2 to the investigation period are references to the methodology for establishing *normal value*. The provision that primarily relates to *export price* – Article 2.3 of the *AD Agreement* – contains no reference to data arising during the investigation period. Thus, aside from Article 2.4.2 of the *AD Agreement*, there is no other express textual provision that would oblige an investigating authority to use export price data arising during the investigation period (or phase). The phrase "at as nearly as possible the same time" in Article 2.4 is qualified, and in any event does

not relate to the exclusion of transactions *outside* the chosen period. Thus, absent the words "during the investigation phase" in Article 2.4.2, an investigating authority might, for one reason or another, seek to draw on export price data arising outside the investigation period. Viewed in this light, the phrase during the investigation phase (or period) in Article 2.4.2 of the *AD Agreement* has an important – even vital – role to play.

4.66 Further contextual support for this view may be found in the reference to "the period of investigation" in Article 9.5 of the *AD Agreement*. What happens in a new shipper review is that an unrelated exporter that did not export during the original investigation period can, on request, obtain "a determination of dumping". In the opinion of the European Communities, that "determination of dumping" must be consistent with all of the disciplines set out in Article 2 of the *AD Agreement* – including Article 2.4.2. What makes an unrelated "new shipper" new is precisely the fact that, during the original investigation period (or phase) it did not export. That is why, in the original investigation, no specific margin of dumping *could* have been calculated in relation to such new shipper. Viewed in this light, it is clear that the phrase "during the period of investigation" in Article 9.5 refers back to the phrase "during the investigation phase" in Article 2.4.2, and confirms that the word "phase" in Article 2.4.2 is in fact synonymous with the word "period".

4.67 The European Communities does not consider it remarkable that, in some instances, different language is used to refer to concepts that are the same, such as a stage in the passage of time (that is, in this case, "period" and "phase"). Where the drafters sought a particularly high level of consistency, they defined the relevant terms (there are eight such definitions in the GATT 1994 and the *AD Agreement*). There are many other examples in the *AD Agreement* of different words or phrases being used to refer to the same thing. All of these terms fall to be interpreted according to the *Vienna Convention*, being given their ordinary meaning and having regard to context and object and purpose. There is nothing in the Vienna Convention that excludes the possibility that such different terms in fact have the same meaning. In such circumstances, the mere fact that the terms are different is of no further legal consequence.

4.68 The European Communities observes that, if the drafters had intended to take a step of such great importance as jettisoning, in retrospective assessments, the basic principles governing the determination of dumping margins, as defined in Article VI of the GATT 1994 and elaborated in Article 2 and particularly Article 2.4.2, thus rendering the results of original investigations worthless, they would not have chosen to: a) rely on an over subtle distinction between the words "during … period" and the words "during … phase", neither the word "period" nor "phase" being defined, and those phrases bearing the same ordinary meaning, if reference is made to a dictionary; b) in circumstances where the use of one word or the other logically had no incidence whatsoever on the meaning of the word "investigation" in Article 2.4.2 – investigation itself not being a defined term: c) by associating the phrase with the word "existence" as opposed to "established", in a manner that is grammatically incorrect given their alleged objective; and d) whilst at the same time including the directly contradictory cross-reference in Article 9.3 to the whole of Article 2. Rather, given the importance of the step the drafters were allegedly taking, they would rather have simply expressly stated that the rules in Article 2.4.2 could be disregarded in retrospective assessments. Just as they did in Article 2.2.1 with regard to sales not in the ordinary course of trade. Just as they did in Article 9.4 with regard to zero, *de minimis* and facts available margins. Just as they did in Article 2.7 with regard to non-market economies. That, at least, is what the third parties in this case seem to think.

4.69 A second possible meaning of the words "during the investigation phase" in Article 2.4.2 is that the investigating authority must make the determination within the 12 to 18 month period during which investigations must generally be concluded.

4.70 In the context of an original investigation, Article 5.10 of the *AD Agreement* contains the procedural rule that: "Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation." Article 2.4.2 takes this procedural rule one step further, and makes it a substantive rule, clearly of application to investigations of all types. It provides that the "margins of dumping" must be established during the 12 to 18 month original investigation phase. Thus, if a margin of dumping resulting from an original investigation were determined 2 years after the initiation of the original investigation, the Member responsible would act inconsistently with the *AD Agreement*. The same would be true if a Member purported to alter the margin of dumping determined during the original investigation, after the end of the 18 month period, without conducting a new investigation. It should not be forgotten that, with a new investigation, there comes, in principle, a new investigation period (or review period) – that is, fresh data (see further below) – and a new obligation to make any necessary margin of dumping determinations required by Article 2 within the new investigation phase.

4.71 The reasons for this rule are self-evident. First, it would be Kafkaesque if a producer or exporter were to find itself forever "under investigation" without ever being subject to a measure (or having the investigation terminated). That would be inconsistent with the basic requirements of certainty and predictability in international trade, which the Appellate Body has so clearly stated lie at the heart of the WTO Agreements. Second, although the *AD Agreement* contains no rule concerning the establishment of periods of investigation, it is well established that an investigating authority is not entirely unfettered in this matter. In principle, the period of investigation must end as close as reasonably possible to the date on which the investigation is initiated. There are very good reasons for this. Anti-dumping measures can only reasonably be imposed on the basis of sufficiently fresh data. Absent some special justification, it would not be reasonable or acceptable under the *AD Agreement* for an investigating authority to impose anti-dumping measures today, based on data from 10 years ago. Requiring the dumping margin determination to be made within the investigation phase is an essential part of this "fresh data" rule: there would be no point in requiring the investigation to be initiated shortly after the end of the investigation period, if the dumping margin determination could be delayed until several years later. Third, given the importance of this rule, it is entirely appropriate that it should be expressed not only in the essentially procedural terms of Article 5.10 of the *AD Agreement*, which relates to original investigations, but that it should also be recalled, or expressed in more substantive terms, in the context of Article 2.4.2 of the *AD Agreement*, and in relation to all types of investigation. This makes it clear that failure to respect the rule would result not merely in a procedural inconsistency with the *AD Agreement*, but would vitiate the very core of the determination – the establishment of the margin of dumping. And it makes it clear that the rule applies in all types of investigation.

4.72 In the context of changed circumstances reviews, Article 11.4 of the *AD Agreement* provides that the review should be carried out expeditiously and normally concluded within 12 months of the date of initiation. The reasoning is analogous. If the review involves reliance on or determination of a new "margin of dumping", that determination must comply with the requirements of Article 2 of the *AD Agreement*, and must be made during the 12 month review investigation phase. The same reasoning applies, *mutatis mutandis*, to sunset reviews under Article 11.3. Similarly, Article 9.5 of the *AD Agreement* provides that new shipper reviews must be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings. In the same vein, both Articles 9.3.1 and 9.3.2 of the *AD Agreement* expressly provide for an investigation phase of normally 12 months and in no case less than 18 months. Thus, this is the period or phase during which the investigating authority must make any "margin of dumping" calculations required by Article 2 of the *AD Agreement*. That is what the words "during the investigation phase" in Article 2.4.2 of the *AD Agreement* mean.

4.73 A third meaning is that Article 2.4.2 does not apply in the pre-investigation phase. The first step in anti-dumping proceedings is not the initiation of an original investigation. The first step is

normally the written application by the domestic industry, pursuant to Article 5.1 of the *AD Agreement*. There are several provisions of the *AD Agreement* regulating the period prior to the initiation of an original investigation. These provisions impose obligations on Members. For example, Article 5.2 sets out the minimum content of an application. If an application does not meet these requirements, a Member cannot initiate an original investigation without acting inconsistently with the *AD Agreement*. According to Article 5.3 of the *AD Agreement*, the authorities must examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation. Article 5.4 of the *AD Agreement* requires the authorities to determine that the application is supported by a sufficient proportion of the domestic industry – otherwise "An investigation shall not be initiated …". Article 5.5 of the *AD Agreement* prohibits the authorities from publicising the application prior to initiation of an investigation, and requires pre-notification to the government of the exporting Member. Article 5.7 of the *AD Agreement* contains rules regarding the consideration of dumping and injury, both in the pre-investigation phase, and "thereafter". Article 5.8 of the *AD Agreement* sets out circumstances in which an application must be rejected, and *de minimis* rules.

4.74 There is therefore, incontestably, a period of time before a decision is taken on whether or not to initiate an original investigation during which: (1) facts material to a possible final determination arise or are placed on the record; (2) procedural steps are taken both by "interested parties" (the domestic industry) and by the authorities; and (3) *AD Agreement* rules apply and impose obligations on Members. This period of time may be termed the pre-investigation phase.

4.75 Thus, the rule in Article 2.4.2 of the *AD Agreement* would not apply, for example, during the pre-investigation phase. That is common sense and consistent with the other provisions of the *AD Agreement*. Article 5.2 of the *AD Agreement* requires the applicant to provide "such information as is reasonably available to the applicant". Article 5.2 (iii) of the *AD Agreement* refers to "information on prices" in the domestic market and "information on export prices". That might, for example, include published price lists. In the opinion of the European Communities, the threshold established by Article 5.2(iii) can be met by information that falls short, very far short, of the information necessary to make a full anti-dumping determination. In fact, this will normally be the case. That is because the very detailed and *complete* information concerning like product, model types, costs of production, domestic export transactions and export transactions, and all information necessary to make a fair comparison pursuant to Article 2.4 of the *AD Agreement*, will simply not be available, or reasonably available, to the applicant. Complaints are not required to contain precise and accurate dumping margin calculations. So the *AD Agreement* provides that the rules of Article 2.4.2 apply in the investigation phase, and thus not in the pre-investigation phase.

4.76 In the opinion of the European Communities, Article 5.2(iii) of the *AD Agreement*, viewed in isolation, would not achieve this result. It simply requires information about prices in the domestic and export markets. That is not in itself enough. Article 5.2 requires that the application must contain sufficient evidence of "dumping" and Article 5.3 requires an authority to determine whether or not there is sufficient evidence to justify initiation. Quite apart from Article 5.2(iii), the authority will therefore have to make some kind of rudimentary comparison. And that is the point at which the rule in Article 2.4.2, on the basis of this interpretation, would have value added, because it would release the authority from the unreasonable burden of applying the rules set out in Article 2.4.2, which essentially pre-suppose that the questionnaire responses, with all the detailed data on domestic and export prices, have already been filed.

4.77 Furthermore, the European Communities emphasizes that its view is consistent with the position that there is a clear distinction between each type of investigation conducted under the *AD Agreement*. Original investigations, new shipper reviews, changed circumstances reviews, sunset reviews and duty assessment proceedings each have a different purpose and are subject to a different set of provisions under the *AD Agreement* – although they are all subject to Article VI of the GATT

1994 and must be conducted in a manner consistent with the object and purpose of anti-dumping measures. On the other hand, some provisions of the *AD Agreement* apply to more than one or all such investigations, and Article 2.4.2 is one such provision.

(iii) Article 2.4.2 prohibits simple zeroing

4.78 The European Communities argues that the reasoning of the Appellate Body in the *EC – Bed Linen*[51] and *US – Softwood Lumber V*[52] cases in relation to model zeroing applies equally whenever an investigating authority decides to fix the parameters of its investigation, whether in relation to a subject product, time period, level of trade, region, or any other parameter. Once such parameters are defined, an investigating authority becomes bound by its own logic, and must complete its analysis on the basis of the same logic.

4.79 The European Communities finds contextual support for this position in the second sentence of Article 2.4.2 of the *AD Agreement*, which refers expressly to certain parameters of relevance to a determination of the existence of dumping, including "time periods". In the light of the periodic reviews at issue, the European Communities argues that these words imply that, having fixed the temporal parameters of the relevant proceeding, the United States had become bound by its own logic, unless the exceptional situation described in the second sentence of Article 2.4.2 of the *AD Agreement* were present (which was not the case).

4.80 More generally, the same is true with respect to any other parameters of an investigation that are fixed by an investigating authority, notably the purchasers and regions concerned, these also being matters referred to in the second sentence of Article 2.4.2. According to the European Communities, the simple zeroing method used by the United States is, at least potentially, offensive to any one of these parameters, because it is performed at the most disaggregated level, that is, at the level of individual transactions. In other words, instead of treating all the relevant export transactions as a whole, the United States methodology results in treating each export transaction individually in the same manner as model zeroing results in treating each model separately. Thus, the European Communities challenges the United States practice, in each of the periodic reviews at issue, of considering each export transaction in isolation.

4.81 In addition, the European Communities argues that Articles 2.4, 2.4.2 and 9.3 require that the total amount of duty collected with respect to exports made by one specific exporter during the assessment period must not exceed the relevant margin of dumping of the same exporter. The only relevant margin of dumping permitted to be calculated under the *AD Agreement*, whether in an original investigation or a periodic review, is that pertaining to the exporter, not one or more entries made by individual importers.

4.82 As explained above in the section concerning Article 2.4, the European Communities rejects the contention of the United States that importer-specific *final* assessment on a transaction-by-transaction basis involving zeroing is contemplated under the *AD Agreement* by virtue of Article 9.4(ii). The arguments presented by the European Communities on this issue are detailed in paragraphs 4.21 to 4.26 above.

(iv) Conditions for the Application of the Asymmetrical Comparison Methodology

4.83 The European Communities considers that the main purpose of Article 2.4.2 of the *AD Agreement* is to provide for an exception (asymmetrical comparison in the case of targeted dumping) to the normal methods of comparison (symmetrical comparison) in order to ensure a fair

[51] Appellate Body Report, *EC – Bed Linen.*
[52] Appellate Body Report, *US – Softwood Lumber V.*

comparison within the meaning of Article 2.4. An asymmetrical comparison can only be used if the circumstances defined in the second sentence of Article 2.4.2 of the *AD Agreement* are met. Thus, it transformed a comparison method (weighted-average-to-transaction) commonly used before the Uruguay Round *AD Agreement* was adopted into an exception subject to strict conditions.

4.84 In the periodic reviews at issue in the present dispute, in order to establish the existence of a margin of dumping for the subject product during the period of review, the United States did not use either of the normal methods of comparison provided for in the first sentence of Article 2.4.2 of the *AD Agreement* (weighted-average-to-weighted-average or transaction-to-transaction). Rather, the United States compared a normal value established on a weighted-average basis to prices of individual export transactions. That corresponds to the asymmetrical method described in the second sentence of Article 2.4.2.

4.85 Further to the second sentence of Article 2.4.2, the asymmetrical method may only be used 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. Thus, in order for the United States to use the asymmetrical method, the conditions laid out in Article 2.4.2 of the *AD Agreement* should have been met. Furthermore, to the extent that the asymmetrical method was not available, the United States was under an obligation to use one of the normally applicable methods provided for in the first sentence of Article 2.4.2 of the *AD Agreement*. Thus, in this case, on this point, the United States acted inconsistently with the *AD Agreement* because it used the asymmetrical method when none of the conditions were fulfilled; and failed to use a symmetrical method when that was the only lawful option.

4.86 As explained above in the section concerning Article 2.4, the European Communities rejects the contention of the United States that importer-specific *final* assessment on a transaction by transaction basis involving zeroing is contemplated under the *AD Agreement* by virtue of Article 9.4(ii). The arguments presented by the European Communities on this issue are detailed in paragraphs 4.21 to 4.26 above.

(b) The United States[53]

(i) Article 2.4.2 does not prohibit model zeroing

4.87 The United States submits that in *US – Softwood Lumber V*, the Appellate Body erred in finding that the *AD Agreement* requires Members, in the investigation phase, to give credit for weighted average comparisons when the export price exceeds the normal value.

4.88 With respect to the investigation phase, the "as applied" and "as such" claims of the European Communities are based on its assertion that the *AD Agreement* requires an offset for non-dumped sales. However, according to the United States, neither the text of the *AD Agreement* nor its negotiating history recognizes the concept of "negative dumping margins," and the *AD Agreement* does not contain any obligations with respect to them. An offset requirement – if one existed – would apply to the *results* of comparisons, and would not pertain to the comparisons themselves. Article 2.4.2 limits the use of average-to-transaction comparisons in the investigation phase, a common practice before the Uruguay Round. Neither the text of the *AD Agreement* nor its

[53] US-First Written Submission, paras. 29-58; US-Second Written Submission, paras. 5-17 and 79-96; US-Opening Statement at the First Substantive Meeting of the Panel, paras. 10-19, 22-24; US-Closing Statement at the First Substantive Meeting of the Panel, para. 112; US-Opening Statement at the Second Substantive Meeting of the Panel, paras. 4-7; US-Closing Statement at the Second Substantive Meeting of the Panel, para. 18; US-Responses to Panel Questions 5, 8-9, 10-11, 13-14, 16-17 and 19.

negotiating history suggest that the drafters agreed to require a credit for sales made at above normal value. Because such a requirement is antithetical to the historic manner in which antidumping investigations have been conducted by many Members, both before and after the completion of the Uruguay Round, and there is no indication in the text of an agreement to change this historic approach, such an obligation should not be created through the dispute settlement process on the basis of tenuous inferences.

4.89 The United States contests the assertion of the European Communities that it "excludes" non-dumped transactions from its calculation of an overall margin of dumping in the investigation phase and that such exclusions are "unfair." When applying the average-to-average method, the United States calculates multiple weighted average normal values, and compares each to a distinct set of weighted average export prices. Each average-to-average pairing is distinguished by a common set of variables establishing their comparability (*e.g.*, model, level of trade). Taken together, these groups of export transactions contain "all comparable export transactions." No export transaction is excluded.

4.90 For each comparison group, the United States compares the weighted average of all the normal values to the weighted average of all the export prices. However, the United States does not determine whether dumping "exists" so as to warrant the imposition of an anti-dumping measure. It simply calculates an amount of dumping for each comparison group. Consistent with the language in Article VI, paragraphs 1 and 2, of GATT 1994, when the weighted average export price for a group of transactions is less than its weighted average normal value, this difference is an amount of dumping. The summation of these dumping amounts occurs subsequently, in order to determine whether the dumping margin for the product is above or below the *de minimis* standard. In this exercise, all export transactions are considered, because they are included in the figure by which the aggregate of the dumping amounts is divided. The result of this calculation is the percentage dumping margin against which the *de minimis* standard is applied.

4.91 The Appellate Body's ultimate finding in *US – Softwood Lumber V* turned on a subsidiary finding that the United States practice of calculating intermediate "margins of dumping", while setting the results of those intermediate comparisons that resulted in "negative margins" to zero, was contrary to the requirements of Article 2.4.2. However, it is inaccurate to state that USDOC's intermediate stage calculations constitute a determination of whether dumping margins "exist" within the meaning of the *AD Agreement*. The calculation of an overall percentage dumping margin (i.e. expressing the overall amount of dumping found during the investigation phase as a percentage of overall export sales), and using this percentage to determine whether dumping "exists" such that the imposition of an antidumping measure is justified, is only done in a separate step in order to satisfy the requirements of Article 5.8 of the *AD Agreement*.

4.92 The Appellate Body's understanding of the facts may have resulted from the use of terminology in United States law that has been interpreted as having a different meaning in the context of the *AD Agreement*. The Appellate Body effectively interpreted the term "margin of dumping" for *AD Agreement* purposes as applying only to the percentage margin for the product as a whole, against which the *de minimis* standard is measured. In the context of this dispute, the "margin of dumping" for *AD Agreement* purposes is equivalent to the "weighted average dumping margin" defined in Section 771(35)(B) of the Act. United States law separately defines "dumping margin" in Section 771(35)(A) as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Nevertheless, the reference in United States law to the intermediate dumping amounts as "dumping margins" does not alter the fact that those intermediate dumping amounts were treated in a manner consistent with the *AD Agreement* and Article VI:1 and 2 of GATT 1994.

4.93 The United States disagrees with the position of the European Communities on the meaning of the word "margin" in Article 2.4.2. In the *AD Agreement*, the word "margin" is modified by the word "dumping," giving it a special meaning. Paragraph 2 of Article VI of GATT 1994 provides that "[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1." When read with the provisions of paragraph 1, the "margin of dumping" is the price difference when a product has been "introduced into the commerce of an importing country at less than its normal value"; i.e., the price difference when the product has been dumped.

4.94 The provisions of the *AD Agreement* must be read in conjunction with Article VI of GATT 1994. While the *AD Agreement* does not provide a definition of "margin of dumping," Article 2.1 does define "dumping" in a manner consistent with the definition provided in Article VI. The express terms of Article VI provide that the *margin of dumping* is the amount by which normal value "exceeds" export price, or alternatively the amount by which export price "falls short" of normal value. Consequently, there is no textual support in Article VI of the GATT or the *AD Agreement* for the concept of "negative dumping."

4.95 Similarly, there is nothing in the text to suggest that the prevailing meaning of the term "dumping" is suspended for purposes of Article 2.4.2. Article 2.4.2 sets forth three comparison methods for establishing "the existence of margins of dumping" in an investigation. There is no reference in Article 2.4.2 to "negative margins," "negative dumping," or any other modification to the term "margin of dumping." Article 2.4.2 establishes an obligation for the administering authority to determine whether dumping "exists" based on certain methodological constraints. Nothing in Article 2.4.2 requires the expression of the margin of dumping as a percentage. Article 5.8 is the only place in the *AD Agreement* where the amount of dumping must be expressed as a percentage margin so that it may be measured against the *de minimis* standard.

4.96 In the absence of any obligation in Article 2.4.2 to calculate an overall margin of dumping, let alone any obligations detailing the manner in which such a calculation must be performed, Article 2.4.2 cannot serve as the basis for finding a requirement to offset negative dumping.

4.97 According to the United States, the negotiating history confirms that Article 2.4.2 does not require an offset for negative dumping. Prior to the entry into force of the WTO Agreement, many users of the antidumping remedy, including the United States and the European Communities, determined the existence of dumping margins by using the average-to-transaction comparison method. Several delegations sought to negotiate a change in this practice in the Uruguay Round negotiations. The negotiations over this "asymmetry" issue were protracted and difficult. Article 2.4.2 of the *AD Agreement* was ultimately agreed upon specifically to address this "asymmetry" issue.

4.98 Separately, a number of signatories to the Tokyo Round Anti-Dumping Code, including the United States and the European Communities, utilized a methodology whereby they calculated the final overall margin of dumping for a company by aggregating the positive dumping amounts for comparisons where normal value exceeded export price and dividing that number by the aggregate of all export prices. So-called "negative margins" were not taken into account in aggregating the overall amount of dumping. This practice was well-known by the Uruguay Round negotiators and was referred to as "zeroing." Concurrent with the negotiations, the practice of zeroing was reviewed by two dispute settlement panels and was found to be consistent with the Anti-dumping Code. In the Uruguay Round negotiations, several delegations sought to prohibit zeroing and to require an offset for "negative dumping." No provision to require such offsetting was agreed to by the negotiators. While agreement was reached to address the "asymmetry" issue through, and to the extent provided for in, the language of Article 2.4.2 of the *AD Agreement*, the Agreement ultimately did not address the zeroing issue.

(ii) Scope of Article 2.4.2 is Limited to Original Investigations

4.99 The United States argues that the express terms of Article 2.4.2 limit its application to the original investigation phase of an antidumping proceeding. Moreover, nothing in the text of Article 9 contradicts or invalidates the express limitation found in Article 2.4.2. On this basis, the claims of the European Communities with respect to Article 2.4.2 and phases of an anti-dumping proceeding other than the original investigation, must fail.

4.100 The express terms of Article 2.4.2 limit its application to the "investigation phase" of a proceeding. The United States asserts that to require the application of Article 2.4.2 to Article 9 assessment proceedings would read out of the *AD Agreement* Article 2.4.2's express limitation to investigations, and would be inconsistent with the principle of effectiveness.

4.101 Other provisions of the *AD Agreement* also expressly limit their application to the investigation phase of an antidumping proceeding, and do not apply elsewhere. For instance, panels have consistently found that the references to "investigation" in Article 5 only refer to the original investigation and not to subsequent phases of an antidumping proceeding.

4.102 According to the United States, the limited applicability of Article 2.4.2 could not be plainer. The text leaves no doubt that the Members did not intend to extend these obligations to any phase beyond the investigation phase. As the panel in *Argentina – Poultry Anti-Dumping Duties* found: "Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping "during the investigation phase."[54]

4.103 The limited application of Article 2.4.2 to the investigation phase is consistent with the divergent functions of investigations and other proceedings under the *AD Agreement*. The United States asserts that in arguing that Article 2.4.2 applies to phases of an anti-dumping proceeding beyond original investigations, the European Communities has argued that the *AD Agreement* does not distinguish between the rules governing investigations, assessment proceedings, and the various proceedings that constitute Article 11 reviews. However, according to the United States, investigations and assessment proceedings constitute distinct phases of an anti-dumping proceeding and have different purposes.

4.104 Article 18.3 of the *AD Agreement* explicitly recognizes the difference between investigations, which may lead to the imposition of a measure, and "reviews" of existing measures. The consistency with which the Appellate Body and panels have recognized the distinctions between investigations and other segments of an antidumping proceeding is consistent with the distinct purpose of the investigation phase, which is to establish as a threshold matter whether the imposition of an antidumping measure is warranted. Other phases (such as Article 9 assessment proceedings or Article 11 sunset reviews) have different purposes. Whereas the purpose of an investigation is to determine whether a remedy against dumping should be provided, the purpose of an assessment proceeding is to determine the precise amount of that remedy. As mentioned above, the Appellate Body has already recognized that investigations and other proceedings serve different purposes and have different functions, and therefore are subject to different obligations under the Agreement. The *AD Agreement* does not require Members to examine whether margins of dumping "exist" in the assessment phase. Article 9 assessment proceedings are not concerned with the existential question of whether injurious dumping "exists" above a *de minimis* level such that the imposition of antidumping measures is warranted. Instead, Article 9 focuses on the amount of duty to be assessed on particular entries, an exercise that is separate and apart from the calculation of an overall dumping margin during the threshold investigation phase.

[54] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.357.

4.105 The express limitation in Article 2.4.2 to the investigation phase is also consistent with the fact that the antidumping systems of Members are different for purposes of the assessment phase. The different methods used by Members pursuant to Article 9 include the use of prospective normal values, retrospective normal values, and prospective *ad valorem* assessment. If the requirements of Article 2.4.2 regarding comparison methods applied to the assessment of antidumping duties, this divergence of assessment systems would not be possible. For example, it is not possible to reconcile the prospective normal value system used by some Members with a requirement to use either the average-to-average or transaction-to-transaction method, because such systems compare weighted average normal values to individual export prices to assess dumping duties on individual transactions. Furthermore, anti-dumping duties, like other duties, are levied on individual imports, consistent with the circumstances associated with each particular import transaction. Individual importers pay such duties. To the extent that an authority may use weighted average to weighted average comparisons in an investigation to determine whether margins of dumping exist sufficient to justify the imposition of an antidumping measure, once that measure is imposed, it is the importers that will incur liability for duties. Consequently, it is appropriate to determine that liability on an importer- and transaction-specific basis. Thus, to retain the flexibility in assessment systems reflected in Article 9, it was not only appropriate, but necessary, to limit the requirements of Article 2.4.2 to the investigation phase.

4.106 The United States contends that Article 9 does not incorporate the requirements of Article 2.4.2. The general reference to Article 2 in Article 9.3 necessarily includes any limitations found in the text of Article 2. As discussed above, Article 2.4.2 by its own terms is explicitly limited to the investigation phase. The reference in Article 9.3 to Article 2 means that the amount of antidumping duty assessed may not exceed the amount of antidumping duty calculated in accordance with the general requirements of Article 2, such as making the various adjustments set forth in Article 2.4 necessary to provide a fair comparison. Furthermore, Article 9 contains certain procedural obligations applicable in assessment reviews. However, Article 9 does not prescribe methodologies for assessment proceedings such as those established in Article 2.4.2 for the investigation phase. Instead, Article 9 establishes time limits for conducting assessment proceedings, ensuring that respondent companies may obtain timely refund of any excess antidumping duties collected by a Member. The United States finds support for its interpretation of Article 9 in the panel's findings in *Argentina – Poultry Anti-Dumping Duties*.[55]

4.107 The United States argues that the phrase "the existence of margins of dumping during the investigation phase", when considered in its entirety, makes it clear that the obligations in Article 2.4.2 do not extend beyond an investigation within the meaning of Article 5. The use of the terms "investigation," "existence," and "initiated" creates a linkage that ties Articles 1, 2.4.2 and 5 together in such a way that confirms that the drafters were referring to Article 5 investigations when they provided that the Article 2.4.2 comparison methodologies are to be used to establish "the existence of margins of dumping during the investigation phase."

4.108 Thus, Article 1 defines the "initiation" of the investigation phase that leads to an anti-dumping measure as "the procedural action by which a Member formally commences an investigation as provided in Article 5." Article 5.1, in turn, provides that investigations are initiated upon a written application, or pursuant to other specified conditions, to determine the "existence, degree and effect" of alleged dumping. Consequently, there is no ambiguity as to the nature of the "investigations initiated and conducted" pursuant to Article 1. Because there is only one type of investigation provided for in Article 5, and footnote 1 to Article 1 explicitly links Article 1 to "an investigation as provided in Article 5," Article 1 can only be referring to Article 5 investigations.

4.109 To complete the linkage between Articles 1, 2.4.2, and 5, the term "existence" as it is used in Article 5.1 of the *AD Agreement* must be considered. The word existence is used in connection with

[55] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.357.

the term dumping in only one other place in the *AD Agreement* besides Article 5.1: Article 2.4.2. The ordinary meaning of the word "existence" according to The New Shorter Oxford English Dictionary is "the fact or state of existing; actual possession of being; a mode or kind of existing; dealing with the existence of a mathematical or philosophical entity." The word "existence" before the phrase "of margins of dumping" indicates that Members are to determine the "existence of [the] mathematical or philosophical entity" referred to as "margins of dumping." This "existence" is a necessary part of an Article 5 investigation which may lead to applying an antidumping measure consistent with Article 1.

4.110 The drafters' intent to limit Article 2.4.2 exclusively to Article 5 investigations is further demonstrated by the use of the definite article "the" before the term "investigation phase", rather than the indefinite article "an". According to The New Shorter Oxford English Dictionary, the ordinary meaning of the article "the" is "designating one or more persons or things already mentioned or known, particularized by context, or circumstances, inherently unique, familiar or otherwise sufficiently identified." If, as the European Communities contends, the term "investigation" in the context of Article 2.4.2 may be interpreted in generic terms, rather than as a term of art referring to the Article 5 phase, then the use of the indefinite article "an" would have been much more appropriate. However, according to the United States, that is not what the *AD Agreement* states.

(iii) Conditions for the Application of the Asymmetrical Comparison Methodology

4.111 According to the United States, not only are the Article 2.4.2 restrictions on the investigation phase irrelevant in assessment proceedings, but Article 9 expressly provides for comparisons between weighted average normal values and individual export transactions in assessment proceedings. Article 9.4(ii) explicitly provides for the calculation of antidumping duties, in the assessment phase, on the basis of a comparison of weighted average normal values and individual export prices. This provision plainly indicates that there is nothing exceptional about assessing antidumping duties on the basis of comparisons of weighted average normal values with individual export prices.

4.112 A panel recently found the calculation of transaction-specific antidumping duties in assessment reviews to be entirely consistent with the *AD Agreement*. In *Argentina – Poultry Anti-Dumping Duties*, the panel found the Argentine prospective normal value assessment system to be fully consistent with the *AD Agreement*.

4.113 Thus, the United States contends that the claim of the European Communities that, with respect to the assessment proceedings at issue in this dispute, USDOC erred in not applying either the average-to-average or transaction-to-transaction methods must fail. There is no textual basis in the *AD Agreement* for the assertion that Article 9.3 requires the application of Article 2.4.2 in assessment proceedings. On the contrary, as the panel in *Argentina – Poultry* correctly found, the reference in Article 9.3 to Article 2 does not overcome the limiting language in Article 2.4.2 which, by its own terms, limits its obligations to "the investigation phase."

3. Consequential Claims with respect to Articles 3.1, 3.2 and 3.5 of the *AD Agreement*

(a) The European Communities[56]

4.114 The European Communities considers that, as a consequence of the unlawful zeroing methods applied by USDOC in the original investigations identified in Exhibits EC-1 to EC-15, the United States acted in a manner inconsistent with obligations imposed on it by Articles 3.1, 3.2 and 3.5 of the *AD Agreement*. The European Communities argues, *inter alia*, that because investigating authorities used the unlawful zeroing method in the original investigations at issue, the volume of imports determined to be dumped in each case was inflated. Accordingly, it is the

[56] EC-First Written Submission, paras 90-93; EC-Rebuttal Submission, para. 64.

European Communities' position that the United States therefore acted inconsistently with Article 3.1 of the *AD Agreement* because it did not base its injury determination on an objective examination of the volume of dumped imports.

4.115 The United States also acted inconsistently with Article 3.2 of the *AD Agreement*, because it failed to properly consider whether or not there had been a significant increase in dumped imports; and because when considering whether or not there was significant price undercutting or price depression it based its assessment also on non-dumped imports, when it was only entitled to take into account dumped imports.

4.116 The United States similarly acted inconsistently with Articles 3.1, 3.2 and 3.5 of the *AD Agreement*, because it examined the impact of non-dumped imports on domestic producers, when it was only entitled to examine the impact of dumped imports; and because it established a causal relationship between injury and non-dumped imports, when it was only entitled to do so in relation to dumped imports. The United States thus unlawfully attributed injury to a factor other than dumped imports, in particular a volume of imports not sold at dumping prices.

4.117 The European Communities does not claim any consequential inconsistency with Article 3 where the correction for unlawful zeroing does not take the margin of dumping below 2 per cent for individual exporters. However, it notes that it necessarily follows, from the fact that it has demonstrated that a determination is inconsistent with the *AD Agreement*, that all subsequent determinations that depend on that earlier determination are similarly vitiated or unsound, necessarily requiring re-consideration, and thus necessarily being inconsistent with the relevant provision(s) of the *AD Agreement*.

(b) The United States[57]

4.118 The United States asserts that the Panel should dismiss the claims of the European Communities concerning injury because even if the methodology used by USDOC in the cited investigations were inconsistent with the *AD Agreement*, the assertion that the margins calculated pursuant to that methodology caused the USITC to act in a manner inconsistent with Articles 3.1, 3.2 and 3.5 is speculative and unfounded.

4.119 The European Communities cannot establish that USDOC necessarily would have calculated zero or *de minimis* dumping margins in the cited cases, or that the USITC treated certain non-dumped imports as dumped. In the absence of such showings, the United States contends that the European Communities has failed to meet its burden to demonstrate that any of the cited determinations by the USITC is inconsistent with Articles 3.1, 3.2, and 3.5.

4.120 The United States notes that the European Communities, in response to the Panel's Question 32, does not deny that its claims as to such measures are merely speculative, given that the European Communities cannot presume the results of an alternative margin calculation methodology permitted by the *AD Agreement*. According to the United States, the European Communities instead adopts the new position that the use of so-called zeroing somehow renders the injury determinations necessarily "unsound".[58] The European Communities does not explain, however, how the use of zeroing necessarily caused the volume of dumped imports to be inflated, or how zeroing otherwise gives rise to an Article 3 claim.

[57] US-First Written Submission, paras. 108-110; US-Second Written Submission, footnote 70.
[58] EC-Response to Panel Question 32.

4. Consequential Claim with respect to Article 5.8 of the *AD Agreement*

(a) The European Communities[59]

4.121 The European Communities considers that, as a consequence of the unlawful zeroing methods applied by USDOC in the original investigations identified in Exhibits EC-1 to EC-15, the United States acted in a manner inconsistent with Article 5.8 of the *AD Agreement*. The European Communities argues that there is a breach of Article 5.8 where the correction for unlawful zeroing would take the margin of dumping below 2 per cent for the exporting country.[60] The European Communities does not claim any consequential inconsistency with Article 5.8 where the correction for unlawful zeroing does not take the margin of dumping below 2 per cent for the exporting country.

5. Consequential Claims with respect to Articles 11.1 and 11.2 of the *AD Agreement*

(a) The European Communities[61]

4.122 The European Communities argues that, as a consequence of the unlawful zeroing methods applied by USDOC in the periodic reviews identified in Exhibits EC-16 to EC-31, the United States acted in a manner inconsistent with Articles 11.1 and 11.2 of the *AD Agreement*. However, these claims are conditional, and may be considered withdrawn if the European Communities' claims relating to the periodic reviews at issue succeed under Articles 2.4, 2.4.2 and 9.3.

4.123 The Article 11 claim is based on the assumption that part of the measures at issue (the decision in each of the periodic reviews to apply a revised estimated anti-dumping duty deposit rate for the future) constituted a "review" within the meaning of Article 11.2 of the *AD Agreement.* The dumping determination made by the United States in each such review was used as the basis for determining whether or not the continued imposition of the duty was "necessary to offset dumping", within the meaning of Article 11.2 of the *AD Agreement*. That determination was made pursuant to the right expressly conferred on interested parties by Article 11.2 of the *AD Agreement*, second sentence.

4.124 The European Communities considers that if an investigating authority makes or relies on a dumping determination for the purposes of Article 11.2 of the *AD Agreement*, it is bound to establish any such dumping margin in conformity with the provisions of Article 2.4, including Article 2.4.2 of the *AD Agreement.* Article 11.2 must be read in conjunction with the other provisions of the *AD Agreement*, including, necessarily, those that contain relevant definitions, such as Article 2, which defines dumping.

(b) The United States[62]

4.125 The United States asserts that in its response to the Panel regarding the basis for its claim under Articles 11.1 and 11.2, the European Communities provided a non-response. According to the United States, the European Communities simply asserts that "the conduct of retrospective assessments in the United States must be consistent both with the provisions of Articles 2.4, 2.4.2 and 9.3, and with the provisions of Article 11." The European Communities fails, however, to provide the requested explanation, despite the latter's own recognition that "United States 'periodic reviews' of the amount of duty correspond to and fit within Article 9.3 of the *AD Agreement*".

[59] EC-First Written Submission, para. 102.
[60] EC-First Written Submission, para. 102, p. 37.
[61] EC-First Written Submission, paras 187-199; EC-Rebuttal Submission, para. 219; EC-Response to Panel Question 69; EC-Closing Oral Statement at the Second Substantive Meeting of the Panel, paras. 48-51.
[62] US-Second Written Submission, para. 36.

6. Other Consequential Claims

(a) The European Communities[63]

4.126 The European Communities considers that, as a consequence of applying unlawful zeroing in the original investigations and periodic reviews in question, the United States acted in a manner inconsistent with the obligations imposed on it by Articles 9.3, 1 and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI.4 of the WTO Agreement.

4.127 Article 9.3 of the *AD Agreement* provides, *inter alia* that the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2. The European Communities does not agree with the United States suggestion that Article 9 contains only "procedural obligations". Nor does the European Communities agree with the United States suggestion that Article 9 contains only "time limits". According to the European Communities, there is nothing in Article 9 to support such views. Article 9 contains substantive obligations, as does Article 2, to which Article 9 expressly refers. Thus, to the extent that the dumping duties imposed and assessed in the original investigations and periodic reviews at issue were greater than they should have been because of zeroing, the United States violated its obligations under Article 9.3.

4.128 The European Communities considers that the United States acted in this case in a manner inconsistent with the obligations imposed on it by Article 1 of the *AD Agreement* and Articles VI:1 and VI:2 of GATT 1994. As a result of the unlawful zeroing method applied in the original investigations and periodic reviews at issue, the United States applied an anti-dumping measure under circumstances other than those provided for in Article VI of GATT 1994 and other than pursuant to investigations initiated and conducted in accordance with the provisions of the *AD Agreement*. In taking action under its domestic anti-dumping legislation, the United States failed to respect the provisions of the *AD Agreement*, which provisions govern such action, and which provisions the United States should have respected. Accordingly, the United States acted in a manner inconsistent with the obligations imposed on it by Article 1 of the *AD Agreement*.

4.129 The United States condemned the sales of the products subject to investigation in circumstances where such products were not introduced into the commerce of the United States at less than the normal value of those products. The United States levied anti-dumping duties on products that were not dumped. The United States levied anti-dumping duties, allegedly in order to offset or prevent dumping, but in an amount greater than the margin of dumping. The United States thus also acted in a manner inconsistent with the obligations imposed on it by Articles VI:1 and VI:2 of GATT 1994.

4.130 As a consequence of applying unlawful zeroing in the original investigations and periodic reviews at issue, the United States also failed to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the *AD Agreement*, and has thus acted in a manner inconsistent with obligations imposed on it by Article 18.4 of the *AD Agreement* and Article XVI:4 of the WTO Agreement.

(b) The United States[64]

4.131 As regards the European Communities' consequential claims with respect to Article 9.3, the United States asserts that Article 2.4.2 does not apply to assessment proceedings pursuant to Article 9.3. According to the United States, the general reference to Article 2 in Article 9.3

[63] EC-First Written Submission, paras. 94-101, 200-210; EC-Rebuttal Submission, paras. 65 and 222-232.

[64] US-First Written Submission, paras. 49-54 and footnote 47.

necessarily includes any limitations found in the text of Article 2. Article 2.4.2 by its own terms is explicitly limited to the investigation phase.

4.132 Citing to the Panel report in *Argentina – Poultry Anti-Dumping Duties*[65], the United States argues that the reference in Article 9.3 to Article 2 means that the amount of antidumping duty assessed may not exceed the amount of antidumping duty calculated in accordance with the general requirements of Article 2, such as making the various adjustments set forth in Article 2.4 necessary to provide a fair comparison. There is no basis in Article 9 to overcome the explicit language in Article 2.4.2, limiting its reach to investigations.

4.133 In other words, the United States argues, Article 9 contains certain procedural obligations applicable in assessment reviews, but does not prescribe methodologies for assessment proceedings, such as those established in Article2.4.2 for the investigation phase. Instead, the United States asserts, Article 9 establishes time limits for conducting assessment proceedings, ensuring that respondent companies may obtain timely refund of any excess antidumping duties collected by a Member.

4.134 With respect to the European Communities' "as applied" claims under Article 18.4 of the *AD Agreement* and Article XVI:4 of the *WTO Agreement*, the United States asserts that, assuming for purposes of argument that the European Communities' positions regarding "symmetry" and offsets for "negative dumping" are valid, the European Communities fails to explain how the obligations of these provisions relate to determinations made in specific antidumping proceedings. Accordingly, the Panel should reject the European Communities' claims.

C. "AS SUCH" CLAIMS

1. The "Standard Zeroing Procedures" (or The United States Practice or Methodology of Zeroing) Used in Original Investigations and Periodic, New Shipper, Changed Circumstance and Sunset Reviews

4.135 The European Communities characterises this complaint as being comprised of two possible challenges: First, to the "Standard AD Margin Program", to the extent that it contains the "Standard Zeroing Procedures"; and secondly, to the extent necessary, the "Import Administration Anti-Dumping Manual" ("the Manual") and the United States practice or methodology of zeroing.

(i) The "Standard Zeroing Procedures" (or the United States practice or methodology of zeroing) are a "measure" or part of a "measure" that can be subject to WTO challenge

(a) The European Communities[66]

4.136 The European Communities contends that the "Standard Zeroing Procedures" and the Manual to the extent the latter refers to the "Standard Computer Programs", or the United States practice or methodology of zeroing, are a "measure" or are part of a "measure" that can be challenged "as such".

4.137 Referring particularly to the Appellate Body Reports in *US-Corrosion Resistant Steel Sunset Review*, paragraphs 73 to 101 and *US – Oil Country Tubular Goods Sunset Reviews*, paragraphs 177 to 189, the European Communities argues that there are no limitations on the type of "measures" that may, "as such", be the subject of dispute settlement under the DSU or the *AD Agreement*. According to the European Communities, this is consistent with the comprehensive nature of the right of

[65] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.355-7.357.

[66] EC-First Written Submission, paras. 103-125 and 212; EC-Rebuttal Submission, paras. 67-79; EC-Responses to Panel Questions 51-53; EC-Opening Statement at the Second Substantive Meeting of the Panel, paras. 40-44; EC-Closing Statement at Second Meeting with the Panel, paras. 55-59.

Members to resort to dispute settlement to "preserve [their] rights and obligations … under the covered agreements, and to clarify the existing provisions of those agreements."[67] Furthermore, it is compatible with the line of reasoning developed by the Appellate Body based on the GATT *acquis* and the language of the *AD Agreement*, in particular Articles 17.3 and 18.4.[68] Thus, provided Members respect the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their "judgment as to whether action under these procedures would be fruitful" and to engage in dispute settlement in good faith, then those Members are entitled to request a panel to examine measures that the Member considers nullify or impair its benefits. In keeping with this view, the European Communities argues that if, as in the present case, it can find language to adequately explain and delineate its concerns in abstract terms, particularly if that language is contained in a document or documents drawn up by the United States itself; and if the European Communities is prepared to expend the time and resources required for a dispute settlement procedure on the point, that is enough.

4.138 The European Communities argues that instruments of a Member containing rules or norms may constitute a "measure", irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted, irrespective of any particular instance of application of such rules or norms.

4.139 The European Communities identifies the "Standard Zeroing Procedures" as the lines of computer code in the United States' "Standard AD Margin Program". According to the European Communities, the "Standard AD Margin Program" is a part of the United States current and standard anti-dumping margin calculation methodology. The code used as the "Standard Zeroing Procedures" varies depending upon whether it is applied in original investigations or periodic reviews. The European Communities describes it as a code that is the same or has substantially the same structure or effect as the following:

(*for original investigations*)	(*for periodic reviews*)
PROC MEANS NOPRINT DATA = MARGIN; **WHERE EMARGIN GT 0;** VAR EMARGIN &MUSQTY USVALUE; OUTPUT OUT = ALLPUDD (DROP = _FREQ_ _TYPE_) SUM = TOTPUDD MARGQTY MARGVAL	PROC MEANS NOPRINT DATA = MARGIN; BY &USCLASS **WHERE EMARGIN GT 0;** VAR WTDMRG WTDQTY WTDVAL; OUTPUT OUT = ALLPUDD (DROP = _FREQ_ _TYPE_) SUM = TOTPUDD MARGQTY MARGVAL

4.140 The European Communities argues that the "Standard Zeroing Procedures" are part of the overall framework within which anti-dumping investigations are conducted in the United States. This framework includes the "Standard AD Margin Program" and the Manual. Both the "Standard Zeroing Procedures" and the "Standard AD Margin Program" are referred to and described in the Manual and are part of the "Standard Computer Programs" applied by the USDOC in anti-dumping proceedings. The "Standard Computer Programs" are also referred to in the Regulations. Furthermore, USDOC

[67] DSU, Article 3.2.

[68] In particular, the European Communities refers to: Appellate Body Report, *Guatemala – Cement I*, para. 69, footnote 47; GATT Panel Report, *Japan – Semi-Conductors*, para. 107; GATT Panel Report, *Japan – Agricultural Products I*.

has disclosed these programs to hundreds and thousands of companies in the context of the very large number of determinations that USDOC makes. Thus, according to the European Communities, the "Standard Zeroing Procedures" are a matter of public knowledge. They cannot fall into some kind of "loophole" or "twilight zone" or "no-man's land", outside the law merely because their content is not published like a notice of findings and reasons in an anti-dumping proceeding. It is not by placing such findings and reasoning in the Manual and "Standard Computer Programs", rather than in the Final Determinations or Orders or Results or the Tariff Act or Regulations, that the United States can escape the scrutiny of the panel in the present dispute. According to the European Communities, such a result would not constitute a good faith interpretation of the WTO Agreement, the *AD Agreement* and the DSU.

4.141 Moreover, the European Communities believes it is not because the "Standard Zeroing Procedures" may be abstract; or because they are not published in the Federal Register or at all; or because they do not bear the title "law" or "regulation"; or because they are adopted by USDOC rather than Congress; or because USDOC is entitled, subject to certain procedures, to change or withdraw them for the purposes of future determinations, that they may escape the panel's scrutiny. In this regard, the European Communities notes that the Manual and "Standard Computer Programs" can only be correctly described as having, at least potentially, some legal effects. Indeed, like United States anti-dumping laws, regulations and administrative procedures, including Policy Bulletins, which the European Communities argues are also measures, the Manual is published by the USDOC on the internet. The Manual and the "Standard Computer Programs" might not have the same force of law as the Tariff Act, but to assert that they are worthless in United States courts would be to overstate the point. In reality, USDOC treats the "Standard Zeroing Procedures" as binding, at least until changed.

4.142 The European Communities argues that a computer program and the procedures it contains are perhaps the paradigm example of normative rules that apply mechanistically and automatically to a given set of facts, without further human intervention. There is no room for administrative or judicial interpretation. The effect of the "Standard Zeroing Procedures" in future cases is utterly predictable. The "Standard Zeroing Procedures" provide certainty and security (at least for United States industry) for the conduct of future trade. They represent a degree of purity in normative terms that makes them *ideally suited* as the vehicle by which the problem or matter can best be apprehended and dealt with at its root. To this end, the European Communities considers that the "Standard AD Margin Program" does "set out … norms". The program is repeatedly referred to as the "standard", which the European Communities contends for the purposes of this dispute equates to the "norm" or what is "normal". The relevant norms are "set out" in the sense that they are expressed in the particular computer language used by the United States, and recorded both electronically and on paper, for all to see. The European Communities further considers that the program "establishes rules", not least because, like the Manual, which refers to it, it is published or issued under the authority of USDOC, and provides guidance for USDOC officials.

4.143 According to the European Communities, there is no reason why a "piece of computer software" should be considered incapable of "setting out rules or norms". Computer programming language is just that – a language, like any other. Understanding it might require special knowledge or translation – that does not mean it is not a measure. A Member might choose to render its entire municipal anti-dumping law in computerised format – even to the exclusion of any other format – that would not mean that it would escape from the disciplines of the *AD Agreement*. If an investigating authority establishes a rule, especially one such as the "Standard Zeroing Procedures", the purpose and effect of which is that equivalent situations are automatically and consistently treated equally, then that rule must by definition be capable of affecting the operation of the *AD Agreement*. It

therefore necessarily falls within the phrase "any matter affecting the operation of the Agreement"[69], and may consequently be referred to this Panel.

4.144 With respect to the claims regarding United States practice or methodology of zeroing, the European Communities describes what it is challenging as consisting of using the particular type of methodology (asymmetry, model zeroing or simple zeroing) repeatedly in a series of specific determinations, in one specific anti-dumping proceeding after another. According to the European Communities, the particular factual circumstances of this case, in which the practice has been lifted up into an abstract document that exists on paper, and applies automatically, are sufficient for the Panel to find that the practice being challenged constitutes a "measure".

(b) The United States[70]

4.145 The United States rejects the claim that the "Standard AD Margin Program" can be regarded as a "measure" for purposes of WTO dispute settlement. The United States notes that the Appellate Body has indicated that instruments setting out rules or norms can be challenged "as such" in a WTO dispute. However, according to the United States, the "Standard AD Margin Program" does not set out or establish rules or norms. The United States contends that it is a piece of computer software that, at most, implements rules or norms adopted by a decision-maker in some other instrument, such as a regulation or a determination in a specific anti-dumping proceeding. To the extent that the European Communities argues that the legal status of lines of computer code are the same as USDOC's regulations, the United States contends that the European Communities is incorrect. Under United States law, validly promulgated regulations are binding on USDOC, the public, and the courts. USDOC's computer programs are not binding on anyone. Finally, the United States points to footnote 6 of the memorandum of Ms. Owenby, submitted by the European Communities as exhibit EC-46, where according to the United States, Ms. Owenby acknowledges that the variables used in USDOC's "AD Margin Program" depend upon the USDOC programmer. The United States contends that this further undermines the claim that there is a "standard" USDOC computer program, and emphasizes that the computer program used in any particular proceeding reflects policy choices, rather than mandating them.

4.146 The United States does not contest the assertion of the European Communities that the Manual is a "measure" for purposes of this WTO dispute.

4.147 On the question of whether the "practice" identified by the European Communities can amount to a "measure", the United States argues that repeated application of a particular measure – such as a statute – in the same manner, does not somehow create a new and separate "autonomous measure." Rather, it is just what the definition implies – it is a repeated application of a measure. The United States asserts that when panels *have* been asked to find that a "practice" of the type described by the European Communities constitutes a measure that can be challenged as such, they have uniformly declined. According to the United States, the panel in *US – India Steel Plate* correctly noted:

> "That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we

[69] Article 17.2 of the *AD Agreement*.

[70] US-First Written Submission, paras. 81-83 and 90-97; US-Second Written Submission, paras. 47-49 and 60-64; US-Closing Statement at the Second Meeting, paras. 3-7; US-Responses to Panel Questions 59-61 and 63.

do not consider that merely by repetition, a Member becomes obligated to follow its past practice."[71]

4.148 Thus, according to the United States, the European Communities has failed to explain how the repeated application of one measure – such as a statute – in the same manner gives rise to a separate and autonomous "measure." Moreover, the United States notes, when the Panel, in its Question 74, asked the European Communities to distinguish the situation in this dispute from that confronting the panel in *US – India Steel Plate*, the European Communities gave a non-answer, referring to its answer to Panel Question 51. However, the United States argues that the European Communities' answer to Question 51 simply contains the European Communities' explanation as to why the "Standard AD Margin Program" is a "measure" distinct from "practice." It does not address the issue of whether "practice" can be considered a measure that can be subject to an "as such" challenge in WTO dispute settlement.

(i) The "Standard Zeroing Procedures" (or the United States practice or methodology of zeroing) are inconsistent with the AD Agreement, the GATT 1994 and the WTO Agreement

(a) The European Communities[72]

4.149 The European Communities refutes the application of the "mandatory/discretionary" doctrine as a mechanistic rule for determining when "as such" measures can be WTO-inconsistent. According to the European Communities, the relevant standard for determining the consistency of an "as such" measure with the *AD Agreement* is whether or not the measure is in conformity with the relevant provision of the *AD Agreement.* The European Communities argues that this is clear from Article 18.4 of the *AD Agreement* and Article XVI:4 of the WTO Agreement. Thus, the test is not whether the measure is "mandatory" as opposed to "discretionary", or whether or not it is "binding"[73], or whether or not it obliges a Member to act in a WTO inconsistent manner in *all cases.*[74] To find an "as such" measure in violation of a WTO obligation, it would suffice that it result in a WTO-inconsistent outcome only in *some* cases.

4.150 Whether legislation is mandatory or discretionary is one question that must be considered along with a multitude of others – including, importantly, an inquiry into the nature and content of the relevant WTO provision, and whether it permits the kind of discretion that is allowed by the legislation at issue – in assessing the compatibility of a measure with a WTO obligation. One major reason why the "mandatory/discretionary" doctrine cannot be a mechanistic rule is that State measures are always, by definition, mandatory in some sense and very often leave some element of discretion. There are always some exceptions possible to any mandatory rule.

4.151 In any event, whichever test that might be applied in the present case, the "Standard Zeroing Procedures", and the "Standard AD Margin Program", are "as such" inconsistent with the *AD Agreement*. Article 2.4.2 of the *AD Agreement* mandates that Members must have a normal or standard rule as described in that provision. The "Standard AD Margin Program" contains a different standard or normal rule. The "Standard AD Margin Program" and its "Standard Zeroing Procedures" are not therefore in conformity with the *AD Agreement*. As they stand, without any modification of the relevant lines of computer code, the "Standard AD Margin Program" and the "Standard Zeroing

[71] Panel Report, *US – Steel Plate*, para. 7.22.

[72] EC-First Written Submission, paras. 103, 126-129, 146-147, 212-214 and 224-225; EC-Rebuttal Submission, paras. 80-82; EC-Opening Statement at the Second Substantive Meeting of the Panel, paras. 52-59; EC-Responses to Panel Questions 54, 62, 67 and 71.

[73] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

[74] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 247 and paras. 265-269.

Procedures" do preclude consistency with the *AD Agreement*. The fact that they can in theory be changed, just like the Regulations or the Tariff Act, is irrelevant. Furthermore, the mathematical character of a computer program makes this finding inevitable, once it is established that model zeroing, zeroing with respect to other averaging groups, simple zeroing and zeroing within the context of importer-specific assessment rates, are inconsistent with the *AD Agreement*[75], and that these zeroing methodologies are incorporated into the "Standard Computer Programs", and particularly the "Standard Zeroing Procedures", as expressly stated in the Manual.

4.152 To the extent that the "Standard Zeroing Procedures" used to automatically effect model zeroing or zeroing with respect to other averaging groups in original investigations are considered to be "as such" inconsistent with Articles 2.4 and/or 2.4.2, the European Communities argues that it follows that they must also be "as such" inconsistent with Articles 1, 5.8, 9.3 and 18.4 of the *AD Agreement*, and Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.[76]

4.153 Likewise the European Communities argues that to the extent that the "Standard Zeroing Procedures" used in periodic reviews to unconditionally effect simple zeroing, for the purpose of calculating both an assessment rate and a cash-deposit rate, are as such inconsistent with Articles 2.4 and/or 2.4.2, it follows that they must also be as such inconsistent with Articles 1, 9.3, 11.1, 11.2 and 18.4 of the *AD Agreement*, and Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.[77] Furthermore, the European Communities argues that to the extent that the zeroing methodology is operative under the "Standard Zeroing Procedures" whenever importer-specific assessment rates are calculated in a periodic review, the "Standard Zeroing Procedures" must also, for this reason, be "as such" inconsistent with Articles 2.4, 2.4.2 and 9.3 of the *AD Agreement*.

4.154 Finally, the European Communities submits that the same conclusions should be reached for new shipper, changed circumstances and sunset reviews. To the extent that the "Standard Zeroing Procedures" are used in these review proceedings to automatically effect model zeroing, simple zeroing or zeroing with respect to other averaging groups, they must be considered as such inconsistent with Articles 2.4 and/or 2.4.2, and consequently, also Articles 1, 9.3, 9.5, 11.1, 11.2, 11.3 and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.[78]

(b) The United States[79]

4.155 The United States asserts that it is well established pursuant to the "mandatory/discretionary" test, that if a measure mandates WTO-inconsistent action or precludes WTO-consistent action, the measure is WTO-inconsistent "as such." According to the United States, the

[75] The European Communities' arguments with respect to its claim that model zeroing, zeroing with respect to other averaging groups, simple zeroing and zeroing within the context of importer-specific assessment rates are inconsistent with the *AD Agreement* are summarised above at paragraphs 4.7-4.27 and 4.36-4.86.

[76] The European Communities' arguments with respect to the alleged consequential violations of Articles 1, 5.8, 9.3 and 18.4 of the *AD Agreement*, and Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement are summarised above at paragraphs 4.121, 4.126-4.130.

[77] The European Communities' arguments with respect to the alleged consequential violations of Articles 1, 9.3, 11.1, 11.2 and 18.4 of the *AD Agreement*, and Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement are summarised above at paragraphs 4.122, 4.126-4.130.

[78] The European Communities' arguments with respect to the alleged consequential violations of Articles 1, 9.3, 9.5, 11.1, 11.2 and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement are summarised above at paragraphs 4.122, 4.126-4.130.

[79] US-First Written Submission, Executive Summary, paras. 35-37, 44-46, 48, 51 and 57-58; US-Second Written Submission, paras. 40-64, paras. 51-58.; US-Opening Statement at the First Substantive Meeting of the Panel, paras. 20-21; US-Responses of 7 April 2005 to questions 55-56, 64-65.

"mandatory/discretionary" test has been consistently applied in GATT and WTO dispute settlement proceedings. The test reflects the fact that, as the Appellate Body has noted, panels may not presume bad faith on the part of Members. Thus, if a measure provides a Member with the discretion to act in a WTO-consistent manner, it may not be presumed that the Member will exercise that discretion in bad faith. The United States submits that in the absence of the "mandatory/discretionary" test, the assessments of Members over many years on how to judge whether their measures are consistent with GATT and then WTO rules would be severely undermined.

4.156 According to the United States, the panel in *Korea – Commercial Vessels*[80] rejected the very interpretation of the "mandatory/discretionary" test advocated by the European Communities in this dispute. In this regard, the United States contends that it is significant that the European Communities has been unable to cite a single panel or Appellate Body report that has followed its interpretation in assessing the WTO-consistency of "as such" measures.

4.157 The United States argues that the European Communities has failed to show that its claims satisfy the "mandatory/discretionary" test. The United States contends that, for some of the "measures" at issue, the European Communities has not demonstrated that the "measures" are mandatory within the meaning of the test. In other cases, the United States alleges that the European Communities has failed to make even a *prima facie* case that the "measure" in question is mandatory.

4.158 With respect to the Manual, the United States contends that the European Communities has neither demonstrated that it mandates any WTO-inconsistent conduct nor established a *prima facie* case of WTO-inconsistency.

4.159 According to the United States, the Manual does not preclude the decision-maker in USDOC from offsetting negative margins nor does it mandate that the decision-maker in USDOC ignore negative margins. The United States argues that the Manual does not mandate that the decision-maker in USDOC do anything, nor does it preclude the decision-maker in USDOC from doing anything. This is because the Manual is nothing more than a source of guidance and training for USDOC personnel. As set forth on page one of the "Introduction" section of the Manual: "This manual is for the internal guidance of Import Administration (IA) personnel only, and the practices set out are subject to change without notice."

4.160 The United States contends that the European Communities provides no evidence to support the assertion that the "USDOC" considers itself to be bound by the Manual. Indeed, what little evidence the European Communities does provide on this point contradicts its own assertion. The European Communities cites United States court decisions that expressly state that the Manual is "not a binding legal document ... ." If USDOC were to treat the Manual as binding, it would be in violation of the United States Administrative Procedure Act.

4.161 The United States submits that by referring to the "USDOC", the European Communities obscures the fact that the United States anti-dumping law is administered by human beings, and that in the case of USDOC there are two categories of human beings: (1) the decision-maker; and (2) the staff that implement the decision-maker's decisions. Here, the relevant decision-maker is the Assistant Secretary of Commerce for Import Administration. For purposes of the mandatory/discretionary test, the question is whether the Assistant Secretary is obligated to follow the Manual. Clearly he is not; as indicated above, the Manual states that he can change the practices set out in the Manual "without notice." Thus, if the Assistant Secretary decided in a particular case to offset negative margins, the Manual could not preclude him from doing so.

[80] Panel Report, *Korea – Commercial Vessels*, paras. 7.60-7.67.

4.162 An even more fundamental flaw, the United States argues, is that the European Communities has failed to identify the specific portions of the Manual that allegedly mandate the WTO-inconsistent behaviour about which the European Communities complains. By failing to do so, the European Communities has failed to make its *prima facie* case.

4.163 *In US – Gambling*, the United States notes, the Appellate Body emphasized the importance of the requirement that a complaining party make its prima facie case. According to the Appellate Body:

> "… it is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation – the evidence – on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position."[81]

4.164 The United States asserts that the European Communities has failed to demonstrate how or why each portion of the Manual that it is challenging is inconsistent with United States' WTO obligations. According to the United States, in its Question 53, the Panel essentially asked the European Communities to identify the portions of the Manual that it is challenging. The European Communities replied that it "is challenging each part of the Manual referenced in the factual part of its first written submission, considered both in isolation and together, including the instruction to use the Standard AD Margin Program." However, the United States notes, the cited portions of the European Communities' first submission identify the entire Manual as a measure that the European Communities is challenging. Thus, if the European Communities is to be taken at its word, it is challenging the *entire* Manual because the entire Manual is referenced in its first written submission.

4.165 The United States asserts that the European Communities has not explained how the entire Manual runs afoul of United States' WTO obligations. The United States notes that most of the Manual has nothing to do with the subject of this dispute. Even where the European Communities cites to more specific portions of the Manual in the referenced portion of its first submission, the United States argues, these portions would appear to have nothing to do with this dispute, and the European Communities has failed to explain how these specific portions are WTO-inconsistent.

4.166 In short, the United States argues, to paraphrase the Appellate Body, the European Communities has filed the entire Manual and expects the Panel to discover, on its own, what relevance the various provisions of the Manual may or may not have for the European Communities' legal position. While the European Communities keeps referring to its desire to "cover all the bases," the United States does not see this as any different from Antigua's approach in *US – Gambling*. As the Appellate Body has indicated, such an approach is neither sufficient nor acceptable.

4.167 With respect to the "Standard AD Margin Program", even assuming that it could be a "measure," the United States argues that it does not preclude the USDOC decision-maker from offsetting negative dumping margins nor does it require the USDOC decision-maker to ignore negative dumping margins. If the USDOC decision-maker decided to offset negative dumping margins in a particular case, his decision would be implemented simply by using a different set of computer instructions.

4.168 As regards the claims of the European Communities with respect to United States' alleged zeroing practice and methodology, the United States argues that even if past instances of not offsetting by USDOC were deemed to constitute a "measure", the European Communities' claims would have to be rejected because this alleged "measure" does not mandate anything, let alone

[81] Appellate Body Report, *US – Gambling*, para. 140, footnote 152, quoting from Appellate Body Report, *Canada – Wheat Exports*, para. 191.

anything inconsistent with a WTO obligation under the "mandatory/discretionary" test. Under United States law, there is no principle of administrative *stare decisis*, and administrative agencies, such as USDOC, may depart from prior practice as long as they provide a reasoned explanation for doing so. According to the United States, the European Communities has failed to argue, let alone demonstrate, that USDOC "practice" mandates a breach within the meaning of the "mandatory/discretionary" distinction.

4.169 Finally, the United States argues that the claims of the European Communities with respect to new shipper, changed circumstances and sunset reviews, are unfounded. The United States argues that the European Communities does not offer any independent arguments concerning these types of reviews. The United States contends that it has demonstrated that the Panel should reject the European Communities' claims insofar as original investigations and periodic reviews are concerned; and for the same reasons, the Panel should reject the claims of the European Communities with respect to new shipper, changed circumstances and sunset reviews.

2. Sections 771(35)(A) and (B), 731 and 777A(d) of The Tariff Act

(a) The European Communities[82]

4.170 The European Communities considers that Sections 771(35)(A) and (B), 731 and 777A(d) of the Tariff Act, as they operate in original investigations and periodic, new shipper, changed circumstance and sunset reviews, are "as such" inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement*. In setting out these claims, the European Communities emphasises that the relevant standard in an "as such" case is not whether the municipal measure *in all cases* leads to a WTO inconsistent result, but whether or not the municipal measure is in *conformity* with the *AD Agreement* – that is, whether or not it is a sound implementation. If a municipal law provision contributes forcefully to the adoption of a series of "as applied" measures that are inconsistent with the *AD Agreement*, then there is every reason to suppose that the root of the problem lies, at least in part, with the relevant provision of municipal law.

(i) Section 771(35)(A) and (B)

4.171 The European Communities argues that a margin is the amount by which one thing differs from another. Normal value may exceed export price. Or export price may exceed normal value. In both cases there is a *margin*. It is not possible to conclude in either case that there is no margin, or that the margin is zero. Nor is it possible to conclude that, when export price exceeds normal value, there is no or a zero margin of *dumping*, because Article 2.4.2 of the *AD Agreement* is precisely concerned with determining whether or not there *is* a margin of dumping for the subject product. It is not possible to use in an analysis in progress a *premise* that, by definition, cannot yet have been substantiated, being one of the possible *conclusions* of that analysis in progress. The first sentence of Article 2.4.2 of the *AD Agreement* and particularly the word "margin", requires a simple and *complete* comparison between normal value and export price, being one that does not *prejudge* how the two elements to be compared are juxtaposed, nor, thus, whether each one of a series of margins is expressed as positive or negative. According to the European Communities, Section 771(35)(A) of the Tariff Act prejudges these matters, for three reasons.

4.172 First, instead of providing for a simple or complete comparison, as it should, it expressly provides only for the measurement of the amount by which normal value exceeds export price. It does not provide for the measurement of the amount by which export price exceeds normal value. Thus, it provides only for a *limited or modified or conditional* comparison. The European

[82] EC-First Written Submission, paras. 130-147, 215 and 225-226; EC-Rebuttal Submission, paras. 83-90; EC-Response to Panel Question 67.

Communities contends that this is the interpretation that has been adopted by USDOC, and defended by USDOC before the United States municipal courts.

4.173 Second, the use of the word "amount" in the text of Section 771(35)(A), which does not appear in the first sentence of Article 2.4.2 of the *AD Agreement*, requires or at the very least strongly suggests a positive result.

4.174 Third, Section 771(35)(A) defines the amount resulting from this limited or modified or conditional comparison as a "dumping margin" – a term almost indistinguishable from the term used in Article 2.4.2 *AD Agreement* ("margins of dumping") – but, according to USDOC, with a *different* meaning ascribed to it – obfuscating the proper application of the *AD Agreement* to such an extent as to render Section 771(35)(A) of the Tariff Act not in conformity with Article 2.4.2. Thus, according to the European Communities, the action of the United States in maintaining in force Section 771(35)(A) of the Tariff Act is not consistent with its obligations under Articles 2.4 and 2.4.2.

4.175 With respect to Section 771(35)(B), the European Communities focuses on the "aggregate dumping margin", which is defined therein. Article 2.4.2 of the *AD Agreement* uses the word average, rather than the word aggregate. The word "average" essentially has the mathematical sense of an arithmetic mean: the result obtained by adding the numbers in a set (whether negative or positive) and dividing the total by the number of members in the set. The word "aggregate" has a different, less mathematical nuance. It rather suggests the grouping together of separate "units", each being an "undivided whole". That suggests something that is positive, rather than negative.

4.176 Furthermore, the use of the plural "dumping margins" in Section 771(35)(B) *in relation to a specific exporter* is also inconsistent with Article 2.4.2. According to the European Communities, the Appellate Body has made it clear that intermediate calculation results are not "margins of dumping", and that "dumping" for the purposes of the *AD Agreement* can be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model or category of that product.[83] Thus, the European Communities considers that the action of the United States in maintaining in force Section 771(35)(B) of the Tariff Act is also not consistent with its obligations under Articles 2.4 and 2.4.2.

4.177 In response to the evidence submitted by the United States showing that its municipal courts have found that Section 771(35)(A) and (B) does not require USDOC to "zero", the European Communities argues that it is not asking the Panel to substitute its judgment on matters of fact for that of the United States Court of Appeals. However, the European Communities argues that in order to properly understand these judgements, it may be relevant for the Panel to consider: (a) whether United States municipal law requires authorities to interpret municipal law in conformity with international law; and (b) whether United States municipal law requires municipal courts to show deference to determinations by investigating authorities. It is a fact that, in the United States, under the so-called *Chevron* doctrine, United States courts show considerable deference to USDOC's interpretations; and that the so-called *Charming Betsey* doctrine does not, apparently, operate, in such a way as to cause USDOC to make its determinations in conformity with the international obligations of the United States.

4.178 Thus, the European Communities argues that all it is asking the Panel to determine is whether or not the relevant provisions of the Tariff Act are in conformity with the *AD Agreement*. The European Communities contends that the United States is relying solely on a "mechanistic" application of the so-called "mandatory/discretionary" doctrine – an approach that the Appellate Body has made clear is incapable, in itself, of resolving the matter.

[83] Appellate Body Report, *EC–Bed Linen*, para. 51, final sentence, Panel Report, para. 6.114; Appellate Body Report, *US-Softwood Lumber V*, paras. 91 to 94 and para. 97.

(ii) Section 731

4.179 Section 731 of the Tariff Act provides that, "if the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value" and if there is injury, "then there shall be imposed upon such merchandise an antidumping duty … in an amount equal to the amount by which the normal value exceeds the export price …". Insofar as this provision is vitiated by the same language as Section 771(35)(A) and (B), the European Communities submits that it is also, "as such", inconsistent with the *AD Agreement* for the same reasons.

(iii) Section 777A(d)

4.180 The European Communities contends that Section 777A(d) of the Tariff Act refers only to the possibility of determining that the subject merchandise is being sold in the United States at less than fair value, instead of providing for a simple comparison, as in Article 2.4 of the *AD Agreement*. Second, it uses the word "comparable", when it should use the words "all comparable", as in Article 2.4 of the *AD Agreement*.

4.181 Furthermore, the European Communities claims that that Section 777A(d) of the Tariff Act is inconsistent with Article 9.3 of the *AD Agreement* because it envisages that the provisions of Section 777A(d)(1) may be abandoned during reviews, including during periodic reviews of the amount of duty. That is, the European Communities argues that Section 777A(d) precludes the investigating authority, in normal circumstances, from establishing the existence of a margin of dumping for the subject product on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, including throughout the investigation period. The European Communities contends that this provision of the Tariff Act is not in conformity with Article 9.3 of the *AD Agreement*, which expressly provides that: "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2".

4.182 To the extent that Sections 771(35)(A) and (B), 731 and 777A(d) of the Tariff Act, as they operate in original investigations, are considered to be "as such" inconsistent with Articles 2.4 and/or 2.4.2, the European Communities argues that it follows that they must also be "as such" inconsistent with Articles 1, 9.3 and 18.4 of the *AD Agreement*, and Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.[84]

4.183 Likewise the European Communities argues that to the extent that Sections 771(35)(A) and (B), 731 and 777A(d) of the Tariff Act, as they operate in periodic reviews, are "as such" inconsistent with Articles 2.4 and/or 2.4.2, it follows that they must also be "as such" inconsistent with Articles 1, 9.3, 11.1, 11.2 and 18.4 of the *AD Agreement*, and Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.[85]

4.184 Finally, the European Communities submits that the same conclusions should be reached for new shipper, changed circumstances and sunset reviews. To the extent that Sections 771(35)(A) and (B), 731 and 777A(d) of the Tariff Act are used in order to automatically effect model zeroing, simple zeroing or zeroing with respect to other averaging groups, they must be considered "as such" inconsistent with Articles 2.4 and/or 2.4.2, and consequently, also Articles 1, 9.3, 9.5, 11.1, 11.2, 11.3

[84] The European Communities' arguments with respect to the alleged consequential violations of Articles 1, 5.8, 9.3 and 18.4 of the *AD Agreement*, and Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement are summarised above at paras. 4.121, 4.126-4.130.

[85] The European Communities' arguments with respect to the alleged consequential violations of Articles 1, 9.3, 11.1, 11.2 and 18.4 of the *AD Agreement*, and Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement are summarised above at paras. 4.122, 4.126-4.130.

and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.[86]

(b) The United States[87]

(i) Sections 771(35)(A) and (B), 731 and 777A(d) of the Tariff Act

4.185 The United States argues that the claims of the European Communities fail because they do not satisfy the "mandatory/discretionary" test. According to the United States, in order for the claims relating to Sections 771(35)(A) and (B) and 731 of the Tariff Act to succeed, the European Communities must demonstrate that these statutory provisions prohibit USDOC from providing an offset for non-dumped transactions. In the *US – Corrosion-Resistant Steel Sunset Review* case, the Appellate Body explained, "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion."[88] The United States submits that the relevant evidence must, of necessity, demonstrate the measure's meaning under municipal law if it is to yield an objectively correct result.

4.186 The United States contends that the European Communities cannot make the necessary demonstration, because the United States Court of Appeals for the Federal Circuit has held twice that the Tariff Act – including Section 771(35)(A) and (B) in particular – does not require the use of zeroing. The first case was *Timken*, which involved a duty assessment proceeding. In *Timken Co. v. United States*[89] USDOC argued that the Tariff Act precluded it from reducing the amount of dumping duties to be assessed based on non-dumped sales. The Federal Circuit disagreed, finding that "the statute does not directly speak to the issue of negative-value dumping margins ... ." The court went on to hold that while offsetting was not prohibited by the statute, not offsetting represented one permissible interpretation of the statute.

4.187 The second case was *Corus Staal BV v. United States*[90] which involved an antidumping investigation. In *Corus*, the Federal Circuit again held that not offsetting reflected a permissible interpretation of the statute, citing its earlier decision in *Timken*.

4.188 Although in principle the United States Supreme Court can review decisions of the Federal Circuit involving antidumping matters, in practice it does not. Therefore, according to the United States, for practical purposes, *Timken* and *Corus* constitute the last word on the interpretation of the Tariff Act insofar this issue is concerned. According to the United States, as a factual matter, the claims of the European Communities must fail.

4.189 Finally, in response to the claims of the European Communities regarding USDOC's own interpretation of the provisions in question, the United States notes that USDOC stopped arguing that the statute required it to "zero" after the *Timken* decision. In any event, according to the United States, for the purposes of determining what United States law means, greater weight cannot

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[86] The European Communities' arguments with respect to the alleged consequential violations of Articles 1, 9.3, 9.5, 11.1, 11.2, and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement are summarised above at paras. 4.122, 4.126-4.130.

[87] US-First Written Submission, paras 74-80, 98-105; US-Second Written Submission, paras. 65-72; US-Response of 7 April 2005 to question 66.

[88] Appellate Body Report, *US – Carbon Steel*, para. 157.

[89] *Timken Co. v. United States*, 354. F.3d 1334 (Fed. Cir. 2004), *rehearing denied*, 2004 US App. LEXIS 6741 (17 March 2004), *cert. denied*, 160 L.Ed.2d 352, 125 S.Ct. 412, 2004 US LEXIS 7382, 73 USLW 3273 (US 2004)

[90] *Corus Staal BV v. United States*, No. 04-1107, 2005 US App. LEXIS 1077 (Federal Circuit, 21 January 2005)

be accorded to the historical views of USDOC – an administrative agency – than to the current holdings of the Federal Circuit, the institution that has the final say as to what the United States antidumping statute means.

4.190 As regards Section 777A(d)(2), the United States argues that the European Communities has failed to make a *prima facie* case. According to the United States, the European Communities merely asserts that the section is as such inconsistent with various WTO obligations "if it means" that a symmetrical comparison is normally precluded or an asymmetrical comparison is normally required.

4.191 The United States notes that in *US – Carbon Steel*, paragraphs 156-157, the Appellate Body explained that the complaining party has the burden of proof with respect to "as such" claims, and that "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion." Here, the United States argues, while the European Communities has submitted the text of the statutory sections at issue as exhibits, it has not offered any explanation, let alone demonstrated, why or how those sections preclude "symmetry" or require "asymmetry." Instead, through its use of the phrase "if it means," the European Communities simply poses a question as to whether the statutory sections might preclude "symmetry" or compel "asymmetry." According to the United States, the European Communities seems to be unsure of the answer to the question, and apparently hopes that the United States or the Panel will make the European Communities' case for it.

4.192 However, the United States notes, that is not the way WTO dispute settlement works. It is the European Communities' burden to prove that the statutory sections are WTO-inconsistent. It is not the task of the United States to prove that they are WTO-consistent. Likewise, the United States notes, it is well-established that a panel may not 'make the case for a complaining party.'

4.193 The United States notes that in its Question 70, the Panel asked the European Communities to comment on the US argument that the European Communities had failed to make a *prima facie* case with respect to section 777A(d)(2). The United States observes that while the European Communities denied that it had failed to make a *prima facie* case, with respect to its challenge to Section 777A(d)(2), the European Communities did modify paragraph 217, line2, of its first submission so that the words "given that" replace the word "if".

4.194 With respect to the European Communities' denial of its failure to make a prima facie case, the United States refers the Panel to the discussion of *US – Gambling*, in connection with the European Communities' failure to make a *prima facie* case regarding the Manual. With respect to Section 777A(d)(2), the European Communities has not explained, let alone demonstrated, how the provision operates in a WTO-inconsistent manner.

4.195 With respect to section 777A(d)(2), the United States notes that the European Communities does not even quote the provision, which reads as follows:

> "In a review under section 751, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale."

4.196 On its face, the United States explains, Section 777A(d)(2) provides that "when" the average-to-transaction method is used in reviews under section 751, the USDOC must use monthly weighted average prices to determine normal value. According to the United States, Section 777A(d) does not address the question of whether or when the average-to-transaction method must be used. Thus, the

United States argues, the European Communities has failed to explain how the plain text of section 777A(d)(2) mandates WTO-inconsistent action. Put differently, the European Communities has failed to make its *prima facie* case."

3. Section 751(a)(2)(A)(i) and (ii) of the Tariff Act

(a) The European Communities[91]

4.197 The European Communities considers that this provision is not in conformity with Articles 2.4, 2.4.2 and 9.3 of the *AD Agreement* because: (i) it precludes the investigating authority, in normal circumstances, from establishing the existence of a margin of dumping for the subject product on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions; and (ii) it requires an investigating authority, in all cases or normally, to make an asymmetrical comparison.

4.198 To the extent that Section 751(a)(2)(A)(i) and (ii) of the Tariff Act, as it operates in periodic reviews, is found to be "as such" inconsistent with Articles 2.4 and/or 2.4.2, it follows that it must also be "as such" inconsistent with Articles 1, 9.3, 11.1, 11.2 and 18.4 of the *AD Agreement*, and Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.[92]

4.199 Furthermore, the European Communities submits that the same conclusions should be reached for new shipper, changed circumstances and sunset reviews. To the extent that Section 751(a)(2)(A)(i) and (ii) of the Tariff Act is used in these reviews to automatically effect simple zeroing or zeroing with respect to other averaging groups, it must be considered "as such" inconsistent with Articles 2.4 and/or 2.4.2, and consequently, also in violation of Articles 1, 9.3, 9.5, 11.1, 11.2, 11.3 and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.[93]

(b) The United States[94]

4.200 As regards Section 751(a)(2)(A)(i) and (ii), the United States argues that the European Communities has failed to make a *prima facie* case. According to the United States, the European Communities merely asserts that the section is "as such" inconsistent with various WTO obligations "if it means" that a symmetrical comparison is normally precluded or an asymmetrical comparison is normally required.

4.201 As the United States noted in connection with Section 777A(d)(2), the Appellate Body has explained that the complaining party has the burden of proof with respect to "as such" claims, and that "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion." Here, the United States argues, while the European Communities has submitted the text of the statutory sections at issue as exhibits, it has not offered any explanation, let alone demonstrated, why or how those sections preclude "symmetry" or require "asymmetry." Instead, through its use of the phrase "if it means," the European Communities simply poses a question as to whether the statutory sections *might* preclude "symmetry" or compel "asymmetry."

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[91] EC-First Written Submission, paras. 218-219 and 223; EC-Rebuttal Submission, para. 237.

[92] The European Communities' arguments with respect to the alleged consequential violations of Articles 1, 9.3, 11.1, 11.2 and 18.4 of the *AD Agreement*, and Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement are summarised above at paras. 4.122, 4.126-4.130.

[93] The European Communities' arguments with respect to the alleged consequential violations of Articles 1, 9.3, 9.5, 11.1, 11.2 and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement are summarised above at paras. 4.122, 4.126-4.130.

[94] US-First Written Submission, paras 98-101; US-Second Written Submission, paras. 69-72.

According to the United States, the European Communities seems to be unsure of the answer to the question, and apparently hopes that the United States or the Panel will make the European Communities' case for it.

4.202 Again, the United States notes, that is not the way WTO dispute settlement works. It is the European Communities' burden to prove that the statutory sections are WTO-inconsistent. It is not the task of the United States to prove that they are WTO-consistent. Likewise, the United States notes, it is well-established that a panel may not "make the case for a complaining party."

4.203 The United States notes that in its Question 70, the Panel asked the European Communities to comment on the US argument that the European Communities had failed to make a *prima facie* case with respect to Section 751(a)(2)(A)(i) and (ii). The United States observes that while the European Communities denied that it had failed to make a prima facie case, with respect to its challenge to Section 751(a)(2)(A)(i) and (ii), the European Communities continued to use the phrase "if it means".

4.204 With respect to the European Communities' denial of its failure to make a *prima facie* case, the United States again refers the Panel to the discussion of *US – Gambling*, in connection with the European Communities' failure to make a *prima facie* case regarding the Manual. With respect to sections 751(a)(2)(A)(i) and (ii), the United States emphasizes that the European Communities continues to assert that these provision are WTO-inconsistent "if they mean" that asymmetry is required, so the original problem noted by the United States remains. However, the United States argues, even if the European Communities substituted "given that", this would not suffice to make its case. According to the United States, the European Communities has to explain why the statute that it quotes mandates the outcome to which it objects. The United States asserts that it has not done so, notwithstanding that the European Communities, as the complaining party, bears the burden of proof. The European Communities has not explained, let alone demonstrated, how the provision operates in a WTO-inconsistent manner.

4. Section 351.414(c)(2) of the Regulations

(a) The European Communities[95]

4.205 The European Communities submits that Section 351.414(c)(2) of the Regulations is "as such" inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement* because it is inconsistent with the fair comparison requirement established by the Appellate Body. According to the European Communities, the fair comparison requirement precludes a national measure providing that the average-to-transaction method is the norm. Section 351.414(c)(2) does not conform with this standard. First, it permits the use of an asymmetrical method of comparison without any of the cumulative conditions set out in Article 2.4.2 having been met. Second, it provides that the normal rule is asymmetry, when Article 2.4.2 of the *AD Agreement* recalls that the normal rule is symmetry. The provision also fails to provide for a fair comparison within the meaning of Article 2.4 of the *AD Agreement*.

(b) The United States[96]

4.206 The United States argues that Section 351.414(c)(2) of the Regulations does not mandate any WTO-inconsistent conduct nor does it preclude WTO-consistent action. The heading to paragraph (c) of section 351.414 is entitled "Preferences." Subparagraph (c)(2) provides as follows: "In a review, the Secretary will normally use the average-to-transaction method." According to the United State, as previously recognized by the Appellate Body, the word "normally" is an indicator of discretion.

[95] EC-First Written Submission, paras. 220-223; EC-Rebuttal Submission, para. 238.
[96] US-First Written Submission, paras. 102-105.

Thus, section 351.414(c)(2), on its face, provides discretion to use something other than the average-to-transaction method. Given that the European Communities relies solely on the text of the regulation, there is no basis for finding that the regulation mandates asymmetry or precludes symmetry. Accordingly, there is no basis for finding that the regulation is inconsistent "as such" with United States WTO obligations.

V. ARGUMENTS OF THE THIRD PARTIES

A. ARGENTINA

5.1 Argentina argues that the question for the Panel in this dispute is whether zeroing is a practice consistent with the obligations set out in Articles 2.4 and 2.4.2 of the *AD Agreement*. If it is not, then Argentina shares the view of the European Communities that, since calculation of the dumping margin is central and fundamental to an anti-dumping proceeding, any defect in the determination of the margin of dumping will inevitably adversely affect the consistency of the investigation as a whole by generating inconsistencies with other provisions of the *AD Agreement*.

1. Arguments with respect to Articles 2.4 of the *AD Agreement*

5.2 Argentina contends that Article 2.4 lays down a general obligation requiring Members to ensure a fair comparison between export price and the normal value when establishing the existence of dumping. Such a comparison is the only means provided for in the *AD Agreement* for determining the existence of dumping. Argentina argues that the Appellate Body has stated that this general obligation informs all of Article 2.[97]

5.3 Although the *AD Agreement* makes no reference to zeroing, it does mention that certain types of adjustments may be made to prices in order to facilitate comparison. Argentina asserts that it would be difficult to find justification for zeroing in such adjustments. Since any comparison between products not ordinarily comparable is deemed to be unfair and adjustments are provided for to remedy such a situation, there is no doubt that zeroing, because it inflates dumping margins, is inconsistent with the obligation to conduct a fair comparison between normal value and export price laid down in Article 2.4. Thus, zeroing breaches Article 2.4 of the *AD Agreement*.

2. Arguments with respect to Article 2.4.2 of the *AD Agreement*

5.4 Argentina argues that previous Panels and the Appellate Body have found zeroing to be inconsistent with Article 2.4.2 of the *AD Agreement*.[98] Argentina asserts that Article 2.4.2 requires that once the transactions that are to serve as the basis for the determination of dumping are identified, they must all be taken into account. Under the *AD Agreement*, it is not possible to select the transactions that can be used for the final determination of dumping precisely on the basis of what one is seeking to determine, namely whether or not dumping exists, and in what amount.

5.5 Argentina does not share the view of the European Communities on the applicability of Article 2.4.2 to the imposition phase and review phase of an anti-dumping proceeding. According to Argentina, the interpretation of the European Communities is contrived and has no basis in the text of the *AD Agreement* or in interpretations given in earlier cases. However, Argentina argues that if the United States calculates a new dumping margin in periodic reviews or sunset reviews, that margin must meet the requirements of Article 2.4 of the *AD Agreement*.

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[97] Appellate Body Report, *EC – Bed Linen*, para. 59.
[98] *EC – Bed Linen* and *US – Softwood Lumber V*.

3. Arguments with respect to Articles 3.1, 3.3, 3.4 and 3.5 of the *AD Agreement*

5.6 Argentina asserts that zeroing results in inconsistencies with Articles 3.1, 3.3, 3.4 and 3.5 of the *AD Agreement*. According to Argentina, the Appellate Body has ruled that both dumping and margins of dumping can be established only on the basis of all the transactions involved, once the product under investigation has been defined, in order to maintain the necessary consistency in the treatment of that product for the purpose of determining the volume of dumped imports, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping.

5.7 It is precisely for the sake of this consistency, which should prevail from beginning to end of anti-dumping investigations, that the consequence of zeroing cannot be ignored. In Argentina's view, the use of zeroing gives rise to artificially inflated margins of dumping, which according to Article 3.4 should then be taken into account as one of the relevant factors for determining injury to the domestic industry. An artificially inflated margin of dumping cannot be a proper basis for an analysis of this kind, as it generates inconsistency with Article 3.1 (by tainting the determination of injury, which must be based on positive evidence and an objective examination of the evidence), Article 3.3 (because of the presumption that the *de minimis* threshold could have been violated) and Article 3.5 (because it is not a proper basis for establishing the causal relationship required by the *AD Agreement*).

4. Arguments with respect to Articles 9.3 of the *AD Agreement*

5.8 Argentina argues that to impose anti-dumping duties on the basis of a determination of dumping that fails to meet the fair comparison requirement of Article 2.4 and is based on a margin of dumping calculated without taking all the transactions into account, cannot be consistent with Article 9.3. This is so because the duties imposed are inconsistent with Article 2. Thus, zeroing leads to the imposition of duties at a higher level than the margin of dumping that would have prevailed had the calculation not been made with this methodology, in violation of Article 9.3.

B. BRAZIL

5.9 Brazil argues that it sees no reason for this Panel to depart from the well established understanding that zeroing is impermissible under the *AD Agreement*. In view of the findings of the Appellate Body in previous disputes involving the same subject matter, namely *EC – Bed Linen* and *US – Softwood Lumber*, Brazil argues that the United States should avoid protracted litigation and agree to change its zeroing practice in all future anti-dumping proceedings, including investigations and reviews, regardless of the type of comparison that is used.

1. Zeroing is WTO-Inconsistent in all Contexts

5.10 According to Brazil, the fundamental issue before the Panel in this dispute is whether zeroing distorts the calculation of a dumping margin. The Appellate Body in *US – Softwood Lumber V* made clear that such a distortion exists. Yet, the United States would have the Panel believe that as long as an administering authority uses a comparison methodology *other* than the average-to-average methodology normally applied in United States investigations, then the prohibition against zeroing does not apply. This cannot be permitted, not merely under Article 2.4.2 of the *AD Agreement*, but also under Article 2.1 of the *AD Agreement*.

5.11 Based on the Appellate Body's understanding of the meaning of the term "dumping" in *US – Softwood Lumber V*, it does not matter how comparisons are made. All comparisons must ensure that all products are taken into account. The overriding rule is that an administering authority cannot simply ignore some transactions, but must instead incorporate the results of the comparison of all transactions into its dumping calculation conducted under Article 2.1. It is with this in mind that the

Appellate Body concluded in *EC – Bed Linen* that zeroing was not merely a violation of Article 2.4.2, but also of the "fair comparison" requirement in Article 2.4. Although it agrees with the positions taken by the European Communities in the present dispute, Brazil believes it is largely academic to discuss whether Article 2.4.2 applies to reviews, or whether "reviews" are considered part of "investigations", or whether transaction-to-transaction average comparisons are permitted. The fact is that zeroing reflects an unfair comparison. The fair comparison requirement in Article 2.4 is not limited to certain types of proceedings or certain types of comparisons; it applies whenever dumping margins are calculated. Therefore, zeroing should be deemed to violate Article 2.4 of the *AD Agreement* in all contexts.

5.12 Brazil asserts that the Panel should pay careful attention to the intrinsically interlocking nature of provisions and concepts governing the calculation of dumping margins, both in the so-called "original investigations" and "reviews". Referring to the definition of "dumping" contained in Article 2.1 of the *AD Agreement*, it is undisputable that such definition is the only one applicable throughout the Agreement, regardless of the stage of any antidumping proceedings where "dumping" is examined. Article 2.1 determines that a comparison between export prices and normal values of the product concerned is inherent to the definition of dumping. Article 2.4, in turn, stipulates that the comparison between the very same terms incorporated into the comparison required by Article 2.1 – "export prices" and "normal value" – must be "fair". In reading both provisions harmoniously, a treaty interpreter must necessarily arrive at the conclusion that, whenever a calculation of a dumping margin is called for, a fair comparison between export prices and normal values is obligatory.

2. United States' Policy of Zeroing

5.13 As the United States admits, the Appellate Body indicated in the *US – Corrosion Resistant Steel Sunset Review* case that instruments or actions setting out rules or norms can be challenged "as such" in a WTO dispute. In the present dispute, the measure at issue is USDOC's *policy* of zeroing, which clearly falls within the scope of rules, norms or standards to which the Appellate Body referred in the *US – Corrosion Resistant Steel Sunset Review* case. The question of whether or not these measures mandate application of zeroing could be deemed irrelevant in this instance, where the practice of zeroing is applied consistently from case to case.

5.14 Brazil argues that zeroing is no different from the kinds of tests or methodologies the United States has agreed to change in the past as a result of dispute settlement, such as the USDOC's 99.5 per cent "arm's length test" in issue in the *US – Hot Rolled Steel* case and the "same person" methodology used by USDOC in countervailing duty cases involving privatization, for example, in the *US – Countervailing Measures on Certain EC Products* case. According to Brazil, zeroing is a *policy* that USDOC uses in every case. This policy is reflected in a combination of, at least: (a) the consistent application of the policy in every case in which there is negative dumping; and (b) the USDOC Antidumping Manual. These, in combination, set forth a rule/norm/standard for applying the zeroing methodology in United States anti-dumping proceedings, which the Appellate Body has determined may be challenged in accordance with Article 18.4 of the *AD Agreement*, and should be found to violate Article 2.4 of that Agreement.

5.15 Whether these measures mandate application of the zeroing methodology could be deemed irrelevant in this instance, where the practice of zeroing is applied consistently from case to case. Brazil submits that repeated use of the zeroing methodology is a measure that the Panel should find inconsistent with the *AD Agreement*, and that its report should ensure that the United States eliminate the zeroing policy in all future cases.

5.16 Brazil submits that, if the Panel and, if necessary, the Appellate Body do not take action that prevents the United States from continuing its disregard of basic fairness in the application of its anti-dumping laws, the WTO and its Members will suffer. Brazil encourages the Panel to find that the use

of zeroing, whether in investigations or reviews, and regardless of the type of comparison employed, is inconsistent with Article 2.4 of the *AD Agreement* and should be eliminated once and for all.

C. CHINA

1. Measures that can be Challenged "As Such"

5.17 China contends that whether a measure can be challenged for the purpose of WTO dispute settlement is governed by the substance of the measure at issue, not its form. According to China, any kind of measures taken by a Member, no matter whether legislative or executive, may be the subject of dispute settlement under the DSU or other applicable covered agreements, as long as another Member considers that benefits accruing to it under the covered agreements are being impaired by such "measures". To this end, China contends that four elements must be present in order to challenge measures "as such" under the *AD Agreement*: (i) the measure must be of general application; (ii) the measure must be a rule, norm or a standard; (iii) the measure must be adopted by a Member, no matter by whether by its legislative or executive branches; and (iv) the measure must be connected with the conduct of anti-dumping proceedings.

5.18 China also argues that the "mandatory/discretionary" distinction is not decisive as to whether a measure is WTO-inconsistent. In China's view, discretionary legislation can also be WTO-inconsistent.

2. Arguments with respect to Article 2.4.2 of the *AD Agreement*

5.19 China submits that the obligations in Article 2.4.2 are not limited to original investigations. China notes that the *AD Agreement* does not define the word "investigation", and that within WTO jurisprudence, there are no precedents distinguishing assessment proceedings from original investigation.

5.20 China considers that duty assessment proceedings must be based on the calculation of a dumping margin according to Article 2 of the *AD Agreement*. If duty assessment proceedings were independent of any dumping margin, the chapeau of Article 9.3 would be redundant. It follows that, when calculating a dumping margin, investigating authorities must abide by Article 2, which naturally includes Article 2.4 and Article 2.4.2.

5.21 Finally, China submits that Article 2.4.2 expressly restricts the use of the third comparison methodology in Article 2.4.2 to situations of "targeted dumping". China considers that recourse to an asymmetrical methodology pursuant to Article 9.4 does not absolve Members of this obligation.

D. HONG KONG, CHINA

1. Arguments with respect to Articles 2.4 and 2.4.2 of the *AD Agreement*

5.22 Hong Kong, China argues that insofar as the Panel finds that the United States applies zeroing in effecting a "weighted-average-to-weighted-average" comparison, it must find such practice inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement* for the same reasons given by the Appellate Body in *EC – Bed Linen*[99] and *US – Softwood Lumber V*[100] cases.

5.23 Hong Kong, China further submits that the use of zeroing in effecting the other two types of price comparison in Article 2.4.2 (namely, "transaction-to-transaction" and "weighted-average-to-

[99] Appellate Body Report, *EC – Bed Linen*, paras. 53-65.
[100] Appellate Body Report, *US – Softwood Lumber V*, paras. 97-103.

transaction" comparisons), is also inconsistent with Article 2.4 of the *AD Agreement*. Noting the difference between the current wording of Article 2.4 and the earlier version (Article 2.6) contained in the Tokyo Round Anti-dumping Code, Hong Kong, China asserts that Article 2.6 of the Tokyo Round Code was specifically re-cast so that the current Article 2.4 of the *AD Agreement* contains a new, separate sentence on fair comparison at the beginning of the Article. This new drafting highlights the overarching nature of the obligation to make fair comparison, and the fact that it constitutes a substantive obligation in itself independent of the substantive obligations set out in other parts of Article 2.4, including Article 2.4.2.

5.24 Hong Kong, China submits that "fair comparison" requires that the way the comparison is conducted must be objectively "fair" in the sense of being equitable and balanced. The use of zeroing when establishing an overall level of dumping is, *per se*, unfair, regardless of which method of price comparison under Article 2.4.2 is used. By disregarding some of the transactions used in the intermediate comparisons, the resultant overall margin of dumping is established based on incomplete price information and as such, the calculation of the overall margin of dumping is inherently unreliable. Moreover, zeroing has an inherent bias which may inflate and distort not only the magnitude of the margin of dumping, but also a finding of the very existence of dumping. A price comparison which uses zeroing is therefore inherently inequitable and unfair, and inconsistent with the requirement to make "fair comparison" in Article 2.4.

5.25 Hong Kong, China further submits that, even though the words "all comparable export transactions" in Article 2.4.2 are not expressly stated in relation to the "transaction-to-transaction" comparison methodology, by its nature, such methodology requires an overall margin of dumping for the product under investigation to be calculated based on a comparison of each export transaction with a corresponding domestic transaction sales transaction, and the zeroing is therefore inherently inconsistent with the "transaction-to-transaction" comparison methodology in Article 2.4.2.

5.26 Hong Kong, China further asserts that the term "investigation" as used in the *AD Agreement* is not necessarily limited to an "original" or "initial" investigation. The term has been used in other parts of the *AD Agreement* in a general sense to refer to other anti-dumping proceedings. With respect to the contention of the United States that Article 18.3 explicitly recognises the difference between "investigations" that may lead to the imposition of a measure, and "reviews" of existing measures, Hong Kong, China submits that while Article 18.3 covers all types of anti-dumping proceedings between the two terms "investigation" and "reviews of existing measures", the purpose of Article 18.3 is not to, nor does Article 18.3, clearly define which proceedings fall within the meaning of "investigations" and "reviews" as used in the *AD Agreement* or draw a clear distinction between the two. Article 18.3 does not provide specific guidance on how the word "investigation" is to be interpreted elsewhere in the *AD Agreement*. In Hong Kong, China's view, the meaning of "investigation" in the *AD Agreement* should be read and construed in the specific context in which it appears.

5.27 With respect to the contention of the United States that Article 2.4.2 does not apply to retrospective assessment of anti-dumping duty under Article 9.3.1, Hong Kong, China states that Article 2.4.2 refers to the establishment of the existence of margins of dumping "during the investigation phase", but draws no apparent distinction between different types of "investigation", nor does it ascribe any special meaning to the term "investigation". Consistent with the customary rules of treaty interpretation under public international law, Hong Kong, China submits that in the context of Article 2.4.2, "investigation" should be construed as referring to any procedure undertaken by an investigating authority which conforms to the ordinary meaning of an "investigation" and which leads to the establishment of the existence of margins of dumping for the subject product. "Investigation phase" should be construed accordingly.

5.28 Referring to dictionary definition of "investigation", Hong Kong, China notes that in a retrospective assessment, an investigating authority has to examine or inquire into transactions that actually took place in the relevant period in order to verify the existence of dumping and the margin of dumping for the subject product during that period, so as to determine the final liability for payment of anti-dumping duties. These procedural steps carried out by an investigating authority conform objectively to the ordinary meaning of the word "investigation", and lead to the establishment of margins of dumping as referred to in Article 2.4.2. Therefore, they constitute an "investigation" for the purpose of Article 2.4.2.

5.29 With respect to the contention of the United States that Article 9 does not incorporate the requirements of Article 2.4.2, Hong Kong, China submits, with specific reference to paragraphs 7.357 and 7.361 of the Panel report of *Argentina – Poultry Anti-Dumping Duties*, that "margin of dumping" in Article 9.3 refers in the case of retrospective assessment to the margin of dumping established for the purpose of final duty assessment, that Article 2 sets forth a definition of dumping "for the purpose of this Agreement", that it would not be possible to establish a margin of dumping without reference to the various elements of Article 2, and that had the Panel in *Argentina – Poultry Anti-Dumping Duties* been specifically asked to consider the true meaning and scope of "investigation phase" in Article 2.4.2, the natural conclusion would have been that the provisions of Article 2.4.2 apply to Article 9.3 assessments.

2. Arguments with respect to Whether the Practice of Zeroing is a Measure which can be Submitted as such to Dispute Settlement

5.30 Hong Kong, China submits that the object and purpose of the WTO Agreement, and in particular, the object and purpose of the DSU, points to a broad interpretation of the term "measure". Any act of a Member, whether or not legally binding, could be submitted "as such" to dispute settlement, including even "non-binding administrative guidance by a government" and "acts setting forth rules and norms that are intended to have general and prospective application". The AD Margin Program (a computer programme designed for margin calculations, which is generally used by the United States Department of Commerce in anti-dumping investigations and through operation of which zeroing is applied), and the computer instructions comprised in it, are of the nature of "norms or rules of general and prospective application" and can be challenged "as such" in dispute settlement proceedings.

5.31 Hong Kong, China further asserts that, in any event, just as instruments "setting forth" rules or norms of general and prospective application may be brought "as such" to dispute settlement, unwritten rules or norms may also be submitted "as such" to dispute settlement: if a particular act (e.g. zeroing) is repeated to such consistency as to give rise to a "repeated pattern of similar responses to a set of circumstances", then such "repeated pattern of similar responses", or "practice", must be regarded as clear evidence as to the existence of rules or norms which are of general and prospective application.

5.32 Were this not the case, a Member would be free to formulate "unwritten" or vague rules or norms and apply them consistently in a particular manner so as to impair the benefits accruing to another Member under the covered agreements, severely reducing transparency in the rules and norms adopted by a Member to implement the covered agreement, crippling the protection of the security and predictability of trade and seriously undermining the purpose of the WTO dispute settlement system.

E. INDIA

1. Model Zeroing and Simple Zeroing are "as such" Measures

5.33 India submits that one of the key issues in this dispute is whether model zeroing and simple zeroing, are "as such" measures that may be challenged. According to India, in both the *US – Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Reviews* cases, the Appellate Body emphasized that the scope of Article 18.4 of the *AD Agreement* is broad, covering "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings." This interpretation of Article 18.4 of the *AD Agreement* indicates that the scope of dispute settlement under the *AD Agreement* for an "as such" claim is not meaningfully different from the general scope of dispute settlement under Article 6.2 of the DSU. In each case, the dispute may concern any rules, norms or standards with general and prospective application.

5.34 India asserts that the United States zeroing methodology is incorporated in the United States' standard anti-dumping computer programs. Certain procedures in these programs result in zeroing through model zeroing or simple zeroing. The standard programs, inclusive of the zeroing procedures, "have been designed to cover as many situations as possible". Each and every program that is applied by the United States in a particular anti-dumping proceeding must use "the same standard calculation methodology," and that methodology must "conform" to the Administration's current methodological requirements. In other words, the standard programs constitute a pre-determined set of procedural rules and are relied upon by the United States for calculating the dumping margins in all anti-dumping proceedings. Thus, the United States' standard anti-dumping computer programs, including the procedures that result in zeroing through model zeroing or simple zeroing, can be characterized as being norms or rules that are applied on a generalized and prospective basis in anti-dumping proceedings. Consequently, model zeroing or simple zeroing are measures that may be challenged "as such" within the WTO system.

2. "Mandatory – Discretionary" Distinction

5.35 India argues that on the basis of the mandatory – discretionary doctrine, the United States has urged the Panel to reject the "as such" claims of the European Communities. According to India, this position is contrary to the findings of the Appellate Body in *U.S. – Corrosion-Resistant Steel Sunset Review*, where the Appellate Body saw no reason for concluding that "in principle, non-mandatory measures cannot be challenged "as such". It is India's position that in order to determine whether model zeroing and simple zeroing are "as such" WTO-inconsistent, the nature and character of these procedures must be examined.

3. Model Zeroing and Simple Zeroing are as such inconsistent with the *AD Agreement*

5.36 India asserts that existing case law on the issue of zeroing confirms that model zeroing and simple zeroing are "as such" inconsistent with Article 2.4 and 2.4.2 of the *AD Agreement*. According to the Appellate Body, "when investigating authorities use a zeroing methodology … to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. … The inherent bias in a zeroing methodology … may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[101] Furthermore, in the *EC – Bed Linen* case, the Appellate Body was of the view that "a comparison between export price and normal value that does *not* fully take into account the prices of *all* comparable export transactions – such as the practice of zeroing at

[101] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

issue in this dispute – is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2." [102] According to India, these findings on zeroing are applicable with equal force to model zeroing and simple zeroing resorted to by the United States in its anti-dumping investigation procedures.

5.37 Furthermore, India argues that it is also clear from the ruling of the Appellate Body in the *US – Corrosion-Resistant Steel Sunset Review* case that the requirements of a "fair comparison" in Article 2.4 apply equally to a dumping margin calculated or used for purposes of Article 9.3. Thus, the resort by the United States, to simple zeroing as a normative rule in sunset reviews and reviews for the purpose of Article 9.3 is "as such" inconsistent with the provisions of Article 2.4.

F. JAPAN

1. Model Zeroing and Simple Zeroing are Measures that can be Challenged as such

5.38 Japan argues that nothing in the *AD Agreement* limits the types of measure that may, as such, be the subject of dispute settlement. To this end, Japan notes that the Appellate Body has clarified that "any act or omission attributable to a WTO Member can be a measure of that Member" and that measures "consisting of acts setting forth rules or norms that are intended to have general and prospective application" or "instruments of a Member containing rules or norms" can be challenged as such.

5.39 The Appellate Body explained that the disciplines and rules of the WTO "are intended to protect not only existing trade but also the security and predictability needed to conduct future trade" and "allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated" There are a growing number of disputes concerning the United States' use of zeroing procedures and, to avoid "future disputes," the European Communities challenges "as such" the administrative procedures embodying the United States' zeroing norms, as envisaged by the rulings of the Appellate Body.

5.40 According to Japan, the characterization of an act in domestic law is not determinative of its character as a "measure" in WTO law. The issue does not depend on "the label given" to an instrument in domestic law, nor upon its "form or nomenclature," but on the "substance and content of the instrument." Accordingly, the fact that the measures at issue are, in part, in the "form" of a computer program is therefore of no importance to their character in WTO law.

5.41 Contrary to the United States' assertion, the mere possibility of change alone does not deprive the acts in question of their character as measures covered by Article 18.4 of the *AD Agreement*. Nor does the nature of the domestic procedures by which the measure in question is "changed" affect its character in WTO law. Furthermore, the question whether or not an act is binding under municipal law is also irrelevant to its characterization as a measure in WTO law.

5.42 Contrary to the United States' argument, the ordinary meaning of the word "procedure" in Article 18.4 encompasses a system, method or mode of proceeding, which may include a methodology. Japan also confirms the view of the European Communities that the dictionary meaning of "procedure" includes "computers: a set of instructions for performing a specific task." Thus, an "administrative procedure," in Article 18.4, is a system or method that directs the administering authority's conduct or management of anti-dumping proceedings. It can include computer procedures that provide a set of instructions for executing tasks.

[102] Appellate Body Report, *EC – Bed Linen*, para 55.

5.43 In determining that the Sunset Policy Bulletin ("SPB") is a "measure" in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body addressed three separate issues: first, the normative character of the alleged measure; second, the generality of its application; and, third, the prospective quality of its application. Notably, the Appellate Body found that the normative character of the SPB stemmed from the fact that it provides "guidance" to the administrative authority and that this guidance creates "expectations" among users that the authority will act in a particular way.

5.44 Model zeroing and simple zeroing are "as such" measures because they are rules, norms or standards applied by the United States in anti-dumping proceedings on a generalized and prospective basis. In all anti-dumping proceedings, the United States relies on standard computer programs to calculate dumping margins, the nature and purposes of which are described in the publicly available Manual. The Manual sets forth published pre-determined rules and procedures that provide "administrative guidance" to USDOC personnel, public and private users. Accordingly, as long as the rules and procedures in the Manual continue to apply, they can be the subject of WTO dispute settlement proceedings as measures, irrespective of their characterization in United States law. As Chapter 9 of the Manual states explicitly that there are "procedures" to be used for calculating dumping margins and that these are contained in standard computer programs. The Manual indicates that the "standard programs" are "procedures" that direct the administrative authority in executing dumping determinations.

5.45 The United States itself, in its first written submission, accepts that the standard AD Margin Program "implements *rules or norms* adopted by a decision-maker." The AD Margin Program is, therefore, no different from any other "measure," in that it reflects or "implements rules or norms" adopted by a decision-maker. According to Article 18.4 of the *AD Agreement*, decisions adopted regarding the administration of anti-dumping proceedings are implemented through "laws, regulations and administrative procedures." That Program is, *in and of itself*, an "instrument" for purposes of Article 18.4. As stated above, the standard AD Margin Program constitutes an "administrative procedure" because it provides a system or method that directs the Administration's execution of dumping determinations.

5.46 In accordance with the Manual, each and every program that is applied by the United States in a particular proceeding must use "the same standard calculation methodology," and that methodology must "conform" to the Administration's current methodological requirements. This systematized manner of proceeding constitutes a "procedure." The calculation procedures are, therefore, not established on an "*ad hoc*" basis in particular investigations or reviews; they are pre-determined for application on a generalized and prospective basis.

5.47 The standard program for the calculation process referred to in the Manual relevant to this case is the AD Margin Calculation Program. The key line of this computer program is the code "WHERE EMARGIN GT 0;". Through this line, the standard AD Margin Calculation Program *includes*, in the calculation of the numerator for the overall dumping margin fraction, only the margins calculated for models (in the case of model zeroing) or for individual export transactions (in the case of simple zeroing) *that are greater than zero*. Negative (and zero) margins are *excluded* from the numerator. Such model and simple zeroing rules are to be used prospectively in every specific program, consistent with their normative character.

5.48 In addition, the evidence of copies of computer programs submitted by the European Communities confirms that the zeroing procedures are applied on a normative and generalized basis as indicated by the Manual. They are, in short, administrative procedures. Further, according to the testimony attached with Japan's submission, since 1993, "the procedure for calculating the overall weighted-average percentage dumping margin, including the 'zeroing' procedure, has never changed."

5.49 Japan submits that, in light of: (1) the standard AD Margin Calculation Program: (2) the many specific margin calculation programs provided by the European Communities: (3) the Manual; and (4) the attached testimony by an expert, model zeroing and simple zeroing are norms or rules that are applied by the United States on a generalized and prospective basis. The very purpose of the AD Margin Calculation Program is to establish standard "programming procedures" that operate mechanistically to ensure that a particular – "proper" – calculation methodology is applied universally and predictably.

2. Model Zeroing and Simple Zeroing are as such WTO-Inconsistent

5.50 The Appellate Body has held that the Article 2.1 of the *AD Agreement* "applies to the entire *Anti-Dumping Agreement*" and Article 2 sets forth the "agreed disciplines" for determining the existence and amount of the margin of dumping.

5.51 As part of these "agreed disciplines," the first sentence of Article 2.4 of the *AD Agreement* states "[A] *fair comparison* shall be made between the export price and the normal value". The Appellate Body ruled that this provision "sets forth a *general* obligation" that "informs *all of Article 2*." The ordinary meaning of the word "fair" in Article 2.4 requires a comparison of normal value and export price that is "unbiased," "impartial," and "offer[s] an equal chance of success" to both domestic parties and exporters. This suggests that a "fair comparison" is one that is "even-handed," a meaning that is reminiscent of the Appellate Body's interpretation of Articles 2.1 and 2.2.1 in United States – *Hot-Rolled Steel*, in which it made an explicit link between "fairness" and "even-handedness" in Article 2. The Appellate Body also held that there was a "lack of even-handedness" because the "combined application of [the measures] operated *systematically to raise normal value*, through the automatic exclusion of marginally low-priced sales, coupled with the automatic inclusion of all high priced sales, except proved, upon request, to be aberrationally high priced" which "disadvantaged exporters."

5.52 Japan believes that the same interpretive principles guide the "fair comparison" under Article 2.4. Thus, it would not be "fair" under that provision to conduct a comparison between normal value and export price in an arbitrary way which is "*more likely*" to result in a determination of dumping or is "*more likely*" to increase the margin of dumping. Any procedure which either excludes high-priced export transactions, reduces export price, or raises normal value, make a dumping determination more likely and improperly inflate any margin that is found to exist. All of these procedures, therefore, create bias because they disadvantage exporters. None of these procedures, therefore, is consistent with the requirements of a "fair comparison" under Article 2.4 of the *AD Agreement*.

5.53 As the *AD Agreement* requires, "all comparable export transactions" for "a product" are to be compared in calculating a dumping margin. The Appellate Body indicated, in this regard, that the investigating authority must take fully into account the entirety of the prices of all comparable export transactions of the subject product in the price comparison, and this, in turn, constitutes the fair, even-handed way to compare transactions. The model and simple zeroing, however, result in precisely the types of unfairness outlined above because they operate systematically to disadvantage and prejudice exporters. The operation of the zeroing procedures: (1) *excludes* from the numerator in the calculation of the weighted-average dumping margin the negative margins for *higher-priced* comparable export transactions or models; and (2) *interferes* with the comparison of normal value and export price to generate a "zero" – instead of a negative – outcome by, in effect, improperly *reducing* the true export price for the excluded export transactions.

5.54 It is noteworthy that, although the United States disregards or interferes with the value of certain "comparable" export transactions, it does not provide any equivalent, counter-balancing compensation for these actions in the overall comparison of normal value and export price. The

zeroing procedures are designed and structured to operate entirely and exclusively to the detriment of exporters. Thus, notwithstanding the obligations assumed by the United States under Article 2 to compare fairly all comparable transactions, its zeroing procedure for selecting from among the comparable transactions systematically prejudices exporters.

5.55 The Appellate Body has consistently held that model zeroing – which operates in the *same* manner and produces *the same* effects as simple zeroing, other than that simple zeroing inflates margins more – is inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement*. As observed by the Appellate Body, there is an "inherent bias in a zeroing methodology." This "bias" "could, in some instances, turn a negative margin into a positive margin of dumping" and may, therefore, "distort not only the magnitude of a dumping margin, but also [result in] a finding of the very existence of dumping." In other words, through the zeroing procedures, a finding of dumping becomes "more likely" and the magnitude of any dumping margin is systematically "inflated." The Appellate Body has also highlighted that there is no express language permitting authorities to disregard negative margins and, therefore, no justification for the "inherent bias" and unfairness in a zeroing procedure.

5.56 In light of these observations, the Appellate Body "emphasized that a [zeroing] comparison such as that undertaken by the European Communities [in *EC – Bed Linen*] is not a 'fair comparison' between export price and normal value as required by Articles 2.4 and 2.4.2." The same reasoning applies to this case. Both model and simple zeroing involve an "inherent bias" against exporters that cannot be regarded as "fair."

3. Arguments with respect to Articles 3 and 5.8 of the *AD Agreement*

5.57 Japan submits that model zeroing systematically leads to a flawed injury determination under Article 3 of the *AD Agreement*. In terms of Articles 3.1, 3.2, 3.3, 3.4 and 3.5 of the *AD Agreement*, authorities must examine the volume of dumped imports, the volume of non-dumped imports, the magnitude of the dumping margin, and the impact of the dumped imports on the domestic industry. However, zeroing overstates the volume of dumped imports, understates the volume of non-dumped imports, systematically inflates the dumping margin and the volume of dumped imports, and also distorts the injury determination. Because the investigating authorities rely on such inaccurate data, zeroing distorts the determination to be made with respect to each of these elements. Furthermore, as a result of relying on such inaccurate data, investigative authorities also fail to terminate investigations in circumstances where, under Article 5.8, they are required to do so.

4. Additional Arguments on Simple Zeroing

5.58 The simple zeroing operates in the context of periodic reviews, conducted pursuant to Article 9.3 of the *AD Agreement*. The express treaty text states that any dumping margin used for purposes of Article 9.3 must be calculated consistently with Article 2. The Appellate Body has ruled that dumping margins used for purposes of sunset reviews under Article 11.3 must be calculated consistently with Article 2.4 of the *AD Agreement*, including with the requirement to make a "fair comparison." It added that if dumping margins used for purposes of a sunset review "were legally flawed because they were calculated in manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *AD Agreement*."

5.59 This Appellate Body's ruling must apply a fortiori to dumping margins calculated and used in reviews under Article 9.3. This is particularly so because, unlike Article 11.3, Article 9.3 specifically refers to Article 2. A comparison that does not meet all of the requirements of "fairness" is not consistent with the "general obligation" in Article 2.4. The requirement in Article 2.4.2 for the comparison of normal value and export price to include "all comparable export transactions" is an expression of the "general obligation" in Article 2.4 to ensure a "fair comparison" for the product as a whole. If certain export transactions are excluded from the comparison, the margin ceases to be for

the product as a whole and is instead for a particular part or category of that product. Such a comparison does not provide a "fair" basis for concluding that the product as a whole is dumped.

5.60 Furthermore, the disregard of, or interference with, export transactions under the simple zeroing rule operates systematically to the disadvantage and prejudice of exporters, without any compensating set-off for this disadvantage in the comparison. The United States is obliged by Article 2.4 to ensure that any selection that it undertakes among comparable transactions is "fair," treating domestic parties and exporters "even-handedly." The "inherent bias" in zeroing is inconsistent with these requirements and is, therefore, inconsistent with Article 2.4. In consequence, simple zeroing is "as such" inconsistent with Articles 2.4, 2.4.2 and 9.3 of the *AD Agreement*.

5. "Mandatory – Discretionary" Distinction

5.61 The United States places considerable emphasis throughout its first written submission on the so-called mandatory – discretionary "doctrine." Contrary to the United States' view, the case-law indicates that measures involving discretion may well be WTO-inconsistent. The Appellate Body indicated that there would be no clear dividing line which distinguishes mandatory measures from discretionary measures, and discretion to violate WTO obligations could be WTO-inconsistent.

5.62 As a result, the United States is incorrect to assert that the mere existence of discretion to comply with WTO law precludes a finding of WTO-inconsistency. In this dispute, the Panel must examine the nature and character of the measure at issue, including the evidence of the general application of the zeroing procedure, to determine whether the measures are "as such" WTO-inconsistent. As outlined above, that evidence shows *prima facie* that the United States generally applies the zeroing procedures, according to their own terms, in a WTO-inconsistent manner and has done so, at least, since 1993. The mere fact that the United States could alter this rule does not eliminate the on-going WTO-inconsistency of the rule.

5.63 Furthermore, even assuming, for the sake of arguments, a mandatory – discretionary analysis were required in this case, the model and simple zeroing at issue, by their own terms, require WTO-inconsistent action. First, the zeroing procedure is included in the USDOC standard AD Margin Calculation Program. The standard "programming procedures" instruct a mechanistic selection and summing of data that, in terms of the procedures, afford no possibility to depart from "zeroing." Second, the evidence submitted by the European Communities of many specific computer programs supports the conclusion that the United States treats the zeroing procedures a mandatory part of its administrative procedure because the zeroing procedure has been included in specific computer programs with the utmost consistency. Third, the expert testimony submitted by Japan demonstrates that the United States has used the zeroing procedures, without change, for at least the past twelve years.

6. Conclusion

5.64 Japan submits that the model zeroing measure, used in original investigations, is "as such" inconsistent with, *inter alia*, Articles 2.4, 2.4.2, 3.1, 3.2, 3.3, 3.4 and 5.8 of the *AD Agreement*. The simple zeroing measure, used in periodic reviews and duty assessments, is "as such" inconsistent with, *inter alia*, Articles 2.4, 2.4.2 and 9.3 of the *AD Agreement*.

G. REPUBLIC OF KOREA

5.65 Korea agues that as the Appellate Body has consistently found zeroing to be prohibited in all anti-dumping proceedings. Indeed, according to Korea, the Appellate Body has consistently held that zeroing should be condemned as unfair and prohibited in the original investigation well as reviews

and consequently has found that zeroing is inconsistent with the "fair comparison" requirements of Articles 2.4 and 2.4.2.[103]

1. Arguments with respect to Article 2.4

5.66 Korea submits that the "fair comparison" requirement of Article 2.4 is an overarching and independent obligation which applies to all dumping calculations. Korea is of the view that a comparison of the text of the current *AD Agreement* to the corresponding provision of the Tokyo Round Antidumping Code suggests that the "fair comparison" requirement of the first sentence of Article 2.4 was intended to be independent of the provisions in the subsequent sentences of Article 2.4.

5.67 Contrary to the Tokyo Round Code, which sets out the "fair comparison" requirement as an introductory clause, the Uruguay Round Agreement contains a separate and explicit command that a "fair comparison shall be made," as an independent new first sentence of Article 2.4. In addition, the position that the "fair comparison" requirement is an independent and overarching obligation is clearly supported by the language of Article 2.4 since the "fair comparison" requirement is set forth independently, in the first sentence of Article 2.4, in language that is not conditioned on the requirements of the following sentences.

5.68 For these reasons, Korea submits that the "fair comparison" requirement of Article 2.4 - which applies to all dumping calculations - provides an independent ground for finding zeroing to be inconsistent with the *AD Agreement.*

2. Article 9.3 Proceedings are Part of "the investigation phase" under Article 2.4.2

5.69 Korea asserts that the periodic review under Article 9.3 is part of "the investigation phase" under Article 2.4.2. According to Korea, in the *US – Corrosion-Resistant Steel Sunset Review* case, the Appellate Body explained that reviews under Article 11 "envision a process combining *both* investigatory and adjudicatory aspects."[104] Furthermore, the Appellate Body noted that although it was not necessary for investigating authorities to calculate dumping margins in sunset reviews, if they chose to do so, their calculation must be consistent with the requirements of Article 2. Korea submits that the same logic should apply to periodic reviews for duty assessment under Article 9.3. Thus, in a periodic review, where the United States chooses to calculate a new dumping margin for the duty assessment, the calculation should be done without zeroing, consistent with the requirements of Article 2, including the requirements of Articles 2.4 and 2.4.2.

3. Articles 2.4 and 2.4.2 Apply to Article 9.3 Proceedings

5.70 Korea submits that the text of Article 9.3 explicitly indicates that the requirements of Articles 2.4 and 2.4.2 must apply to periodic reviews under Article 9.3. Noting that Article 9.3 explicitly refers to margin of dumping "as established under Article 2," Korea is of the view that in a periodic review, a new dumping margin for the duty assessment should be calculated pursuant to Article 2, including Articles 2.4 and 2.4.2. In addition, Korea argues that Article 9.3 establishes a basic requirement that "the amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2." If zeroing is permitted in the periodic review for the duty assessment, then duties would be imposed in excess of "the margin of the dumping as established under Article 2" due to the use of a methodology that Article 2.4.2 does not permit.

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[103] Appellate Body Report, *EC – Bed Linen*; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*; and Appellate Body Report, *US – Softwood Lumber V*.

[104] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111.

H. MEXICO

1. Zeroing is Prohibited by Article 2.4

5.71 Mexico argues that Article 2.4 of the *AD Agreement* establishes the fundamental principle that: "A fair comparison shall be made between the export price and the normal value". This entails an independent obligation to determine the relevant dumping margin by using a fair method of comparison that takes into account sales of all the products under investigation, which necessarily means that "negative margins" should not be zeroed.

5.72 The United States zeroing practice is not objective and impartial and therefore this practice is as such unfair under Article 2.4. Consequently, zeroing is inconsistent with the obligations of the United States established under Article 2.4.

2. Zeroing is Prohibited by Article 2.4.2

5.73 The United States model zeroing and simple zeroing comparison methodologies are inconsistent with Article 2.4.2 because they do not involve a weighted-average comparison of the prices of all comparable export transactions. Pursuant to paragraph 55 of Appellate Body's report in the *EC – Bed Linen*, case an investigating authority must include in the comparison of prices it undertakes when calculating a dumping margin all comparable export transactions, otherwise it would not be making a "fair comparison", something which would be contrary to the terms of Articles 2.4 and 2.4.2.

3. Article 2.4.2 Applies to Duty Assessment Proceedings

5.74 Article 9 of the *AD Agreement* provides that the obligations contained in Article 2 apply to the duty assessment proceedings. According to Article 9.3 of the *AD Agreement*, the amount of the antidumping duty shall not exceed the margin of the dumping as established under Article 2. That is, Article 9 refers to the whole Article 2, without any restrictions. It therefore obliges an investigating authority to apply Article 2.4.2 when determining the amount of anti-dumping duties in the corresponding duty assessment proceedings. In this connection, Mexico is of the view that all the obligations contained in Article 2 are directly applicable in the context of United States duty assessment proceedings, since, as established in Article 9.3, the requirement to determine the amount of an anti-dumping duty (if one is imposed) at a level that does not exceed the margin of dumping as established under Article 2 applies equally to retrospective and prospective systems.

4. Weighted-Average Normal Value to Individual Export Transaction Comparison is Permitted only in Specific Circumstances

5.75 The obligation to make a fair comparison must necessarily and normally be based on equivalent methodologies, that is to say, on a symmetrical comparison, a principle set out in Article 2.4, which establishes that "A fair comparison shall be made between the export price and the normal value". According to this principle, the *AD Agreement* establishes that the methodology involving a comparison of weighted-average normal values with individual export transactions (i.e. an asymmetrical comparison) is permitted only if particular conditions, set out in Article 2.4.2 (known as "selective dumping"), are present.

5.76 Contrary to the arguments of the United States, the obligation of making a "fair comparison" (that is, a symmetrical comparison) applies to the antidumping duty assessment proceedings, given that as previously described, Article 2 of the *AD Agreement* is applicable to those proceedings.

5.77 The text of *AD Agreement* Article 9.4, as in original investigations, expressly restricts the situations in which an asymmetrical comparison can be made – namely when the investigating authority uses samples in its investigations and, particularly significantly, when the amount of anti-dumping duties is determined prospectively, a situation that does not apply in any circumstance to the United States, given its current laws and regulations.

5.78 The main aim of the provisions contained in Articles 2 and 9 is to ensure a "fair comparison" consistent with the *AD Agreement*, and the exceptions for an asymmetrical comparison methodology are confined to the circumstances specifically enumerated in the Agreement.

5. The "Standard Zeroing Procedures" are a Measure that can be Challenged as such

5.79 Pursuant to a dispute settlement proceeding, every act or omission of a WTO Member can be considered as a "measure". Therefore, there is no limit about the kind of measures of the United States related to the zeroing practice that can be subject to a dispute settlement proceeding under the DSU or the *AD Agreement* in which its conformity as such with those Agreements is challenged.

5.80 Mexico considers that the United States rules on anti-dumping, specifically sections 771(35)(A) and (B) and 777A(d) of the 1930 Tariff Act and section 351.414(c)(2) of the USDOC regulations, are inconsistent as such with Articles 2.4, 2.4.2, 9.3, 11 and 18.4 of the *AD Agreement*, with Articles VI:1 and VI:2 of the *GATT 1994* and with Article XVI:4 of the *WTO Agreement*.

5.81 The Import Administration Antidumping Manual, the standard computer programs and the standard anti-dumping margin program are components of standard zeroing procedures and constitute a part of the overall structure in which anti-dumping investigations are conducted by the United States. The United States' investigating authority systematically applies standard zeroing procedures in all calculations of dumping margins in original investigations as well as in anti-dumping duty assessment procedures. Accordingly, the standard zeroing procedures, in practice, are deemed compulsory. In this light, it is appropriate to review the standard zeroing procedures, as part of the "measures" challenged in this dispute.

I. NORWAY

1. Zeroing is Prohibited in "Retrospective Assessment Reviews" under Article 9.3 of the *AD Agreement* and in "New Shipper Reviews" under Article 9.5

5.82 Norway submits that the pivotal question, in this case, is whether Article 2.4, including Article 2.4.2, of the *AD Agreement* applies to "retrospective assessment reviews" and "new shipper reviews".

5.83 According to Norway, the Appellate Body has clearly stated that there is only one method of calculating dumping margins in the *AD Agreement* and that is in accordance with the provisions of Article 2.4 – which includes Article 2.4.2. This was most recently stated in the *US – Corrosion Resistant Steel Sunset Review* case in connection with the interpretation of Article 11.3 of the Agreement concerning "sunset reviews".[105] In this case, the Appellate Body recalled its findings in the *EC – Bed Linen* case, and stated that:

[105] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 127

> "When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated."[106]

5.84 Norway contends that the word "otherwise" makes it particularly clear that the findings of the Appellate Body in this case are just as valid whenever a margin of dumping is calculated, and not just in original investigations. This is, furthermore, abundantly clear from the chapeau to paragraph 3 of Article 9, which states that "[T]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." This creates a clear and unambiguous link between the dumping duty imposed, reassessed or collected and the disciplines in Article 2 governing the calculation of dumping margins.

5.85 Norway rejects the argument of the United States that Article 2.4 applies to periodic reviews, but not to sub-paragraph 4.2, because of the existence of the word "investigation" in Article 2.4.2. First, the United States' arguments fail because there is nothing in paragraph 3 of Article 9 that bars the application of Article 2.4.2. To the contrary, there is a clear reference to calculations of dumping margins, an issue squarely within Article 2.4.2. Secondly, because the Appellate Body in the *EC – Bed Linen* case has interpreted the prohibition on zeroing based not on Article 2.4.2 as such but on the requirement of a "fair comparison" in Article 2.4. Thirdly, because what the United States is doing in its duty "reassessment reviews" and "new shipper reviews" is similar to what it does in original investigations and in "sunset reviews". For all practical purposes it is a new investigation. If the reach of Article 2.4.2 is excluded from all but original investigations there would be no disciplines left to ensure fairly computed dumping margins. This would be contrary not only to the "fair comparison" requirement, but also to the Appellate Body's explicit findings in the *US – Corrosion Resistant Steel Sunset Review* case.

2. Measures that can be Challenged "as such"

5.86 Norway argues that there are no limitations on the types of measures that can be challenged as such before a WTO panel. Norway asserts that guidance on the measures, and types of measures, that can be challenged before a WTO panel in a case concerning the *AD Agreement* can be found in many provisions. For instance, Norway contends that the interpretation of Article 3.3 of the DSU by the Appellate Body in the *US – Corrosion Resistant Steel Sunset Review* case indicates that, in principle, any act or omission attributable to a WTO Member can be assumed to be a measure by that Member for the purposes of dispute settlement proceedings.

5.87 The wide reach of the notion of "measure" is also evident from Article 18.4 of the *AD Agreement*, which refers not only to laws or regulations, but also to "administrative procedures" as measures subject to the disciplines of the *AD Agreement*. Furthermore, Article 17.3 of the *AD Agreement*, which concerns disputes relating to the Agreement, only makes reference to the "effects" of any action by another Member, and not to specific types of measures. Indeed, the Appellate Body stated in the *US – Corrosion Resistant Steel Sunset Review* case that there is no threshold requirement in Article 17.3 of the *AD Agreement* that the measure in question be of a certain type. In the same ruling the Appellate Body also held that the provisions of Article 18.4 of the *AD Agreement* have a certain relevance in relation to the question of what type of measure may be submitted to dispute settlement under the agreement. The phrase "laws, regulations and administrative procedures" in Article 18.4 has been interpreted very broadly to encompass *all* generally applicable rules, norms and standards adopted by Members in connection with anti-dumping proceedings.

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[106] Appellate Body Report, *US - Corrosion Resistant Steel Sunset Review*, para. 135.

3. The Anti-Dumping Margin Program is a Challengeable "as such" Measure

5.88 Norway is of the view that the anti-dumping margin program is a norm or standard adopted by the United States in connection with the conduct of anti-dumping proceedings. The fact that the zeroing procedures in the anti-dumping margin program are abstract; that they not published in the Federal Register; that they do not bear the title "law" or "regulation"; that they are not adopted by Congress but by the US Department of Commerce; that the Department is entitled to change or withdraw them for the purposes of future determinations; and that they are not relevant in US courts, cannot be decisive for whether these procedures are a "measure" for the purpose of anti-dumping proceedings.

5.89 Norway believes that the anti-dumping margin program and the procedures it contains may be a set of normative rules that apply mechanistically and automatically to a given set of facts without further human intervention. There is no room for administrative or judicial interpretation. The effect of the standard zeroing procedures in future cases is utterly predictable. The "Standard Zeroing Procedures" in the anti-dumping margin program provide certainty and security (at least for US industry) for the conduct of future trade. They mandate zeroing in all cases, and continue to do so until changed.

5.90 Even if one were to accept the contention of the United States that the anti-dumping margin program is not a measure in itself but only the implementation of "rules or norms adopted by a decision-maker in some other instrument, such as a regulation or a determination in a specific antidumping proceeding", they would still be challengeable. This is because an implementing measure is as challengeable as the law or regulation from which it is derived.

5.91 For the above reasons, the anti-dumping margin program containing the standard zeroing procedures is a "challengeable" measure under WTO law as such.

4. The Anti-Dumping Margin Program is inconsistent with the *AD Agreement*

5.92 The Appellate Body has clearly stated that there is only one method of calculating dumping margins in the *AD Agreement* and that is in accordance with the provisions of Article 2.4 of the Agreement. By virtue of the fact that Article 2 is also applicable to assessment reviews under Article 9.3 and to "new shipper reviews" under Article 9.5, it follows that zeroing is prohibited.

5.93 The anti-dumping margin program is a measure that can be challenged "as such" in a WTO dispute. Thus the anti-dumping margin program containing the standard zeroing procedures is in violation of Article 2.4 of the *AD Agreement* and in particular Article 2.4.2, as well as all other articles concerning the calculation of dumping margins.

5.94 The calculation of dumping margins has a bearing on the assessment that must be made under a number of the provisions of the *AD Agreement*, including Articles 3.1, 3.2, 3.5, 11.1, 11.2, 11.3, 9.3, 1, 18.4. When the United States "Standard Zeroing Procedures" in the anti-dumping margin program are in violation of Article 2.4, this will therefore, in turn, lead to a number of consequential inconsistencies.

J. TURKEY

1. Model Zeroing is Inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement*

5.95 Turkey asserts that the model zeroing method used by the United States in determining the dumping margin in original investigations leads to an unfair comparison of normal value and export price within the meaning of Articles 2.4 and 2.4.2 of the *AD Agreement*. This contention is supported

by the Panel and Appellate Body decisions in the *EC – Bed Linen* case. In that dispute, the Panel decided that establishing the existence of margins of dumping on the basis of a methodology, which included zeroing negative price differences, calculated for some models (model zeroing methodology) was inconsistent with Article 2.4.2 of the *AD Agreement*. Furthermore, the Panel noted that, in arriving at a conclusion whether the product as a whole is being dumped, Article 2.4.2 obligates an investigating authority to make its determination in a way which fully accounts for the export prices on all comparable transactions. Thus, the Panel found the methodology, which focuses on those models that are dumped, and takes less than full account of those models where the comparison results in a negative margin, to be inconsistent with Article 2.4.2 of the Agreement. The Appellate Body in the *EC – Bed Linen* case, further stated that, regardless of the method used to calculate the margins of dumping, these margins must be, and can only be, established for the product under investigation as a whole.

2. Recourse to Simple Zeroing Should Be an Exception

5.96 The text of Article 2.4.2 recognizes three different methodologies for dumping margin calculations. The comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions and the comparison of normal value and export prices on a transaction-to-transaction basis are both identified as the normal way of calculation, whereas the comparison of weighted average normal value with prices of individual export transactions is identified as an exception. Thus, at the outset, it is clear that simple zeroing is not expressly prohibited in the text of the said Article. Furthermore, if simple zeroing was prohibited then it would render meaningless the inclusion of the exceptional calculation method in the Article since the result of both comparisons, that is the weighted average normal value to weighted average export transactions comparison and the weighted average normal value to prices of individual export transactions comparison, would lead to the same result.

5.97 On the other hand, the main purpose of Article 2.4.2 of the *AD Agreement* is to provide for an exception (asymmetrical comparison in the case of targeted dumping) to the normal methods of comparison (symmetrical comparison) in order to ensure a fair comparison within the meaning of Article 2.4 of the *AD Agreement*. Yet, the application of this exception is expressly tied to the existence of certain conditions. If the investigating authority is to calculate a dumping margin in a way other than the two normal methods, then, pursuant to Article 2.4.2, it should perform a targeted dumping analysis. Should the authority find such targeting; it should explain why such differences could not be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

5.98 In this respect, although the *AD Agreement* does not prohibit simple zeroing, recourse to such application should be an exception, not a standard procedure and the conditions that call for it should be clearly examined and explained. Thus, the standard zeroing methodology as applied in periodic reviews by the United States is inconsistent with the provisions of Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2 and 18.4 of the *AD Agreement*.

3. Dumping Determinations for the Purposes of Article 11.2 of the *AD Agreement*

5.99 Article 2 defines dumping along with the methodologies to be used in the determination of dumping margin. Turkey contends that the provisions covered by this Article should apply to all types of investigations, including reviews, where a dumping margin is to be calculated. Thus, in view of the fact that there exists no other provision on how to calculate the dumping margin for the purposes of Article 11.2 reviews, the investigating authorities should also abide by the provisions of Article 2.

4. Consistency with Provisions of the *AD Agreement*

5.100 In Turkey's view, where dumping margin calculation in an investigation or review is established under a methodology that leads to the violation of the relevant provisions of the *AD Agreement*, the Regulation that establishes the basis for implementing such methodology should also be found to be inconsistent with the *AD Agreement*.

5.101 It is without doubt that the signatory Members to the Agreement Establishing the WTO commit themselves to abide by the rules and procedures of the WTO Agreements. The presence of such commitment provides security and predictability for the proper functioning of the multilateral trading system. In this respect, domestic laws of the Members that implement the WTO Agreements must be compatible with the requirements of the relevant Agreements. Otherwise, the WTO Agreements and the multilateral trade system would prove unnecessary since Members might adopt legislation with completely different obligations. This would inevitably result in chaos and unpredictability in the international environment. However, this should not be interpreted as to say that Members are precluded of having domestic legislations. On the contrary, the WTO Agreements put forward general principles of application and in most instances they do not describe the procedures to be followed to act consistently with those principles. Thus, domestic legislation is essential in those instances where they help to describe procedures and rules that should be followed in order to be compatible with the Agreements. Yet, the balance should be well established. The provisions of the domestic legislations should not contradict with the provisions of the WTO Agreements nor nullify the benefits accruing to the Members under the WTO Agreements.

VI. INTERIM REVIEW

6.1 The Panel submitted its Interim Report to the parties on 4 August 2005. On 26 August 2005, both parties requested that the Panel revise precise aspects of the Interim Report. Neither party requested an interim review meeting. On 12 September 2005, both parties submitted comments on the other party's request for interim review. The Panel has carefully addressed the arguments made by the parties in their requests for interim review and addresses them below, in accordance with Article 15.3 of the DSU.[107]

A. COMMENTS BY THE EUROPEAN COMMUNITIES

1. Request for explanation of the legal reasoning of the Appellate Body in *EC – Bed Linen* and *US – Softwood Lumber V*

6.2 Regarding the finding of the Panel in paragraph 7.32 of the Report that USDOC acted inconsistently with Article 2.4.2 of the *AD Agreement* in the anti-dumping investigations at issue, the European Communities considers that the Report should "faithfully explain" the legal reasoning underlying the findings in the two Appellate Body reports referred to by the Panel (*EC – Bed Linen* and *US – Softwood Lumber V*). The United States opposes this request.

6.3 Bearing in mind that the precise issue addressed in this part of the Report – the application of model zeroing when using an average-to-average comparison in original investigations- has already been the subject of detailed analysis and findings in two previous dispute settlement proceedings, we remain of the view that paragraphs 7.26-7.31 provide a sufficient explanation of our finding in paragraph 7.32 that USDOC acted inconsistently with Article 2.4.2 of the *AD Agreement*. We note that footnote 127 of the Report refers to the precise sections of the Appellate Body reports that contain the reasoning of the Appellate Body. The European Communities argues that an explanation by this

[107] Section VI of this report, entitled "Interim Review" therefore forms part of the final findings of the panel report, in accordance with Article 15.3 of the DSU.

Panel of the legal reasoning of the Appellate Body in *EC – Bed Linen* and *US – Softwood Lumber V* "might... help the reader of the report to properly understand the full implications of those findings". In our view, the kind of explanation suggested by the European Communities would go beyond what is necessary to decide the issue raised by this particular claim of the European Communities regarding the application of model zeroing in certain anti-dumping investigations. We therefore see no reason to amend our Report as suggested by the European Communities.

2. Request for a finding with respect to the claim of the European Communities regarding "automatic assessment"

6.4 The European Communities argues that not all its "as applied" claims relating to original investigations under provisions other than Articles 2.4.2 and 2.4 of the *AD Agreement* are consequential, and refers in particular to its claim that the "automatic assessment" of liability in the sample case is inconsistent with Article 9.3. The European Communities also considers that the United States has not contested this claim. Thus, in the view of the European Communities, the Panel "has no legal alternative but to find that model zeroing in an assessment is inconsistent with" Article 9.3. The United States opposes this request.

6.5 As we understand it, the issue raised by the European Communities regarding "automatic assessment" pertains to a claim under Article 9.3 of the *AD Agreement* concerning situations in which, as a result of the absence of a request for administrative review, USDOC assessed the amount of anti-dumping duty in an amount corresponding to the margin of dumping determined in the original investigation.[108] As explained in paragraph 7.12 of the Report, we have treated this claim as a dependent claim on the grounds that it alleges a breach of a provision as a consequence of the alleged violations of Articles 2.4 and 2.4.2 of the *AD Agreement*. This characterization is based on the express language used by the European Communities in paragraph 94 of its First Submission, where it states that the United States acted inconsistently with Article 9.3 "as a consequence of the unlawful zeroing method described in this submission". It is clear from paragraph 95-96 that the key argument in support of this claim is that as a result of the use of an "inflated" margin of dumping as the basis of the assessment of the amount of anti-dumping duty, the amount of anti-dumping duty exceeded the margin of dumping as established under Article 2. There is no argumentation that Article 9.3 is violated other than as a result of a violation of other provisions of the *AD Agreement*. Against this background, we see nothing in the request by the European Communities for interim review that substantiates the assertion that its "as applied" claim under Article 9.3 is not consequential.

6.6 We consider that paragraph 7.34 of the Report and the accompanying footnote 134 sufficiently explain why we do not consider it necessary to make findings on the dependent claims raised by the European Communities, including its claim under Article 9.3 of the *AD Agreement*. The key consideration, as stated in that paragraph, is that deciding dependent claims will not provide additional guidance as to the steps to be undertaken by the United States in order to implement the Panel's recommendation regarding the violation on which the recommendation is dependent. The interim review request of the European Communities contains no argumentation that calls into question the logic of that reasoning. We also note that in footnote 134 we have drawn attention to recent panel reports that have adopted the same approach with respect to the treatment of dependant claims. Particularly noteworthy in this context is the panel report in *US – Softwood Lumber V*. After finding that model zeroing in an original investigation is inconsistent with Article 2.4.2 of the *AD Agreement*, that panel declined to make a finding on a claim that zeroing is also inconsistent with Article 9.3 of the *AD Agreement* based on the reasoning articulated in paragraph 7.34 of our Report. In light of these considerations, we have decided not change our Report as proposed by the European Communities.

[108] EC- First Written Submission, paras. 28, 54, 94-96 and Exhibit EC-1.7.1.

3. Request for a revision of the Panel's reasoning regarding zeroing as a methodology

6.7 The European Communities disagrees with what it characterizes as the conclusion of the Panel that the standard zeroing procedures "do not exist in written form". The United States opposes this request.

6.8 Although the European Communities does not make reference to a particular paragraph of the Report, we believe that this comment pertains to paragraph 7.104 where we state that there is a zeroing methodology which is manifested in the Standard Zeroing Procedures and which represents a well-established and well-defined norm but which "is not expressed in writing". Thus, strictly speaking, we have not stated that the "Standard Zeroing Procedures do not exist in written form" but that the zeroing methodology itself "is not expressed in writing". The European Communities does not submit any factual or legal arguments to explain why it considers that the Panel erred in making this statement. We therefore have not changed the Report in this respect.

4. Request for a finding by the Panel on the claim of the European Communities under Article 2.4 of the *AD Agreement*

6.9 In its interim review comments, the European Communities requests the Panel to make a finding on its claims that the use of zeroing in original investigations is inconsistent with Article 2.4 of the *AD Agreement*.[109] The European Communities considers that a decision on whether and to what extent the zeroing practice is violating Article 2.4, in particular the independent and overarching obligation contained in the first sentence thereof, in the context of original investigations, is essential to give the United States the guidance it needs in order to bring its measures into conformity with the *AD Agreement*. The United States opposes this suggestion.

6.10 We have explained in paragraph 7.33 of the Report why, having found that the use of model zeroing in the investigations at issue is inconsistent with Article 2.4.2 of the *AD Agreement*, we do not consider it necessary to examine whether the use of model zeroing in these investigations is also inconsistent with Article 2.4. We consider that this approach is within our discretion to exercise judicial economy. The fundamental consideration regarding the appropriateness of the exercise of judicial economy in WTO dispute settlement is that a panel only needs "to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings".[110] In our view, in determining whether or not to exercise judicial economy, we must determine whether a finding requested by a party is necessary to decide those specific claims that are actually before us. In the present case, the European Communities has raised the same issue under Articles 2.4.2 and 2.4 of the *AD Agreement*, namely the lawfulness of model zeroing in the context of average-to-average comparisons between export price and normal value in original investigations. While the interim review request of the European Communities asserts that a finding by the Panel under Article 2.4 is essential, it does not advance any argument demonstrating that action by the United States to remove the inconsistency with Article 2.4.2 would not at the same time also remove the alleged inconsistency with Article 2.4 of the *AD Agreement*. Thus, it remains our view that a DSB recommendation based on our finding of inconsistency of the application of zeroing with Article 2.4.2 is sufficiently precise. We also note that, as described in footnote 133 of the Report, other panel reports have also refrained from making findings on whether zeroing is inconsistent with Article 2.4 after finding that zeroing is inconsistent with Article 2.4.2. In sum, the European Communities has not provided any cogent argument to demonstrate that we erred in deciding to exercise judicial

[109] It is not entirely clear whether this request pertains only to the "as applied" claims of the European Communities under Article 2.4 or to both the "as applied" and "as such" claims. In any event, our analysis applies to both.

[110] Appellate Body Report, *Australia – Salmon*, para. 223.

economy with respect to its claims under Article 2.4, and we disagree with the European Communities that in the present case a decision on Article 2.4 is somehow essential. Thus, we have not made any changes to the Report in this respect.

B. COMMENTS BY THE UNITED STATES

1. Request for changes to paragraph 2.5 of the Report

6.11 The United States requests that we insert the word "dumped" before "amount" in the second and third sentences of paragraph 2.5 of the Report. The United States further requests that we replace "customs" with "US Bureau of Customs and Border Protection ('USCBP')" in the seventh sentence of paragraph 2.5 and that we substitute "USCBP" for "customs" in the next sentence. The European Communities agrees. We have decided to accept these changes, which we regard as being of a purely editorial nature.

2. Request for changes to paragraph 2.6 of the Report

6.12 The United States requests the Panel to replace paragraph 2.6 of the Report with paragraph 2.4 of the original draft descriptive part of the Report. The United States objects in particular to the inclusion in this paragraph of references to three kinds of "measures": (1) the Issues and Decision Memoranda; the (2) Final Margin Program Logs and Outputs; and (3) assessment instructions. The United States considers that these three measures are not part of the request for establishment of a panel. The European Communities objects to the amendments suggested by the United States.

6.13 When read in light of the relevant paragraphs of the First Written Submission of the European Communities, as referred to in footnotes 21 and 22 of the Report, it is clear to us that paragraph 2.6 of the Report does not treat the Issues and Decision Memoranda, the Final Margin Program Logs and Outputs, and the assessment instructions as three separate categories of measures but as aspects of the measures at issue.[111] Thus, paragraph 2.6 of our Report does not imply that we are presented with a request for separate findings on the Issues and Decision Memoranda, the Final Margin Program Logs and Outputs and the assessment instructions. While it is certainly true that there is no express mention of these "measures" in the request for the establishment of a panel, they clearly form part of the measures mentioned in that document.[112] Therefore, we have not made the change requested by the United States.

3. Request for changes to paragraph 7.67 of the Report

6.14 The United States requests that the Panel delete the second sentence and the first part of the third sentence of paragraph 7.67 of the Report. The United States considers that the second sentence can be read to imply that Appellate Body reports constitute sources of WTO law and that the Panel's statement in footnote 167 of the Interim Report on the Sunset Policy Bulletin is unclear. The

[111] For example, paragraph 63 of the First Submission of the European Communities states that the "measures at issue in the sample 'as applied' case include the Final Determination and any amendments to the Final Determination. The Final Determination refers to the Issues and Decision Memorandum, which in turn refers to the 'Margin Calculations', that is the Calculation Memoranda and the Final Margin Program Log and Outputs for all the firms investigated". (footnotes omitted)

[112] The request for the establishment of a panel (WT/DS294/7/Rev.1, paragraph 3.2) mentions "determinations of dumping by DOC, the determinations of injury by the United States International Trade Commission, the imposition of definitive duties in the original investigations and the outcome of the administrative review investigations as detailed in the annexes". The same paragraph refers to paragraph 3.1, which describes a number of violations of WTO obligations by the United States with respect to the manner in which the United States "calculates a margin and amount of dumping" and "calculates a margin of dumping and collects an amount of anti-dumping duty".

European Communities objects to these changes proposed by the United States but suggests that the issue raised by the United States regarding the second sentence of paragraph 7.67 can perhaps be addressed by substituting "understood" for "interpreted".

6.15 To accommodate the concern of the United States regarding the possible implications of the statement in the second sentence of paragraph 7.67, we have slightly redrafted that sentence and have deleted footnote 167 of the Interim Report. However, we see no reason to delete or amend the first part of the third sentence of paragraph 7.67.

6.16 Finally, in addition to the above-mentioned changes, we have corrected a number of typographical errors in the Interim Report.

VII. FINDINGS

A. INTRODUCTION

7.1 The **European Communities** requests the Panel to find that:[113]

(a) In the cases and measures listed in Exhibits EC-1 to EC-15, the United States acted inconsistently with (1) Articles 2.4 and 2.4.2; 3.1, 3.2 and 3.5; 5.8; 9.3; 1 and 18.4 of the *AD Agreement*, (2) Articles VI:1 and VI:2 of the GATT 1994 and (3) Article XVI:4 of the WTO Agreement by setting at zero negative margins when aggregating the intermediate results of comparisons between averaging groups for the purposes of calculating the margin for the subject product.

(b) The "Standard Zeroing Procedures" used by the United States in original investigations (or the US practice or methodology of zeroing) and Sections 771(35)(A) and (B), 731 and 777(A(d) of the Tariff Act are as such inconsistent with: (1) Articles 2.4 and 2.4.2; 5.8; 9.3; 1 and 18.4 of the *AD Agreement;* (2) Articles VI:1 and VI:2 of the GATT 1994; and (3) Article XVI:4 of the WTO Agreement.

(c) In the cases and measures listed in Exhibits EC-16 to EC-31, the United States acted inconsistently with: (1) Articles 2.4 and 2.4.2; 9.3; 11.1 and 11.2; 1 and 18.4 of the *AD Agreement*; (2) Articles VI:1 and VI:2 of GATT 1994; and (3) Article XVI:4 of the WTO Agreement by comparing a weighted average normal value with individual export transactions, without explanation or justification, and by setting at zero negative margins when aggregating the intermediate results of such comparisons for the purposes of calculating the margin of dumping for the subject product.

(d) The "Standard Zeroing Procedures" used by the United States in periodic reviews (or the US practice or methodology of zeroing), Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(A)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of USDOC's Regulations are as such inconsistent with (1) Articles 2.4; 2.4.2; 9.3; 11.1 and 11.2; 1 and 18.4 of the *AD Agreement*, (2) Articles VI:1 and VI:2 of the GATT 1994 and (3) Article XVI:4 of the WTO Agreement.

(e) The "Standard Zeroing Procedures" used by the United States in new shipper reviews, changed circumstances reviews and sunset reviews (or the US practice or methodology of zeroing), Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(A)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of USDOC's

[113] EC-First Written Submission, para. 226.

> Regulations are as such inconsistent with (1) Articles 2.4 and 2.4.2; 9.3 and 9.5; 11.1, 11.2 and 11.3; 1 and 18.4 of the *AD Agreement*; (2) Articles VI:1 and VI:2 of the GATT 1994 and (3) Article XVI:4 of the WTO Agreement.

7.2 The European Communities requests that the Panel recommend that the United States take the steps necessary to bring its measures into conformity with the cited WTO provisions.

7.3 The **United States** requests that the Panel reject the claims of the European Communities.

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

1. Standard of Review

7.4 Article 11 of the DSU provides the standard of review for WTO panels in general. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.[114]

7.5 Article 17.6 of the *AD Agreement* sets forth the special standard of review applicable to disputes under the *AD Agreement*:

> (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 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 *AD Agreement* establish the standard of review this Panel must apply with respect to both the factual and the legal aspects of the present dispute.

2. Rules of Treaty Interpretation

7.6 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.* Article 31(1) of the *Vienna Convention* provides:

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[114] Article 11 of the DSU provides: 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.

> "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".

7.7 In the context of disputes under the *AD 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."[115]

Thus, it is clear that under the *AD Agreement*, we are to follow the same rules of treaty interpretation as in any other dispute. The difference is that if we find more than one permissible interpretation of a provision of the *AD Agreement*, we may uphold a measure that rests on one of those interpretations.

3. Burden of Proof

7.8 The general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member assert and prove its claim.[116] The European Communities as the complaining party must therefore make a *prima facie* case of violation of the relevant provisions of the relevant WTO agreements, which the respondent must refute. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[117] In this respect, therefore, it is also for the United States to provide evidence for the facts which it asserts. We also 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.

C. CLAIMS OF THE EUROPEAN COMMUNITIES IN RESPECT OF CERTAIN ORIGINAL INVESTIGATIONS[118]

1. Measures at issue

7.9 The European Communities claims that the United States has acted inconsistently with its WTO obligations in 15 anti-dumping investigations listed in Exhibits EC-1 to EC-15[119] because

[115] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 57 and 59 (emphasis in original).
[116] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 337.
[117] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 337.
[118] The European Communities uses the term "original investigations" to refer to investigations within the meaning of Article 5 of the *AD Agreement* as distinguished from what it considers to be "other types of investigations" such as duty assessment proceedings under Article 9.3 and reviews under Article 11 of the *AD Agreement*. In light of the fact that the meaning of the term "investigations" is the subject of dispute between the parties, we have for the sake of clarity used the term "original investigations". The use of this phrase in this Report is without prejudice to our view on the legal status of that term under the *AD Agreement*.

USDOC, when calculating the weighted average dumping margin for exporters/manufacturers of the product subject to investigation on the basis of multiple comparisons between average export prices and average normal values within "averaging groups"[120] consisting of merchandise that was identical or virtually identical in all physical characteristics, included in the numerator used to calculate the weighted average dumping margin only the results of those comparisons in which average export prices were below average normal values. The European Communities uses the term model zeroing to refer to this exclusion from the numerator of the weighted average dumping margin of any amounts by which average export prices within individual averaging groups based upon physical characteristics exceeded average normal values.

7.10 In the latter regard, we note that the parties to this dispute disagree on the appropriate terminology to describe this aspect of the dumping margin calculation methodology of USDOC. The United States rejects the term model zeroing used by the European Communities as being without any textual basis in the *AD Agreement* or in the anti-dumping laws and regulations of the United States. On the other hand, the European Communities contests that, as argued by the United States, the issue before the Panel is properly characterized in terms of whether or not an investigating authority must "grant" an "offset" or "credit" for "negative dumping". It is important to emphasize in this respect that where this Report uses the terms employed by the parties, this should not necessarily be seen as an acknowledgement by the Panel of the legal relevance of those terms under the *AD Agreement*.

7.11 As explained by the European Communities, USDOC's Regulations also provide for the possibility to establish averaging groups based on other factors, e.g. level of trade. While the claims of the European Communities regarding the original investigations at issue pertain specifically to model zeroing i.e. zeroing in the context of averaging groups established on the basis of physical

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[119] *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Italy*, 67 Fed. Reg. 3155 (23 January 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From France*, 67 Fed. Reg. 3143 (23 January 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Germany*, 67 Fed. Reg. 3159 (23 January 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From the United Kingdom*, 67 Fed. Reg. 3146 (23 January 2002); *Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands*, 66 Fed. Reg. 50408 (3 October 2001); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Sweden*, 63 Fed. Reg. 40449 (29 July 1998); *Notice of Final Determination of Sales at Less Than Fair Value*: *Stainless Steel Wire Rod From Italy*, 63 Fed. Reg. 40422 (29 July 1998); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Belgium*, 64 Fed. Reg.15476 (31 March 1999); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From France*, 64 Fed. Reg. 30820 (8 June 1999); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Italy*, 64 Fed. Reg. 30750 (8 June 1999); *Notice of Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils From The United Kingdom*, 64 Fed. Reg. 30688 (8 June 1999); *Notice of Final Determination of Sales At Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products From France*, 64 Fed. Reg. 73143 (29 December 1999); *Notice of Final Determination of Sales At Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products From Italy*, 64 Fed. Reg. 73234 (29 December 1999); *Notice of Final Determination of Sales At Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products From Italy*, 64 Fed. Reg. 73234 (29 December 1999); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy*, 61 Fed. Reg. 30326 (14 June 1996); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Spain*, 63 Fed. Reg. 40391 (29 July 1998). The European Communities treats *Stainless Steel Bar From Italy* as a sample case and indicates that the measures at issue in this sample case include the *Final Determination of Sales at Less than Fair Value* and any amendments thereto. The *Final Determination* refers to the Issues and Decision Memorandum, which in turn refers to the Margin Calculations, i.e. the Calculation Memoranda and the Final Margin Program Log and Outputs for all the firms investigated. The measures at issue also include the anti-dumping duty order and any amendments, including the assessment instructions, and the USITC injury determination. EC-First Written Submission, para. 63.

[120] See *supra*, para. 2.3 for an explanation of the concept of "averaging groups".

characteristics, the claims of the European Communities that "Standard Zeroing Procedures" and certain provisions of the United States' anti-dumping legislation are WTO-inconsistent as such are broader in scope in this respect and concern the use of zeroing in the context of any type of averaging group. We consider that the specific criterion used in establishing an averaging group is of no particular relevance to our legal analysis and that our reasoning with respect to model zeroing is equally applicable to the use of zeroing in relation to averaging groups established on the basis of factors other than physical characteristics.

2. Order of analysis

7.12 The European Communities presents claims regarding the WTO-inconsistency of the application of model zeroing in the subject anti-dumping investigations under: (1) Articles 1, 2.4 and 2.4.2, 3.1, 3.2, 3.5, 5.8, 9.3 and 18.4 of the *AD Agreement*; (2) Articles VI:1 and VI:2 of the GATT 1994; and (3) Article XVI:4 of the WTO Agreement. There is a clear distinction between the claims of the European Communities under Articles 2.4 and 2.4.2 of the *AD Agreement* and the claims under the other WTO provisions invoked by the European Communities in that the alleged breach of these other provisions is a consequence of the alleged violation of Articles 2.4 and 2.4.2 of the *AD Agreement*.[121] Because of this difference between "independent" claims under Articles 2.4 and 2.4.2 and "dependent" claims under other WTO provisions, we commence our analysis with the claims of the European Communities under Articles 2.4 and 2.4.2 of the *AD Agreement*.

7.13 Regarding the order in which we should take up the claims of the European Communities under Articles 2.4 and 2.4.2 of the *AD Agreement*, we consider that a panel is entitled to structure its analysis in a manner most appropriate to facilitate the analysis of the issues presented to it. In this respect, we note that Article 2.4.2 expressly deals with the question of how export price and normal value must be compared for purposes of establishing the existence of margins of dumping during the investigation phase. Article 2.4 requires Members to make a fair comparison between export price and normal value and contains rules on allowances that must be made to this end but does not expressly address the issue of the establishment of margins of dumping. In contrast, Article 2.4.2 addresses the issue of the establishment of margins of dumping specifically. Moreover, several panel and Appellate Body reports have made findings under Article 2.4.2 with respect to claims concerning the methodology for calculating margins of dumping. While the Appellate Body has in some cases expressed views on the implications of the "fair comparison" language in Article 2.4 for the calculation of margins of dumping, to date no panel or Appellate Body report has actually made findings under Article 2.4 with respect to a claim concerning the calculation of margins of dumping. For these reasons, we decide to examine first the claim of the European Communities that the model zeroing methodology employed by USDOC in the subject investigations is in breach of Article 2.4.2 of the *AD Agreement*.

3. Claim of the European Communities under Article 2.4.2 of the *AD Agreement*

(a) Arguments of the parties

7.14 The **European Communities**, referring to the Appellate Body report in *EC – Bed Linen* and the panel and Appellate Body reports in *US – Softwood Lumber V*, submits that since Article 2.1 of the *AD Agreement* defines "dumping" in relation to a product, the term "margins of dumping" in Article 2.4.2 applies to the product subject to investigation as a whole and not to models, types or categories of a product. Intermediate margins calculated by the USDOC in respect of particular models are not margins of dumping within the meaning of Article 2.4.2. Having defined the product subject to investigation, USDOC was bound by its own logic and should have determined a margin of dumping in conformity with Article 2.4.2 for the product as a whole. Thus, USDOC, which correctly

[121] EC-First Written Submission, paras, 90, 94, 98, 100, 101, 198, 200, 205, 209 and 210.

compared a weighted average normal value to a weighted average export price of all transactions within individual averaging groups, including export prices above normal value, should also have incorporated "negative margins" of particular averaging groups when it calculated a margin of dumping for the product as a whole. The European Communities asserts that this interpretation is supported by the fact that Article 2.4.2 requires a simple comparison between export price and normal value, and that any difference between export price and normal value, whether positive or negative, is a "margin" for purposes of Article 2.4.2. The European Communities also recalls that the Appellate Body reports in *EC – Bed Linen* and *US – Softwood Lumber V* reject the view that where a margin of dumping is calculated on the basis of comparisons between export price and normal value in individual averaging groups, Article 2.4.2 only applies to the comparisons within these groups and not to the subsequent aggregation of these results into an overall margin.[122]

7.15 The **United States** disagrees that the term "margins of dumping" in Article 2.4.2 of the *AD Agreement* can only apply to the product under investigation as a whole, and not to a product type, model or category. The GATT 1994 and the *AD Agreement* demonstrate that the drafters used the term "margin of dumping" to refer both to the results of particular comparisons between normal value and export price and to the overall results of those comparisons.[123] The United States considers that the Appellate Body erred in finding, in *US – Softwood Lumber V,* that the *AD Agreement* requires Members, in the investigation phase, to calculate and give credit for weighted average comparisons when the export price exceeds the normal value. First, it is factually incorrect to contend that USDOC "excludes" non-dumped transactions from the calculation of an overall margin of dumping under the average-to-average comparison method used in the investigation phase because, taken together, the averaging groups comprise all comparable export transactions and because all export transactions are included in the figure by which the aggregate amount of dumping is divided. Second, Article 2.4.2 restricts the use of the average-to-transaction comparison method in the investigation phase but does not address the offsetting of negative dumping. The negotiating history of Article 2.4.2 demonstrates that negotiators were only able to reach a limited agreement on the issue of "asymmetry" and that the issue of zeroing was raised but ultimately not addressed. Moreover, the concept of negative margins is without textual support in Article VI of the GATT 1994 or the *AD Agreement*. In the context of Article VI of the GATT 1994 and the *AD Agreement*, the term "margin of dumping" refers to the amount by which normal value exceeds the export price. Article 2.4.2 does not in any way modify this meaning of "margin of dumping" and contains no reference to the concept of negative margins of dumping. Since Article 2.4.2 contains no obligation to calculate an overall margin of dumping, let alone any obligations detailing the manner in which such a calculation must be performed, it cannot serve as the basis for finding a requirement to offset negative dumping.[124]

(b) Arguments of third parties

7.16 **Argentina** agrees with the European Communities that the use of model zeroing by USDOC in original investigations is inconsistent with Article 2.4.2 because, as the Appellate Body found in *EC – Bed Linen* and *US – Softwood Lumber V*, zeroing fails to take into account all transactions used to serve as the basis for the determination of the existence dumping.

7.17 **Hong Kong, China** submits that the Appellate Body has already held in *EC – Bed Linen* and *US – Softwood Lumber V* that the use of the model zeroing methodology in the context of a weighted-average-to weighted average comparison between export price and normal value is inconsistent with Article 2.4.2 because by using such a methodology an authority fails to establish an overall margin of dumping for the product under investigation on the basis of all comparable export transactions.

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[122] EC-First Written Submission, paras. 75-89.
[123] US-Closing Statement at the First Substantive Meeting of the Panel, paras. 9-12.
[124] US-Second Written Submission, paras. 81-96.

7.18 **Japan** submits that, as held by the Appellate Body in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review*, both model zeroing and simple zeroing are inconsistent with the "fair comparison" requirement contained in Articles 2.4 and 2.4.2. Specifically with regard to Article 2.4.2, Japan notes in this connection that zeroing amounts to a failure to take into account prices of all comparable export transactions.

7.19 **India** submits that, as found by the Appellate Body in *EC – Bed Linen*, model zeroing is inconsistent with the "fair comparison" required by Articles 2.4 and 2.4.2 because it means that an authority does not fully take into account the prices of all comparable export transactions.

7.20 **Korea** submits that the decisions of the Appellate Body in *EC – Bed Linen, US – Corrosion-Resistant Steel Sunset Review* and *US – Softwood Lumber V* make it clear that zeroing is inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement* because it involves a failure to take into account all comparable export transactions.

7.21 **Mexico** argues that model zeroing as used by USDOC in original investigations is inconsistent with Article 2.4.2 of the *AD Agreement* because USDOC failed to fully take account of prices of all comparable export transactions. USDOC thereby also failed to make a fair comparison, as required by Article 2.4.

7.22 **Norway** submits that the prohibition against zeroing in original investigations (and in reviews under Article 11.3 of the *AD Agreement*) has already been established by the Appellate Body in *EC – Bed Linen, US – Corrosion-Resistant Steel Sunset Review* and *US – Softwood Lumber V*.

7.23 **Turkey** argues that the model zeroing method used by the United States in determining the dumping margin in original investigations leads to an unfair comparison of export price and normal value within the meaning of Articles 2.4 and 2.4.2 of the *AD Agreement*. Turkey refers in this regard to the panel and Appellate Body ruling in *EC – Bed Linen* that Article 2.4.2 requires authorities to take full account of prices of all comparable export transactions and that margins of dumping can only be established for the product under investigation as a whole.

(c) Evaluation by the Panel

7.24 In the anti-dumping investigations at issue in the present dispute[125] USDOC first compared normal values and export prices for individual models of the subject product. For each model, a weighted average normal value was compared to a weighted average of prices of all export transactions, which, by definition, included export prices of individual transactions that were above normal value. USDOC then aggregated the results of these model-specific weighted-average-to-weighted average comparisons into an overall dumping margin for the product under investigation for each exporter/manufacturer. In so doing, USDOC did not include in the numerator used to calculate the overall dumping margin the results of those comparisons where the weighted-average export price of a model exceeded its weighted-average normal value. It is not in dispute that USDOC included all export transactions in the denominator of this overall dumping margin calculation.

7.25 The European Communities does not challenge the use of multiple averaging *per se* i.e. the making of separate comparisons between export prices and normal values for individual models.[126] Nor does it contest any aspect of the manner in which the model-specific comparisons of export prices and normal value were made. Rather, the European Communities challenges the manner in which

[125] *Supra*, footnote 119.

[126] The Appellate Body has affirmed in *US – Softwood Lumber V* that "multiple averaging" is permitted under Article 2.4.2 to establish the existence of margins of dumping for the product under investigation. Appellate Body Report, *US – Softwood Lumber V*, para. 81.

USDOC *aggregated the results* of those comparisons for purposes of determining an overall margin of dumping for the product subject to investigation. Specifically, the European Communities claims that "the setting at zero" or zeroing of the results of comparisons in which weighted-average export prices were *above* weighted-average normal values is inconsistent with Article 2.4.2 of the *AD Agreement*.

7.26 Article 2.4.2 of the *AD Agreement* provides:

> "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."

The legal issue presented by the claim of the European Communities under Article 2.4.2 concerns the interpretation of the first of the two methods set out in the first sentence of Article 2.4.2. In particular, the question is whether establishing "the existence of margins of dumping during the investigation phase...on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" means that, if multiple comparisons are made between export price and normal value for individual models, all differences between weighted average export prices and weighted average normal values resulting from such comparisons, positive or negative, must be fully reflected in the computation of the overall margin of dumping for the product in question.

7.27 We recall that in *EC – Bed Linen* and *US – Softwood Lumber V*, which both involved original investigations, the panels and the Appellate Body found that, if an authority divides a product into different models, compares the weighted average of prices of all comparable export transactions and weighted average normal value for each of those models and aggregates the results of those model-by-model comparisons to arrive at a margin of dumping for the product as a whole, it is inconsistent with Article 2.4.2 not to include in the numerator the results of comparisons where the weighted average of prices of all comparable export transactions is above the weighted average normal value.[127]

7.28 The information before us shows that in the anti-dumping investigations at issue in this dispute[128] USDOC calculated aggregate margins of dumping in a manner that, with respect to the treatment of weighted-average export prices that were above normal value, was identical in relevant respects to the zeroing methodology considered by the panels and Appellate Body in *EC – Bed Linen* and *US – Softwood Lumber V*.[129]

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[127] Appellate Body Report, *EC – Bed Linen*, paras. 46-66; Appellate Body Report, *US – Softwood Lumber V*, paras. 76-117. In *US – Softwood Lumber V*, the Appellate Body emphasized that its analysis was limited to the use of zeroing in the context of the weighted-average-to-weighted-average comparison methodology provided for in the first sentence of Article 2.4.2. Appellate Body Report, *US – Softwood Lumber V*, paras. 63, 104-105 and 108.

[128] *Supra*, footnote 119.

[129] E.g., *Issues and Decision Memo for the Antidumping Duty Investigation of Stainless Steel Bar from Italy; Final Determination*, pp. 3-5, Comment 1: Treatment of Sales Above Normal Value, Exhibit EC-1.3.

7.29 The Panel has carefully considered the arguments advanced by the United States with respect to what the United States considers to be flaws in the reasoning of the Appellate Body in *US – Softwood Lumber V*. In this respect, we are mindful of our obligations under Article 11 of the DSU. At the same time, we note that the issues raised by the United States regarding the meaning of the term "margin of dumping" and the relevance of the historical background of Article 2.4.2 of the *AD Agreement* were addressed by the Appellate Body in *US – Softwood Lumber V*.

7.30 Although previous Appellate Body decisions are not strictly speaking binding on panels, there clearly is an expectation that panels will follow such decisions in subsequent cases raising issues that the Appellate Body has expressly addressed. The Appellate Body has stated that adopted Appellate Body reports should be taken into account where they are relevant to any dispute.[130] In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body specifically stated 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".[131]

We also note that Article 3.2 of the DSU refers to the DSU as "a central element in providing security and predictability to the multilateral trading system".

7.31 Therefore, we do not believe that it would be appropriate for us to depart from the Appellate Body's conclusion that when a margin of dumping is calculated on the basis of multiple averaging by model type, the margin of dumping for the product in question must reflect the results of all such comparisons, including weighted average export prices that are above the normal value for individual models.

7.32 In light of the foregoing considerations, the Panel **finds** that the United States has acted in breach of Article 2.4.2 of the *AD Agreement* when in the anti-dumping investigations at issue[132] USDOC did not include in the numerator used to calculate weighted average dumping margins any amounts by which average export prices in individual averaging groups exceeded the average normal value for such groups.

4. Claim of the European Communities under Article 2.4 of the *AD Agreement*

7.33 In light of its finding with respect to the claim of the European Communities under Article 2.4.2 of the *AD Agreement*, the Panel considers that it is not necessary to address the claim of the European Communities that the application of the model zeroing method in these investigations was also inconsistent with Article 2.4 of the *AD Agreement*.[133]

5. Claims of the European Communities under other provisions of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.

7.34 The Panel also perceives no need to pronounce on the dependent claims raised by the European Communities under Articles 1; 3.1, 3.2 and 3.5; 5.8; 9.3; and 18.4 of the *AD Agreement*,

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See Panel Report, *EC – Bed Linen*, para. 6.102 and Panel Report, *US – Softwood Lumber V*, para. 7.185 for a description of the zeroing methodology at issue in those cases.

[130] Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 109.

[131] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

[132] *Supra*, footnote 119.

[133] We note that the panels in *EC – Tube or Pipe Fittings* and in *US – Softwood Lumber V* likewise declined to make a finding on whether zeroing is inconsistent with the "fair comparison" language of Article 2.4 once they had found this zeroing method to be inconsistent with Article 2.4.2 of the *AD Agreement*. Panel Report, *EC – Tube or Pipe Fittings*, para. 7.219; Panel Report, *US – Softwood Lumber V*, para. 7.226.

Articles VI:1 and VI:2 of the GATT 1994 and Article XVI: 4 of the WTO Agreement. Deciding such dependent claims would provide no additional guidance as to the steps to be undertaken by the United States in order to implement our recommendation regarding the violation on which it is dependent.[134]

D. CLAIMS OF THE EUROPEAN COMMUNITIES IN RESPECT OF "STANDARD ZEROING PROCEDURES" AND CERTAIN PROVISIONS OF THE TARIFF ACT IN RELATION TO ORIGINAL INVESTIGATIONS

7.35 The European Communities claims that, with respect to the use of a zeroing[135] methodology in the calculation of margins of dumping in original investigations, USDOC's "Standard Zeroing Procedures" and certain provisions of the Tariff Act of 1930, as amended ("Tariff Act") are as such inconsistent with Articles 2.4 and 2.4.2, 5.8, 9.3, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.

7.36 It is not in dispute that the provisions of the Tariff Act, as such, can be challenged as measures. By contrast, the parties disagree on whether what has been described for the purposes of this dispute by the European Communities as "Standard Zeroing Procedures", as such, constitute measures that can be challenged in WTO dispute settlement. Because it is possible that a finding with respect to the merits of the claims of the European Communities regarding the provisions of the Tariff Act may obviate the need to address the issue of the status of the "Standard Zeroing Procedures", we examine first the "as such" claims of the European Communities regarding the Tariff Act.

1. The "as such" claims of the European Communities with respect to the Tariff Act

(a) Relevant provisions

7.37 The provisions of the Tariff Act challenged by the European Communities are: (i) Sections 771(35)(A) and (B); (ii) Section 731; and (iii) Section 777A(d).[136]

7.38 **Section 771(35) of the Tariff Act**[137] provides:

> "DUMPING MARGIN; WEIGHTED AVERAGE DUMPING MARGIN
>
> (A) Dumping margin. The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.
>
> (B) Weighted average dumping margin. The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins

[134] Our decision not to make findings on dependent claims is consistent with the approach followed in recent panel reports, including, for example, Panel Report, *US – Softwood Lumber V*, para. 7.378; Panel Report, *Argentina –Poultry Anti-Dumping Duties*, para. 7.369; Panel Report, *US – Softwood Lumber VI*, para. 8.4.

[135] It is our understanding, particularly in light of the discussion in paragraphs 146-147 of the EC-First Written Submission of "other averaging groups", that the European Communities challenges the provisions of the Tariff Act and the "Standard Zeroing Procedures" with respect to both model zeroing i.e. zeroing when multiple comparisons are made using averaging groups based on physical characteristics and zeroing involving the use of averaging groups established on the basis of other criteria.

[136] Although the first written submission of the European Communities includes the Statement of Administrative Action ("SAA") among the measures at issue, it is our understanding that the European Communities does not request us to make a separate finding on the SAA as a measure which is as such WTO-inconsistent. EC-Response to Panel Question 50; EC-Rebuttal Submission, para. 68.

[137] Section 771 ("Definitions; Special Rules") is the first provision in Subtitle D ("General Provisions") in Title VII of the Tariff Act ("Countervailing and Antidumping Duties").

determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."

7.39 **Section 731 of the Tariff Act** [138] provides:

"ANTIDUMPING DUTIES IMPOSED

If :

(1) The administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value; and

(2) The Commission determines that:

(A) An industry in the United States:

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this subsection and Section 735(b)(1), a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the age sale of the merchandise."

7.40 **Section 777A(d) of the Tariff Act** [139] provides:

"(d) Determination of Less Than Fair Value.

(1) Investigations.

(A) In general. In an investigation under subtitle B, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value

(i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or

(ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

[138] Section 731 is the first provision in Subtitle B ("Imposition of Antidumping Duties") in Title VII of the Tariff Act.

[139] Section 777A ("Sampling and averaging; determination of weighted average dumping margin and countervailable subsidy rate") is contained in Subtitle D ("General Provisions") of Title VII of the Tariff Act.

> (B) Exception. The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if
>
> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).
>
> (2) Reviews. In a review under Section 751, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale."

(b) Arguments of the parties

7.41 The **European Communities** submits that Section 771(35)(A) of the Tariff Act is inconsistent with the requirement of Articles 2.4 and 2.4.2 of the *AD Agreement* that any difference between export price and normal value be treated as a margin of dumping because (a) it expressly provides only for the measurement of the amount by which the normal value exceeds the export price, (b) it uses the word "amount", which requires or at the very least strongly suggests a positive result and (c) it uses the concept of "dumping margin" which is almost indistinguishable from the concept of "margins of dumping" in Article 2.4.2 but which has a different meaning, thus obfuscating the proper application of the *AD Agreement*.[140]

7.42 Regarding Section 771(35)(B) of the Tariff Act, the European Communities asserts that this provision is inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement* because the use of the word "aggregate" rather than "average" suggests something that is positive and because the use of the plural "dumping margins" for an individual exporter is inconsistent with Article 2.4.2 as dumping and margins of dumping can only be established in relation to the subject product as a whole.[141]

7.43 The European Communities submits that Section 731 of the Tariff Act, which provides for the imposition of an anti-dumping duty "in an amount equal to the amount by which the normal value exceeds the export price" is inconsistent as such with the *AD Agreement* because it is vitiated by the same language as Section 771(35)(A) and (B).[142]

7.44 The European Communities submits that Section 777A of the Tariff Act only provides for the possibility of determining that the subject merchandise is sold at less than fair value, rather than providing for the simple comparison required by Article 2.4 of the *AD Agreement*. Second, instead of the words "all comparable" used in Article 2.4 of the *AD Agreement*, it uses the word "comparable".[143]

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[140] EC-First Written Submission, paras. 132-136.
[141] EC-First Written Submission, paras. 139-141.
[142] EC-First Written Submission, para. 142.
[143] EC-First Written Submission, para. 145. The European Communities also argues that the juxtaposition between investigations and reviews indicates that the requirement contained in Section 777A(d)(1) of a symmetrical comparison method may be abandoned during reviews, including periodic reviews of the amount of the duty, and that this is inconsistent with Article 9.3 of the *AD Agreement*, which requires that the

7.45 The European Communities asserts that the relevant standard with respect to "as such" claims is whether a measure is in conformity with the *AD Agreement*, i.e. whether or not it is a sound implementation. If a domestic law contributes forcefully to the adoption of a series of measures that are inconsistent with the *AD Agreement*, this means that the root of the problem lies at least in part with the relevant provision of that law. That the provisions of the Tariff Act are at least in part the source of the inconsistency is evident from the fact that USDOC has repeatedly asserted that zeroing is required by these provisions.[144]

7.46 The European Communities considers that whether legislation is mandatory or discretionary is only one of the questions to be examined in determining its compatibility with WTO provisions. If a measure is discretionary, its effects must also be taken into account. In determining whether legislation is WTO-inconsistent as such, one must weigh and assess all relevant factual evidence to determine whether it is possible to determine whether the law, or more generally the document containing the general rule or norm for prospective application is the root of the problem. Under this approach, legislation that is open to interpretation and is in fact consistently interpreted and applied by the investigating authority as permitting WTO-inconsistent conduct could be found to be inconsistent as such.[145]

7.47 The **United States** submits that Sections 771(35)(A) and (B) and 777A(d) of the Tariff Act are not inconsistent as such with the WTO provisions cited by the European Communities because they do not prohibit USDOC from providing an offset for non-dumped transactions. The European Communities cannot demonstrate that these provisions prohibit USDOC from providing an offset for non-dumped transactions because the United States Court of Appeals for the Federal Circuit has held twice that the Tariff Act, including these provisions in particular, does not require the use of zeroing.[146]

7.48 The United States submits in this connection that a measure is WTO-inconsistent as such if it mandates WTO-inconsistent action or precludes WTO-consistent action.[147] Numerous panel reports have applied this mandatory/discretionary distinction and there has been no instance in which a panel or the Appellate Body has found a measure WTO-inconsistent as such if the measure was found to neither mandate WTO-inconsistent action nor preclude WTO-consistent action. The United States rejects the argument of certain third parties that recent Appellate Body decisions have called into question the mandatory/discretionary test and refers in this respect to the panel report in *Korea – Commercial Vessels*. The United States asserts that the European Communities has not been able to cite any panel or Appellate Body report that supports its approach to determining when legislation is WTO-inconsistent as such.[148]

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amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2. We consider that this argument concerning the alleged non-application to administrative *reviews* of the requirement of a symmetrical comparison method in Section 777A(d)(1) logically cannot be a basis for a finding that this provision is WTO-inconsistent as such in relation to *investigations*.

[144] EC-First Written Submission, para. 143.

[145] EC-Response to Panel Question 54.

[146] US-First Written Submission, paras. 77-80. The two decisions referred to by the United States are: *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), *rehearing denied*, 2004 U.S. App. LEXIS 6741 (March 17, 2004), cert. denied, 160 L. Ed.2d 352, 125 S. Ct. 412 (U.S. 2004) and *Corus Staal BV v. United States*, No. 04-1107, 2005 U.S. App. LEXIS 1077 (Fed. Cir., 21 January 2005). Exhibits US-1 and 2.

[147] US-First Written Submission paras. 71-73.

[148] US-Response to Panel Question 55; US-Second Written Submission, paras. 40-45.

(c) Arguments of third parties

7.49 Third parties have not submitted arguments specifically in respect of the particular provisions of the Tariff Act challenged by the European Communities in this dispute.[149] [150]

(d) Evaluation by the Panel

7.50 It is well-established in GATT and WTO dispute settlement practice that a Member may bring a complaint under the DSU with respect to another Member's legislation as such[151] i.e. "independently from the application of that legislation in specific instances".[152] Thus, legislation as such can be a "measure" as that term is used in the DSU.[153]

7.51 The Appellate Body has on several occasions pronounced on the burden of proof and relevant evidence to sustain an "as such" claim with respect to legislation:

> "... a responding Member's law will be treated as WTO-consistent until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."[154]

7.52 The Appellate Body has also emphasized that:

> "[w]hen a measure is challenged 'as such', the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone.

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[149] While Mexico argues that the United States' legal rules on anti-dumping, specifically sections 771(35)(A) and (B) and Section 777A(d) of the Tariff Act are inconsistent as such with Articles 2.4, 2.4.2, 9.3, 11 and 18.4 of the *AD Agreement*, Article VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement, Mexico has not elaborated this argument through a textual analysis of the provisions in question.

[150] We note that in connection with the issue of whether "Standard Zeroing Procedures" are measures that can be challenged as such, some third parties have presented arguments that are also relevant to the question of how to determine whether legislation is WTO-inconsistent as such, notably regarding the mandatory/discretionary distinction.

[151] E.g., Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 107; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 165; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 82 and 85; Appellate Body Report, *US – Carbon Steel*, para. 156; Appellate Body Report, *US - 1916* Act, paras. 60-68. In the case of the *AD Agreement*, Article 18.1 and 18.4 provide additional support for the view that legislation can be challenged as such. Appellate Body Report, *US – 1916 Act*, paras. 77-82

[152] Appellate Body Report, *US – 1916 Act*, paras. 60-61.

[153] E.g., DSU Arts. 3.3 and 4.2. The DSU focuses on "measures" as the subject of challenge in WTO dispute settlement. Appellate Body Report, *US – Gambling*, para. 123.

[154] Appellate Body Report, *US – Carbon Steel*, para. 157 (footnote omitted); Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 111 and Appellate Body Report, *US – Gambling*, para. 138.

> If, however, the meaning or content of the measure is not evident on its face, further examination is required …" [155]

7.53 WTO panels and the Appellate Body have applied the principle, articulated by the Permanent Court of International Justice, that municipal laws are facts before international tribunals.[156] One aspect of this is the need for an international tribunal to take account of decisions of domestic courts on the meaning of municipal law. [157]

7.54 While there is no disagreement between the parties to the present dispute that legislation can be challenged as such in WTO dispute settlement, they have expressed divergent views on the substantive criterion for determining whether legislation is WTO-inconsistent as such. In particular, they disagree on the significance to be attached in this respect to whether legislation is "mandatory" or "discretionary" with respect to the allegedly WTO-inconsistent conduct in question.

7.55 We note that a considerable number of WTO panel reports have applied the principle that domestic legislation is WTO-inconsistent as such if it mandates WTO-inconsistent conduct but not if it merely provides the executive branch with the discretion to act inconsistently with WTO obligations.[158] Although the Appellate Body has in several cases found that legislation that provided the executive with sufficient discretion to avoid acting inconsistently with WTO-obligations was not WTO-inconsistent as such[159], it has also made it clear in *US – Corrosion Resistant Steel Sunset Review* that it has not "pronounce[d] generally upon the continuing relevance or significance" of the mandatory/discretionary distinction".[160] The Appellate Body went on to observe that:

> "... Nor do we consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the 'mandatory/discretionary distinction' may

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[155] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112.

[156] E.g., Appellate Body Report, *India – Patents (US)*, paras. 65-67.

[157] "Interpretation of their own laws by national courts is binding on an international tribunal". Ian Brownlie, *Principles of Public International Law*, 5th Ed. (1998) p. 40.

[158] E.g., *Argentina – Textiles and Apparel*, paras. 6.45-6.47; *US – DRAMS*, paras. 6.51 and 6.53; *Canada – Aircraft*, paras. 9.127-9.129; *Turkey – Textiles*, para. 9.37*; US – 1916 Act (EC*), paras. 6.168-6.169; *US - Hot-Rolled Steel*, para. 7.90; *US – Export Restraints*, paras. 8.4-8.9; *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.9-5.12; *Canada – Aircraft Credits and Guarantees*, paras. 7.56-7.59; *US - Carbon Steel*, para. 8.102; *US – Section 211 Appropriations Act*, paras. 8.136-8.137; *US – Countervailing Measures on Certain EC Products*, paras. 7.120-7.123; *US – Steel Plate*, paras. 7.88-7.90; *US – Section 129(c)(1) URAA*, para. 6.22; *US – Softwood Lumber III*, para. 7.158.

[159] E.g., Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 159.

[160] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93. A footnote to this sentence explains that: "In our Report in *US – 1916 Act*, we examined the challenged legislation and found that the alleged 'discretionary' elements of that legislation were not of a type that, *even under the mandatory/discretionary distinction*, would have led to the measure being classified as 'discretionary' and therefore consistent with the *AD Agreement*. In other words, we *assumed* that the distinction could be applied because it did not, in any event, affect the outcome of our analysis. We specifically indicated that it was not necessary, in that appeal, for us to answer 'the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *AD Agreement*'. (Appellate Body Report, *US – 1916 Act*, para. 99) We also expressly declined to answer this question in footnote 334 to para. 159 of our Report in *US – Countervailing Measures on Certain EC Products*. Furthermore, the appeal in *US – Section 211 Appropriations Act* presented a unique set of circumstances. In that case, in defending the measure challenged by the European Communities, the United States unsuccessfully argued that discretionary regulations, issued under a separate law, cured the discriminatory aspects of the measure at issue." Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93, footnote 94 (emphasis original).

> vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion."[161]

7.56 The parties and third parties have expressed sharply divergent views with respect to the question of whether the mandatory/discretionary distinction continues to be relevant.[162] We consider, however, that it is neither necessary nor appropriate for us to articulate a comprehensive view on this question in the abstract. Instead, we will address this issue only to the extent necessary in light of our analysis of the provisions challenged by the European Communities in this proceeding.

7.57 In this regard, we recall that the issue before us is the alleged WTO-inconsistency of certain provisions of the Tariff Act with regard to the manner in which export prices that are above the normal value are treated if an overall margin of dumping for a product is calculated based on the results of average-to-average comparisons between export price and normal value for individual averaging groups. As explained below, in our view, the text of these provisions simply does not address this particular aspect of the methodology for calculating a dumping margin.

7.58 We recall that the textual basis of the claim of the European Communities with respect to Section 771(35)(A) and (B) is the use of the word "amount", the phrase "amount by which the normal value exceeds the export price or constructed export price...", the use of the concept of "dumping margin", the use of the plural "dumping margins" in relation to individual exporters and the use of the word "aggregate" rather than "average".

7.59 We consider that the word "amount" and the phrase "the amount by which the normal value exceeds the export price or constructed export price" in Section 771 (35)(A) reflect the fact that this provision addresses the magnitude and not just the existence of dumping *per se*. In this regard, we note that Article VI:2 of the GATT 1994, read together with Article VI:1, defines the margin of dumping as "the price difference" when products of one country are introduced into the commerce of another country at less than their normal value. A product is introduced into the commerce of another country at less than its normal value if its export price is less than the comparable price for the like product in the domestic market of the exporting country or in the absence of such a domestic price, is less than a comparable price at which the product is exported to a third country or the constructed value of the product. Thus, the concept of "margin of dumping" in GATT Article VI is defined in terms of a *price difference* in a situation in which a product is introduced into the commerce of another country at less than its normal value i.e. when the export price of the product *is less* than the normal value of the product. We fail to see how the word "amount" and the phrase "the amount by which the normal value exceeds the export price or constructed export price..." are qualitatively different from, and less neutral, than the notion of a price difference that exists when the export price is less than the normal value. We consider that it is not possible to draw any conclusion from the use of terminology that can be seen as simply paraphrasing the language of Article VI of the GATT 1994 as to the approach envisioned with respect to the specific issue of whether or not export prices above normal value will be taken into account when an average dumping margin is calculated on the basis of multiple comparisons.

7.60 Regarding the term "dumping margin(s)" in Section 771(35)(A) and (B), we note that the use of the plural "dumping margins" logically implies that there can be more than one "dumping margin"

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[161] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

[162] We also note that this matter has been discussed in recent panel reports. At least two recent panel reports have relied on the mandatory/discretionary distinction in analyzing whether legislation is WTO-inconsistent as such. Panel Report, *US – Upland Cotton*, paras. 7.333-7.336, 7.748 and 7.1092 and Panel Report, *Korea - Commercial Vessels*, paras. 7.60-7.67. The latter panel report explicitly rejected the argument of the European Communities that in *US – Corrosion-Resistant Steel Sunset Review* the Appellate Body had ruled against the application of the traditional mandatory/discretionary distinction.

for a specific exporter or producer, which is in contradiction with the interpretation of "margins of dumping" by the Appellate Body. The term "dumping margin" as used in Section 771(35)(A) and (B) would appear to refer to what the Appellate Body has termed "intermediate calculations" and "intermediate values".[163] At the same time, a finding on whether legislation is WTO-inconsistent as such should be based on the substantive content of the legislation rather than on its terminology. The issue before us is not whether Section 771(35) uses terminology that is different from the terminology of relevant WTO provisions but whether it provides for a methodology that is substantively inconsistent with the requirements of the *AD Agreement* regarding the calculation of "margins of dumping". Since the use of "dumping margin" and the plural "dumping margins" do not indicate whether in the aggregation phase account will be taken of average export prices that are above the average normal values for particular averaging groups, we consider the difference in terminology between these provisions and the relevant WTO provisions to be of no relevance to the issue before us.

7.61 The use of the word "aggregate" in Section 771(35)(B) in our view reflects a necessary feature of a method that calculates a margin of dumping on the basis of multiple comparisons between export price and normal value because the results of those comparisons must be "combined". We note in this regard that the Appellate Body has used the same term "aggregate" in referring to the process of combining the results of multiple comparisons.[164] The word "aggregate" in and of itself does not indicate whether in the process of combining results of multiple comparisons results of comparisons in averaging groups in which the average export price is higher than the normal value will be included in the numerator of the average dumping margin.[165]

7.62 Thus, our analysis of the specific textual arguments of the European Communities in support of its claim that certain provisions of the Tariff Act are as such WTO-inconsistent with regard to the use of model zeroing in original investigations leads to the conclusion that those provisions do not speak to that issue.

7.63 In any event, even if we had come to a different understanding of the meaning of these provisions of the Tariff Act, we note that while USDOC has interpreted Section 771(35)(A) and (B) of the Tariff Act as precluding it from taking into account "negative dumping margins"[166], the United States Court of Appeals for the Federal Circuit has recently rejected the view that these provisions in and of themselves require USDOC to disregard negative dumping margins. Thus, in *Timken Co. v. United States*, the Court held that the word "exceeds" "could arguably allow for negative dumping margins" and that, as a consequence, the definition of "dumping margin" as "the amount by which the normal value exceeds the export price" " ...does not unambiguously require that dumping margins be

[163] E.g., Appellate Body Report, *US – Softwood Lumber V*, para. 97.

[164] Appellate Body Report, *US – Softwood Lumber V*, paras. 97-98.

[165] The argument of the European Communities with respect to Section 731 of the Tariff Act is based on the use of the phrase "the amount by which the normal value exceeds the export price...". We have already analyzed this language above in connection with Section 771(35) (A) and (B). That analysis also applies to the issue raised by the European Communities in respect of the reference in Section 777A(d) to merchandise "being sold in the United States at less than fair value". Finally, we note the argument of the European Communities related to the fact that Section 777A(d) uses the word "comparable" rather than "all comparable". We see nothing in the text or context of Section 777A(d) to warrant the conclusion that this provision envisages or permits a comparison between a weighted average normal value and a weighted average export price that does not reflect all export transactions. As noted above, a finding that a domestic law is WTO-inconsistent as such cannot be based upon a mere difference in terminology between that law and the relevant WTO provision. We note that it is not contested in this dispute that when USDOC computes an average dumping margin based on multiple comparisons, it includes the values of all export transactions in the denominator of that dumping margin.

[166] E.g., the *Issues and Decision Memo for the Antidumping Duty Investigation of Stainless Steel Bar from Italy; Final Determination* , 23 January 2002, p. 4.

positive numbers". In fact, the Court further explained that "the statute does not directly speak to the issue of negative-value dumping margins".[167] In light of this finding, the Court examined whether USDOC's interpretation was "based on a permissible statutory construction". The Court held that USDOC "reasonably interpreted §1677(35)(A) to allow for zeroing" and that "Commerce based its zeroing practice on a reasonable interpretation of the statute".[168] Moreover, most recently, in *Corus Staal BV v. United States*, the Court observed that "Section 1677(35) presented Commerce with a *choice* as to how it calculates weighted-average dumping margins".[169] We conclude therefore that the Court has established that the Tariff Act does not require, albeit that it does not preclude, USDOC from zeroing.

7.64 The meaning of municipal law in a WTO dispute settlement proceeding is a fact to be established by relevant evidence. Although relevant evidence of the meaning of a law may take various forms, including evidence of the consistent application of the law[170] we must accord greater weight to the interpretation of the meaning of domestic law by the competent domestic tribunal than to the interpretation by the agency administering that law. We note in this respect the statement of the United States that "the Federal Circuit has the final say as to what the U.S. antidumping statute means".[171]

7.65 We recall that the Court found that the provisions of the Tariff Act at issue "do not directly speak to the issue" of (model) zeroing, that the law "presents Commerce with a choice" and that "Commerce reasonably interpreted" the statute "to allow for zeroing". Therefore, we conclude from our own analysis of the text of the provisions of the Tariff Act challenged by the European Communities and from the decisions of the United States Court of Appeals for the Federal Circuit that these provisions do not specifically address the issue of zeroing.

7.66 It is clear to us that under the "mandatory/discretionary" approach as applied in many GATT and WTO panel reports, the provisions of the Tariff Act challenged by the European Communities cannot be found to be WTO-inconsistent as such since they cannot be considered to be "mandatory" within the meaning of that distinction. We also note, however, that while the Appellate Body has not rejected the validity of the mandatory/discretionary distinction as an "analytical tool", it has also indicated that it had not yet pronounced on the continuing relevance or significance of this distinction and has cautioned against its mechanistic application.[172]

7.67 In that connection, we have found in the present case that the provisions of law that are being challenged as WTO-inconsistent as such do not specifically address the issue in respect of which it is claimed that they are WTO-inconsistent. If we had found that the relevant provisions of the Tariff Act, while not requiring the use of a zeroing methodology, at least specifically addressed that, it might perhaps have been necessary to reach the question whether recent Appellate Body decisions[173] should perhaps be understood to mean that a provision of a law can be WTO-inconsistent if it envisions WTO-inconsistent conduct without necessarily *requiring* such conduct. However, while we are cognizant of the need for caution with respect to the application of what after all is nothing more

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[167] *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), *rehearing denied*, 2004 U.S. App. LEXIS 6741 (17 March 2004), cert. denied, 160 L. Ed.2d 352, 125 S. Ct. 412 (U.S. 2004), US Exhibit 1, p. 4.

[168] *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), *rehearing denied*, 2004 U.S. App. LEXIS 6741 (17 March 2004), cert. denied, 160 L. Ed.2d 352, 125 S. Ct. 412 (U.S. 2004), US Exhibit 1, pp. 4-6.

[169] *Corus Staal BV v. United States*, No. 04-1107, 2005 U.S. App. LEXIS 1077 (Fed. Cir., 21 January 2005), US Exhibit 2, p. 5 (emphasis added).

[170] *Supra*, para. 7.51

[171] US-First Written Submission, para. 80. Review by the United States Supreme Court is possible in theory but it would appear that this has never occurred in practice.

[172] *Supra*, para. 7.55.

[173] For example, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*.

than an "analytical tool", we cannot see any support in GATT and WTO dispute settlement practice, including recent Appellate Body decisions, for the proposition that a law can be found to be WTO-inconsistent as such with respect to an issue that it does not specifically address. In our view, the very notion of a law as being WTO-inconsistent necessarily entails that the law must address that issue with a certain degree of specificity. In this case such specificity does not exist. While the law at issue envisions the calculation of dumping margins, the relevant United States court has made clear that as the provisions of the law "do not directly speak to the issue", USDOC retains the freedom in making those calculations as to whether to zero or not.

7.68 We note, in this respect, the argument of the European Communities that an "as such" finding should be possible where it can be determined that a provision of a law contributes forcefully to the adoption of a series of WTO-inconsistent measures and is thereby "the root of the problem" and the "source" of the inconsistency.[174] While we are not entirely sure what the European Communities means by this, if it means that a law can be found to be WTO-inconsistent as such even where it does not address the issue, we reject that position. [175]

7.69 The Panel therefore **finds** that Sections 771(35)(A) and (B), 731 and 777A(d) of the Tariff Act are not as such inconsistent with Articles 2.4, 2.4.2, 5.8, 9.3, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement with respect to the use of a zeroing methodology in the calculation of margins of dumping in original investigations.

2. The "as such" claims of the European Communities with respect to "standard zeroing procedures"

(a) Measures at issue

7.70 The European Communities uses the term "Standard Zeroing Procedures" in this proceeding to refer to specific lines of computer code contained in the AD Margin Programme, one of the computer programmes that incorporate USDOC's current calculation methodology, which separate sales with "positive margins" and sales with "negative margins" and subtotal only the dumping amounts for sales with "positive margins". The European Communities refers in particular to the line WHERE EMARGIN GT 0.[176]

7.71 The term "Standard Zeroing Procedures" is not used in United States anti-dumping laws and regulations.

7.72 Since the claim of the European Communities is with respect to the "'standard zeroing procedures' (or the United States practice or methodology of zeroing)", the Panel has sought clarification from the European Communities of whether it is challenging a practice or methodology

[174] EC-First Written Submission, para. 143.

[175] With respect to the argument of the European Communities that the relevant criterion to apply in case of an "as such" claim is whether a measure is "in conformity" with WTO obligations, we note that the Panel in *US – 1916 Act (Japan)* expressed the view that because of the "in conformity" language of Article 18.4 of the *AD Agreement*, the notion of mandatory/discretionary legislation was no longer relevant. However, the Appellate Body in that case specifically stated that it did not find it necessary to consider whether Article 18.4 had supplanted or modified the distinction between mandatory and discretionary legislation and that the Panel did not need to opine on this issue. With respect to the reasoning of the Panel in *US - 1916 Act (Japan)*, we note that a provision identical to Article 18.4 already existed in various Tokyo Round Agreements. No other WTO panel has adopted the view that the mandatory/discretionary distinction has lost its relevance because of Article 18.4 of the *AD Agreement* (or Article 32.5 of the *SCM Agreement*).

[176] EC-First Written Submission, paras. 16, 21-22, 37-38; EC-Response to Question from the United States following the First Meeting, para. 5; EC-Response to Panel Question 51 (para. 166) and EC-Rebuttal Submission, para. 69.

as a measure distinct from the standard zeroing procedures. In response, the European Communities has stated that, although the computer programme is "the root of the problem", in order " to cover all the bases", it is also challenging the "consistent practice" as such of the United States with regard to zeroing.[177] It is therefore our understanding that the European Communities claims that both the "Standard Zeroing Procedures" and the United States' *practice* or *methodology* of zeroing are WTO-inconsistent as such.

(b) Arguments of the parties

7.73 The **European Communities** submits that the measure that consists of or includes the Standard Zeroing Procedures (and the [Anti-Dumping Procedures] Manual to the extent it refers to the Standard Computer Programmes), or the United States practice or methodology of zeroing[178] is as such inconsistent with Articles 2.4, 2.4.2, 5.8, 9.3, 1 and 18.4 of the *AD Agreement*; Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.

7.74 The European Communities argues that any act or omission attributable to a WTO Member can be a measure that can be challenged in WTO dispute settlement, including not only particular acts applied to a specific situation but also acts setting forth rules or norms that are intended to have general and prospective application. There is no basis in the practice of the GATT and WTO generally or in the provisions of the *AD Agreement* for finding that only certain types of measure can be challenged as such under the *AD Agreement*. In order to demonstrate that the "Standard Zeroing Procedures" are a "measure" the European Communities submits *inter alia* that the Anti-Dumping Procedures Manual and the "Standard Zeroing Procedures" are "administrative procedures" within the meaning of Article 18.4 of the *AD Agreement*; that they have at least potentially some legal effects; that in practice USDOC treats the "Standard Zeroing Procedures" as binding, at least until changed; and that the purpose and effect of the "Standard Zeroing Procedures" is to ensure that equivalent situations are automatically and consistently treated equally.[179]

7.75 The European Communities argues that, in light of Article 18.4 of the *AD Agreement* and Article XVI:4 of the WTO Agreement, the correct legal test to apply to "as such" claims is whether or not a measure that is being challenged as such is "in conformity" with the relevant provisions of the *AD Agreement*, and not whether the measure is mandatory or discretionary, whether it is binding or whether it requires a Member to act in a WTO-inconsistent manner in all cases. In any event, whichever test is used, the mathematical character of the "Standard Zeroing Procedures" necessarily means that they are WTO-inconsistent as such because they provide for the application of a standard that differs from the standard set out in Article 2.4.2 of the *AD Agreement*.[180]

7.76 The European Communities states that it is challenging, first and foremost the Standard AD Margin Programme but that to the extent necessary, and in order to "cover all the bases" it is challenging each part of the Anti-Dumping Procedures Manual referenced in the factual part of its first written submission, including the instruction to use the Standard AD Margin Programme.[181]

7.77 The European Communities submits that it is not necessary for a measure to set out or establish rules or norms in order for the measure to be reviewable under the DSU. In any event, the Standard Anti-Dumping Margin Program does set out or establish rules or norms because it is repeatedly referred to as a standard, is published or issued under the authority of USDOC and provides guidance to USDOC officials. The fact that the "Standard Zeroing Procedures" are

[177] EC-Response to Panel Question 51.
[178] EC-First Written Submission, para. 125.
[179] EC-First Written Submission, paras. 104-124.
[180] EC-First Written Submission, paras. 126-129.
[181] EC-Response to Panel Question 53.

contained in a computer programme and that they can be seen as implementing something else does not mean that they cannot be challenged as a measure. That the Standard Anti-Dumping Margin Programme can be changed is irrelevant; what matters is that, as it stands, it contains a standard rule different from the rule prescribed by Article 2.4.2 of the *AD Agreement*.[182]

7.78 The European Communities points out that while the standard computer programmes used by USDOC may have undergone various changes, they have never been changed with respect to the zeroing procedures at issue in this dispute.[183]

7.79 Regarding the issue of whether "practice" can be a "measure", the European Communities submits that whatever panels may or may not have said on this point in past cases, the particular factual circumstances of the present case justify an "as such" finding of inconsistency because the practice has been lifted up by the investigating authority itself into the Standard AD Margin Programme and the Anti-Dumping Procedures Manual. That USDOC cannot depart from the "Standard Zeroing Procedures" without providing a reasoned explanation confirms that these procedures have a legal effect. [184]

7.80 The **United States** submits that the measures referred to by the European Communities in its claims regarding "Standard Zeroing Procedures" either are not measures at all or are not mandatory measures within the meaning of the mandatory/discretionary test.[185] First, with respect to the Anti-Dumping Procedures Manual, even if this Manual is considered a measure, it does not preclude the USDOC decision maker from offsetting negative margins nor does it mandate that the decision maker ignore negative margins. The Manual is nothing more than a source of guidance and training for USDOC personnel. The European Communities provides no evidence to support its assertion that USDOC considers itself bound by the Manual, and the court decisions cited by the European Communities expressly state that the Manual is not legally binding. For purposes of the mandatory/discretionary test, the relevant decision maker is the Assistant Secretary of Commerce for Import Administration, not the staff that implement the decision maker's decisions. The Assistant Secretary clearly is not obligated to follow the Manual and can decide in a particular case to offset negative margins. Second, the Anti-Dumping Margin Program is not a measure for purposes of WTO dispute settlement. It does not set out or establish rules or norms but is a piece of computer software that, at most, implements rules or norms contained in some other instrument. Even assuming that the Anti-Dumping Margin Program is a measure, it does not preclude the USDOC decision maker from offsetting negative dumping margins nor does it require the USDOC decision maker to ignore negative dumping margins.[186]

7.81 The United States further submits that, to the extent that the claims of the European Communities regarding the "Standard Zeroing Procedures" pertain to the "practice or methodology of zeroing", they must be rejected because "practice" is not a "measure" and, even if it were, it would not be a mandatory measure within the meaning of the mandatory/discretionary test. The European Communities fails to explain how "practice" - the repeated application of a particular measure – creates a new and separate "autonomous measure". The Panel in *US – Steel Plate* specifically rejected the view that a practice can be challenged as a measure. Even if past instances of not offsetting negative margins were deemed to be a measure, it would not be WTO-inconsistent under

[182] EC-Rebuttal Submission, paras. 71-82; EC-Response to Panel Question 72.
[183] EC-Response to Question from the United States following the First Meeting.
[184] EC-Second Oral Statement, paras. 55-56.
[185] In its First Submission (paras. 82-83), the United States notes in this respect the lack of precision of the European Communities as to what it means by the term "Standard Zeroing Procedures" and assumes that the European Communities means the Anti-Dumping Manual and the Anti-dumping Margin Programme.
[186] US-First Written Submission, paras. 81-92.

the mandatory/discretionary test because there is no principle of administrative *stare decisis* under United States' law.[187]

7.82 The United States submits that the argument of the European Communities and Japan that the lines of computer programming code at issue in this dispute are covered by Article 18.4 of the *AD Agreement* as "administrative procedures" is contrary to the *Vienna Convention* rules on treaty interpretation because it is inconsistent with the ordinary meaning of the term "administrative procedures". The United States also submits that no Member has ever notified a computer programme to the Committee on Anti-Dumping Practices. The Standard Anti-Dumping Margin Programme has often been changed, and is revised in each case in which a margin calculation is performed. The Assistant-Secretary of Import Administration is not obligated to follow either the Standard Anti-Dumping Margin Programme or the Anti-Dumping Procedures Manual, and there is no evidence that the United States treats zeroing as binding or mandatory.[188]

7.83 The United States submits that the position of the European Communities on the Standard Anti-Dumping Margin Program as a measure that can be found to be WTO-inconsistent as such is based on a flawed approach to the mandatory/discretionary distinction that has never been applied in any WTO panel or Appellate Body report. The United States also asserts that the European Communities is incorrect in arguing that it is not necessary for a measure challenged as such to prescribe a result and in suggesting that the status of the Standard Anti-Dumping Margin Program is similar to that of the USDOC Regulations.[189]

(c) Arguments of third parties

7.84 **Brazil** argues that the measure that is the subject of the present dispute is zeroing as a "policy". As such, it clearly falls within the scope of the expression "rules, norms and standards" used by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*. This policy is reflected in a combination of the consistent application of the policy in every case in which there is negative dumping and the USDOC Antidumping Manual. These, in combination, set forth a rule, norm or standard for applying the zeroing methodology in US anti-dumping proceedings, which the Appellate Body has determined may be challenged in accordance with Article 18.4 of the *AD Agreement*, and should be found to violate Article 2.4 of that Agreement. In view of the practice of consistent application of zeroing, it is irrelevant whether these measures mandate application of zeroing.

7.85 **China** submits that the notion of "measures" that can be submitted to dispute settlement must be interpreted broadly and refers in this respect to the Appellate Body's analysis in *US – Corrosion-Resistant Steel Sunset Review*. In light of the Appellate Body's findings on this issue, a measure can be challenged as such if it is a generally applicable rule, norm or standard adopted by a Member in connection with the conduct of anti-dumping proceedings. The panel reports in *US – Section 301* and *US – 1916 Act* (Japan) and the Appellate Body reports in *US – 1916 Act* and *US – Corrosion-Resistant Steel Sunset Review* indicate that the mandatory nature of a measure is not the decisive factor in deciding whether legislation is inconsistent as such with WTO obligations.

7.86 **Hong Kong, China** submits that, in light of the objectives of the DSU, the term "measures" in Article 3.3 of the DSU must be interpreted broadly. Since the Appellate Body has affirmed that in principle any act or omission attributable to a Member can be a measure of that Member for purposes of WTO dispute settlement, USDOC's AD Margin Programme, and more generally its practice of zeroing, constitutes a measure. In order to challenge a measure as such, it is not necessary for that measure to be mandatory. The consistent use by USDOC of the computer instructions in the AD

[187] US-First Written Submission, paras. 93-97.
[188] US-Response to Panel Questions 57, 59-60, 61, 63-65 and 73.
[189] US-Second Written Submission, paras. 60-64.

Margin Programme demonstrates that they are in the nature of norms or rules of general and prospective application. That they can be changed is irrelevant because all norms and rules, including mandatory rules, can be changed. Even if practice in and of itself cannot be considered to be setting forth rules or norms that are intended to have general and prospective application, a repeated pattern of similar responses to a set of circumstances must be regarded as clear evidence of the existence of rules or norms which are of general and prospective application.

7.87 **India** argues that it follows from the rulings of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Reviews* that the model zeroing and simple zeroing procedures of USDOC can be challenged as such because the standard computer programmes, which include the procedures that result in zeroing through model or simple zeroing, can be characterized as norms or rules that are applied on a generalized and prospective basis. India recalls that the Appellate Body has held that in principle non-mandatory measures can be challenged as such in WTO dispute settlement.

7.88 **Japan** submits that in considering the issue of the measures that can be challenged as such, the Appellate Body has held that the word "measure" has a broad meaning, that an alleged "measure" will be assessed in WTO law irrespective of its legal character in domestic law, and that a "measure" need not be binding or mandatory in domestic law. Model and simple zeroing are measures that can be challenged as such because they are rules, norms or standards applied by the United States in anti-dumping proceedings on a generalized and prospective basis.

7.89 **Mexico** argues that in principle, for the purposes of a dispute settlement proceeding any act or omission attributable to a WTO Member may be deemed to be a measure. The Anti-Dumping Procedures Manual, the standard computer programmes and the Standard AD Margin Programme are components of "Standard Zeroing Procedures" and are built into the overall structure in which anti-dumping proceedings are conducted in the United States. Furthermore, USDOC applies the "Standard Zeroing Procedures" in all investigations and duty assessment proceedings. Thus, in practice they are compulsory.

7.90 **Norway** argues that, as stated by the Appellate Body, there are no limitations on the types of measures that can be challenged as such in WTO dispute settlement and that even non-mandatory measures can be the subject of dispute settlement. The AD Margin Programme is a norm or standard adopted by the United States in connection with the conduct of anti-dumping proceedings. The programme is a set of normative rules that apply mechanistically and the effect of which is utterly predictable. The fact that the Assistant Secretary of Commerce for Import Administration can change the Anti-Dumping Procedures Manual and the Anti-Dumping Margin Programme without notice is irrelevant because all measures are subject to changes. The Manual and the AD Margin Programme are prescriptive for a certain WTO-inconsistent result until they are changed.

(d) Evaluation by the Panel

7.91 The European Communities claims that "Standard Zeroing Procedures", by which it means certain lines of computer programming code contained in what it terms standard computer programmes used by USDOC in the calculation of dumping margins, are WTO-inconsistent as such, i.e. independently from their application in specific cases.

7.92 As a starting point for our analysis of this claim, we briefly recapitulate the main points emerging from recent Appellate Body decisions regarding measures that can be challenged as such in WTO dispute settlement.

7.93 In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body discussed the issue of "the type of measures that can, as such, be the subject of dispute settlement proceedings" under the

AD Agreement. The Appellate Body held that "in principle any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement", and that, in addition, GATT and WTO dispute settlement practice confirmed that the term "measure" also comprised "*acts setting forth rules or norms that are intended to have general and prospective application*" or, in other words, "*instruments of a Member containing rules or norms*", irrespective of their application in particular instances. Specifically with respect to the *AD Agreement*, the Appellate Body held that the phrase "laws, regulations and administrative procedures" used in Article 18.4 of that Agreement implies that "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings" can be challenged as such.[190] The Appellate Body concluded that:

> "..there is no basis either in the practice of the GATT and the WTO generally or in the provisions of the *AD Agreement*, for finding that only certain types of measures can, as such, be challenged in dispute settlement proceedings under the *AD Agreement*".[191]

7.94 With regard to the particular measure at issue in that case, USDOC's Sunset Policy Bulletin ("SPB"), the Appellate Body found that certain provisions of the SPB were not as such inconsistent with Articles 6.10 and 11.3 of the *AD Agreement*, and that it was unable to rule on the claim that certain other provisions of the SPB were as such inconsistent with Article 11.3 because of "the lack of relevant actual findings by the Panel or uncontested facts on the Panel record".[192]

7.95 The Appellate Body confirmed that the SPB is a measure that can be challenged as such in *US — Oil Country Tubular Goods Sunset Reviews*, when it held that the SPB was covered by the concept of "acts setting forth rules or norms that are intended to have general and prospective application":

> "In our view, the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance. Thus, we confirm—once again—that the SPB, as such, is subject to WTO dispute settlement. "[193]

In this connection, the Appellate Body rejected as irrelevant the arguments of the United States that the SPB is not a legal instrument under United States law, that the SPB does not bind USDOC and that USDOC is entirely free to depart from the SPB at any time.[194]

7.96 It can thus be inferred from the Appellate Body's reasoning with regard to the SPB as a measure that can be challenged as such in WTO dispute settlement that it is possible for a measure to be challenged as an act or instrument that "sets forth rules or norms that are intended to have general and prospective application" even where the measure in question is not "a legal instrument" under the law of a Member and does not bind an administering agency.[195]

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[190] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-87. (Italics added)
[191] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88.
[192] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 158 and 190.
[193] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 187.
[194] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para.187.
[195] We also note that the Appellate Body has explicitly stated in a recent case that it "... has not, to date, pronounced upon the issue of whether "practice" may be challenged as such, as a measure in WTO dispute settlement." Appellate Body Report, *US – Gambling*, para. 132. See also Appellate Body Report, *Oil Country Tubular Goods Sunset Reviews*, para. 220 ("Therefore, even assuming argued that a practice may be challenged as a measure in WTO dispute settlement- an issue on which we express no view here...").

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

7.98 We note in this regard, however, that the European Communities has not limited its claim to the "Standard Zeroing Procedures" in and of themselves but has also challenged what it describes as "the United States practice or *methodology* of zeroing". We will therefore proceed to consider whether there exists what the European Communities terms methodology and whether this methodology can be found to be WTO-inconsistent.

7.99 In the latter regard, we note that the SPB, which the Appellate Body has found to be a measure challengeable as such, notwithstanding that it has no legally binding status under United States law, embodies a norm to act in a given way in a given situation. That is precisely what the Appellate Body focuses on when it refers to the SPB as an instrument with normative value that contains rules or norms of general and prospective application. If, as confirmed by the Appellate Body, a non-legally binding policy instrument such as the SPB is a measure that can be challenged as such, it must logically also be possible to challenge as a measure a norm that is not expressed in the particular form of an official written statement but the existence of which is made manifest on the basis of other evidence.

7.100 We find support for this approach in the reasoning of the Appellate Body regarding the rationale for allowing "as such" claims. We note in particular the following statement in paragraph 82 of the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review:*

> "... the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."[196]

In our view, the objective of protecting the security and predictability needed to conduct future trade can just as readily be frustrated if well-established norms that systematically and predictably lead to WTO-inconsistent actions cannot be challenged or if they can be challenged only if they are embodied in a particular type of instrument. Similarly, not allowing "as such" claims against such norms that are "the root of WTO-inconsistent behaviour" might well entail a multiplicity of litigation. While an agency probably can in most cases more easily depart from its own established norm than from a law

[196] Appellate Body Report, *US – Corrosion-Resistant-Steel Sunset Review*, para. 82.

or regulation, the argument that there cannot be WTO-inconsistency as such if an agency has discretion to make a change strikes us as artificial, at the very least in the case of a norm that has been applied invariably for a considerable period of time. In such a case, WTO-inconsistent conduct may be as predictable as when WTO-inconsistent conduct is envisaged in a law or regulation. We also consider that to accord decisive weight to the nature of a particular instrument in which a norm manifests itself creates a risk of addressing symptoms rather than causes.

7.101 In light of these considerations, we must determine whether in the present case what is challenged by the European Communities as methodology constitutes a norm that is WTO-inconsistent as such. We note that the idea that methodology can be challenged as such is not new.[197]

7.102 We realize that "as such" challenges are "serious challenges" in that they "seek to prevent Members *ex ante* from engaging in certain conduct".[198] In this regard, we consider that a finding that a norm is as such WTO-inconsistent must rest on solid evidence that enables a panel to determine the precise content of that norm and the conduct to which that norm will necessarily give rise in future. We are cognizant that norms are not always susceptible of such a clear definition. In the case of the SPB, the necessary precision and predictability resulted from the availability of an official policy statement that set out with a considerable degree of detail the methodology the USDOC intended to apply in certain situations. There are, however, other types of evidence that can be used to establish with the necessary degree of precision the content of a norm and the future conduct it will generate. While we do not focus on the "Standard Zeroing Procedures" as a measure *per se*, we consider that they can be relevant evidence to ascertain the existence of a methodology.[199]

7.103 Thus, in the present case, the instruction not to include comparison results with negative margins in the numerator of the dumping margin is reflected in certain lines of computer code that are always included in the computer programmes used by USDOC in anti-dumping proceedings. Although the United States has emphasized that what the European Communities refers to as standard computer programme has frequently been revised, the United States does not contest that the lines of computer code identified by the European Communities as "Standard Zeroing Procedures" are a constant feature of the computer programmes used by USDOC to perform dumping margin calculations. The evidence before the Panel also indicates that this exclusion of comparison results with negative margins has been invariably performed by USDOC for an extended period of time. In response to a panel question whether there have been cases in which the Anti-Dumping Margin Program has been applied without zeroing, the United States states that, whether calculations have been done by hand or by computer, it is unable to identify any instance where USDOC had given a credit for non-dumped sales.[200] The United States has not contested in this proceeding that USDOC's zeroing methodology reflects a deliberate policy.

7.104 We thus consider that the evidence before us indicates that the zeroing methodology manifested in the "Standard Zeroing Procedures" represents a well-established and well-defined norm followed by USDOC and that it is possible based on this evidence to identify with precision the

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[197] In *US – Countervailing Measures on Certain EC Products*, the Panel and the Appellate Body examined and made findings with respect to the "same person method" applied by USDOC for the purposes of determining the continued existence of a "benefit" within the meaning of the *SCM Agreement* following a change in ownership.

[198] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

[199] We note more generally that GATT and WTO panels have sometimes relied on evidence of an informal nature to establish the existence of a measure or policy. We find instructive in this regard the discussion by the Panel in *Japan – Film* of the term "measures" as it applies to "administrative guidance". Panel Report, *Japan – Film*, paras. 10.43-10.51.

[200] US-Response to Panel Question 73. We also note, in this respect, the argument of the United States that it was well known by Uruguay Round negotiators that zeroing was utilised by the United States and other signatories to the Tokyo Round Anti-Dumping Code. US-Second Written Submission, para. 89.

specific content of that norm and the future conduct that it will entail.[201] In our view, the situation is the same as in the case of the Sunset Policy Bulletin, except that the zeroing methodology is not expressed in writing.

7.105 We recall our finding that the use of model zeroing in the anti-dumping investigations at issue in this dispute is inconsistent with Article 2.4.2 of the *AD Agreement*. Therefore, in light of the considerations in the preceding paragraphs, we find that USDOC maintains a norm that will necessarily produce WTO-inconsistent actions.

7.106 In light of all the foregoing considerations, the Panel **finds** that the United States' zeroing methodology, as it relates to original investigations, is a norm which, as such, is inconsistent with Article 2.4.2 of the *AD Agreement*.

7.107 The Panel considers that it is not necessary to make a finding on whether the Anti-Dumping Procedures Manual is WTO inconsistent as such. The Manual has been referred to by the European Communities principally as evidence to confirm the "standard" character of the "Standard Zeroing Procedures".

7.108 In light of its finding that the United States' zeroing methodology, as it relates to original investigations, is a norm which, as such, is inconsistent with Article 2.4.2 of the *AD Agreement*, the Panel considers that it is not necessary to address the claim of the European Communities that this methodology is also inconsistent as such with Article 2.4 of the *AD Agreement*.

7.109 The Panel also perceives no need to pronounce on the dependent claims raised by the European Communities under Articles 1; 3.1, 3.2 and 3.5; 5.8; 9.3; and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI: 4 of the WTO Agreement. Deciding such dependent claims would provide no additional guidance as to the steps to be undertaken by the United States in order to implement our recommendation regarding the violation on which it is dependent.

E. CLAIMS OF THE EUROPEAN COMMUNITIES IN RESPECT OF CERTAIN ADMINISTRATIVE REVIEWS

1. Measures at issue

7.110 The European Communities requests the Panel to find that the United States has acted inconsistently with its WTO obligations in 16 "anti-dumping duty administrative review" proceedings listed in Exhibits EC-16 to EC-31[202] because: (a) USDOC compared export price and normal value

[201] In this context, we note that the United States has argued that USDOC has the discretion to zero or not and that, under the mandatory/discretionary distinction and "WTO/GATT" practice, a WTO Member must be presumed to implement its WTO obligations in good faith. This rationale, however, only applies where a Member's legislation provides discretion to the executive branch to avoid acting WTO-inconsistently and it is unknown how that discretion will be used. (E.g., GATT Panel report, *US – Superfund*, para. 5.2.9 and GATT Panel Report, *US – Tobacco*, para. 123) In such a situation, the rationale for applying a mandatory/discretionary distinction is that it should not be presumed that the Member will not act in good faith and implement its legislation in a WTO-inconsistent manner. The same rationale, based on an assumption of implementation in good faith, cannot apply when a Member has adopted a norm that systematically leads to WTO-inconsistent conduct.

[202] *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 67 Fed. Reg. 55780 (30 August 2002) (the European Communities challenges this determination with respect to France, Italy and the United Kingdom); *Stainless Steel Plate in Coils from Belgium; Final Results of Antidumping Duty Administrative Review*, 67 Fed. Reg. 64352 (18 October 2002); *Stainless Steel Sheet and Strip in Coils From Italy; Final Results of Antidumping Duty Administrative Review*, 67 Fed. Reg. 1715 (14 January 2002); *Stainless Steel Sheet and Strip*

on an asymmetrical, average-to-transaction basis; and (b) in calculating a weighted average dumping margin based on these average-to-transaction comparisons, USDOC did not take into account any amounts by which individual export transactions exceeded average normal value. The European Communities uses the term simple zeroing to refer to this second aspect of the calculation methodology used by USDOC. The United States rejects the simple zeroing terminology employed by the European Communities but does not contest that the European Communities has accurately described the comparison methodology used by USDOC in these administrative reviews.

2. Order of analysis

7.111 The claims of the European Communities with respect to the administrative reviews at issue are based on: (1) Articles 2.4, 2.4.2, 11.1, 11.2, 9.3, 1 and 18.4 of the *AD Agreement*; (2) Articles VI:1 and VI:2 of GATT 1994; and (3) Article XVI:4 of the WTO Agreement.

7.112 As in the case of the claims of the European Communities with regard to the model zeroing methodology used by the USDOC in original investigations, we consider that it is logical to address first the claim of the European Communities under Article 2.4.2 of the *AD Agreement*.

3. Claim of the European Communities under Article 2.4.2 of the *AD Agreement*

(a) Arguments of the parties

7.113 The **European Communities** submits that the United States acted inconsistently with Article 2.4.2 of the *AD Agreement* because USDOC used the asymmetrical, average-to-transaction comparison referred to in the second sentence of Article 2.4.2 when the conditions for the use of that exceptional method were not met and because it failed to use one of the two symmetrical methods set out in the first sentence of Article 2.4.2. With respect to simple zeroing, the European Communities submits that the reasoning of the Appellate Body in *EC – Bed Linen* and *US – Softwood Lumber V* with regard to model zeroing applies to any parameter used to define the scope of an investigation, be it product, time, level of trade or region. Thus, the simple zeroing methodology employed by USDOC is inconsistent with Article 2.4.2 because instead of treating all export transactions as a

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in Coils from Italy: Final Results of Antidumping Administrative Review, 68 Fed. Reg. 6719 (10 February 2003); *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from France*, 67 Fed. Reg. 6493 (12 February 2002); *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from France*, 67 Fed. Reg. 78773 (26 December 2002); *Stainless Steel Sheet and Strip in Coils From Germany; Notice of Final Results of Antidumping Duty Administrative Review*, 67 Fed. Reg. 7668 (20 February 2002); *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Germany*, 68 Fed. Reg. 6716 (10 February 2003); *Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part: Certain Pasta from Italy*, 68 Fed. Reg. 6882 (11 February 2003); *Notice of Final Results of Antidumping Duty Administrative Review: Granular Polytetrafluoroethylene Resin from Italy*, 67 Fed. Reg. 1960 (15 January 2002); *Notice of Final Results of Antidumping Duty Administrative Review: Granular Polytetrafluoroethylene Resin from Italy*, 68 Fed. Reg. 2007 (15 January 2003); *Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order in Part: Certain Pasta From Italy*, 67 Fed. Reg. 300 (3 January 2002); *Industrial Nitrocellulose From France: Final Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 54213 (26 October 2001); *Industrial Nitrocellulose From the United Kingdom; Final Results of Antidumping Duty Administrative Review*, 67 Fed. Reg. 77747 (19 December 2002). The European Communities treats the administrative review in *Ball Bearings from Italy* as a sample case. The European Communities indicates that in addition to the *Final Results* of the administrative review, the measures at issue include the amendments to these Final Results and that the *Final Results* of the administrative review refers to the accompanying *Issues and Decision Memorandum*, which in turn refers to the Margin Calculations, i.e. the Final Margin Program Log and Outputs for the firms investigated, and to the assessment instructions. EC-First Written Submission, para. 148.

whole, it treats each transaction individually. The European Communities also refers to its arguments presented in connection with its claims regarding model zeroing.[203]

7.114 The European Communities rejects the argument of the United States that since Article 2.4.2 is expressly limited to the investigation phase of an anti-dumping proceeding it does not contain any obligations with respect to administrative reviews. Since the *AD Agreement* does not contain a definition of the word "investigation" the ordinary meaning of "investigation" in Article 2.4.2 must be determined on the basis of dictionary definitions, which indicate that "investigation" means "a systematic examination or inquiry or a careful study of or research into a particular subject". While the text of a provision may limit the particular subject of such an examination or study, as is the case in Article 5, the meaning of the word "investigation" by itself is not limited to investigations "to determine, the existence, degree and effect of any alleged dumping" referred to in Article 5. In the view of the European Communities, Articles 9.3.1, 9.5, 11.2 and 11.3 of the *AD Agreement* require an authority to conduct "investigations".[204] The European Communities asserts that the *AD Agreement* generally uses "investigation" in accordance with the dictionary definition but that, having regard to text, context, object and purpose, the word "investigation(s)" in Articles 3.3, 5, 7, 9.5 and 10 of the Agreement has the more limited meaning of "an investigation to determine the existence, degree and effect of any alleged dumping".[205]

7.115 The European Communities submits various possible alternative interpretations of the phrase "during the investigation phase" in Article 2.4.2 in order to demonstrate that this phrase can be given meaning without interpreting it as restricting the application of the obligations contained in Article 2.4.2 to original investigations. First, the most natural reading of "during the investigation phase", given its placement in the sentence, is that it is associated with "the existence of margins of dumping". Linked to the words "the existence of margins of dumping", the phrase "during the investigation phase" can be interpreted to refer to the investigation period and to prohibit authorities from relying on data arising outside that period. This would apply to any kind of investigation conducted under the Agreement, not just an original investigation.[206] Second, if "during the investigation phase" is associated with the word "established", it can be interpreted to refer to the period of time during which the investigating authority must make its determination. This would again apply not only to an original investigation but to any type of investigation under the Agreement. Under this interpretation, the phrase "during the investigation phase" requires authorities to make their determination within the time span identified in the relevant provision.[207] Third, "during the investigation phase" can also be interpreted to mean that in the pre-initiation phase applicants are not require to apply the technical rules of Article 2.4.2. Fourth, it is possible to interpret the words "during the investigation phase" as being descriptive, in the same way in which the United States considers the words "the existence, degree and effect of any alleged dumping" in Article 5.1 to be descriptive.

7.116 The European Communities considers that the word "the" in "during the investigation phase" does not support the view of the United States that this phrase refers to investigations within the meaning of Article 2.4.2. If the word "the" suggests something that already "known ... or ... familiar" this would rather support the view that "investigation phase" in Article 2.4.2 means the "period of investigation", an expression frequently used in Article 2.[208]

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[203] EC-First Written Submission, paras. 164-170.
[204] EC- Oral Statement at the First Substantive Meeting of the Panel, paras. 24 and 31-37.
[205] EC-Response to Panel Question 14.
[206] EC-Response to Panel Question 52, paras. 55-71.
[207] See also EC-Response to Panel Question 52, paras. 72-82
[208] EC-Second Oral Statement, para. 28.

7.117 The European Communities rejects the argument of the United States that Article 2.4.2 focuses upon the "existence" of dumping rather than on the "amount" of dumping. In an original investigation, it is impossible to determine the existence of dumping without calculating the degree of dumping. In an assessment proceeding, in calculating the degree of dumping, an authority is necessarily also determining whether dumping existed during the period under review. A margin of dumping can only exist if it has a defined magnitude. The word "existence" is used in various provisions of the *AD Agreement* without that being of any legal consequence. The European Communities also draws attention to the fact that the United States does not apply certain provisions of Article 2.4.1 to administrative reviews, notwithstanding that Article 2.4.1 does not include the word "existence" of dumping. The fact that the French and Spanish titles of Article 2 of the *AD Agreement* refer to the "existence" of dumping shows that Article 2 as a whole addresses the "existence" of dumping and that the connection between "existence" and dumping in Article 2.4.2 is not unique.[209]

7.118 Regarding the word "phase" in "during the investigation phase", the European Communities considers that while there can be phases other than an investigation phase, such as a pre-investigation phase or post-investigation phase, this applies to any type of investigation, original or otherwise. Therefore, the word "phase" in Article 2.4.2 does not support the conclusion that the word "investigation" is defined in Article 5.1 for the purposes of the entire *AD Agreement*, including Article 2.4.2. In any event, the fact that the United States has excluded certain provisions of Article 2.4.1 from administrative reviews because of the phrase "in an investigation" shows that the word "phase" in Article 2.4.2 cannot explain the position of the United States that Article 2.4.2 does not apply to such reviews. Panel and Appellate Body reports have used the word "phase" in different ways indicating that the word "phase" in Article 2.4.2 does not have the special or limited or defined meaning suggested by the United States. [210]

7.119 The European Communities rejects as irrelevant the reference made by the United States to Article 9.4(ii) of the *AD Agreement* because none of the measures at issue in this dispute involved the application of a prospective normal value system within the meaning of that provision and because a prospective normal value system is in any event subject to the refund provisions of Article 9.3.2, which in turn is subject to Article 2, including Article 2.4.2.[211]

7.120 The European Communities asserts that the United States has not been able to substantiate its view that the word "investigation" in Article 2.4.2 has a limited meaning and that the United States ignores the plain language of Article 2.4.2 by not interpreting the word "investigation" in its ordinary meaning. The interpretation of "investigation" advanced by the United States in this dispute is contradicted by the fact that in the retrospective assessment proceedings at issue in this case the USDOC used the term "investigation" and by the use of the terms "Five-Year Review(Sunset) Investigations" and "review investigation" by the USITC.[212] The interpretation advanced by the United States is also inconsistent with the *Vienna Convention* because it ignores the relevant context, such as Articles 2.2 and 6, and the object and purpose of the *AD Agreement* and of retrospective assessment proceedings.[213]

7.121 The European Communities finds support for its interpretation of "investigation" in panel and Appellate Body reports that characterize investigations under Article 5.1 as "original investigations"

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[209] EC-Second Written Submission, paras. 118 and 156-160; EC-Oral Statement at the Second Substantive Meeting of the Panel, paras. 19-27; EC-Closing Oral Statement at the Second Substantive Meeting of the Panel, para. 11.

[210] EC-Second Written Submission, paras. 154-155; EC-Closing Oral Statement at the Second Substantive Meeting of the Panel, para. 12.

[211] EC-Second Written Submission, para. 28.

[212] EC-Second Written Submission, paras. 123-136.

[213] EC-Oral Statement at the Second Substantive Meeting of the Panel, paras. 8-9; EC-Closing Oral Statement at the Second Substantive Meeting of the Panel, paras. 9 and 15-16.

and in panel reports that have used the words "investigated" and "investigation" in connection with annual administrative reviews and sunset reviews carried out by the United States.[214]

7.122 The European Communities rejects what it characterizes as a monolithic conception of the term "investigation" according to which an investigation exists only when a careful examination is undertaken of all the three matters referred to in Article 5.1 (existence, degree and effect of any alleged dumping). With reference to Article 3, the European Communities argues that a careful and systematic examination of injury (the effect of any alleged dumping) is nevertheless an "investigation". Thus, it is the nature of the activity carried out by an authority, not the scope of the inquiry, that determines whether that activity is an investigation. Consequently, an assessment proceeding under Article 9.3.1, which involves a careful and systematic examination of the "degree" of dumping is an "investigation".[215] The European Communities finds further support for its view that an investigation under the *AD Agreement* is not necessarily an investigation to determine the existence degree and effect of any alleged dumping in Article 5.8 and in the provisions on on-the-spot investigations in Annex I.[216]

7.123 The European Communities refers to the negotiating history of the *AD Agreement* as support for its position that the applicability of Article 2.4.2 is not limited to investigations within the meaning of Article 5 of the *AD Agreement*.[217] The European Communities asserts that there is "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention* that supports its interpretation of Article 2.4.2 because a review of domestic anti-dumping legislation notified by 105 Members indicates that no other Member has adopted the position that Article 2.4.2 is limited to original investigations.[218]

7.124 The European Communities submits that the term "margin of dumping" is defined in Article VI:2 of the GATT 1994, which definition is implemented and further elaborated in Article 2. The same defined term "margin of dumping" is also used in Articles 9.3, which cross-refers to all of Article 2, and in Articles 9.1 and 9.5. Article 2.4.2 states what it applies to, not what it does not apply to. Article 2.4.2 unlike the SAA, does not contain the words "(not reviews)". The United States is therefore using an *a contrario* reasoning in an attempt to defeat the definition of "margin of dumping" and the cross-reference to Article 2 in Article 9.3. If Members had really wanted to achieve what the United States asserts, it would have been a simple matter for them to have used express exclusionary language. [219]

7.125 The European Communities submits that not applying Article 2.4.2 to duty assessment under Article 9.3.1 would entail unequal treatment between prospective and retrospective duty assessment systems. In a prospective system, the amount of anti-dumping duty collected is based on the margin of dumping established in the original investigation in which context zeroing is prohibited. By contrast, in a retrospective assessment system the result of the initial investigation, in which dumping is established without zeroing, would be eclipsed by the use of the zeroing methodology to determine the final amount of anti-dumping duty in a periodic administrative review. In the case of the United States, the results of such a review would apply retrospectively from the date provisional duties were first applied. The European Communities points out that this will necessarily imply that under the retrospective assessment method a higher amount of anti-dumping duties will be collected than under the prospective system and that, while in the prospective system it will be sufficient for the

[214] EC-Second Written Submission, paras. 168-170.
[215] EC-Second Written Submission, paras. 179-187.
[216] EC-Second Written Submission, paras. 188-197.
[217] EC-Second Written Submission, paras. 199-217.
[218] EC-Second Written Submission, para. 218; EC-Oral Statement at the Second Substantive Meeting of the Panel, para. 37.
[219] EC-Closing Oral Statement at the Second Substantive Meeting of the Panel, paras. 5-6.

exporter to increase the export price by the margin of dumping to obtain a refund of all duties paid, in the retrospective system such an increase will not suffice to remove duty liability. The European Communities submits that retrospective and prospective duty assessment systems must lead to the same level of protection against dumped imports, which must correspond to the actual margin of dumping of the exporter.[220]

7.126 The European Communities points out that acceptance of its claims would mean that there would be only one margin of dumping, for each exporter, in all cases of retrospective duty assessment. Thus the practice of considering each export transaction would be prohibited at the final assessment stage when authorities must ensure that the total amount of duty collected with respect to exports made by one specific exporter during the assessment period does not exceed the relevant margin of dumping of the same exporter.[221]

7.127 The **United States** argues that the text of the *AD Agreement* expressly limits the obligations of Article 2.4.2 to the investigation phase of an anti-dumping proceeding. Investigations and assessment proceedings constitute distinct phases of an AD proceeding and have different purposes. The distinction made between investigations and reviews in Article 18.3 of the *AD Agreement* mirrors the distinction between these terms in the substantive provisions of the Agreement. Panel and Appellate Body reports have recognized this distinction, consistently finding that provisions in the *AD Agreement* with express limitations to investigations are in fact limited to the investigation phase of a proceeding.[222] The argument of the European Communities that Article 2.4.2 applies to assessment proceedings under Article 9 ignores the clear distinctions made in the text of the *AD Agreement* between investigations and other proceedings. The Appellate Body has recognized, in *US – Corrosion Resistant Steel Sunset Review*, that investigations and other proceedings serve different purposes and have different functions and are therefore subject to different obligations. Article 9 assessment proceedings are not concerned with the question of whether injurious dumping "exists" above a *de minimis* level such that the imposition of anti-dumping measures is warranted but with the amount of duty to be assessed on particular entries, which is a separate exercise from the calculation of an overall margin of dumping during the threshold investigation phase of an anti-dumping proceeding.[223]

7.128 The United States submits that it is clear from the phrase "the existence of margins of dumping during the investigation phase" that Article 2.4.2 only applies in an Article 5 investigation. Articles 1 and 5.1 of the *AD Agreement* provide for the existence of a discrete investigation phase. The first sentence of Article 1 cross-references Article 5 to define "investigations initiated" under the *AD Agreement*. Only investigations under Article 5 are initiated under the *AD Agreement*. Article 5.1, in turn defines the scope of such investigations as "to determine the existence, degree and effect of any alleged dumping". An investigation under Article 5 is the only investigation phase under the *AD Agreement* that requires a determination of the "existence" of dumping. Article 2.4.2 establishes how the "existence" of dumping is to be determined. Thus Article 2.4.2 is expressly limited to an Article 5 investigation in that it refers to the "investigation phase" and in that it provides that its purpose is to establish the existence of dumping. The Appellate Body in *EC – Bed Linen* and the panel in *Argentina – Poultry Anti-Dumping Duties* have confirmed that the application of Article 2.4.2 is limited to the investigation phase.[224]

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[220] EC-Rebuttal Submission, paras. 30-37; EC-Oral Statement at the Second Substantive Meeting of the Panel, paras. 65-66.

[221] EC-Response to Panel Question 39.

[222] US-First Written Submission, paras. 36-39.

[223] US-First Written Submission, paras. 44-46.

[224] US-Response to Panel Questions 10, 13 and 14; US-Second Written Submission, paras. 5-13.

7.129 The United States argues that Article 9 does not incorporate the requirements of Article 2.4.2 of the *AD Agreement*. The general reference in Article 9.3 to Article 2 necessarily includes any limitations found in the text of Article 2. Therefore, the explicit limitation of Article 2.4.2 to the investigation phase means that Article 2.4.2 does not apply to Article 9.3.[225]

7.130 The United States submits that the limited application of Article 2.4.2 to the investigation phase is also consistent with the fact that the *AD Agreement* allows for the use of different assessment systems. Application of Article 2.4.2 to assessment proceedings would render this divergence of assessment systems impossible.[226] Article 9.4(ii) explicitly allows for the calculation of anti-dumping duties on the basis of a comparison of a prospective normal value and individual export prices.[227] There is no basis in the *AD Agreement* for a requirement that Members with prospective normal value systems provide credits for non-dumped entries when assessing duties on subsequent entries that are dumped.[228] Prospective normal value systems inherently operate on an entry-by-entry basis. The assessment system used by the United States functions on a retrospective basis but in substance it operates much like a prospective normal value system, albeit with contemporaneous normal values.[229]

7.131 The United States considers that the concern of the European Communities that limiting the application of Article 2.4.2 to the investigation phase would place retrospective anti-dumping systems at a relative disadvantage as compared to prospective systems is misplaced because Article 9.3 places prospective and retrospective systems on the same footing. Under both systems, the *AD Agreement* permits the investigating authority to attach liability for antidumping duties on imports as they cross the border. The *AD Agreement* then provides for the Member, no matter what the system, to determine whether any refund is due. A prospective system does not inherently require the application of Article 2.4.2 to refund proceedings. Nothing in Article 9.3 requires Members to conduct such assessment proceedings so as to cover all imports from a particular exporter over any period of time. The *AD Agreement* permits Members to apply their duty assessment systems so as to focus any Article 9.3 proceedings on particular imports, particular importers or particular exporters as they deem most appropriate.[230] The United States further asserts that the spectre of unequal treatment conjured up by the European Communities has no legal or factual basis because, first, the argument of the European Communities erroneously assumes that Article 5 investigation phase margins are the basis for duty collections in all prospective systems. In a prospective normal value system duties need not be limited by the margins of dumping calculated during the Article 5 investigation phase. Second, even Members with prospective *ad valorem* systems may conduct Article 11.2 reviews at any time to update those margins so that the amount of duty collected corresponds to the actual margin of dumping of the exporter. Article 2.4.2 is no more applicable to such Article 11.2 reviews than it is to Article 9.3 assessment proceedings.[231]

7.132 The United States submits that while investigations determine whether anti-dumping measures may be applied by determining the existence, degree and effect of any alleged dumping, the collection and assessment of anti-dumping duties is a separate and distinct phase that occurs after an anti-dumping measure is imposed. Because importers will incur liability for duties, it is appropriate to determine that liability on an importer- and transaction-specific basis.[232] The United States further argues that the European Communities proposes an approach that divorces the amount of anti-dumping duty assessed with respect to an import from the dumping margin associated with that

[225] US-First Written Submission, paras. 50-54.
[226] US-First Written Submission, para. 47.
[227] US-First Written Submission, paras. 55-57.
[228] US-First Written Submission, para. 31.
[229] US-Opening Statement at the First Substantive Meeting of the Panel, para. 18.
[230] US-Opening Statement at the First Substantive Meeting of the Panel, paras. 8-10.
[231] US-Closing Statement at the Second Substantive Meeting of the Panel, paras. 16-17.
[232] US-Response to Panel Question 11.

import transaction. The argument of the European Communities ignores the distinction between the Article 5 investigation phase referred to in Article 2.4.2 with its focus on the existence of margins of dumping and the assessment proceeding under Article 9.3.1 with its focus on duty liability, and is inconsistent with the Appellate Body finding in *EC – Bed Linen*. Moreover, there is no support in the text or context of Article 9.3.1 for the proposition that a Member must apply an assessment methodology whereby importers that pay relatively high non-dumped export prices could also be liable for anti-dumping duties because of low, dumped prices paid by other, unrelated importers.[233] There is a basic logic and fairness that supports importer-specific assessment in that an importer will pay no anti-dumping duties when none of its imports are dumped. By contrast, the exporter-oriented assessment process required by the European Communities' interpretation would under any of the margin methodologies, even without, zeroing require some assessment of anti-dumping duties on the non-dumped imports of such an importer.[234]

(b) Arguments of third parties

7.133 **Argentina** submits that Article 2.4.2 of the *AD Agreement* does not apply outside the investigation phase and therefore disagrees with the assertion of the European Communities that insofar as the United States uses a retrospective duty assessment system for calculating anti-dumping duties to be collected, the authorities should calculate those duties in a manner consistent with Article 2.4.2. Article 2.4.2 is expressly limited to the investigation phase. The *AD Agreement* makes a clear distinction between the investigation phase and the imposition and collection of anti-dumping duties. Therefore, the requirement in Article 9.3 that anti-dumping duties shall not exceed the margin of dumping established pursuant to Article 2 does not mean that authorities conduct an on the spot recalculation of the margin of dumping in accordance with Article 2.4.2. As stated by the Panel in *Argentina – Poultry Anti-Dumping Duties*, Article 9.3 refers to the margin of dumping established in accordance with Article 2 as a whole.

7.134 **Brazil** submits that while it agrees with the positions taken by the European Communities in this dispute, it is largely academic to discuss whether Article 2.4.2 applies to the reviews, or whether reviews are considered to be part of investigations or whether average-to-transaction comparisons are permitted because zeroing is inconsistent with the "fair comparison" requirement of Article 2.4, which is not limited to certain types of proceedings or certain types of comparisons.

7.135 **China** submits that "during the investigation phase" does not limit Article 2.4.2 to original investigations because there exists no definition of the word "investigation" and there is no precedent in WTO dispute settlement practice for distinguishing between assessment proceedings and original investigations. While there may be differences between reviews and original investigations, assessment proceedings are closely related to original investigations in that they both pertain to the imposition of anti-dumping duties. Moreover, Article 2 of the *AD Agreement* applies for the entire purpose of the Agreement and Article 9.3 specifically refers to "the margin of dumping as established under Article 2", which includes Articles 2.4 and 2.4.2.

7.136 **Hong Kong, China** submits that Article 18.3 of the *AD Agreement* and the panel and Appellate Body reports cited by the United States do not provide any guidance with respect to how the term "investigation" is generally used in the *AD Agreement*. The word "investigation" in the *AD Agreement* does not necessarily mean original or initial investigation. In the context of Article 2.4.2, "investigation" and "investigation phase" should be interpreted to refer to any procedure undertaken by an investigating authority which conforms to the ordinary meaning of an "investigation" ("action or process of investigating", i.e. search[ing] or inquir[ing] into; examining (a

[233] US-Second Written Submission, paras. 31-35.

[234] US-Closing Statement at the Second Substantive Meeting of the Panel, paras. 12-14 and Exhibit US-3.

matter) systematically or in detail") and which leads to the establishment of the existence of margins of dumping for the subject product. The steps taken by USDOC in a retrospective duty assessment proceeding conform to this meaning of "investigation". Article 9.3 is further support for the proposition that Article 2.4.2 applies to the calculation of margins of dumping in duty assessment proceedings. Hong Kong, China rejects the argument of the United States that Article 9 4(ii) of the *AD Agreement* provides for an average-to-transaction comparison method. Article 9.4 is applicable only in the special situation where authorities have used sampling to limit their examination and does not permit the calculation of a margin of dumping on the basis of an average-to-transaction comparison as such. Instead, it refers to the use of variable duties. In any case, the United States does not use the prospective normal value system envisaged in Article 9.4 (ii).

7.137 **Japan** submits that the use by USDOC of simple zeroing in duty assessment proceedings is inconsistent with Articles 2.4, 2.4.2 and 9.3 of the *AD Agreement*. The ruling of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* that Article 2 of the *AD Agreement* applies to dumping margins used in a sunset review under Article 11.3 must apply *a fortiori* to dumping margins calculated and used in periodic reviews under Article 9.3, which specifically refers to Article 2. It follows from this ruling that the "fair comparison" requirements in Article 2.4 apply equally to a dumping margin calculated or used for purposes of Article 9.3. The requirement in Article 2.4.2 for the comparison of normal value and export price to include "all comparable export transactions" is one of such "fair comparison" requirements. In any event, leaving aside whether Article 2.4.2 applies to margins of dumping calculated pursuant to Article 9.3, the use of simple zeroing in periodic reviews is inconsistent with Article 2.4, which plainly does apply.

7.138 **Korea** argues that a periodic review under Article 9.3 is part of the investigation phase under Article 2.4.2. The Appellate Body stated in *US – Corrosion-Resistant Steel Sunset Review* that reviews under Article 11 of the *AD Agreement* involve both investigatory and adjudicatory aspects and therefore concluded that the prohibition of zeroing implicit in Article 2.4.2 also applied to dumping margin calculations under Article 11.3. This suggests that "investigation phase" is properly understood in the context of Article 2.4.2 to mean the portion of the proceeding (original investigation or review) in which an authority "investigates" whether dumping has occurred. Korea submits that the same logic should apply to duty assessment under Article 9.3 of the *AD Agreement*. The reference in Article 9.3 to "the margin of dumping as established under Article 2" explicitly indicates that the requirements of Articles 2.4 and 2.4.2 must be applied to periodic reviews under Article 9.3.

7.139 **Mexico** submits that the use of simple zeroing in duty assessment proceedings is inconsistent with Article 2.4.2 of the *AD Agreement* because it fails to take into account all sales of the product under investigation. The argument that Article 2.4.2 only applies to original investigations is untenable because Article 9.3 refers to, and incorporates, Article 2 as a whole without limitation and therefore requires authorities to apply Articles 2.4 and 2.4.2 in assessment proceedings. In addition, the definition of dumping in Article 2.1 applies throughout the *AD Agreement*. Article 9.4 does not support the position of the United States because it applies only where authorities use sampling to limit the scope of their examination and where liability for payment of anti-dumping duties is calculated on a prospective basis, which is not the case of the United States.

7.140 **Norway** submits that the argument of the United States that the word "investigation" in Article 2.4.2 prevents application of Article 2.4.2 to periodic reviews and new shipper reviews is without merit because Article 9.3 explicitly refers to the calculation of dumping margin, an issue that falls squarely within the scope of Article 2.4.2. Second, the Appellate Body has based its conclusion that zeroing is prohibited also on Article 2.4, which includes Article 2.4.2. Third, the steps taken by USDOC in duty assessment proceedings and new shipper reviews effectively amount to a new investigation.

7.141 **Turkey** submits that Article 2.4.2 does not prohibit simple zeroing in all circumstances but that it may only be applied in connection with the exceptional, average-to-transaction method provided for in the second sentence of Article 2.4.2. By systematically applying in the periodic reviews at issue in this dispute a method that is permitted only in exceptional circumstances, the United States has violated Article 2.4.2. Turkey disagrees with the United States that Article 2.4.2 is not applicable to the duty assessment phase and refers in this regard to the Appellate Body ruling in *US – Corrosion-Resistant Steel Sunset Review* that whenever a Member calculates a margin of dumping it must abide by Article 2, and 2.4 in particular.

(c) Evaluation by the Panel

7.142 The measures at issue[235] are certain administrative reviews[236] of anti-dumping duty orders, in which USDOC determined *percentage weighted average dumping margins* and *cash deposit rates* for individual exporters/producers and *assessment rates* for individual importers.[237]

7.143 It is not disputed that these administrative reviews of existing anti-dumping duty orders fall within the scope of Article 9 of the *AD Agreement* ("Imposition and Collection of Anti-Dumping Duties") which provides:

> "9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.
>
> 9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.
>
> 9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon

[235] *Supra*, footnote 202.

[236] The term "administrative review" in this context means "periodic review of the amount of antidumping duty" as required by Section 751(a) of the Tariff Act. This provision requires the administering authority to review and determine the amount of any anti-dumping duty at least once during each 12-month period beginning on the anniversary of the date of publication of an anti-dumping duty order if a request for such a review has been received. The United States uses a retrospective assessment system under which final liability for anti-dumping duties is determined after merchandise is imported. USDOC's Regulations (§351.414(c)(2) and (e)) provide that in such a periodic review of the amount of anti-dumping duty USDOC will normally use the average-to-transaction method and that, in applying that method, when normal value is based on the weighted average of sales of the foreign like product, the USDOC will limit the averaging of such prices to sales incurred during the contemporaneous month.

[237] §351.212 of USDOC's Regulations provide that if the Secretary has conducted an administrative review, a new shipper review or an expedited antidumping review, "the Secretary normally will calculate an assessment rate for each importer of subject merchandise covered by the review. The Secretary normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise."

> request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.
>
> 9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided."

Sub-paragraph 3.1 specifically addresses retrospective duty assessment procedures such as the administrative reviews at issue in this dispute.

7.144 In these administrative reviews, USDOC determined margins of dumping on the basis of "asymmetrical" comparisons between (monthly) weighted-average normal values and individual export transactions without regard to whether the conditions expressly set out in the second sentence of Article 2.4.2 of the *AD Agreement* were fulfilled. In aggregating the results of these comparisons to calculate an overall margin of dumping for each exporter, USDOC did not include in the numerator of that overall margin any amounts by which export prices exceeded normal value.[238] The European Communities asserts that in these respects USDOC acted inconsistently with Article 2.4.2 of the *AD Agreement*. The United States submits that Article 2.4.2 does not apply in the context of these administrative reviews.

7.145 Therefore, the threshold legal question before us is whether the obligations contained in Article 2.4.2 apply to duty assessment proceedings provided for in Article 9.3.

7.146 As noted above, Article 9.3 provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."[239] Thus, it is clear that as a general matter "Article 2" is relevant to duty assessment procedures[240], and there is nothing in Article 9.3 itself that suggests that Article 2.4.2 specifically does not apply in the context of Article 9.3. That, however, is not the end of the matter. If Article 2 *itself* provides that Article 2.4.2 does not apply in the case of reviews under Article 9.3, that is not overridden by the fact that "Article 2" is specifically referred to in Article 9.3. Absent anything explicitly to the contrary, that reference to "Article 2" in Article 9.3 must be read as *including* any limitation that is expressed in Article 2 itself. We commence therefore with Article 2.4.2.

7.147 Article 2.4.2 of the *AD Agreement* provides that:

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[238] It is not in dispute that USDOC included the values of all export transactions in the denominator of the aggregate margin calculation.

[239] In addition, Article 2.1 contains a definition of dumping that applies to the entire *AD Agreement*. Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 109 and 126.

[240] We emphasize that the issue before us is limited to whether Article 2.4.2 applies to duty assessment proceedings under Article 9.3. The applicability of other provisions of Article 2 to such proceedings is not at issue in this dispute.

> "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).

7.148 The interpretive question raised by the disagreement between the parties is whether, as argued by the European Communities, Article 2.4.2 applies to any proceeding under the *AD Agreement* in which authorities determine margins of dumping or whether, as argued by the United States, Article 2.4.2 only applies to determinations of dumping in the context of investigations within the meaning of Article 5 of the *AD Agreement*.[241]

7.149 In analyzing this issue we examine successively: (i) the interpretation of the phrase "the existence of margins of dumping during the investigation phase" in context; (ii) relevant panel and Appellate Body reports; (iii) the alternative interpretations of "during the investigation phase" suggested by the European Communities; (iv) arguments of the European Communities regarding object and purpose of Article 9.3 and the *AD Agreement*; (v) arguments of the European Communities regarding subsequent practice; and (vi) arguments of the European Communities regarding supplementary means of treaty interpretation.

(i) Interpretation of "the existence of margins of dumping during the investigation phase" in context

7.150 The disciplines of Article 2.4.2 apply in the context of the establishment of "the existence of margins of dumping during the investigation phase". We therefore consider that our analysis should focus on the meaning of the expression "the existence of margins of dumping during the investigation phase..." as a whole and not on the word "investigation" taken in isolation. Consistent with basic principles of treaty interpretation[242], we must proceed on the basis that this phrase – which is unique

[241] We note in this regard that the argument of the European Communities that the word "investigation" in Article 2.4.2 applies to any provision of the *AD Agreement* that obligates an authority to conduct "a systematic examination or inquiry or a careful study" logically implies that all proceedings under the *AD Agreement* – e.g., duty assessment proceedings under Article 9.3, new shipper reviews under Article 9.5, "interim" or "changed circumstances" reviews under Article 11.2 and sunset reviews under Article 11.3 – would be "during the investigation phase" and thus be subject to Article 2.4.2. Thus, while the issue before us with respect to this "as applied" claim is limited to the application of Article 2.4.2 to duty assessment proceedings, we must arrive at a more general understanding of the scope of application of Article 2.4.2, both in order to reach a reasoned conclusion regarding this claim, and in order to resolve this dispute in respect of the other as such claims. We also note that the European Communities has indicated that the implication of its position that Article 2.4.2 applies to duty assessment proceedings under Article 9.3 is that both the "*import*-specific" and the "*importer*-specific" aspects of the United States' duty assessment system are inconsistent with the *AD Agreement*. Thus, whether the *AD Agreement* must be interpreted to proscribe import-specific and importer-specific methods of assessment of anti-dumping duties is an unavoidable and central aspect of our analysis of the claim of the European Communities under Article 2.4.2. We discuss the issue of whether duty assessment must be based on the overall behaviour of an exporter or whether it is permissible to focus on individual transactions and individual importers below in paras. 7.203-7.207.

[242] "One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a

in Article 2 and in fact in the *AD Agreement* as a whole – has a meaning and function. Our task is to determine whether, as argued by the United States, that function is to limit the application of Article 2.4.2 to the "investigation phase" in the sense of the "original investigation" as opposed to subsequent phases of an anti-dumping proceeding such as duty assessment. Since the relevant "context" for purposes of treaty interpretation in principle comprises the text of the entire treaty, the requirement to interpret the terms of the treaty "in their context", means that we must not only consider the word "investigation" as part of the phrase "the existence of margins of dumping during the investigation phase" but that we must also consider whether other provisions of the *AD Agreement* illuminate the meaning of the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2.

7.151 In light of these considerations, we disagree with the view of the European Communities that the decisive element regarding the interpretation of the scope of Article 2.4.2 is the word "investigation" which has not been defined in the *AD Agreement* and which must therefore be interpreted strictly by reference to a dictionary definition.[243] Rather, we must determine the meaning of the entire phrase "the existence of margins of dumping during the investigation phase" in the context of the *AD Agreement* as a whole. The dictionary definition of "investigation" is only one element in this analysis and is not necessarily dispositive.[244]

7.152 In interpreting the phrase "the existence of margins of dumping during the investigation phase" in context we consider the following textual and contextual elements, taken together, to be particularly significant: (a) the reference to "the investigation *phase*"; (b) the textual similarity between the phrase "the existence of margins of dumping during the investigation phase" and the language of Article 5.1 of the *AD Agreement*; (c) the fact that where the terms "investigation" and "investigations" are used in the *AD Agreement* to refer to particular proceedings, it is in most cases clear from the substantive context that such proceedings are investigations within the meaning of

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reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility". Appellate Body Report, *US –- Gasoline*, p. 23.

[243] The position of the European Communities that Article 2.4.2 of the *AD Agreement* applies to the assessment of the amount of an anti-dumping duty under Article 9.3 is based essentially on the following propositions: (1) The key interpretive issue before the Panel is the meaning of the word "investigation". (2) In the absence of a generic definition limiting the meaning of "investigation", its ordinary meaning must be established on the basis of dictionary definitions. (3) The dictionary definition of "investigation" is "a systematic examination or inquiry or a careful study of a particular subject". (4) The word "investigation" in Article 2.4.2 therefore applies to any provision of the *AD Agreement* that obligates an authority to conduct "a systematic examination or inquiry or a careful study". (5) A duty assessment proceeding under Article 9.3 is an investigation in this sense.

[244] The fundamental rule of treaty interpretation that governs our analysis is that: 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 (*Vienna Convention*, Art. 31(1)) In our view, it is not consistent with this rule to interpret Article 2.4.2 by focusing on the word "investigation" in isolation as determinative and to equate the ordinary meaning of this word with its dictionary definition. We note in the latter regard that the Appellate Body has on several occasions cautioned against placing too much emphasis on dictionary definitions. In *US – Gambling*, the Appellate Body observed that: "In order to identify the ordinary meaning, a panel may start with the dictionary definition of the terms to be interpreted. But dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words– be those meanings common or rare, universal or specialized". Appellate Body Report, *US- Gambling*, para. 164 (footnotes omitted, emphasis in original). In the same Report, the Appellate Body stated that: "... to the extent that the Panel's reasoning simply equates the 'ordinary meaning' with the meaning of words as defined in dictionaries, this is, in our view, too mechanical an approach". Appellate Body Report, *US – Gambling*, para. 166. In *US – Offset Act (Byrd Amendment)*, the Appellate Body observed that: "It should be remembered that dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents". Appellate Body Report, *US – Offset Act (Byrd Amendment)* para. 248.

Article 5 and that the *AD Agreement* does not use "investigation" and "investigations" in relation to proceedings that take place once an anti-dumping measure has been taken; (d) the fact that certain provisions governing investigations apply to provisions governing different proceedings only by virtue of express cross-references; and (e) the express distinction between "investigations" and "reviews" in Article 18 of the *AD Agreement*.

- Investigation *phase*

7.153 First, we consider that a key element in resolving the issue of the scope of Article 2.4.2 is the use of the phrase "*the* investigation *phase*". This phrase, in our view, reflects the notion that there exists in the *AD Agreement* a particular phase, characterized by the word "investigation" used as an adjective, that is distinct from other "phases". The yoking of these two words together must be given effect. It would be inherently flawed to act as if this word "phase" did not exist. The meaning of the term "investigation" in any abstract or general sense is not the issue. Rather the issue is the phrase "investigation phase", to wit, a determinate stage in a process of longer duration and can only be interpreted in that way. Therefore, what we must be concerned with is investigation as a particular stage in a process. We note in this connection that, as held by the Appellate Body in *US – Softwood Lumber V*, the phrase "during the investigation phase" operates to limit the *applicability* of Article 2.4.2.[245]

7.154 In considering how to distinguish this "investigation phase" from other phases, we see significance in the fact that Article 5 ("Initiation and Subsequent Investigation") is the only provision in the entire *AD Agreement* that uses the word "investigation" to define its subject matter. As the provision that is the most specific in the *AD Agreement* with respect to the concept of "investigation", it would be most natural in the context to read "the investigation phase" in Article 2.4.2 as referring to the concept of "investigation" as used in Article 5. To interpret "the investigation phase" as corresponding to an investigation within the meaning of Article 5 makes it possible to maintain a meaningful distinction within the *AD Agreement* between "the investigation phase" and subsequent phases: the "investigation phase" referred to in Article 2.4.2 is the phase that begins when an investigation is initiated under Article 5 and that ends when that investigation is concluded, which, under Article 5.10, must occur within one year, and in no case more than 18 months after the initiation of the investigation. This interpretation of "the investigation phase" in Article 2.4.2 is, moreover, consistent with the distinction drawn by the Appellate Body between "investigations" and other phases of countervailing duty and anti-dumping duty proceeding subsequent to the application of countervailing or anti-dumping measures.[246]

7.155 In contrast, according to the interpretation advanced by the European Communities, "the investigation phase" within the meaning of Article 2.4.2 would effectively include any kind of "systematic examination or inquiry or careful study", be it in the context of an investigation under

[245] "Article 2.4.2 of the AD Agreement permits the use of three methodologies, *applicable during the investigation phase*, for establishing the existence of 'margins of dumping'". Appellate Body Report, *US – Softwood Lumber V*, para. 76 (footnote omitted, emphasis added). It is implied by this statement that "during the investigation phase" must be read to be associated with the word "established" in the first sentence of Article 2.4.2 rather than with "the existence of margins of dumping". Contrary to what is suggested in the dissenting opinion, we do not believe that any clear grammar rules compel the result the dissenting opinion argues for in any of the three authentic languages, namely that "investigation phase" must be linked to the existence of margins of dumping. We also note in this regard that to read 'investigation phase' as qualifying "the existence of margins of dumping" would effectively amount to equating "investigation phase" with "period of investigation" as used elsewhere in Article 2. However, as discussed *infra* in paras. 7.190-7.194, "period of investigation" is clearly a concept different from "investigation phase". This difference in meaning between "investigation phase" and "period of investigation" thus supports a reading of "investigation phase" as being associated with the word "established".

[246] *Infra*, Section VII.E.3(c)(ii).

Article 5, an assessment proceeding under Article 9.3, a review under Article 9.5 or a review under Articles 11.2 and 11.3. But this has the inevitable consequence of eroding any meaningful distinction between "the investigation phase" and subsequent phases. In fact, by the approach of the European Communities each and every phase of an anti-dumping proceeding is "the investigation phase". This would effectively read the word "phase" out of the text.

- Textual similarity between Article 2.4.2 and Article 5.1 of the *AD Agreement*

7.156 Second, we note the textual similarity between establishing "the existence of margins of dumping during the investigation phase" in Article 2.4.2 and "an investigation to determine the existence of ...any alleged dumping" in Article 5.1 While there are various provisions of the *AD Agreement* requiring authorities to determine a margin of dumping, it is only in Article 5 that the "*existence... of dumping*" must be determined in the context of an "*investigation*". This textual similarity between "the existence of margins of dumping during the investigation phase" in Article 2.4.2 and the language used in Article 5 of the *AD Agreement* stands in clear contrast to the terminology used in other provisions of the *AD Agreement* that may require authorities to determine margins of dumping and which the European Communities considers to be "investigations" based on the dictionary definition of the meaning of "investigation". The *AD Agreement* characterizes the nature and purpose of proceedings under Article 9 and 11 in terms that are very different from establishing "the existence of margins dumping during the investigation phase".[247]

7.157 The European Communities has submitted various arguments in support of its view that the word "existence" in the first sentence of Article 2.4.2 cannot support the interpretation of Article 2.4.2 as not applicable to administrative reviews.[248] We recall our view that the issue before us is the meaning of "the existence of margins of dumping during the investigation phase" in its entirety rather than the individual words used in this phrase isolated from their context. Contrary to what the

[247] Thus, Article 9.3 is part of an article on "Imposition and Collection of Anti-Dumping Duties". Article 9.3.1, the provision that applies to the measures at issue, addresses the "*determination* of the final *liability* for payment of anti-dumping duties" "when the *amount* of the anti-dumping duty is *assessed* on a retrospective basis. " Footnote 21 refers to "[a] determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9". Article 18 refers to "refund procedures" under Article 9.3. If in a proceeding under Article 9.3 it is found that the margin of dumping in a particular period is zero, this does not amount to a finding, resulting from an "investigation", that dumping did not "exist". Footnote 22 of the *AD Agreement* provides that "[w]hen the amount of the anti-dumping duty is assessed on a retrospective basis, *a finding* in the most recent assessment proceeding under subparagraph 3.1 of Article 9 *that no duty is to be levied* shall not by itself require the authorities to terminate the definitive duty." This footnote refers to "a finding that no duty is to be levied" and not to "a finding that dumping does not exist". Similarly, Article 9.5 of the *AD Agreement* provides for "a *review* for the purpose of *determining individual margins of dumping* for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation..." and does not use the words "investigation" or "investigate" to characterize the nature of this proceeding. A review under this provision is to be carried out on accelerated basis "compared to *normal duty assessment and review proceedings*" of the importing Member. Article 11 of the *AD Agreement* ("Duration and Review of Anti-Dumping Duties and Price Undertakings") uses the words "review" and "determine" rather than "investigate". Articles 9.5 and 11 also contain no references to "the existence of margins of dumping".

[248] The European Communities argues that it is not possible to dissociate the "existence" of dumping from the "degree" of dumping; the existence of dumping must be established not only in an original investigation but also in other proceedings such as changed circumstances reviews or sunset reviews; the word "existence" is used in other provisions in the *AD Agreement* without having the meaning attributed to it by the United States; the word "existence" is also part of the title of Article 2 of the French and Spanish texts of the *AD Agreement*; and the United States does not apply certain provisions of Article 2.4.1 in administrative reviews, even though Article 2.4.1 does not contain the word "existence". EC-Rebuttal Submission, paras. 118 and 156-160; Oral Statement at the Second Substantive Meeting of the Panel by the European Communities, paras. 19-26.

European Communities suggests, proceedings other than investigations under Article 5 are not concerned with determining "the existence of margins of dumping during the investigation phase". In this respect, whether or not it is possible as an empirical matter to determine the "existence" of dumping without at the same time determining its "magnitude", this is not the legally relevant issue. Rather, what matters is that the *AD Agreement* does not express textually the nature and purpose of proceedings under provisions other than Article 5 in terms of establishing "the existence of margins of dumping during the investigation phase".[249] Similarly, while it is true that the word "existence" in and of itself is not unique and is used in other provisions of the *AD Agreement* as well as in the *SCM Agreement*, none of the provisions cited by the European Communities[250] refers to the establishment of the *existence of dumping* (or a subsidy) in the context of an *investigation*.[251]

- Use of the term "investigation" in the *AD Agreement* to refer to (phases of) proceedings

7.158 Third, in order to interpret the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2, it is also helpful to examine the general pattern of the usage of the term "investigation" in the *AD Agreement*.[252] That term is used both: (i) in a general sense (on-the-spot investigation, period of investigation); and (ii) to refer to a proceeding or phase of proceeding.[253] Since in the context of Article 2.4.2 the word "investigation" in "the investigation phase" is used to refer to a particular phase of an anti-dumping proceeding, its use in the general sense is not germane to the issue at hand. If, however, an examination of the use of the term to refer to a (phase of a) proceeding consistently refers to Article 5 proceedings, that fact would strongly buttress the interpretation of "investigation phase" that we reached above. It is instructive in this respect to review the reference made to "investigations" in Article 1 of the *AD Agreement* as a prerequisite for the application of an anti-dumping measure and the usage of "investigation" in the provisions of Articles 3, 6, 7, 8 and 10 and 12 on evidence, provisional measures, price undertakings, retroactive application of anti-dumping measures and public notice and explanation of determinations.

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[249] We note, in this regard, that the Appellate Body has expressly relied on the phrase "the existence of (margins of) dumping" to distinguish original investigations under the *AD Agreement* from proceedings under Articles 9 and 11. *Infra*, paras. 7.177-7.179.

[250] The European Communities refers to the word "existence" or "existing" in Articles 3.7, 8.4, 4.1(ii), 18.3, 18.3.2 of the *AD Agreement* and in Articles 1.1, 2.1(b), 4.2, 6.1, 6.5, 6.7(d), 6.8, 7.2, 7.9, 8.2(c), 9.4, 15.7, 16.2, 17.1(b), 18.4, 19.1 and 19.4, 22.4, 24.3, 27.6, 27.9, 32.3 Annex III, paras. 1-2 and 4, Annex IV, para. 4 and Annex V, para. 2 of the *SCM Agreement*. Oral Statement at the Second Substantive Meeting of the Panel by the European Communities, paras. 22-23. We do not need to express a view on whether, as argued by the European Communities, all these provisions are in fact relevant to the imposition and collection of anti-dumping and countervailing duties.

[251] With regard to the argument that the French and Spanish texts of the *AD Agreement* refer to "existence" of dumping in the title of Article 2 ("Determination de l'existence d'un dumping" and "determinación de la existencia de dumping"), we consider that this does not alter the fact that Article 2.4.2 is the only provision in Article 2 that expressly relates "the existence of margins of dumping" to "the investigation phase". Since the issue of the application of Article 2.4.1 is not before us, we need not express a view on the scope of application of that provision.

[252] As noted above, we consider that the entire *AD Agreement* can be relevant context for the interpretation of Article 2.4.2.

[253] To illustrate this concept: we consider that the word "investigation" is used to refer to (a phase of a) proceeding when, for instance, a provision defines rules that apply to "an investigation" "an anti-dumping investigation" or "the investigation". The question before us is whether in such cases the proceedings referred to are only proceedings under Article 5 or whether these terms are also used in the *AD Agreement* in connection with proceedings under Articles 9 and 11. Therefore, in our view the relevant question is narrower in scope than whether the word "investigation" *per se* is always used in the *AD Agreement* to refer to investigations in the sense of Article 5 of the *AD Agreement*.

7.159 **Article 1** of the *AD Agreement* ("Principles") provides that the initiation and conduct of "investigations" in accordance with the Agreement is one of the two fundamental prerequisites for the application of an anti-dumping measure. The fact that anti-dumping measures may only be applied "pursuant to" "investigations" and the express link made to Article 5 in footnote 1 indicate that "investigations" within the meaning of Article 1 necessarily precede the application of an anti-dumping measure. This is also apparent from the fact that an "investigation" within the meaning of Article 1 is initiated by the procedural action by which a Member formally commences an investigation as provided in Article 5.[254]

7.160 With respect to **Article 3** of the *AD Agreement* ("Determination of Injury"), we note that the Appellate Body has affirmed in *US – Oil Country Tubular Goods Sunset Reviews* that "anti-dumping investigations" in the first sentence of Article 3.3 refers to investigations within the meaning of Article 5 and thus not to sunset reviews under Article 11 of the *AD Agreement*.[255] The European Communities does not contest that it refers to "investigations" within the meaning of Article 5.

7.161 The European Communities argues that **Article 6** of the *AD Agreement* ("Evidence") employs the word "investigation" in a generic sense that corresponds to its dictionary definition and that this is important contextual support for the view that "investigation" in "investigation phase" has a generic meaning. We disagree. First, Article 6 begins with the phrase "[a]ll interested parties in an anti-dumping investigation....". The fact that Article 6 immediately follows the provisions on "Initiation and Subsequent Investigation" in Article 5 would more naturally imply that "an anti-dumping investigation" in the first sentence of Article 6.1 has the same meaning as the word "investigation" in Article 5. Second, Article 6.1.3 provides that as soon as "an investigation" has been initiated, the authorities shall provide the text of the application received under Article 5.1 to the known exporters, the authorities of the exporting Member and, upon request, to other interested parties. The direct link made in this sentence between "an investigation" and the application received under Article 5.1 confirms that "an investigation" within the meaning of this sub-paragraph is an investigation initiated under Article 5 i.e. an investigation "to determine the existence, degree and effect of any alleged dumping". This link between "anti-dumping investigation" and "investigation" in Article 6.1 and the word "investigation" as used in Article 5 logically implies that references to "the anti-dumping investigation", "an anti-dumping investigation" or "an investigation" in other provisions of Article 6 must be construed in the same manner. More generally, the fact that Article 6 is placed between an Article on "Initiation and Subsequent Investigation" and an Article on "Provisional Measures" gives further contextual support to the reading that this Article lays down rules applicable to investigations initiated under Article 5 to determine whether or not the conditions for the application of an anti-dumping measure are fulfilled.[256] [257]

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[254] We note the argument of the European Communities that footnote 1 does not limit the meaning of "investigations" but explains the meaning of "initiated" in the context of investigations, both under Article 5 and in the context of other types of investigation. However, "investigations" within the meaning of the first sentence of Article 1 are "initiated" by "the procedural action by which a Member formally commences an investigation as provided in Article 5." Therefore, the only "investigations initiated" referred to in Article 1 of the *AD Agreement* are investigations within the meaning of Article 5.

[255] *Infra*, para. 7.183.

[256] The relationship between investigation and the application of measures is also explicit in the text of Articles 6.9 and 6.14. Thus, Article 6.9 provides: "The authorities shall, before a final determination is made, inform all interested parties of the *essential facts under consideration which form the basis for the decision whether to apply definitive measures*. Such disclosure should take place in sufficient time for the parties to defend their interests". Article 6.14 provides: "The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, *reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures*, in accordance with relevant provisions of this Agreement."

7.162 **Article 7** of the *AD Agreement* ("Provisional Measures") expressly refers in sub-paragraph 1(i) to an investigation initiated in accordance with Article 5. Given this express cross-reference to Article 5, the terms "the investigation" in Article 7.1(iii) and 7.3 and "an investigation" in Article 7.4 must also be understood to refer to investigations within the meaning of Article 5.

7.163 In **Article 8** of the *AD Agreement* ("Price Undertakings") the phrase "the investigation of dumping and injury" in paragraph 4, read together with "a negative determination of dumping or injury" in the second sentence and with "an affirmative determination of dumping and injury" in the last sentence clearly means an investigation to determine whether dumping and injury exist i.e. an investigation within the meaning of Article 5.

7.164 In **Article 10** of the *AD Agreement* ("Retroactivity"), the phrases "after initiating an investigation" in Article 10.7 and "the date of initiation of the investigation" read in their context must necessarily be interpreted to refer to investigations within the meaning of Article 5 of the *AD Agreement*.

7.165 In **Article 12** of the *AD Agreement* ("Public Notice and Explanation of Determinations"), it logically follows from the reference to Article 5 in paragraph 1 that "initiation of an investigation" in Article 12.1.1 and 12.1.1(ii) means initiation of an investigation pursuant to Article 5. The concept of an investigation as the investigatory phase culminating in the decision whether or not to apply an anti-dumping measure is also apparent from the context in which the word "investigation" appears in the first sentence of Article 12.2.2 and in Article 12.2.3.[258]

7.166 Thus, our review of the use of "investigation" and "investigations" in Articles 1, 3, 6, 7, 8, 10 and 12 of the *AD Agreement* reveals that, where these words refer to a proceeding or a phase of a proceeding, they are limited to investigations within the meaning of Article 5.1 of the *AD Agreement*, i.e. investigations that aim to determine whether the conditions for the application of an anti-dumping measures are present. By contrast, the *AD Agreement* typically does not use the words "investigation" and "investigations" in relation to proceedings that take place after an anti-dumping measure has been imposed. In particular, as discussed above[259], there is nothing in the text of Articles 9 and 11 of the *AD Agreement* to suggest that proceedings under those provisions are "investigations". The *AD Agreement* does not distinguish between "original investigations" and other types of "investigations" but between "investigations" and other types of "proceedings".

7.167 Given our view that we need to focus on how the word "investigation" is used in the *AD Agreement* in relation to (phases of) proceedings, we see no merit in the argument of the European Communities that the fact that other provisions in Article 2 use the word "investigation" in the general sense of "a systematic examination or inquiry or a careful study of a particular subject"[260] because in these provisions[261] "investigation" is generally not used to refer to a particular (phase of a)

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[257] Article 6.7 provides for "investigations" in the territories of other Members. The fact that in this provision investigation clearly does not refer to an investigation within the meaning of Article 5 is of no particular relevance because it is evident that this provision uses "investigation" to refer to a particular aspect of the data gathering process and not to investigation as a "proceeding".

[258] Article 12.2.2 sets forth certain requirements regarding "[a] public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking". Article 12.2.3 deals with "[a] public notice of the termination or suspension of an investigation following the acceptance of an undertaking."

[259] *Supra*, para. 7.156 and footnote 247.

[260] E.g. EC-First Written Submission, para. 178 and Exhibit EC-45.

[261] "...exporter or producer under investigation" (Article 2.2.11, first sentence and Article 2.2.2, first sentence); "in the course of the investigation" (Article 2.2.1.1, second sentence); "during the investigation" (footnote 6); "exporters or producers subject to investigation" (Article 2.2.2(ii)) and "period of investigation" (Article 2.2.1, last sentence, Article 2.2.1.1, last sentence, footnote 6 and Article 2.4.1).

proceeding. We also recall that the issue before us is whether the phrase "the existence of margins of dumping during the investigation phase" as a whole, and not the word "investigation" by itself, limits the scope of Article 2.4.2. That a provision in Article 2 that refers to "period of investigation" or to "exporters or producers under investigation" is not limited in its applicability to investigations within the meaning of Article 5 is of little relevance to whether Article 2.4.2 is so limited as a result of the phrase "the existence of margins of dumping during the investigation phase".

- Cross-references in Articles 11 and 12 of the *AD Agreement*

7.168 Fourth, the idea that "investigation", when used to refer to a (phase of a) proceeding, is generally used in the *AD Agreement* in relation to the formal process of inquiry that precedes the possible application of an anti-dumping measure finds further support in the fact that certain provisions governing proceedings that take place *after* the imposition of an anti-dumping measure contain express cross-references to provisions applicable to investigations. Article 11.4 provides that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article". Article 12.3 states that "the provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 ..." The need for such cross-references can only be explained by the fact that provisions applicable to "investigations" (Articles 6 and 12.1-2) are not automatically applicable to provisions dealing with other types of proceedings such as duty assessment proceedings and reviews.[262] That such provisions applicable to investigations do not *ipso facto* also apply to other kinds of proceedings confirms that the concept of "investigation" as used in the *AD Agreement* in relation to proceedings is limited to particular kinds of proceedings and that the mere fact that an authority engages in an intellectual activity that can be described as "investigation" within the dictionary meaning of that term is not determinative.

- Distinction between investigations and reviews in Article 18 of the *AD Agreement*

7.169 Finally, we note, in this respect, the distinction drawn in Article 18.3 of the *AD Agreement* between "investigations" and "reviews of existing measures". The juxtaposition of these two concepts in the same sentence makes it unambiguously clear that the drafters of the *AD Agreement* were aware of the difference between these two concepts. The concept of a "review investigation" used by the European Communities[263] is in direct contradiction with this distinction and has no textual basis in the *AD Agreement*.

7.170 Based on our analysis of the textual and contextual elements discussed in the preceding paragraphs – the use of "investigation *phase*", the textual similarity between "the existence of margins of dumping during the investigation phase" in Article 2.4.2 and the wording in Article 5.1; the fact that the *AD Agreement* consistently uses the word "investigation" in relation to proceedings under Article 5 and uses different terminology in relation to proceedings under Articles 9 and 11; the

[262] The European Communities appears to argue that the reference to Article 6 in Article 11.4 of the *AD Agreement* means that a "review" within the meaning of that provision necessarily entails an "investigation". The more logical conclusion, however, is that the fact that it was necessary to make express reference in Article 11 to Article 6 to make it applicable within the context of Article 11 confirms that a provision applicable to investigations is not *per se* applicable to reviews. We note that unlike Article 11, Article 9 does not contain a cross-reference to Article 6. We consider that this absence of a cross-reference may well reflect an understanding among negotiators that, in view of the particular nature of duty assessment proceedings, Article 6 cannot apply in its entirety to Article 9. It is not clear, for example that negotiators would necessarily have envisaged that, if an individual importer requests a refund of anti-dumping duties under Article 9.3.2, all "interested parties", as defined in Article 6.11, should be able to participate in the ensuing refund procedure and exercise the procedural rights provided for in the various provisions of Article 6.

[263] EC-First Written Submission, para. 176; EC-Closing Oral Statement at the Second Substantive Meeting of the Panel, para. 8.

express cross-references in Articles 11 and 12; and the express distinction between investigations and reviews in Article 18 – we conclude that Article 2.4.2 of the *AD Agreement* must be interpreted to apply only to determinations of dumping in the context of investigations pursuant to Article 5 of the *AD Agreement*.

(ii) Panel and Appellate Body Reports

7.171 Panel and Appellate Body reports support our interpretation that "the existence of margins of dumping during the investigation phase" in Article 2.4.2 restricts the applicability of that provision to investigations within the meaning of Article 5 of the *AD Agreement*. First, the Appellate Body has confirmed that the *SCM Agreement* and the *AD Agreement* distinguish between investigations and other "phases" or "stages" of countervailing duty and anti-dumping proceedings, such as duty assessment and review proceedings. Second, the Appellate Body has highlighted the difference in purpose and nature of the determination to be made between "investigations" and other proceedings under the *SCM Agreement* and the *AD Agreement*. Third, WTO dispute settlement practice has also made clear that provisions that apply to investigations are not *ipso facto* applicable to other proceedings under the *SCM Agreement* and the *AD Agreement*.

- Investigations and other "phases" or "stages" of countervailing duty and anti-dumping proceedings

7.172 The Appellate Body has made it clear that there are distinct phases or stages discernible in a countervailing duty or anti-dumping action and that the investigation phase, which precedes the imposition of a countervailing or anti-dumping duty, is distinct from phases or stages that follow the imposition of such a duty.

7.173 In *US – Carbon Steel*, the Appellate Body reversed the finding of the Panel in that case that the *de minimis* standard in Article 11.9 of the *SCM Agreement* also applies to sunset reviews under Article 21.3 of that Agreement.[264] The Appellate Body noted in this connection that Article 11.9 of the *SCM Agreement* sets forth a *de minimis* standard "for original investigations" and that all of its provisions relate to the authorities' initiation and conduct of a countervailing duty investigation.[265] According to the Appellate Body:

> "Although the terms of Article 11.9 are detailed as regards the obligations imposed on authorities hereunder, none of the words in Article 11.9 suggests that the *de minimis* standard that it contains is applicable *beyond* the investigation phase of a countervailing duty proceeding. In particular, Article 11.9 does *not* refer to Article 21.3, nor to reviews that may follow the imposition of a countervailing duty."[266]

In this respect, the Appellate Body rejected an argument of Japan that the use of the word "cases" in the second sentence of Article 11.9 means that the *de minimis* provision must be applied "to all phases of countervailing duty proceedings not only in investigations". According to the Appellate Body, "[t]he use of the word 'cases' does not alter the fact that the terms of Article 11.9 apply the *de minimis* standard only to the investigation phase."[267] The Appellate Body also observed later in its Report that:

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[264] Appellate Body Report, *US – Carbon Steel*, paras. 58-97.
[265] Appellate Body Report, *US – Carbon Steel*, paras. 66-67.
[266] Appellate Body Report, *US – Carbon Steel*, para. 68 (footnote omitted, emphasis in original)
[267] Appellate Body Report, *US – Carbon Steel*, footnote 58.

> "... the non-application of an express *de minimis* standard at the review stage, and limiting the application of such a standard to the investigation phase alone, does not lead to irrational or absurd results".[268]

Thus, the Appellate Body clearly used the term "the investigation phase" in the context of a countervailing duty proceeding to refer to an "investigation" within the meaning of Article 11 of the *SCM Agreement*[269], as distinguished from other phases of countervailing duty proceedings, such as "the review stage".

7.174 The notion that the process of inquiry that culminates in the imposition of a countervailing duty or anti-dumping duty is a phase distinct from other proceedings that follow the imposition of such a duty is also apparent from the remark by the Appellate Body in *EC – Bed Linen (Article 21.5)* that:

> "... the imposition and collection of anti-dumping duties under Article 9 is a separate and distinct phase of an anti-dumping action that necessarily occurs *after* the determination of dumping, injury, and causation under Articles 2 and 3 has been made".[270]

- The difference in purpose of the determination to be made between "investigations" and other proceedings

7.175 In connection with the temporal distinction between investigations and other phases or stages of countervailing duty and anti-dumping proceedings, the Appellate Body has pointed to the differences in purpose between these distinct phases or stages.

7.176 In *US – Carbon Steel*, the Appellate Body underlined the fact that under the *SCM Agreement*:

> "...original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation."[271]

7.177 In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated that this observation also applies to the *AD Agreement*:

> "In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an antidumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping*."[272]

7.178 In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body discussed this distinction as follows:

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[268] Appellate Body Report, *US – Carbon Steel*, para. 89.
[269] Article 11 of the *SCM Agreement* corresponds to Article 5 of the *AD Agreement*.
[270] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 123 (italics in original).
[271] Appellate Body Report, *US – Carbon Steel*, para. 87.
[272] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 107 (emphasis in original). See also para. 124. The Panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods* considered that the Appellate Body's reasoning regarding the differences in purpose between original investigations and sunset reviews "applies with equal force to the question of injury". Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 7.116-7.117.

> "Original investigations require an investigating authority, in order to *impose* an anti-dumping duty, to make a determination of the existence of dumping in accordance with Article 2, and subsequently, to determine, in accordance with Article 3, whether the domestic industry is facing injury or a threat thereof at the time of the original investigation. In contrast, Article 11.3 requires an investigating authority, in order to *maintain* an anti-dumping duty, to review an anti-dumping duty order that has already been established-following the prerequisite determinations of dumping and injury-so as to determine whether that order should be continued or revoked."[273]

7.179 In *EC - Bed Linen,* the Appellate Body distinguished between the determination to be made under Article 2.4.2 and the imposition and collection of duties under Article 9:

> "... Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of 'the existence of margins of dumping'. Rules relating to the 'prospective and 'retrospective' collection of anti-dumping duties are set forth in Article 9 of the *AD Agreement*. The European Communities has not shown how and to what extent these rules on the 'prospective' and 'retrospective' collection of anti-dumping duties bear on the issue of the establishment of 'the existence of dumping margins' under Article 2.4.2."[274][275]

7.180 We also note in this connection the discussion in the panel reports in *US - DRAMS* and *Mexico – Anti-Dumping Measures on Rice* on the difference in purpose between Article 5.8 and Article 9.3 of the *AD Agreement*.[276]

- Provisions that apply to investigations are not *ipso facto* applicable to other proceedings under the *SCM Agreement* and the *AD Agreement*.

7.181 The Appellate Body has held that a provision that applies to a countervailing duty or anti-dumping investigation is not automatically applicable to provisions of the *SCM Agreement* and the *AD Agreement* that deal with proceedings that take place following the imposition of a countervailing or anti-dumping duty.

7.182 As affirmed by the Appellate Body in *US – Carbon Steel* and *US – Corrosion-Resistant Steel Sunset Review*, rules relating to due process aspects of investigations contained in Article 12 of the SCM Agreement and Article 6 of the *AD Agreement* apply to reviews under Article 21 of the *SCM Agreement* and Article 11 of the *AD Agreement* only because they are expressly referred to in those provisions.[277]

7.183 Similarly, in *US – Oil Country Tubular Goods Sunset Reviews,* the Appellate Body found that Article 3.3 of the *AD Agreement*, which allows for a cumulative assessment of the effects of imports where imports from more than one country "are simultaneously subject to anti-dumping investigations", does not apply in the context of sunset reviews under Article 11.3 of the *AD Agreement*:

> "This provision plainly speaks to the situation '[w]here imports of a product from more than one country are simultaneously subject *to anti-dumping investigations*'

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[273] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 279.
[274] Appellate Body Report, *EC – Bed Linen*, para. 62, footnote 30.
[275] See also Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.
[276] Panel Report, *US – DRAMS*, para. 6.90; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.144.
[277] Appellate Body Report, *US – Carbon Steel*, para. 72; Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 152.

> (emphasis added) It makes no mention of injury analyses undertaken in any proceeding other than original investigations; nor do we find a cross-reference to Article 11, the provision governing review of anti-dumping duties, which itself makes no reference to cumulation. We therefore find Articles 3.3 and 11.3, on their own, not to be instructive on the question of the permissibility of cumulation in sunset reviews..."[278]

7.184 The Appellate Body thus made it clear that the expression "anti-dumping investigations" in Article 3.3 by itself has the effect of limiting the applicability of that provision to "original investigations". We note the argument of the European Communities that Article 3.3 has no bearing on the meaning of "investigation" in Article 2.4.2 because the reference in Article 3.3 to Article 5.8 implies that Article 3.3. is limited to investigations within the meaning of Article 5. However, we note that the Appellate Body's conclusion that Article 3.3 makes no mention of injury analyses "in any proceeding other than original investigations" immediately follows its reference to the phrase "anti-dumping investigations". There is nothing in this passage to suggest that the Appellate Body based this conclusion on the fact that Article 3.3 contains a textual link to Article 5. On the contrary, in a subsequent passage the Appellate Body expressly stated that "the opening text of Article 3.3 plainly limits its applicability to original investigations".[279]

7.185 The European Communities argues that the Appellate Body's use of the term "original investigation" supports its position because the word "original" would be redundant if an investigation were always an investigation within the meaning of Article 5. In our view, however, the above passage indicates that the Appellate Body treats "investigation" and "original investigation" as synonymous. We note that the Appellate Body very frequently refers to "investigation" as used in the *SCM Agreement* and *AD Agreement* as "original investigation". In many instances in which the Appellate Body uses "original investigation" in these reports it is clear from the context that the word "original" is used simply for the sake of clarity to highlight the distinction between "investigation" and "review".[280] We see nothing in these reports to suggest that the Appellate Body's use of "original" before "investigation" should be interpreted to mean that apart from "original investigations" there are "other types of investigations" under the *AD Agreement*, such as reviews and duty assessment proceedings.

7.186 To conclude, relevant Appellate Body and panel reports reveal a clear pattern: the concept of an "investigation" in countervailing duty and anti-dumping proceedings, when used to refer to a proceeding or phase of a proceeding, has been consistently distinguished from duty assessment and reviews as a unique phase with a distinct purpose, and, as a consequence, rules applicable to investigations have been found not to be *ipso facto* applicable to other phases of countervailing duty and anti-dumping proceedings. *No Appellate Body or panel report has found that the dictionary definition of the word "investigation" is determinative of the interpretation of that concept in the AD Agreement and that, as a consequence, the concept of "investigation" in the SCM Agreement and AD Agreement applies to any provision, including Articles 19 and 21 of the SCM Agreement and Articles 9 and 11 of the AD Agreement, that can be characterized as contemplating a systematic examination, inquiry or careful study.*[281]

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[278] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 294 (emphasis in original).

[279] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 301.

[280] E.g., Appellate Body Report, *US – Carbon Steel*, paras. 66, 83 and 86-87; *US – Corrosion Resistant Steel Sunset Review*, paras107, 112, 124, 135 and 154; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 279, 284, 287-288, 290, 294, 296-301, 327-328 and 359.

[281] In this respect, the fact that a number of WTO panel and Appellate Body reports and GATT panel reports have used the words "investigation", "investigatory" and "investigate" in connection with proceedings under Article 9.3 and Article 11 (EC-Rebuttal Submission, paras. 168-170; EC-Second Oral Statement,

7.187 Finally, we note specifically with respect to Article 2.4.2 of the *AD Agreement*, that the Panel in *Argentina – Poultry Anti-Dumping Duties* observed:

> "We consider that Brazil's principal argument misinterprets the reference to "margin of dumping" in Article 9.3. Based on that language, Brazil focuses entirely on Article 2.4.2, and the reference to the "investigation phase" in that provision. However, Article 9.3 does not refer to the margin of dumping established "under Article 2.4.2", but to the margin of dumping established "under Article 2". In our view, this means simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2. This is entirely consistent with the introductory clause of Article 2, which sets forth a definition of dumping "for the purpose of this Agreement …". In fact, it would not be possible to establish a margin of dumping without reference to the various elements of Article 2. For example, it would not be possible to establish a margin of dumping without determining normal value, as provided in Article 2.2, or without making relevant adjustments to ensure a fair comparison, as provided in Article 2.4. Thus, *the fact that Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping "during the investigation phase" is not determinative of the issue before us, since other provisions of Article 2 do not contain that limitation*." [282]

7.188 That "during the investigation phase" constitutes a unique limitation of the scope of Article 2.4.2 contradicts the view that "during the investigation phase" has the general meaning that the European Communities ascribes to that phrase.

(iii) The Alternative Interpretations of "during the investigation phase" suggested by the European Communities

7.189 It is of course well accepted in public international law that a treaty must be interpreted in a manner that gives meaning to all its terms. If, as argued by the European Communities the word "investigation" in Article 2.4.2 must be interpreted in line with its dictionary definition, the inclusion of the phrase "the existence of margins of dumping during the investigation phase" means that Article 2.4.2 applies to the establishment of "the existence of margins of dumping during the phase in which authorities carry out a systematic examination or inquiry or a careful study of or research". Such an interpretation of "investigation" as simply referring to the conduct of an examination, inquiry or study would seem to render the phrase "the investigation phase" redundant given that the need to conduct an examination, inquiry or study is already implied by the words "established" in the same sentence of Article 2.4.2 and by the word "determination" in the title of Article 2.

7.190 The European Communities proposes three possible interpretations of "during the investigation phase" in an attempt to demonstrate that this provision can be given meaning without limiting its applicability to investigations within the meaning of Article 5.

7.191 The first of these interpretations is that "during the investigation phase", if associated with "the existence of margins of dumping" rather than with "establishment", means "during the

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para. 36) is of no particular significance. The mere fact that a panel or the Appellate Body characterizes a review under Article 11 as a "review investigation" does not imply that it thereby expresses a view that provisions in the *AD Agreement* that apply to "investigations" are also applicable to "reviews". Similarly, we fail to see the relevance of the documents submitted by the European Communities that show that USDOC and USITC have sometimes characterized reviews as "investigations". (EC-Rebuttal Submission, paras. 132-133) The issue before us is how certain terms are used in the *AD Agreement*.

[282] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.357 (emphasis added)

investigation period." Specifically, the European Communities suggests that references to the "period of investigation" in Article 2.2.1, footnote 6 to Article 2.2.1.1 and Article 2.4.1, serve to ensure that investigating authorities rely only on data from the period of investigation, particularly in respect of normal value; the reference in Article 2.4.2 to the establishment of margins of dumping "during the investigation phase" ensures a similar limitation on the use of data from outside the "period of investigation" in respect of the comparison phase generally and in respect of export prices in particular, since there is not otherwise any restriction in regard to them.[283] We note, however, the striking difference in this regard between, on the one hand, the repeated use of "period of investigation" in Articles 2.2.1, 2.2.1.1, footnote 6 and Article 2.4.1[284] and, on the other, the use of "investigation phase" which appears only in Article 2.4.2. Although not defined in the *AD Agreement*, the meaning of the concept of a "period of investigation" in anti-dumping proceedings is well understood.[285] We note that a *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations* adopted by the Committee on Anti-Dumping Practices in May 2000 states that the *AD Agreement*:

> "refers to the period for data collection for dumping investigations when it refers to the period of investigation".[286]

If the drafters of the *AD Agreement* had intended to refer in Article 2.4.2 to "the period of data collection" used by investigating authorities as the basis for their findings, they could have used the concept of "period of investigation", which they consistently used in four other places in the same Article, including in the last sentence of Article 2.4.1, which immediately precedes the sentence in Article 2.4.2 that contains the phrase "during the investigation phase".[287] We note in this respect the very clear difference in the French and Spanish texts of the *AD Agreement* between "la période couverte par l'enquête" and "la phase d'enquête" and between "el período objeto de investigación" and "la etapa de investigación". The argument that "the investigation phase" can be understood to mean "the period of investigation" therefore lacks support in the text of the *AD Agreement*.

7.192 Further, the overall characterization by the European Communities of how Article 2 addresses the issue of "period of investigation" and the role played by Article 2.4.2 in that regard is unconvincing. The provisions in Article 2 that employ the term "period of investigation" do not set out a general rule restricting data collection in the context of normal value to the period of investigation such that a counterpart in the context of comparison and export prices is required, but rather address very specific issues relating to the period of investigation in particular contexts.[288] Thus, the proposition that Article 2.4.2's reference to "during the investigation phase" was intended to ensure that such a data limitation requirement extended to the comparison phase and to export prices is difficult to sustain. The question thus remains why Article 2.4.2 would contain an explicit

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[283] EC-Response to Panel Question 15, paras. 55-64.

[284] The concept of "period of investigation" also appears in Article 9.5 of the *AD Agreement*.

[285] See Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.100-7.101; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.50-7.65; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.287.

[286] G/ADP/6 (16 May 2000).

[287] The fact that drafts of the second sentence of what is now Article 2.4.2 used the concept of "period of investigation" when the first sentence already used "the investigation phase" confirms that the drafters understood these concepts to have different meanings. See e.g. Draft Working Paper on AD dated 26 November 1991, referred to as "New Zealand III, Ramsauer Text" in Exhibit EC-51.

[288] The first three uses of the term (Article 2.2.1, and 2.2.1.1 and its footnote 6) relate specifically and exclusively to the determination of cost of production. Article 2.2.1 provides that prices that are below cost at the time of sale still allow for recovery of costs within a reasonable period of time if above weighted average unit costs for the POI. Footnote 6 to Article 2.2.1.1 may actually require reference to data *subsequent to* and thus outside the POI. The fourth use of the term relates to the issue of exchange rate movements in the context of export prices.

limitation on the use of data outside the period of investigation in one particular context while no general requirement to that effect may be identified in Article 2.

7.193 More generally, it is hard to imagine that if the drafters had wanted to express the rule that data collection must be restricted to a period of investigation they would have chosen to express themselves in the manner in which Article 2.4.2 is written. While we acknowledge that the WTO Agreement is not always drafted in the clearest terms, we would have expected that a general rule to that effect would have been expressed as a distinct thought somewhere in Article 2, and would have in some manner indicated that as a general rule Members should only rely on data from within that period of investigation.

7.194 That "investigation phase" in Article 2.4.2 cannot be equated with "period of investigation" as used elsewhere in Article 2 (and in Article 9.5) is confirmed by the statement of the Appellate Body that:

> "Article 2.4.2 of the Anti-Dumping Agreement permits the use of three methodologies, *applicable during the investigation phase*, for establishing the existence of 'margins of dumping'."[289]

Therefore, it is clear that the Appellate Body interprets "during the investigation phase" as pertaining to the issue of when the three methodologies contained in Article 2.4.2 are applicable, rather than to the period of time with respect to which the existence of margins of dumping is established.

7.195 The second possible interpretation advanced by the European Communities is that "during the investigation phase" in Article 2.4.2 refers to the period during which investigating authorities have to make their determination.[290] However, Article 2 deals with the methodology for determining the existence of dumping and does not address procedural aspects, such as the timing of determinations. Articles 5.10, 9.3 and 11 contain specific requirements regarding the time-limits applicable to investigations, assessment proceedings and reviews. Thus, to read into "during the investigation phase" in Article 2.4.2 a requirement that investigating authorities abide by the time-limits specified in Articles 5, 9 and 11 of the Agreement would render this phrase redundant. Moreover, it is not clear why the need to state expressly that authorities must abide by those time-limits arises only with respect to this particular aspect of a determination, and not with respect to others such as the injury determination.

7.196 The third possible interpretation advanced by the European Communities of the meaning "during the investigation phase" is that it clarifies that Article 2.4.2 does not apply to the pre-initiation phase. This interpretation poses the same kind of interpretive problems as the other two suggested interpretations. The issue of the requirement to be met by an application for initiation of an anti-dumping investigation are dealt with in some detail in Article 5.2. It is clear from Article 5.2(iii) that an applicant is required to simply provide information on domestic and export prices and not to perform the calculations foreseen in Article 2.4.2. Therefore, there was no need for the drafters of the Agreement to clarify that Article 2.4.2 does not apply to the pre-establishment stage. Moreover, there is no logical explanation why the drafters would have considered it necessary to provide such a clarification specifically with respect to Article 2.4.2.

7.197 In sum, the possible interpretations offered by the European Communities in an attempt to demonstrate that "during the investigation phase" does not limit the applicability of the requirements

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[289] Appellate Body Report, *US – Softwood Lumber V*, para. 76, (footnote omitted, emphasis added).
[290] See, e.g. EC-Response to Panel Question 15, paras. 72-82.

of Article 2.4.2 to investigations within the meaning of Article 5 are not persuasive. We note that the European Communities itself does not actually endorse any of these interpretations.[291]

(iv) Arguments of the European Communities regarding object and purpose of Article 9.3 and the AD Agreement

7.198 Based on an analysis of text and context of Article 2.4.2 of the *AD Agreement* we have found that the application of this provision is limited to investigations within the meaning of Article 5. However, the European Communities argues that an interpretation of Article 2.4.2 as being limited to original investigations cannot be correct because it would be contrary to the object and purpose of Article 9.3 and the *AD Agreement*. While we are not convinced that these arguments are properly characterized in terms of "object and purpose"[292], we consider them important and therefore consider them on their merits.

7.199 The European Communities asserts that since the purpose of a duty assessment proceeding under Article 9.3.1 is simply to update the temporal frame for the normal value, there is no rational justification for differentiating between the comparison method applied in an assessment proceeding and the comparison method applied in an investigation. The European Communities also argues that the effect of an interpretation that restricts the application of Article 2.4.2 to investigations is that in the same factual situation a greater amount of duties will be collected in a retrospective system than in a prospective system. By contrast, the United States argues that because the purpose of a duty assessment proceeding is fundamentally different from the purpose of an investigation to determine whether dumping exists and given the explicit recognition in Article 9 of various duty assessment systems, the application of the comparison methods set out in Article 2.4.2 necessarily had to be limited to investigations within the meaning of Article 5.

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[291] We note, in particular, the statement of the European Communities, in response to Panel Question 15, at para. 54: "Furthermore, before entering into a discussion of what the meaning of the words 'during the investigation phase' in Article 2.4.2 of the Anti-Dumping Agreement might be, the European Communities would like to stress that it has no particularly strong views on this matter in these proceedings, and that the outcome of these proceedings does not depend in any way whatsoever on the meaning that might eventually be attributed to those words. On the contrary, since it is the United States that has repeatedly asserted that the word 'investigation' in Article 2.4.2 has a special and limited or defined meaning, namely 'an investigation to determine the existence, degree and effect of any alleged dumping' within the meaning of Article 5.1 of the Anti-Dumping Agreement, it is for the United States to substantiate that assertion. Insofar as the United States has failed to substantiate that assertion – and the European Communities believes that to be incontrovertibly what has happened in these proceedings – that is an end of the matter. The European Communities claim under Article 9.3 and 2.4.2 must prevail. The meaning of the phrase 'during the investigation phase' does not need to be decided by this Panel." (Emphasis added).

[292] We note that Article 31 of the *Vienna Convention* provides that the object and purpose of a treaty must be taken into account in establishing the ordinary meaning of the terms used therein. Since Article 31 refers to "the object and purpose" of *the treaty* and not of its individual provisions, the argument of the European Communities regarding Article 9.3 might be better characterized as a further contextual argument rather than an argument relating to object and purpose. We further note that since the *AD Agreement* contains no discrete statement of objectives, one can only derive or deduce its objectives from the operational provisions of the Agreement. While it is perhaps possible at a very high level of generality to deduce from the operational provisions of the *AD Agreement* as a whole that for instance, one of the "objectives" of the *AD Agreement* is to provide a multilaterally agreed framework of rules governing actions against injurious dumping, claims of more specific objectives are difficult to discern with any facility or compelling force due to the lack of anything that could properly be described as constituting a clear statement of the objectives of the *AD Agreement*. In this regard, we note that the European Communities refers to "the object and purpose of the *AD Agreement* regarding the consistent application of basic economic concepts" in the measurement of international price discrimination between two markets. The precise meaning the European Communities ascribes to these concepts and the manner in which the European Communities derived them from the text of the *AD Agreement* are unclear.

7.200 We recall that in *US – Carbon Steel* the Appellate Body found, with respect to the lack of an explicit reference in Article 21.3 of the *SCM Agreement* to a *de minimis* standard, that the non-application of the *de minimis* standard to sunset reviews was not an irrational or absurd result because of the "qualitative differences" between the purpose of investigations under Article 11 of the *SCM Agreement* and the purpose of sunset reviews under Article 21.3. It follows from the reasoning of the Appellate Body in that case that it is perfectly possible that the fact that a particular aspect of the methodology provided for in Article 2 of the *AD Agreement* only applies in the context of an investigation within the meaning of Article 5 may be explained by qualitative differences between the purpose of an investigation under Article 5 and the purposes of subsequent phases of an anti-dumping proceeding.

7.201 In this regard, we note that Article 9 of the *AD Agreement* is concerned with the "Imposition and Collection of Anti-Dumping Duties" and that, as stated by the Appellate Body, rules on the determination of the margin of dumping are "distinct and separate" from rules on the imposition and collection of anti-dumping duties. It follows from Article 9.2, which provides that anti-dumping duties are collected on imports of the product in respect of which an anti-dumping duty has been imposed, that the amount of duty to be assessed in a proceeding under Article 9.3 is the amount of duty payable on imports of the subject product. In our view, the fact that in an assessment proceeding in Article 9.3 the margin of dumping must be related to the liability incurred in respect of particular import transactions is an important element that distinguishes Article 9.3 proceedings from investigations within the meaning of Article 5. In the context of Article 5, when the question is whether dumping "exists" so as to determine whether or not the imposition of an anti-dumping measure is justified, the focus is on the overall pricing behaviour of the exporter under investigation. By contrast, in an Article 9.3 context the extent of dumping found with respect to a particular exporter must be translated into an amount of liability for payment of anti-dumping duties by importers in respect of specific import transactions. Considerations that are relevant to determining the design of an appropriate comparison methodology in the context of investigations to determine whether dumping exists may not apply with equal force to the design of a methodology for determining the final liability for payment of anti-dumping duties. Therefore, we do not agree with the view of the European Communities that there could be no rational basis for differentiating between the comparison method applied in an assessment proceeding and the comparison method applied in an investigation.

7.202 Similarly, the qualitative differences between determining the existence of margins of dumping in an investigation and determining margins of dumping as part of the imposition and collection of an anti-dumping duty mean that the results of an administrative review cannot "eclipse" the results of the "original investigation". The comparison methodology used in the investigation is one element in establishing whether or not the imposition of an anti-dumping duty is justified. To the extent that the methodology used in the investigation has established the legal basis for the imposition of an anti-dumping duty, it cannot be superseded by the methodology subsequently used to determine the amount of duty to be collected. In light of this difference in purpose between the collection of anti-dumping duties and the determination of the existence of margins of dumping, it does not follow that the fact that a particular provision of Article 2 is not applicable to Article 9.3 is necessarily illogical.

7.203 We must now proceed to consider whether the non-application to Article 9.3 of Article 2.4.2 in particular is comprehensible in terms of the differences in purpose or function between investigations and duty assessment. We note the argument of the European Communities that Article 9.3 must be interpreted in light of Article 2.4.2 and therefore prohibits duty assessment on a transaction-specific and importer-specific basis. The European Communities submits that all export transactions that fall within the time period covered by a review must be treated as a whole rather than being treated individually. Accordingly, the position of the European Communities is that in normal circumstances, if an authority establishes an average normal value based on a particular time period,

the amount of anti-dumping duty must be established by comparing that average normal value with the average price of all export transactions that have occurred during the same period. In this situation an importer will incur liability for payment of anti-dumping duties on an individual import transaction if the exporter's average export price is below the average normal value, regardless of the export price of that particular transaction. The assessment of liability based on a comparison of an average normal value with individual export prices would be permitted only in the circumstances set out in the second sentence of Article 2.4.2.

7.204 We see no textual support in Article 9.3 for the view that the *AD Agreement* requires an exporter-oriented assessment of anti-dumping duties, whereby, if an average normal value is calculated for a particular review period, the amount of anti-dumping duty payable on a particular transaction is determined by whether the overall average of the export prices of all sales made by an exporter during that period is below the average normal value. While the present *AD Agreement* is more detailed in its provisions on duty assessment than the Tokyo Round Anti-Dumping Code in that it explicitly reflects the existence of retrospective and prospective duty assessment systems, Articles 9.3 and 9.4 provide little detail as regards the substantive methodology to be followed by an authority to determine the basis for attributing liability in respect of a particular transaction.[293] In our view, if the drafters of the *AD Agreement* had wanted to impose a uniform requirement to adopt an exporter oriented-method of duty assessment, which would have entailed a significant change to the practice and legislation of some participants in the negotiations, they might have been expected to have indicated this more clearly.

7.205 If anything, the plain text of Article 9 contradicts the view that the *AD Agreement* requires an exporter-oriented approach to duty assessment based on the application of the comparison methods set out in Article 2.4.2. Article 9.4 provides *inter alia* that an anti-dumping duty applied to imports of exporters or producers who have not been included in an examination that has been limited in accordance with Article 6.10, shall not exceed:

> "... where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined."

7.206 This provision necessarily means that duty assessment based upon a prospective normal value is compatible with Article 9.3. To calculate liability on the basis of a prospective normal value means that prices of individual export transactions are compared with a minimum reference price. As discussed in the panel report in *Argentina – Poultry Anti-Dumping Duties*, Article 9.4(ii) thus clearly envisions that a Member may operate a system of variable duties.[294] We see nothing in Article 9.4 to suggest that if duty is initially collected on the basis of the extent by which the export price in a particular transaction is below the prospective normal value, a Member must subsequently, in a refund procedure under Article 9.3.2, determine the entitlement to a refund of anti-dumping duties by comparing an average normal value with an average export price charged by a given exporter to all importers. We can see no textual support for such an interpretation.

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[293] We note in this respect the discussion of Article 9.3 in para. 7.355 of the panel report in *Argentina – Poultry Anti-Dumping Duties*.

[294] Panel Report, *Argentina - Poultry Anti-Dumping Duties*, para. 7.359: "In our view, Article 9.4(ii) is describing the use of variable anti-dumping duties, which are calculated by comparing actual (i.e., at the time of collection) export price with a prospective normal value. Since Article 9.4(ii) expressly envisages the imposition of variable AD duties, there is no basis for us to find that Argentina's recourse to variable duties (calculated on the basis of "minimum export prices" used as prospective normal values) is necessarily inconsistent with Article 9.3 of the *AD Agreement.*" The European Communities has explicitly recognized the permissibility of such a system of variable anti-dumping duties. E.g., EC-Response to Panel Question 4, para. 29 ("Variable duties are foreseen in Article 9.4.")

7.207 In addition, we consider that the European Communities has not presented a convincing explanation as to why as a matter of logic or fairness Article 2.4.2 must be interpreted as applying to duty assessment under Article 9.3. In particular, we fail to see why the *AD Agreement* must be interpreted to require that when an authority calculates an average normal value for a review period, an importer can be liable to pay anti-dumping duties on an import of the subject product even where the export price in that transaction actually exceeds the average normal value. While we are of course aware that the Appellate Body has ruled that dumping can be found to exist only for the product under investigation as a whole, we note that the Appellate Body expressed that view in cases involving investigations within the meaning of Article 5 and that the Appellate Body has not yet had the occasion to consider in detail the question of how the amount of anti-dumping duty must be assessed for purposes of Article 9.3. Given that the Appellate Body has also repeatedly stressed the need to have regard to distinct purposes of provisions of the *AD Agreement* and the *SCM Agreement*, and has in particular pointed to the distinction between rules on the existence of margins of dumping and rules on the imposition and collection of anti-dumping duties, we do not believe that the general notion that dumping can be found only for a product can sustain the view that Article 9.3 must be read to require an exporter-oriented approach to duty assessment.

7.208 We next turn to the argument of the European Communities that the non-application of Article 2.4.2 to assessment proceedings under Article 9.3 would entail unequal treatment of prospective and retrospective duty assessment systems. The essence of this argument is that while in a prospective system the amount of duty collected cannot exceed the margin of dumping established without the use of the zeroing methodology in the initial investigation, in a retrospective system, such as the one applied by the United States, the amount of duty that is ultimately collected can exceed the original margin of dumping because it will be determined in periodic reviews in which a zeroing methodology will be used.

7.209 First, we note that it is not necessarily the case that in a prospective duty assessment system the amount of duty collected is always limited by the magnitude of the margin of dumping found in the initial investigation If a duty is collected based on a prospective normal value, the amount of that duty is determined by the extent to which the export price is below the prospective normal value.

7.210 Second, our interpretation of Article 2.4.2 as not applicable beyond "the investigation phase" in Article 5 applies to any type of duty assessment system, whether retrospective or prospective. Thus the consequence of our interpretation is that a Member applying a prospective duty assessment system is not required to apply Article 2.4.2 when it decides whether or not to grant a refund under Article 9.3.2. As discussed above, we see no support in Article 9.3 for a view that the average price behaviour of an exporter must determine the amount of liability incurred in relation to a particular import transaction. Consequently, we reject the view that the *AD Agreement* should be interpreted in such a manner as to ensure that both prospective and retrospective duty assessment systems provide an identical level of protection against dumped imports corresponding to the actual margin of dumping of the exporter in question.

7.211 We realize of course that in a prospective duty system the amount by which the duty exceeds the actual margin of dumping will be reimbursed in a refund procedure but that there is no possibility to collect the amount by which the duty is less than the actual margin of dumping. By contrast, in a retrospective system it is possible to collect the difference between the actual margin of dumping and the deposit paid. Thus, regardless of whether or not Article 2.4.2 applies to duty assessment proceedings, there is an inherent difference between retrospective and prospective duty assessment systems which, in this respect at least, constitutes an "advantage" for users of retrospective systems. The European Communities does not appear to dispute that the *AD Agreement*, in explicitly recognizing the appropriateness of both retrospective and prospective duty assessment systems, enshrines this advantage. We do not think that this "inequality" in the amount of duty collected is of any legal relevance to the interpretation of Article 2.4.2 of the *AD Agreement*. A variety of factors

determine the choice by a Member of an appropriate duty assessment system. The fact that a prospective system may not in a given situation lead to the same amount of duty that it would be possible to collect in a retrospective system may well be outweighed by other considerations. Thus, a prospective system can be considered to have certain advantages over a retrospective system, for example in terms of predictability and ease of administration.[295] Therefore, we disagree with the assumption underlying the argument of the European Communities that the *AD Agreement* must be interpreted to mean that in an identical situation retrospective and prospective duty assessment systems must necessarily lead to the same level of protection against dumped imports.

7.212 *Grosso modo*, the "object and purpose" arguments of the European Communities amount to the assertion that it would not make sense to interpret Article 2.4.2 to be limited to original investigations. In light of the foregoing elements, however, we do not think that it would have been irrational for negotiators to agree to limit Article 2.4.2 to the investigation phase. In any event, we cannot preclude that the explanation for such a differentiation might be the result of negotiating dynamics. Specifically, it could reflect a compromise bridging different interests, even if it was not the initial negotiating position of any party. From the perspective of those seeking to limit the use of antidumping duties, the limitation would make it more difficult to impose an anti-dumping duty in the first instance, while from the perspective of those defending the use of anti-dumping duties, it would have allowed them to continue their then-current practices once a measure was imposed.

7.213 In light of the foregoing considerations, we conclude that the European Communities has not advanced any arguments with respect to what it characterizes as object and purpose of Article 9.3 that would cause us to conclude that negotiators cannot have intended to limit the scope of Article 2.4.2 to investigations within the meaning of Article 5.[296]

(v) Arguments of the European Communities regarding subsequent practice

7.214 The European Communities asserts that its interpretation of Article 2.4.2 of the *AD Agreement* is supported by the fact that a review of notifications provided by 105 Members[297] reveals that none of these Members has in its domestic legislation limited the application of Article 2.4.2 to investigations under Article 5. The European Communities claims that this is "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*.[298]

7.215 Article 31(3)(b) of the *Vienna Convention* provides, as one element of the general rule of interpretation, that:

> "there shall be taken into account, together with the context, ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

7.216 The Appellate Body has interpreted the term "subsequent practice" as used in this provision to mean:

> "...a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation.

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[295] One aspect of this is that refund procedures in prospective duty assessment systems often occur much less frequently than administrative reviews in retrospective systems.

[296] We are not thereby suggesting that it would necessarily have been illogical, in light of the object and purpose of Article 9.3, for the negotiators of the *AD Agreement* to have decided to extend the application of Article 2.4.2 to duty assessment proceedings under Article 9.3.

[297] Exhibit EC-55.

[298] EC-Rebuttal Submission, para. 218.

> ...a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of [the relevant provision]".[299]

7.217 We note that the argument of the European Communities with respect to subsequent practice is based on the fact that the particular provisions in domestic laws and/or regulations that have been notified to the Committee on Anti-Dumping Practices[300] that in the view of the European Communities correspond to Article 2.4.2 of the *AD Agreement* either do not include the phrase "during the investigation phase" or use the phrase "during the investigation period."[301] In our view, this is simply not a sufficient basis to draw a conclusion as to whether or not it is the practice of a particular Member to apply Article 2.4.2 to the assessment of the amount of anti-dumping duties within the meaning of Article 9.3. Many Members have notified legislation that predates the WTO Agreement. We also note that in many cases, the legislation identified by the European Communities makes no or little mention of duty assessment at all, and it is therefore difficult to draw any conclusion regarding the specific methodology applied. We note, however, that many Members provide in their domestic anti-dumping legislation for the collection of anti-dumping duties through a system of variable duties. The transaction-specific character of such a duty assessment system would appear to suggest that those Members do not apply the symmetrical comparison methods foreseen in Article 2.4.2 to determine the amount of liability for payment of anti-dumping duties.

7.218 In any event, even if it were established conclusively that all the 76 Members referred to by the European Communities have adopted a practice of applying Article 2.4.2 to duty assessment, this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States. We fail to see how one can conclude on this basis that there exists "a discernible pattern of acts or pronouncements *implying an agreement among WTO Members* on the interpretation of" Article 2.4.2. We note that one third party in this proceeding submitted arguments contesting the view of the European Communities that Article 2.4.2 applies to the imposition and collection of anti-dumping duties. Therefore, we conclude that even if the documentation provided by the European Communities were relevant as evidence of "practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*, that practice is not a practice "which establishes the agreement between the parties regarding the interpretation" of Article 2.4.2. Consequently, the reference by the European Communities to "subsequent practice" does not undermine the conclusion we have reached based on an interpretation of Article 2.4.2 in accordance with Article 31(1) of the *Vienna Convention*.

(vi) Reference made by the European Communities to supplementary means of treaty interpretation

7.219 We do not consider that an interpretation of Article 2.4.2 of the *AD Agreement* in accordance with Article 31 of the *Vienna Convention* leaves the meaning of that provision "ambiguous or

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[299] Appellate Body Report, *US – Gambling*, para. 191-192.

[300] Of the 105 Members that have made notifications under Article 18.5 of the *AD Agreement*, 29 Members have indicated that they have no anti-dumping legislation. *Report (2004) of the Committee on AD Practices*, G/L/707 (4 November 2004), Annex A.

[301] EC-Rebuttal Submission, para. 218. The European Communities argues that "if the words 'during the investigation phase' are not simply omitted from such implementing legislation, there are numerous instances where they are rendered as 'during the investigation period.'" We note that legislation notified by India and Tunisia does use "during the investigation phase". G/ADP/N/1/IND/1, p. 22 and G/ADP/N/1/TUN/2, p. 20. We also note that in some of the cases in respect of which Exhibit EC-55 notes that no reference is made to "during the investigation phase", the provision in question is of a rather general character. For example the European Communities notes that Article 4 of Indonesia's' Law Number 10, 1995 does not contain the phrase "during the investigation phase". Article 4 simply states that "(1) the amount of anti-dumping duties referred to in Article 2 shall be as high as that of dumping margins". G/ADP/N/1/IDN/2, p. 12.

obscure" or "leads to a result which is manifestly absurd or unreasonable".[302] Therefore, we see no need to have recourse to any of the supplementary means of treaty interpretation within the meaning of Article 32 of the *Vienna Convention*. In any event, the documentation submitted by the European Communities relating to the negotiating history of the Uruguay Round *AD Agreement*[303] does not support its argument on the interpretation of Article 2.4.2 of the *AD Agreement*. First, none of the documents provided by the European Communities indicates that there was an understanding among negotiators that rules in the draft *AD Agreement* referring to "investigations" should apply generally to any provision that requires a process of systematic examination, inquiry or careful study. Second, we note that the European Communities relies on this negotiating history *inter alia* for the proposition that there never was a suggestion that a distinction should be made between investigations and retrospective assessment proceedings as regards the application of Article 2.4.2.[304] However, most of the documents submitted by the European Communities pertain to a period of the Uruguay Round negotiations prior to the intense phase of work that led to the release in November 1990 of a draft ("New Zealand I") that introduced the phrase "when establishing the existence of dumping margins during the investigation phase" in what is now Article 2.4.2. It is therefore not surprising that the documentation provided by the European Communities is silent on the background to the insertion of this phrase. What is clear is that the insertion of this phrase marked a significant difference with the corresponding provisions in two previous draft texts (Article 2.4.3 in "Carlisle I" and "Carlisle II"). It is also clear from the fact that the second sentence of Article 2.4.2 of the "New Zealand I" text used "period of investigation" that "investigation phase" in the first sentence must have been understood to have a different meaning.

(vii) General Conclusion

7.220 We recapitulate the conclusions of our analysis. First, the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 read in its ordinary meaning in context of the *AD Agreement* as a whole means that Article 2.4.2 applies to the phase of the "original investigation" i.e. the investigation within the meaning of Article 5 of the *AD Agreement*, as opposed to subsequent phases of duty assessment and review. Second, our interpretation of the meaning of this phrase as limiting the applicability of Article 2.4.2 to investigations within the meaning of Article 5 is also consistent with the distinction made between investigations and subsequent proceedings in various Appellate Body decisions. Third, alternative meanings suggested by the European Communities are implausible at best and deny this phrase any real function, in contradiction with principles of interpretation. Fourth, this interpretation is entirely consistent with the different functions played by "original investigations" and duty assessments proceedings. Finally, the references made by the European Communities to subsequent practice and preparatory work do not undermine this interpretation.

7.221 We recall that the standard that we must apply in interpreting the *AD Agreement* is set forth in Article 17.6(ii) of the *AD Agreement*:

> "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

[302] *Vienna Convention*, Article 32(a) and (b).

[303] The documentation contained in Exhibits EC-48-50 consists mainly of formal documents circulated in the Uruguay Round Negotiating Group on MTN Agreements and Arrangements in the period 1987-July 1990, including proposals by delegations, Secretariat notes, notes on meetings and the first draft Chairman's text circulated in July 1990. Exhibit EC-51 reproduces the successive versions of what is now Article 2.4.2 in what the European Communities refers to as" Carlisle I Text" , "Carlisle II Text", "New Zealand I Text", "New Zealand II Text", "New Zealand III Ramsauer Text" and "Dunkel Draft".

[304] EC-Rebuttal Submission, para. 209.

interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

7.222 Based on an analysis in accordance with customary rules of treaty interpretation, we conclude that the scope of Article 2.4.2 of the *AD Agreement* is limited to the establishment of the existence of margins of dumping in the context of investigations under Article 5 of the *AD Agreement*. In any event, we cannot find that an interpretation that restricts the scope of application of Article 2.4.2 to investigations within the meaning of Article 5, thereby excluding its application to Article 9.3, is not permissible within the meaning of Article 17.6(ii).

7.223 The Panel therefore **finds** that the United States did not act inconsistently with Article 2.4.2 of the *AD Agreement* when, in the administrative reviews listed in Exhibits EC-16 to EC-31[305], USDOC used a methodology that involved asymmetrical comparisons between export price and normal value and in which no account was taken of any amount by which export prices exceeded normal value.

4. Article 2.4 of the *AD Agreement*

7.224 Having rejected the claim of the European Communities that the United States acted inconsistently with Article 2.4.2 of the *AD Agreement* by reason of the method of calculating dumping margins in the administrative reviews at issue[306], we now proceed to examine the claim of the European Communities that the calculation of dumping margins in these cases was inconsistent with Article 2.4 of the *AD Agreement*.

(a) Arguments of the Parties

7.225 The **European Communities** claims that the United States acted inconsistently with Article 2.4 of the *AD Agreement* because in the administrative reviews at issue USDOC calculated dumping margins by using an asymmetrical comparison between export price and normal value and by not taking into account any amounts by which export prices exceed the (monthly) average normal values. The European Communities argues that the first sentence of Article 2.4 of the *AD Agreement* contains an obligation to make a fair comparison between the export price and the normal value, which obligation is "overarching" in the sense that it is further elaborated in the other provisions of Article 2.4, including Articles 2.4.1 and 2.4.2, and "independent" in the sense that it is not exhausted by the other provisions of Article 2.4, including Articles 2.4.1 and 2.4.2. This interpretation of the "fair comparison" language in Article 2.4 as creating an overarching and independent obligation is supported by many Appellate Body and panel reports. The European Communities emphasizes the fact that the "fair comparison" language is contained in a separate first sentence in Article 2.4, which is an important difference with the corresponding provision in the Tokyo Round Anti-Dumping Code. The first sentence of Article 2.4 would serve no useful purpose if interpreted as being limited in scope to the remainder of Article 2.4.[307] It follows from the ordinary meaning of "fair" that a fair comparison is a symmetrical comparison, which necessarily precludes zeroing.[308] Fairness, in the context of a comparison between domestic sales and export sales, requires that under normal circumstances the same treatment be applied to domestic and export sales, i.e. that such sales be treated in a symmetrical way. Zeroing is inconsistent with this symmetry requirement because it involves an artificial reduction of prices that is only applied to export sales.[309] This interpretation of fairness as requiring symmetrical treatment of export sales and domestic sales is supported by the

[305] *Supra*, footnote 202.
[306] *Supra*, footnote 202.
[307] EC-First Written Submission, paras. 149-150; EC-Response to Panel Question 25; EC-Response to Questions Posed by the Panel at Second Substantive Meeting, paras. 2-8.
[308] EC-First Written Submission, para. 68.
[309] EC-Response to Panel Question 27.

context and object and purpose of the *AD Agreement* because a methodology that is inconsistent in the treatment of domestic sales and export sales cannot establish effectively the existence of international price discrimination.[310]

7.226 The European Communities also submits that zeroing is inherently unfair because it inflates dumping margins. One aspect of this inherent unfairness in the context of the retrospective duty assessment system of the United States is that exporters need to increase their prices by more than the margin of dumping in order to avoid payment of anti-dumping duties.[311] That zeroing is unfair within the meaning of Article 2.4 has been confirmed by the Appellate Body reports in *EC — Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review* and by the Panel and Appellate Body reports in *US – Softwood Lumber V*.[312]

7.227 The European Communities also asserts that zeroing is inconsistent with the first and the third to fifth sentences of Article 2.4 because it amounts to an allowance or adjustment to export price, normal value or otherwise, so as to effectively reduce the export price for a difference other than a difference affecting price comparability. The difference for which zeroing makes an allowance or adjustment by reducing the export price is not a difference affecting price comparability but a part of the very price comparison that the investigating authority is obliged to carry out. An allowance or adjustment reflecting a difference that does not affect price comparability is not a "due allowance" within the meaning of the third sentence of Article 2.4. Thus, the European Communities submits that it is not asking the United States to grant an offset or credit for negative dumping but to stop adjusting the export price or normal value or certain intermediate values, or to stop making an allowance or adjustment for something which does not affect price comparability.[313]

7.228 Regarding the relationship between Articles 2.4 and 2.4.2 of the *AD Agreement*, the European Communities argues that the first sentence of Article 2.4.2 explains that in normal circumstances the "fair comparison" required by Article 2.4 implies equal and symmetrical treatment while the second sentence of Article 2.4.2 clarifies that a Member may depart from the requirement of symmetrical treatment in case of targeted dumping.[314] In this connection, the European Communities considers that zeroing is unfair within the meaning of Article 2.4 when dumping margins are established under the transaction-to-transaction methodology because it conflicts with the requirement of symmetrical treatment of export prices and normal values.[315] On the other hand, zeroing is not unfair when used in connection with the average-to-transaction comparison method if the conditions for the use of that method are fulfilled.[316] The existence of a distinct pattern of export prices of the type contemplated in the second sentence of Article 2.4.2 can be a difference affecting price comparability for which due allowance may have to be made.[317] Similarly, the European Communities considers that the use of an average-to-transaction comparison is not unfair within the meaning of Article 2.4 if the conditions for a targeted dumping analysis are fulfilled.[318]

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[310] EC-Response to Panel Question 27.

[311] EC-First Written Submission, paras. 152-153.

[312] EC-First Written Submission, paras. 155-159.

[313] EC-Oral Statement at the First Substantive Meeting of the Panel, para. 10; EC-Response to Panel Questions 28, 33, 38 and 45; EC-Rebuttal Submission, paras.7, 95, 101-104; EC-Oral Statement at the Second Substantive Meeting of the Panel, paras. 44-47; EC-Response to Questions Posed by the Panel at Second Substantive Meeting, paras. 16-27.

[314] EC-Responses to Panel Questions 41, 43 and 48. EC-Oral Statement at the Second Substantive Meeting of the Panel, paras. 38-39.

[315] EC-Response to Panel Question 47.

[316] EC-Response to Panel Question 47 (para. 157).

[317] EC-Oral Statement at the Second Substantive Meeting of the Panel, para. 47; EC-Response to Questions Posed by the Panel at Second Substantive Meeting, paras. 28-34.

[318] EC-Response to Panel Question 48.

7.229 The European Communities considers that the first sentence of Article 2.4.2 does not exhaust the "fair comparison requirement". Thus, for example, a weighted-average-to-weighted average comparison in which an allowance or adjustment has been made that does not correspond to a difference affecting price comparability is inconsistent with Article 2.4.[319]

7.230 The European Communities interprets the expression "subject to the provisions governing 'fair comparison' in paragraph 4" in the first sentence of Article 2.4.2 to mean that, in case of conflict, the provisions in the second to final sentences of Article 2.4 must prevail over Article 2.4.2.[320] This implies that the rules in Article 2.4.2 cannot be applied in such a way as to frustrate or compromise the fair comparison required by Article 2.4.[321]

7.231 The European Communities submits that Article 9.4(ii) of the *AD Agreement* does not support the position of the United States that asymmetrical comparison methods must be permitted in the duty assessment phase because in a prospective system the collection of anti-dumping duties is subject to a refund procedure in which the full disciplines of Article 2.4.2 apply.[322]

7.232 The **United States** submits that Article 2.4 of the *AD Agreement* establishes the obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. The focus of Article 2.4 is on how the authorities are to select transactions for comparison and make the appropriate adjustments for differences that affect price comparability.[323] While the first sentence of Article 2.4 creates a general, mandatory obligation to make a fair comparison, it cannot be divorced from the provisions in the remainder of Article 2.4 regarding allowances for differences affecting price comparability. The words "this comparison" at the beginning of the seconds sentence of Article 2.4 and the reference in Article 2.4.2 to "the provisions" governing fair comparison in "paragraph 4" confirm this close relationship between the concept of fair comparison and the provisions on allowances to ensure price comparability.[324] The United States asserts that numerous Appellate Body and panel reports support its position on the scope of the "fair comparison" language in Article 2.4.[325] The panel and Appellate Body reports cited by the European Communities do not demonstrate that the first sentence of Article 2.4 contains an independent obligation extending beyond the remainder of Article 2.4.[326]

7.233 The United States asserts that the issue of symmetrical comparisons between export price and normal value is only dealt with in Article 2.4.2 of the *AD Agreement* and that the phrase "subject to the provisions governing fair comparison in paragraph 4" would have been redundant if the "fair comparison" requirement in Article 2.4 already included a requirement to make such symmetrical comparisons.[327]

7.234 With regard to the argument of the European Communities that the zeroing method used by the United States inflates the margins of dumping, the United States asserts that a methodology cannot be designated as fair or unfair within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down. Moreover, it is factually incorrect that the average-to-

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[319] EC-Response to Panel Question 45.
[320] EC-Response to Panel Question 42.
[321] EC-Rebuttal Submission, paras. 97 and 102.
[322] EC-Rebuttal Submission, para. 100.
[323] US-First Written Submission, paras. 61-62 and 69. US-Responses to Panel Questions 26 and 30.
[324] US-Response to Panel Question 40.
[325] US-First Written Submission, para. 62. US-Response to Panel Question 26.
[326] US-Second Written Submission, para. 20.
[327] US-First Written Submission, para. 63; US-Responses to Panel Questions 44 and 48; US-Second Written Submission, paras 22-23.

transaction comparison used by the United States in assessment proceedings necessarily results in higher AD duties than a symmetrical comparison.[328]

7.235 The United States considers that the statement by the Appellate Body in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review* that zeroing is inherently biased towards inflating the margin of dumping lacked any textual analysis or reasoning and is *obiter dictum*.[329] The United States considers, in this respect, that the lack of a reference to Article 2.4 in the Appellate Body's analysis of zeroing in *US – Softwood Lumber V* reflects a development in the Appellate Body's consideration of this issue because the Appellate Body was faced with substantive arguments and analysis as to the interpretative problem with its *dicta* in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review*.[330]

7.236 The United States submits that the argument that Article 2.4 requires that an offset be granted for sales at export prices above the normal value is predicated on the assumption that the *AD Agreement* requires symmetrical comparison methods in assessment proceedings. This assumption is in contradiction with the fact that the Agreement permits several types of assessment systems some of which inherently operate on an entry-specific basis, and that Article 9.4(ii) of the Agreement expressly provides for a comparison between a weighted average normal value and individual export transactions for purposes of assessment.[331] Moreover, the European Communities has not offered any argument as to how an offset to antidumping duties assessable on one entry as a result of a distinct entry having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under the rubric of Article 2.4.[332]

7.237 The United States asserts that an interpretation of Article 2.4 to include an offset requirement for non-dumped sales would be inconsistent with the principle that interpretation must give meaning and effect to all the terms of a treaty because it would render the targeted dumping exception in Article 2.4.2 a nullity as a simple matter of mathematics. If non-dumped transactions are allowed to offset dumped transactions, an average-to-transaction comparison will yield exactly the same result as an average-to-average comparison. Because the targeted dumping provision is only an exception to the provisions of the first sentence of Article 2.4.2 and not to the "fair comparison" requirement of Article 2.4, to interpret Article 2.4 as imposing an offset requirement would necessarily make the targeted dumping provision redundant.[333] The United States notes that in its responses to Panel Questions the European Communities appears to have accepted that zeroing must be possible in an average-to-transaction comparison. However, the recognition by the European Communities that zeroing is permissible in the context of the average-to-transaction method cannot be reconciled with the argument that zeroing is an impermissible allowance or adjustment to the export price because there is nothing in Article 2.4.2 to suggest that the targeted dumping provision is an exception to the "fair comparison" requirement.[334]

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[328] US-First Written Submission, paras. 65-67. The United States illustrates this point with a numerical example in which a transaction-to transaction comparison method leads to a higher amount of AD duties than an average-to-transaction comparison.

[329] US-Response to Panel Questions 29 and 37.

[330] US-Response to Panel Question 36.

[331] US-First Written Submission, para. 68.

[332] US-First Written Submission, para. 69.

[333] US-Opening Statement at the First Substantive Meeting of the Panel, paras. 10-14; US-Responses to Panel Questions 22 and 46; US-Second Written Submission, para. 26.

[334] US-Second Written Submission, paras. 28-29; US-Opening Statement at the Second Substantive Meeting of the Panel, para. 6; US-Closing Statement at the Second Substantive Meeting of the Panel, paras. 8-11.

7.238 The United States rejects the argument of the European Communities that differences between export prices referred to in the second sentence of Article 2.4.2 can constitute a difference affecting price comparability.

(b) Arguments of Third Parties

7.239 **Argentina** submits that Article 2.4 of the *AD Agreement* prohibits zeroing independently of the particular method used to compare export price and normal value. The "fair comparison" requirement is a general obligation that informs the whole of Article 2 but applies in particular to Article 2.4.2. The zeroing methodology fails to take into account the entirety of the prices of some export transactions and artificially distorts the margin of dumping by inflating it in a way inconsistent with the "fair comparison" obligation under Articles 2.4 and 2.4.2. An asymmetrical comparison method is not in itself inconsistent with the "fair comparison" requirement if the conditions set out in Article 2.4.2 are met. However, no transaction may be excluded from the calculation of an overall margin of dumping based on such an asymmetrical comparison.

7.240 **Brazil** submits that zeroing is prohibited by Article 2.4 of the *AD Agreement* regardless of the method of comparison used and regardless of whether it occurs in an investigation or review proceeding. Zeroing is inherently unfair to respondents because it distorts the calculation of the margin of dumping by effectively ignoring the prices of some export transactions. Dumping and margins of dumping can be established only for a product as a whole and all comparisons must be taken into account. It is with this in mind that the Appellate Body concluded in *EC – Bed Linen* that zeroing was inconsistent not only with Article 2.4.2 but also with Article 2.4. In response to a Panel Question, Brazil submits that the reasoning of the Appellate Body in *US – Softwood Lumber V* clearly suggests that the use of zeroing in the context of the transaction-to-transaction or average-to-transaction comparison methods is inconsistent with Article 2.4. Brazil considers that the use of an asymmetrical comparison is not in itself inconsistent with Article 2.4.

7.241 **Hong Kong, China** submits that the first sentence of Article 2.4 of the *AD Agreement* creates an overarching obligation to make a fair comparison that is independent of the substantive obligations set out in the remainder of Article 2.4, including Article 2.4.2. This is reinforced by the phrase "subject to the provisions governing fair comparison in paragraph 4" at the beginning of Article 2.4.2. Therefore, dumping margins for a product must be calculated in accordance with both Article 2.4.2 and the "fair comparison" requirement of Article 2.4. In order to be fair, the comparison of export price and normal value must be symmetrical but also objectively fair in the sense of being equitable and balanced. The use of zeroing when establishing an overall margin of dumping for the product under investigation is *per se* unfair, regardless of which method of comparison under Article 2.4.2 is used because it involves disregarding some or all of the intermediate comparisons. Thus, zeroing results in an overall margin of dumping established on the basis of incomplete price information and is inherently biased towards inflating the margin of dumping. While Article 2.4.2 allows a Member to use an asymmetrical, average-to-transaction comparison method, the use of zeroing in connection with this method is inconsistent with the "fair comparison" requirement of Article 2.4.

7.242 **India** submits that model zeroing and simple zeroing are inconsistent with Article 2.4 of the *AD Agreement*. India refers to the statements of the Appellate Body that a zeroing methodology is inherently biased and that a comparison of export price and normal value that does not fully take into account the prices of all comparable export transactions is not a fair comparison. India further recalls that the Appellate Body has ruled that the first sentence of Article 2.4 sets forth a general obligation that informs all of Article 2. Zeroing is inherently inconsistent with the overarching and independent "fair comparison" requirement contained in Article 2.4 because it selectively disregards or alters the results of price comparisons and thereby inflates the margin of dumping. India therefore considers that Article 2.4 proscribes zeroing when a Member establishes dumping on the basis of the transaction-to-transaction or on the basis of the average-to-transaction comparison method. The use

of an asymmetrical comparison method is not in itself necessarily unfair because Article 2.4.2 specifically authorizes the use of one type of asymmetrical comparison method. However, even when such an asymmetrical comparison method is permitted, an authority may not disregard or alter the results of any individual comparisons when aggregating the results of individual comparisons to determine an overall margin of dumping.

7.243 **Japan** notes that the Appellate Body has characterized the first sentence of Article 2.4 of the *AD Agreement* as a general obligation that informs all of Article 2. The ordinary meaning of the word "fair" suggests that a fair comparison must be "even-handed". The Appellate Body has explicitly linked the concepts of "fairness" and "even-handedness" in Article 2 in its report in *US – Hot–Rolled Steel*. Model zeroing and simple zeroing operate systematically to disadvantage and prejudice exporters by excluding from the numerator in the calculation of the weighted average dumping margin the negative margins for comparable export transactions or models priced higher than normal value, and by interfering with the comparison of normal value and export price to generate a zero instead of a negative outcome by, in effect, improperly reducing the true export price for the excluded export transactions or increasing the corresponding normal value. The Appellate Body has consistently held in *EC – Bed Linen* and *US – Corrosion -Resistant Steel Sunset Review* that a zeroing methodology is unfair within the meaning of Article 2.4 because of its inherent bias. Because of this inherent bias zeroing is inconsistent with Article 2.4 regardless of whether export price and normal value are compared on a weighted-average-to-weighted-average basis, transaction-to-transaction basis or average-to- transaction basis.

7.244 **Korea** submits that, as stated by the Appellate Body in *EC – Bed Linen* and reaffirmed in *US – Corrosion-Resistant Steel Sunset Review*, zeroing is inconsistent with the "fair comparison" requirement of Article 2.4. The first sentence of Article 2.4 establishes an overarching and independent obligation that authorities must observe whenever they calculate margins of dumping. Thus the "fair comparison" requirement in Article 2.4 constitutes an independent ground for finding zeroing to be inconsistent with the *AD Agreement*. Zeroing is inconsistent with the "fair comparison" requirement in Article 2.4 irrespective of the particular comparison method used. While the use of an average-to-transaction comparison method is specifically permitted under Article 2.4.2, zeroing is not permitted when this method is used.

7.245 **Mexico** argues that Article 2.4 proscribes zeroing because the "fair comparison" language creates an independent obligation to use an equitable comparison methodology that takes into account all sales of the products under investigation. Article 2.4 prohibits zeroing regardless of which of the three comparison methodologies set out in Article 2.4.2 is applied. A comparison methodology that selectively disregards or alters the results of price comparisons that may be made at a level below that of the entire product as a whole is inherently distorted and not fair. In particular, zeroing, by inflating the margin of dumping above what it would have been had the results of all comparisons been properly considered and treated equally, actually biases and skews the result in the direction of inflating dumping margins.

7.246 **Norway** submits that, as explained by the Appellate Body in *EC – Bed Linen*, zeroing is inconsistent with the "fair comparison" requirement contained in Article 2.4 because it does not take into account prices of all export transactions. Norway also refers to the statements of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* on the inherent bias of a zeroing methodology. Norway considers that zeroing is inconsistent with the "fair comparison" requirement of Article 2.4 regardless of the comparison method used because of its inherent bias and distorting effect. An average-to-transaction comparison method referred to in Article 2.4.2 is permitted as an exception to the general "fair comparison" principle if the conditions set out in the Article 2.4.2 are fulfilled.

7.247 **Turkey** submits that the model zeroing method used by the United States leads to an unfair comparison of export price and normal value within the meaning of Articles 2.4 and 2.4.2 of the

AD Agreement. Turkey refers to the finding of the Panel in *EC – Bed Linen* that zeroing is inconsistent with the requirement of Article 2.4.2 to take into account export prices of all comparable transactions and to the statement of the Appellate Body in *EC – Bed Linen* that, regardless of the method used to calculate margins of dumping, these margins must be established for the product under investigation as a whole. In response to a Question of the Panel, Turkey states that the "fair comparison" requirement of Article 2.4 is not directly related to the issue of whether zeroing is prohibited or allowed for purposes of Article 2.4.2. Adjustments under Article 2.4 take place at a stage prior to the computation of the dumping margin. For the same reason, Turkey submits that the use of an asymmetrical comparison method is not inconsistent with Article 2.4.

(c) Evaluation by the Panel

7.248 The European Communities challenges as inconsistent with Article 2.4 of the *AD Agreement* the fact that USDOC in certain administrative reviews[335] compared (monthly) average normal values with prices of individual export transactions ("asymmetry") and that in calculating dumping margins based on the comparisons between these normal values and individual export transactions, USDOC did not include in the numerator of the dumping margin any amounts by which prices of individual export transactions exceed the normal values (simple zeroing).

7.249 Article 2.4 of the *AD Agreement* provides:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."

7.250 The European Communities asserts that the "fair comparison" language in the first sentence prohibits the zeroing of export prices above normal value and the use of an asymmetrical, average-to-transaction comparison where the requirements of the second sentence of Article 2.4.2 are not met, and that zeroing is also prohibited by the provisions on due allowances in the third to fifth sentences of Article 2.4. The United States argues that Article 2.4 only contains obligations regarding the selection of comparable transactions and the making of appropriate adjustments to those transactions so as to render them comparable before calculating margins of dumping and contains no obligations with respect to the issues of symmetry and zeroing. The United States rejects the characterization of zeroing as amounting to an adjustment to export price.

7.251 We will first analyze the issues that arise from the arguments of the parties with respect to the "fair comparison" language in the first sentence of Article 2.4 of the *AD Agreement*.

[335] *Supra*, footnote 202.

(i) The "fair comparison" language in the first sentence of Article 2.4

7.252 The disagreement between the parties with respect to whether the "fair comparison" language in Article 2.4 gives rise to obligations with regard to the manner in which a margin of dumping is determined raises three principal questions. The first question is whether the legal obligation created by the "fair comparison" language in the first sentence of Article 2.4[336] can only be violated as a result of a violation of the specific requirements set out in the remainder of paragraph 4 regarding steps to be taken by authorities to ensure price comparability or whether it is an independent obligation, i.e. an obligation that can be violated by an action that is not inconsistent with other requirements of paragraph 4. A second question, which necessarily arises only if the answer to the first question is affirmative, is whether the scope of application of the "fair comparison" requirement as an independent obligation is limited to the general subject matter expressly addressed by paragraph 4, i.e. price comparability, or whether its reach extends beyond this paragraph.[337] The third question, which arises only if it is established that the "fair comparison" requirement is an independent obligation that is not limited in scope to the general subject matter of paragraph 4 but also applies to the calculation of margins of dumping, concerns the substantive meaning of "fair comparison", particularly in relation to the determination of margins of dumping.

7.253 With respect to the first question, i.e. whether the "fair comparison" language creates an independent obligation or whether it contains an obligation that can be violated only if a Member acts inconsistently with other requirements of paragraph 4, we note that although there exists a close link between this first sentence and the remainder of the paragraph, we find no language in Article 2.4 that suggests that this "fair comparison" requirement is defined exhaustively by the specific requirements set out in the remainder of the paragraph regarding the steps to be taken to ensure price comparability. Indeed, to read the "fair comparison" requirement as doing no more than repeating the requirements that follow would render this provision *inutile*. In this regard, we consider that our reading is confirmed by the decision in the Uruguay Round negotiations to place the "fair comparison" language in a separate sentence at the beginning of Article 2.4, rather than continuing with the Tokyo Round text, in which the "fair comparison" language was contained in an introductory clause to the counterpart provision to Article 2.4, where its meaning was ambiguous.[338]

7.254 We now turn to the second question, i.e. whether the "fair comparison" requirement, as an independent obligation, is limited in scope of application to the general subject matter of paragraph 4. In this regard, we note first that the narrow interpretation of the scope of application of the "fair comparison" requirement as being limited to the issue of steps to be taken to ensure price comparability is difficult to reconcile with the structure of Article 2.4. The fact that provisions on currency conversions and the establishment of margins of dumping during the investigation phase are not contained in separate paragraphs of Article 2 but are indented as sub-paragraphs of Article 2.4 means that these provisions and the provisions in the chapeau of Article 2.4 are part of a whole. We see nothing in the text of these provisions to suggest that they should not be read as a whole. On the contrary, the text of Articles 2.4.1 and 2.4.2 contains an express substantive link with Article 2.4. As

[336] There is no disagreement between the parties on the fact that the first sentence of Article 2.4 establishes a legally binding obligation.

[337] If the first sentence creates an obligation that is independent relative to the obligations contained in the remainder of the paragraph, this simply means that a violation of that obligation is not dependant upon a violation of one of the other requirements contained in paragraph 4. However, this does not necessarily imply that the obligation applies to issues other than the issue of price comparability. Thus, the issue of the independent character of the "fair comparison" obligation vis-à-vis other obligations in paragraph 4 is an issue distinct from the scope of application of the obligation.

[338] Article 2.6 of the Tokyo Round Anti-Dumping Code provided: "In order to effect a fair comparison between the export price and the domestic price in the exporting country ... the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time." The same language appeared in Article 2(f) of the Kennedy Round Anti-Dumping Code.

discussed in the panel report in *Egypt – Steel Rebar*[339], the "comparison" referred to in Articles 2.4.1 and 2.4.2 is the "comparison" under Article 2.4. Since the subject matter of Article 2.4.2 in particular is different from price comparability, the inclusion of paragraph 2.4 and sub-paragraphs 2.4.1 and 2.4.2 in a single provision supports the interpretation that "fair comparison" in Article 2.4 is not limited to price comparability.

7.255 Second, the expression "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2 in our view clearly supports an interpretation that the "fair comparison" requirement is of broader application than the issue of price comparability. We note in this regard the analysis by the Appellate Body in *EC – Bed Linen*:

> "Article 2.4 sets forth a general obligation to make a fair comparison between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'."[340]

The Appellate Body's characterization of the "fair comparison" language as a "general obligation" which "informs all of Article 2" but which "applies in particular to Article 2.4.2" by virtue of the phrase "subject to the provisions governing fair comparison in paragraph 4" entails that the "fair comparison" requirement in the first sentence of Article 2.4 is not limited in its scope of application to the issue of price comparability within the meaning of Article 2.4 but at a minimum also encompasses the calculation of margins of dumping under Article 2.4.2 of the *AD Agreement*.[341]

7.256 In this connection, we note that the panel report in *Egypt – Steel Rebar*, which the United States cites as support for its position that the fair comparison requirement only applies to the issue of price comparability, discusses Article 2.4 and its context as follows:

> "Article 2.4, on its face, refers to the *comparison* of export price and normal value, i.e., the calculation of the dumping margin, and in particular, requires that such a comparison shall be 'fair'.
>
> The immediate context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to the comparison of export price and normal value, that is, the calculation of the dumping margin. Article 2.4.1 contains the relevant provisions for the situation where 'the *comparison* under paragraph 4 requires a conversion of currencies' (emphasis added). Article 2.4.2 specifically refers to Article 2.4 as "the provisions governing fair comparison", and then goes on to establish certain rules for the method by which that comparison is made (i.e., the calculation of dumping margins on a weighted-average to weighted-average or other basis)".[342]

Thus, the Panel explicitly equated "comparison of export price and normal value", which is subject to the "fair comparison" requirement, with "calculation of the dumping margin" and considered that this calculation of the dumping margin is subject not only to the "fair comparison" requirement but also to the burden of proof requirement of Article 2.4. It would also appear that the Panel interpreted the

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[339] *Infra*, para. 7.256.

[340] Appellate Body Report, *EC - Bed Linen*, para. 59.

[341] In order to resolve the interpretive issue before us in this dispute we do not need to express a view on whether the "fair comparison" requirement in Article 2.4 applies to any aspect of Article 2 other than the calculation of margins of dumping.

[342] Panel Report, *Egypt – Steel Rebar*, paras. 7.333-7.334 (emphasis in original).

reference made in Article 2.4.2 to "the provisions governing fair comparison" to mean that the provisions in Article 2.4.2 lay down rules for the method by which a "fair comparison" is to be made.

7.257 Third, we note that the dispute settlement reports cited by the parties in support of their respective positions on the interpretation of the first sentence of Article 2.4 generally contain little detailed analysis of the specific question of whether the "fair comparison" requirement is limited in its scope of application to the issue of price comparability within the meaning of Article 2.4. It is true that panel reports that have made findings on claims raised under Article 2.4 have in most cases focused their discussion of the meaning of Article 2.4 on the requirement to make allowance for differences affecting price comparability.[343] In most of these cases, however, the question presented to the panel was whether or not an allowance should be made for a particular factor claimed to affect price comparability, and it has not been necessary for panels to pronounce on the broader issue of whether the "fair comparison" requirement can apply to issues other than price comparability.[344] Therefore, these panel reports do not support the proposition that the scope of the "fair comparison" requirement in the first sentence of Article 2.4 does not extend beyond the question of price comparability. As discussed above, the panel report in *Egypt- Steel Rebar*, which is one of the few reports to have discussed this issue, appears to reflect a view that the "fair comparison" requirement is broader in scope than Article 2.4 and applies to the calculation of margins of dumping. The Appellate Body report in *EC – Bed Linen* also appears to reject a narrow interpretation of the scope of this requirement.

7.258 In sum, while Article 2.4 could ideally have been expressed more clearly, we conclude that the obligation to make a fair comparison is not limited to the issue of how to ensure price comparability by selecting comparable transactions or making appropriate adjustments but also applies to the issue of the calculation of margins of dumping within the meaning of Article 2.4.2 of the *AD Agreement*.

7.259 Accordingly, we must now proceed to consider the substantive meaning of the term "fair comparison" in this context.

7.260 We have carefully considered the arguments of the European Communities and some of the third parties regarding the ordinary meaning of the word "fair" in light of dictionary definitions.[345] We recall that we have already expressed our reservations earlier in this Report with respect to an approach to treaty interpretation that focuses on particular words divorced from their context in the *AD Agreement* and that equates "ordinary meaning" as used in the *Vienna Convention* with dictionary

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[343] Panel Report, *Guatemala – Cement I*, paras. 7.65-7.66; Panel Report, *US - Stainless Steel*, paras. 6.71-6.80 and 6.102-6.104; Panel Report, *Argentina - Ceramic Tiles*, paras. 6.110-6.116; Panel Report, *Egypt – Steel Rebar*, paras. 7.330-7.337 and 7.347-7.388; Panel Report, *EC - Tube or Pipe Fittings*, paras. 7.154-7.193; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.234-7.260; Panel Report, *US – Softwood Lumber V*, paras. 7.163-7.184 and 7.349-7.365.

[344] We note in this respect that the issue of the relationship between the first sentence of Article 2.4 and the requirements in the remainder of Article 2.4 was debated by the parties in *US – Stainless Steel*. After finding that USDOC had acted inconsistently with Article 2.4.1 in respect of the conversion of currency and had acted inconsistently with the third and fourth sentences of Article 2.4 in respect of its treatment of bad debt, the Panel decided that it was not necessary to examine the claims of Korea that the United States had also breached a more general "fair comparison" requirement under Article 2.4 of the *AD Agreement*. Panel Report, *US – Stainless Steel*, paras. 6.45 and 6.104.

[345] E.g., the European Communities states in response to Panel Question 27 that "[t]he ordinary meaning of the word 'fair' indicates a comparison that is 'just, unbiased, equitable, impartial'; 'offering an equal chance of success'; conducted 'honestly, impartially'; and 'evenly, on a level'". Japan argues that the word "fair" in its ordinary meaning requires a comparison of normal value and export price that is "unbiased", "impartial" and "offer[s] an equal chance of success" to both domestic parties and exporters. Japan argues that this means that a "fair comparison" must be "even-handed". Third Party Submission of Japan, para. 33.

definitions of words. We consider that caution with respect to such an approach is especially warranted where, as in the case of the first sentence of Article 2.4, a legal rule is expressed in terms of a standard that by its very nature is more abstract and less determinate than most other rules in the *AD Agreement*. The meaning of "fair" in a legal rule must necessarily be determined having regard to the particular context within which that rule operates. Whereas words like "fair" are also frequently used in connection with obligations of a procedural nature, in Article 2.4 of the *AD Agreement* "fair" is used in a substantive obligation relating to the determination of dumping. Thus, a claim that a particular methodology is not "fair" within the meaning of Article 2.4 is a claim that the methodology is not a fair method of determining dumping. The fairness of the methodology logically cannot be divorced from the underlying conception of what dumping means. To determine whether an approach is unfair there must be a discernible standard of appropriateness or rightness within the four corners of the *AD Agreement* which would provide a basis for reliably judging that there has been an unfair departure from that standard.[346] The brute fact that methodology A produces a higher margin of dumping than methodology B can be a basis for assessing the fairness of methodology A only if methodology B can be equated with such a discernable standard. In other words, when comparing the results of the two methodologies, one would be entitled to regard methodology A as unfair only if it could be established that methodology B was the only "correct" methodology for determining the margin of dumping.

7.261 The "fair comparison" requirement in Article 2.4 exists as part of a provision that contains other rules that are more determinate in their substantive content, reflecting the outcome of negotiations on specific aspects of the determination of dumping. In our view, this means that this requirement must be interpreted in harmony with such rules. The "fair comparison" requirement cannot have been intended to enable a dispute settlement panel to review a measure in light of a necessarily somewhat subjective or in effect arbitrary judgement of what fairness means in the abstract and in complete isolation from the substantive context and thereby effectively create obligations additional to and perhaps even inconsistent with the express requirements of Article 2.

7.262 In light of these considerations, we are of the view that in order to determine what is "fair" under the *AD Agreement* in relation to the calculation of margins of dumping, we must take into account substantive rules and concepts in the *AD Agreement* relevant to the issue of the determination of margins of dumping. In particular, our analysis must take into account Article 2.4.2 of the *AD Agreement*, which is the only provision of the *AD Agreement* that specifically addresses the subject of methods of determining margins of dumping. Furthermore, given that we are considering the applicability of the "fair comparison" standard in the determination of margins of dumping for purposes of assessing the amount of anti-dumping duties, our interpretation of the meaning of "fair" must also take into account relevant rules and concepts in Article 9 regarding the imposition and collection of anti-dumping duties.

7.263 The fact that Article 2.4.2 expressly permits the use of an asymmetrical, average-to-transaction comparison method of export price and normal value as an exception to the symmetrical comparison methods in the first sentence of Article 2.4.2 and that, as discussed in the previous section of this Report, negotiators did not extend the application of Article 2.4.2 beyond investigations within the meaning of Article 5 of the *AD Agreement* indicates that the negotiators did not treat asymmetry as a practice to be banned in all circumstances. Similarly, while zeroing effectively is prohibited under the average-to-average method in the first sentence of Article 2.4.2, the non-application of Article 2.4.2 outside the "the investigation phase" shows that zeroing was not treated as a practice to be banned in all circumstances. Conceptually, it is difficult to understand why one provision of the

[346] In saying this, we are not of course saying that such a standard can only be discerned from some succinct and express formulation within the *AD Agreement*. However, such a standard must at least be reliably and specifically grounded in the *AD Agreement*'s concepts and principles such that it is based upon a convincing rationale.

AD Agreement specifically dealing with a particular subject would prohibit a practice in certain circumstances and specifically permit or not address the same practice in other circumstances, if another provision of the *AD Agreement* already prohibited that practice as inherently unfair in all circumstances. In fact, the very rationale for the existence of Article 2.4.2 is undermined if asymmetry and zeroing are already proscribed in all circumstances as practices that are inherently unfair by Article 2.4. Therefore, the treatment of asymmetry and zeroing as necessarily unfair is contradicted by the manner in which Article 2.4.2 treats these practices.

7.264 Similarly, as discussed above[347], Article 9 of the *AD Agreement* clearly permits the use of an asymmetrical method of comparing normal value and individual export prices in the context of a system of variable anti-dumping duties, which necessarily involves zeroing. The principle that treaty provisions must be presumed not to be in conflict entails that Article 2.4 cannot be read to ban this methodology in all circumstances by treating it as unfair within the meaning of Article 2.4 of the *AD Agreement*.

7.265 The conceptual difficulty discussed in the preceding paragraphs translates into a specific problem in terms of the principle of effective treaty interpretation.[348] This principle means that the "fair comparison" requirement can only be interpreted to entail a prohibition of asymmetry and zeroing insofar as this would not deprive other provisions of the *AD Agreement* of their useful effect.

7.266 This problem arises, first, in respect of the second sentence of Article 2.4.2. This sentence of Article 2.4.2 addresses the issue of "targeted dumping". This provision acknowledges that an examination, in an original investigation, of average behaviour for a product and exporter through the symmetrical comparison methodologies in the first sentence may in some cases mask the existence of targeted dumping with respect to specific purchasers, regions or time periods.[349] In other words, it recognizes that a pattern of export prices below normal value may need to be addressed even in cases where based on average exporter behaviour that pattern might be offset by other export prices in excess of normal value. It therefore permits an alternative, asymmetrical, comparison methodology in such cases. An interpretation of zeroing as by definition unfair in all circumstances, such that even in these circumstances a Member would be required to offset the (pattern of) below-normal-value export prices by others above normal value, would deny the second sentence the very function for which it was created. In fact, under such an interpretation the alternative asymmetrical comparison methodology would as a matter of mathematics produce a result that was *identical* to that of the first, average-to-average, methodology. [350] We cannot interpret the Agreement in a manner that denies a

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[347] *Supra*, paras.7.204-7.206.

[348] "One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility". Appellate Body Report, *US – Gasoline*, p. 23.

[349] The European Communities, which itself refers to the second sentence as relating to "targeted dumping" (e.g., EC-Responses to Panel Questions 41, 43, 47-49), shares this view as to the purpose of that sentence.

[350] At the First Substantive Meeting of the Panel, the European Communities asserted that the use of an average-to-average methodology and an average-to-transaction methodology both without zeroing, would not necessarily produce the same result. We asked the European Communities to elaborate on this statement. From the response to Panel Question 49, we conclude that the European Communities no longer contests that, without zeroing, these two methods will produce the same result. ("By the use of the "weighted average to individual methodology", the European Communities referred to the legitimate use of such method in cases of targeted dumping as defined in the second sentence of Article 2.4.2. The fact that the two methods may lead to different results is provided for in the text of this sentence itself when it says that the "differences [among purchasers, time period or regions] cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." Evidently, this means that the two methods give different margins as a result of zeroing or some other method considered appropriate to address targeting. The

provision the role for which it was created and in fact renders that provision without effect. Accordingly, we *must* conclude that Article 2.4 does not consider zeroing to be unfair and thus prohibited in *all* circumstances, but rather recognizes that in some cases zeroing may be appropriate in order to accurately reflect the existence of dumping by an exporter.[351]

7.267 The same problem arises in respect of our finding regarding the scope of application of Article 2.4.2 of the *AD Agreement*. The European Communities alleges that there are two aspects of the unfairness of the methodology applied by USDOC: the use of an asymmetrical, average-to-transaction comparison and the use of simple zeroing. Article 2.4.2 explicitly addresses the issue of the use of symmetrical and asymmetrical comparison methods and the Appellate Body has confirmed that it also addresses the issue of zeroing. We have found, however, that Article 2.4.2 is limited in its application to investigations within the meaning of Article 5 of the *AD Agreement* by virtue of the phrase "the existence of margins of dumping during the investigation phase".[352] To interpret Article 2.4 as prohibiting asymmetry and zeroing not only in investigations within the meaning of Article 5 but also in duty assessment proceedings under Article 9 (and reviews under Article 11), would render ineffective the language in Article 2.4.2 that limits its scope of application to investigations.

7.268 Our analysis above[353]of the merit of the argument that the *AD Agreement* requires an exporter-oriented method of duty assessment is also relevant here. Interpreting the "fair comparison" standard of Article 2.4 to prohibit zeroing and asymmetrical comparisons between export price and normal value would be inconsistent with the specific provisions on duty assessment in Article 9, which clearly envision that a Member may operate a system of variable duties. Since there is nothing in the text of Articles 2.4 and 9 to indicate that what is unfair under the general "fair comparison" standard of Article 2.4 is not unfair if permitted by Article 9, an interpretation of Article 2.4 as prohibiting the practice of zeroing and making of asymmetrical comparisons necessarily deprives some of the provisions of Article 9 of their useful effect.

7.269 We note that the European Communities argues that asymmetry and zeroing are not unfair when the conditions set out in the second sentence of Article 2.4.2 are met.[354] According to the European Communities, "Article 2.4.2 clarifies what fairness means when establishing the margin of dumping in normal circumstances and in the exceptional circumstances of targeted dumping".[355] This approach effectively attempts to resolve the tension between, on the one hand, the proposition that asymmetry and zeroing are unfair within the meaning of Article 2.4 and, on the other, the need to give effect to the second sentence of Article 2.4.2 with regard to the average-to-transaction comparison methodology by construing Article 2.4.2 as a clarification of the meaning of the "fair comparison" obligation. We note that the logic underlying this approach is that what is fair or unfair in relation to the calculation of margins of dumping is driven by the specific provisions of Article 2.4.2. If this is true, then the logical implication of the express limitation of Article 2.4.2 to original investigations is that asymmetry and zeroing when used in the duty assessment phase cannot be found to be unfair within the meaning of Article 2.4. More generally, the argument of the European Communities amounts to an implicit admission that with respect to the calculation of margins of dumping the specific provisions of Article 2.4.2 prevail over the "fair comparison" requirement.

European Communities notes however that the United States does not claim that in assessment proceedings it applies the third method of comparison in conformity with the second sentence of Article 2.4.2.")

[351] The European Communities itself does not, as discussed below, deny that zeroing is permitted in the context of the alternative comparison methodology set forth in the third sentence.

[352] *Supra* Section VI.E.3.

[353] *Supra*, paras. 7.204-7.206

[354] EC-Responses to Panel Questions 47-48.

[355] EC-Response to Panel Question 41.

7.270 We note that the Appellate Body has not actually made any legal *findings* that zeroing is inconsistent with Article 2.4 of the *AD Agreement*. Nevertheless, we recognize that, as emphasized by the European Communities and many third parties to this proceeding, the Appellate Body has twice expressed the view that the practice of zeroing is unfair within the meaning of Article 2.4. Under Article 11 of the DSU our task is to make an objective assessment of the matter before us. In this respect, we consider that the matter before us is different from the matter considered by the Appellate Body in the decisions referred to by the European Communities and third parties. In particular, in making an objective assessment of this matter, we have had to rule on different claims and to address directly a multiplicity of arguments not addressed by the Appellate Body in these decisions. We must, of course, carefully consider the reasoning contained in relevant Appellate Body reports.[356]

7.271 In *EC – Bed Linen*, the Appellate Body discussed the implications of the "fair comparison" requirement of Article 2.4 for the use of a zeroing methodology in the context of the weighted-average-to-weighted-average comparison method in the first sentence of Article 2.4.2:

> "Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of 'all' comparable export transactions. As explained above, when zeroing, the European Communities counted as zero the 'dumping margins' for those models where the 'dumping margin' was 'negative'. As the Panel correctly noted, for those models, the European Communities counted 'the weighted average export price to be equal to the weighted average normal value … despite the fact that it was, in reality, higher than the weighted average normal value.' By 'zeroing' the 'negative dumping margins', the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish 'the existence of margins of dumping' for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of zeroing at issue in this dispute – is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2."[357]

When read as a whole, it is clear that the main theme in this passage is the inconsistency of zeroing with the "all comparable export transactions" language in the first sentence of Article 2.4.2 of the *AD Agreement*. It is only in the last sentence that the Appellate Body mentions Article 2.4 for the first time. Other than the statement that zeroing does not take into account the prices of all comparable export transactions, the last sentence does not analyze the text of Article 2.4 and provides no explanation of the conclusion that zeroing is unfair. However, this statement is virtually indistinguishable from the explanation of the finding of inconsistency with Article 2.4.2. The "all comparable export transactions" language used by the Appellate Body thus suggests that the Appellate Body may have derived its substantive benchmark for qualifying zeroing as unfair from its interpretation of the average-to-average comparison method in the sentence of Article 2.4.2. We

[356] *Supra*, paras. 7.30-7.31
[357] Appellate Body Report, *EC – Bed Linen*, para. 55 (footnotes omitted, emphasis in original)

therefore question whether the Appellate Body should be understood to have meant to imply that zeroing is necessarily unfair when used in the context of any other comparison methods set out in Article 2.4.2. Moreover, it is surely significant that the Appellate Body made this statement that zeroing is unfair in the context of a dispute involving an investigation within the meaning of Article 5. As discussed above, Article 2.4.2 does not apply to proceedings other than investigations within the meaning of Article 5. We therefore see no basis for the view that the reasoning of the Appellate Body in *EC – Bed Linen* can be interpreted to sustain the proposition that the use of zeroing outside the context of average-to-average comparisons in original investigations is necessarily inconsistent with the "fair comparison" obligation of Article 2.4. Where zeroing is not permitted by Article 2.4.2 of the *AD Agreement*, it can understandably be considered to be unfair. However, where zeroing is effectively permitted by Article 2.4.2, to characterize it as unfair and inconsistent with Article 2.4 raises the issues of effective treaty interpretation discussed above.

7.272 In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body ruled that Article 11.3 of the *AD Agreement* does not obligate investigating authorities to calculate or rely on margins of dumping in determining the likelihood of continuation or recurrence of dumping but that, if they choose to rely upon dumping margins in making this determination, those margins must be calculated in a manner consistent with Article 2.4.of the *AD Agreement*.[358] The Appellate Body observed in this respect:

> "In *EC – Bed Linen*, we upheld the finding of the panel that the European Communities acted inconsistently with Article 2.4.2 of the *AD Agreement* by using a 'zeroing' methodology in the anti-dumping investigation at issue in that case. We held that the European Communities' use of this methodology 'inflated the result from the calculation of the margin of dumping.' We also emphasized that a comparison such as that undertaken by the European Communities in that case is not a 'fair comparison' between export price and normal value as required by Articles 2.4 and 2.4.2.
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> When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, 'zeroing ... may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing.' Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[359]

While this case involved a review under Article 11 of the *AD Agreement* and the Appellate Body specifically discussed the use of a zeroing methodology "whether in an original investigation or otherwise", the Appellate Body made no findings on Article 2.4. Indeed, on the zeroing issue, the Appellate Body was not in a position to complete the analysis as the panel report did not contain sufficient factual findings on the precise methodology used by USDOC in the administrative reviews on which USDOC had relied in its sunset review.[360] The Appellate Body did not expand the reasoning in *EC – Bed Linen* as to why zeroing is unfair beyond its indication that a zeroing methodology will tend to inflate margins of dumping and may lead to a finding of dumping where no

[358] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 127-130.

[359] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 134-135 (footnotes omitted)

[360] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 137-138

dumping would have been found in the absence of zeroing. We recall in this respect our observation that an assessment of whether a particular methodology is fair cannot be simply based on a comparison of the results of that methodology with the results produced by another methodology[361], but requires at a minimum knowing that the latter methodology somehow reflects a discernable standard or norm of "fairness". We see no indication that the Appellate Body considered this issue in this case. Indeed, as noted, because of the state of the record and the absence of panel findings, the Appellate Body was unable to complete the analysis of the underlying claim. Thus, we are of the view that the reasoning of the Appellate Body in *EC – Bed Linen* and *US - Corrosion-Resistant Steel Sunset Review* does not necessarily provide a basis to conclude that zeroing is unfair in a context other than the use of the average-to-average comparison methodology in the first sentence of Article 2.4.2.

7.273 That the Appellate Body Reports in *EC - Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review* must necessarily be interpreted to support the proposition that zeroing is always unfair within the meaning of Article 2.4 is also difficult to square with the Appellate Body's decision *in US – Softwood Lumber V*. The Appellate Body made it very clear in *US – Softwood Lumber V* that the issue before it was limited to the use of zeroing in the context of the average-to-average comparison methodology in the first sentence of Article 2.4.2[362], which provision, it specifically noted, is "applicable during the investigation phase".[363] We recognize that in *US – Softwood Lumber V* the Appellate Body did not have a panel finding under Article 2.4 before it and that it was therefore not strictly necessary for it to discuss Article 2.4 but neither did it in *EC – Bed Linen,* in which case it did pronounce on the inconsistency of zeroing with the "fair comparison" requirement. The lack of any reference in *US – Softwood Lumber V* to Article 2.4 and to the reasoning in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review* calls into question the idea that those cases have firmly established the principle that zeroing is always unfair within the meaning of Article 2.4 of the *AD Agreement*. In this regard, we see considerable significance in the fact that the Appellate Body declined to address the issue of zeroing in the context of the transaction-to-transaction comparison method set out in the first sentence of Article 2.4.2 even though the United States had referred to this method as a core contextual argument in support of its position that zeroing is not proscribed by Article 2.4.2.[364] It is very difficult to reconcile this fact with the idea that previous Appellate Body decisions had already confirmed the existence of a general prohibition of zeroing under Article 2.4 of the *AD Agreement*, particularly in light of the explanation provided by the Appellate Body of its decision not to examine this issue:

> "We fail to see how we could find that the transaction-to-transaction and average-to-individual methodologies could provide contextual support for the United States' interpretation of Article 2.4.2 without *examining first whether zeroing is permitted under those methodologies*. Indeed the United States faulted the Panel for making observations in this regard. [footnote omitted] As we have observed, the United States acknowledged at the oral hearing that the issue before us is confined to determining whether zeroing is prohibited under the average-to-average methodology."[365]

This passage in our view clearly indicates that the Appellate Body treated the issue of "whether zeroing is permitted under those methodologies" as an open question.

7.274 In this regard, we recall that the Appellate Body has consistently emphasized the distinctions between the purposes of investigations and other proceedings under the *AD Agreement*, notably duty

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[361] *Supra*, para. 7.260.
[362] Appellate Body Report, *US - Softwood Lumber V*, paras. 63, 77 and 104-105.
[363] Appellate Body Report, *US - Softwood Lumber V*, para. 76.
[364] Appellate Body Report, *US – Softwood Lumber V*, paras. 104-105.
[365] Appellate Body Report, *US – Softwood Lumber V*, para. 105 (emphasis added).

assessment under Article 9 and reviews under Articles 11.[366] Considerations that are pertinent to determining whether zeroing is unfair in an original investigation, the purpose of which is to analyze whether application of an anti-dumping measure is appropriate, may not be equally relevant to the duty assessment phase, the purpose of which is to assess the amount of anti-dumping duty to be paid by an importer in respect of a particular import transaction. We recall our conclusion above that there exists no compelling rationale to interpret the *AD Agreement* to mean that duty liability must necessarily be established on an exporter-oriented basis, which would result in the payment of anti-dumping duties by importers in respect of imports whose prices were above the normal value. In this respect, we do not see the logic of an approach that interprets the "fair comparison" standard of Article 2.4 in a way that compels such a result.

7.275 In sum, we consider that while Article 2.4 gives rise to a "fair comparison" obligation that also applies to the calculation of margins of dumping, to interpret Article 2.4 as prohibiting zeroing and asymmetrical comparisons, zeroing and importer-specific assessment of anti-dumping duties in proceedings other than original investigations cannot be reconciled with the fact that the negotiators of the *AD Agreement* specifically permitted and/or decided not to address these practices in certain circumstances and would undermine the useful effect of Article 2.4.2 and of provisions of Article 9 that permit the collection and assessment of anti-dumping duties on a transaction-specific basis.[367] In light of the foregoing analysis, we do not consider that the Appellate Body reports in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review*, when read together with the Appellate Body's subsequent decision in *US – Softwood Lumber V*, lead us to a different conclusion.

(ii) Zeroing as an impermissible allowance or adjustment for a difference that does not affect price comparability

7.276 We now turn to the second main argument raised by the European Communities in support of its claim under Article 2.4 of the *AD Agreement* with respect to the methodology applied by USDOC in the administrative reviews at issue. According to the European Communities, zeroing amounts to "an allowance or adjustment to export price, normal value or otherwise, so as to effectively reduce the (true) export price, for a difference other than a difference affecting price comparability" and is thereby inconsistent with the third to fifth sentences of Article 2.4.[368]

7.277 In our view, the argument that zeroing is an impermissible allowance or adjustment for a difference not affecting price comparability cannot be reconciled with the fact that Article 2.4.2 specifically does not deal with zeroing other than in the context of original investigations and that the

[366] *Supra*, paras. 7.177-7.179.

[367] Contrary to what is alleged in the dissenting opinion, our approach to the interpretation of the "fair comparison" requirement in no way negates the legal effect of this provision as an independent legal obligation. In particular, we have not suggested that a violation of the "fair comparison" requirement can only be the result of a violation of Article 2.4.2 of the AD Agreement. Rather, our approach is that the meaning of the "fair comparison" requirement must be rooted in the concept of dumping and that in determining what fair comparison means with respect to the determination of margins of dumping, it is necessary to take into account the manner in which specific rules contained in the AD Agreement address that particular issue. Thus, for example, if in a transaction-to-transaction comparison between export price and normal value an authority deliberately selects only those domestic transactions with the highest prices, this may well be inconsistent with the "fair comparison" requirement even though it is not prohibited by Article 2.4.2. By contrast, if a particular methodological approach is specifically permitted by Article 2.4.2, it can in our view not be found to be unfair. In this respect, we note that the dissenting opinion posits that the "fair comparison" requirement must, in case of conflict, prevail over Article 2.4.2. We consider that the correct approach, consistent with the principle of a presumption against conflict in the interpretation of treaty provisions, is to interpret fair comparison in a manner that *avoids* conflict with other provisions of the AD Agreement.

[368] E.g., EC-Rebuttal Submission, para. 95.

second sentence of Article 2.4.2 specifically permits an asymmetrical comparison method that would be without any useful effect if zeroing were prohibited. If zeroing is characterized as an impermissible allowance or adjustment, there is no rational basis to explain why an allowance or adjustment that is prohibited because it does not correspond to a difference affecting price comparability is no longer prohibited in the context of the asymmetrical comparison method provided for in the second sentence of Article 2.4.2 or in the context of a duty assessment proceeding under Article 9.

7.278 We note that the European Communities acknowledges that zeroing may be necessary in the situation envisaged in the second sentence of Article 2.4.2, and that in order to reconcile the possible need for zeroing in this context with its characterization of zeroing as an impermissible allowance or adjustment, the European Communities submits that the existence of a "pattern of export prices which differ significantly among different purchasers, regions or time periods" envisaged in the second sentence of Article 2.4.2 can be a factor affecting price comparability. According to the European Communities, where there exists such a pattern of "targeted dumping", "[i]t is self-evident that prices in what has been identified as distinct market A cannot-without some further consideration and explanation-necessarily simply be directly compared with prices in what has been identified as distinct market B".[369] In turn if prices in the two export markets A and B cannot be compared, it follows that by definition they cannot together be compared with prices in the home market.[370]

7.279 This argument reflects a misinterpretation of the very concept of price comparability as used in Article 2.4 of the *AD Agreement*. Differences in price comparability in Article 2.4 for which an adjustment or allowance may have to be are differences between the product as sold in the export market and the product as sold in the domestic market with respect to factors such as level of trade, taxation, quantities, etc. The existence of differences in prices in the export market between regions, purchasers and time-periods is conceptually wholly irrelevant to, and outside the scope of, Article 2.4 because such differences have nothing to with whether or not export sales and domestic sales are comparable with regard to factors such as level of trade, taxation, quantities, etc. Therefore, if zeroing is inconsistent with Article 2.4 on the ground that it is an impermissible adjustment or allowance, the existence of a "pattern of export prices which differ significantly among different purchasers, regions or time periods"[371] cannot justify what is otherwise an adjustment or allowance prohibited by Article 2.4.

7.280 In light of these considerations we reject the argument of the European Communities that zeroing is inconsistent with Article 2.4 of the *AD Agreement* as an allowance or adjustment for a difference other than a difference affecting price comparability.

(iii) General conclusion

7.281 We have found that the two main arguments of the European Communities in support of its claim that the use of a methodology involving zeroing and asymmetry in the administrative reviews at issue was inconsistent with Article 2.4 cannot be reconciled with the fact that the negotiators of the *AD Agreement* specifically permitted and/or decided not to address these practices in certain circumstances and is inconsistent with the principle of effective treaty interpretation.

7.282 We recall that the standard that we must apply in interpreting the *AD Agreement* is set forth in Article 17.6(ii) of the *AD Agreement*:

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[369] EC-Second Oral Statement, para. 47.

[370] EC-Response to Questions Posed by the Panel at the Second Meeting, para. 33.

[371] We note that while the European Communities in discussing the second sentence of Article 2.4.2 uses the term "distinct markets", the text of this provision does not make any mention of that concept.

> "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."

7.283 In light of our analysis in the preceding sections, we find that it is permissible to interpret Article 2.4 of the *AD Agreement* as not proscribing a method of calculating dumping margins for purposes of duty assessment under Article 9.3 in which an asymmetrical comparison is made between normal value and export price and in which the numerator of the dumping margin does not reflect the amount by which individual export prices exceed the normal value.

7.284 The Panel therefore **finds** that the United States did not act inconsistently with Article 2.4 of the *AD Agreement* when in the administrative review proceedings challenged by the European Communities in this dispute[372] USDOC calculated dumping margins by comparing average monthly normal value with prices of individual export transactions and did not include in the numerator of the dumping margins any amounts by which export prices of individual transactions exceeded the normal value.

7.285 One Member of the Panel offers the following additional observations: Aside from the considerations set out above, the view that the *AD Agreement* cannot be interpreted to prohibit the use of zeroing and an asymmetrical comparison between export price and normal value in the collection and assessment of anti-dumping duties is supported by the text of Article 2.1 of the *AD Agreement*, which defines dumping as a situation in which a product is "introduced into the commerce of another country at less than its normal value". Because it clearly connotes real world business transactions, the phrase "a product...introduced into the commerce of another country" can reasonably be interpreted to permit an authority to focus on particular import transactions and does not require a consideration of dumping in terms of an aggregate or average of export transactions over a period of time.[373] While the Appellate Body has relied on Article 2.1 of the *AD Agreement* as textual support for the view that dumping and margins of dumping can be found to exist only for the product as a whole, it is important to emphasize that the Appellate Body articulated this interpretation of Article 2.1 as context for its analysis of Article 2.4.2[374], which is applicable only to the investigation phase. The notion that dumping can be found only for the product as a whole is particularly relevant to an original investigation, one of the main purposes is to determine whether dumping exists above a *de minimis* level so as to justify the imposition of an anti-dumping measure. A focus on average conduct may well be appropriate in that regard. However, to transpose this notion to the duty

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[372] *Supra*, footnote 202.

[373] It might also usefully be observed that the concept of dumping, as defined in Article VI: of the GATT and Article 2.1 of the *AD Agreement* in terms of a product that is being introduced into the commerce of another country has not historically been understood as referring exclusively to average conduct. Thus, for example, the second report of the group of experts on anti-dumping and countervailing duties adopted in May 1960 observed that "the ideal method" to ensure that anti-dumping duties are not used for ordinary protective purposes and are applied only when a product is dumped and found to be causing injury "was to make a determination in respect of both dumping and material injury in respect of each single importation of the product concerned" BISD 9S/195.

374 In *EC – Bed Linen*, the Appellate Body observed that Article 2.4.2 explains how authorities must proceed in establishing that there is dumping and that Article 2.1 made it clear in this regard that the margins of dumping to which Article 2.4.2 refers are margins of dumping for a product. Appellate Body report, *EC – Bed Linen*, para. 51. Similarly, in *US – Softwood Lumber V*, the Appellate Body's ruling that dumping and margins of dumping can be found only for the product under investigation as a whole was part of an analysis of the meaning of the terms "dumping" and "margins of dumping" in Article 2.4.2 of the *AD Agreement*. Appellate Body Report, *US – Softwood Lumber V*, paras. 90, 93 and 96. The relevant section of the Appellate Body's Report is entitled "Interpretation of Article 2.4.2".

collection and assessment phase is difficult to reconcile with the particular purpose of such a phase to determine liability for payment of anti-dumping duties on particular imports and with the meaning of the concept of introduced into the commerce of another country.

5. Claims of the European Communities under other provisions of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement

7.286 The European Communities claims that in the administrative reviews at issue[375] USDOC also acted inconsistently with Articles 9.3, 11.1 and 11.2, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of GATT 1994 and Article XVI:4 of the WTO Agreement as a consequence of the unlawful zeroing method used in the calculation of margins of dumping.[376]

7.287 These claims of the European Communities are dependant in that they presuppose that the zeroing method used by USDOC in these administrative reviews is inconsistent with Articles 2.4 and/or Article 2.4.2 of the *AD Agreement*. However, we have found in our analysis in Section E that USDOC did not act inconsistently with Articles 2.4 and 2.4.2 in this respect.[377]

7.288 We therefore reject the claims of the European Communities that in the administrative reviews at issue USDOC acted inconsistently with Articles 9.3, 11.1 and 11.2, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of GATT 1994 and Article XVI:4 of the WTO Agreement.

F. CLAIMS OF THE EUROPEAN COMMUNITIES IN RESPECT OF THE STANDARD ZEROING PROCEDURES, THE TARIFF ACT AND THE USDOC'S REGULATIONS IN RELATION TO PERIODIC ADMINISTRATIVE REVIEWS

7.289 The European Communities claims that "Standard Zeroing Procedures" used by the United States in administrative reviews or the United States practice or methodology of zeroing and Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the USDOC Regulations are as such inconsistent with Articles 2.4, 2.4.2,9.3, 11.1 and 11.2, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.[378]

7.290 We note that these claims are dependent upon a violation of Articles 2.4 and/or 2.4.2 and that the claim of a violation of Articles 2.4 and/or 2.4.2 is based on an interpretation of these provisions as prohibiting zeroing and the use of asymmetrical comparison of export price and normal value in periodic administrative reviews. We have rejected that interpretation in our analysis in Section E. In addition, we recall that we have found that Sections 771(35)(A) and (B),731 and 777A(d) of the Tariff Act are not WTO-inconsistent as such because they do not specifically address the issue of zeroing.[379]

7.291 We therefore reject the claims of the European Communities that "Standard Zeroing Procedures" used by the United States in administrative reviews or the United States practice or methodology of zeroing and Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the USDOC Regulations are as such inconsistent with Articles 2.4, 2.4.2,9.3, 11.1 and 11.2, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.

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[375] *Supra*, footnote 202.
[376] EC-First Written Submission, paras. 183-210.
[377] *Supra*, paras. 7.223 and 7.284.
[378] EC-First Written Submission, paras. 212-224. As part of these "as such" claims, the European Communities challenges the use of importer-specific assessment rates. EC-First Written Submission, para. 224.
[379] *Supra*, para. 7.69.

G. CLAIMS OF THE EUROPEAN COMMUNITIES IN RESPECT OF THE STANDARD ZEROING PROCEDURES, THE TARIFF ACT AND THE USDOC'S REGULATIONS IN RELATION TO NEW SHIPPER REVIEWS, CHANGED CIRCUMSTANCES REVIEWS AND SUNSET REVIEWS

7.292 The European Communities claims that "Standard Zeroing Procedures" used or relied upon by the United States in new shipper reviews, changed circumstances reviews and sunset reviews and Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the USDOC Regulations are as such inconsistent with Articles 2.4, 2.4.2, 9.3, 9.5, 11.1,11.2, 11.3, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.[380]

7.293 We note that these claims are dependent upon a violation of Articles 2.4 and/or 2.4.2 and that the claim of a violation of Articles 2.4 and/or 2.4.2 is based on an interpretation of these provisions as prohibiting zeroing and the use of asymmetrical comparison of export price and normal value in proceedings under Articles 9.5, 11.2 and 11.3. In light of our analysis in Section E, we reject that interpretation. In addition, we recall that we have found that Sections 771(35)(A) and (B),731 and 777A(d) of the Tariff Act are not WTO-inconsistent as such because they do not specifically address the issue of zeroing.[381]

7.294 We therefore reject the claims of the European Communities that "Standard Zeroing Procedures" used or relied upon by the United States in new shipper reviews, changed circumstances reviews and sunset reviews and Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the USDOC Regulations are as such inconsistent with Articles 2.4, 2.4.2, 9.3, 9.5, 11.1,11.2, 11.3, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In light of our findings above, we conclude that:

(a) The United States acted inconsistently with Article 2.4.2 of the *AD Agreement* when in the anti-dumping investigations listed in Exhibits EC-1 to EC-15 USDOC did not include in the numerator used to calculate weighted average dumping margins any amounts by which average export prices in individual averaging groups exceeded the average normal value for such groups.[382]

(b) Sections 771(35)(A) and (B), 731 and 777(A)(d) of the Tariff Act are not as such inconsistent with Articles 2.4, 2.4.2, 5.8, 9.3, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement with respect to the use of a zeroing methodology in the calculation of margins of dumping in original investigations.[383]

(c) The United States' zeroing methodology, as it relates to original investigations, is a norm which, as such, is inconsistent with Article 2.42 of the *AD Agreement*.[384]

(d) The United States did not act inconsistently with Article 2.4.2 of the *AD Agreement* when, in the administrative reviews listed in Exhibits EC-16 to EC-31, USDOC used

[380] EC-First Written Submission, para. 225.
[381] *Supra*, para. 7.69.
[382] *Supra*, para. 7.32.
[383] *Supra*, para. 7.69.
[384] *Supra*, para. 7.106.

a methodology that involved asymmetrical comparisons between export price and normal value and in which no account was taken of any amount by which export prices exceeded normal value.[385]

(e) The United States did not act inconsistently with Article 2.4 of the *AD Agreement* when in the administrative reviews listed in Exhibits EC-16 to EC-31 USDOC calculated dumping margins by comparing average monthly normal value with prices of individual export transactions and did not include in the numerator of the dumping margins any amounts by which export prices of individual transactions exceeded the normal value.[386]

(f) The United States did not act inconsistently with Articles 9.3, 11.1 and 11.2, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of GATT 1994 and Article XVI:4 of the WTO Agreement in the administrative reviews listed in Exhibits EC-16 to EC-31.[387]

(g) The Standard Zeroing Procedures used by the United States in administrative reviews or the United States practice or methodology of zeroing and Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the USDOC Regulations are not as such inconsistent with Articles 2.4, 2.4.2,9.3, 11.1 and 11.2, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.[388]

(h) The Standard Zeroing Procedures used or relied upon by the United States in new shipper reviews, changed circumstances reviews and sunset reviews and Sections 771(35)(A) and (B), 731, 777A(d) and 715(a)(2)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the USDOC Regulations are not as such inconsistent with Articles 2.4, 2.4.2, 9.3, 9.5, 11.1,11.2, 11.3, 1 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.[389]

8.2 We have also concluded that it is not necessary for us to make findings on the claim of the European Communities that the application of the model zeroing method in the investigations listed in Exhibits EC-1 to EC -15 was inconsistent with Articles 1, 2.4, 3.1,3.2,3.5,5.8,9.3 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement[390], and on the claim of the European Communities that the Standard Zeroing Procedures used by USDOC in original investigations are inconsistent as such with Articles 1, 2.4 3.1, 3.2, 3.5, 5.8, 9.3 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.[391]

8.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States acted inconsistently with the provisions of the *AD Agreement*, it has nullified or impaired benefits accruing to the European Communities under the *AD Agreement*.

[385] *Supra*, para. 7.223.
[386] *Supra*, para. 7.284.
[387] *Supra*, para. 7.288.
[388] *Supra*, para. 7.291.
[389] *Supra*, para. 7.294.
[390] *Supra*, paras. 7.33 and 7.34.
[391] *Supra*, paras. 7.108 and 7.109.

8.4 We therefore recommend that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the *AD Agreement*.

IX. DISSENTING OPINION BY ONE MEMBER OF THE PANEL WITH RESPECT TO CERTAIN CLAIMS OF THE EUROPEAN COMMUNITIES RELATING TO ZEROING

9.1 The Panel has given long and careful consideration to the arguments advanced by both parties. I agree with three of the Panel's findings which have been made unanimously by all three Panel members:

(a) The "as applied" claims of the European Communities -

(i) that model zeroing in original investigations is prohibited by Article 2.4.2 of the *AD Agreement*

(b) The "as such" claims of the European Communities -

(ii) that Sections 771(35)(A) and (B), 731 and 777(A)(d) of the United States Tariff Act are not as such inconsistent with the provisions of the *AD Agreement*, the GATT 1994 and the WTO Agreement invoked by the European Communities, since they do not speak to the issue of zeroing; and

(iii) that the United States' zeroing methodology, as it relates to original investigations, is a norm which, as such, is inconsistent with Article 2.4.2 of the *AD Agreement*.

However, I must respectfully disagree with all other findings of the Panel. My disagreement is based essentially on a different interpretation of the term "during the investigation phase" in Article 2.4.2 of the *AD Agreement* and of the "fair comparison" principle in the first sentence of Article 2.4 of the *AD Agreement* and its importance in the context of Article 2.4.2.

9.2 The European Communities, in its first written submission to the Panel[392], has stressed that the dispute, even if technically addressing symmetry too, is essentially about a single issue: "zeroing", i.e. the counting as zero of the results of price comparisons in those cases where export prices exceed normal value.

9.3 Panels have noted that the practice of zeroing arises in situations where an investigating authority makes multiple comparisons of export price and normal value, and then aggregates the results of individual comparisons to calculate a dumping margin for the product as a whole.[393] Zeroing in its most common form is practiced either for a certain series of transactions ("simple zeroing") or per model ("model zeroing").

9.4 The effect of zeroing is best illustrated by the following example: Suppose the home market price for a certain product is 100. If there is one shipment of the product made at an export price of 100 there is no dumping. If, however, the same quantity is exported in two shipments, one at a price of 70, the other at 130, the dumping margin established will be 30 ("positive" dumping) plus 0 ("negative" margin of 30 counted as zero) divided by 2 = 15. With zeroing, the size of the dumping margin therefore depends on the size and the frequency of shipments. The result of comparisons is influenced by the calculation method used.

[392] EC-First Written Submission, p. 1.
[393] Panel Report, *EC – Bed Linen*, para. 6.102; *cf.* Panel Report, *US – Softwood Lumber V*, para. 7.213.

9.5 Zeroing is also related to "symmetry". Where price comparisons are symmetrical, simple and model zeroing cannot occur, at least not so long as there is no aggregation of any intermediate result obtained. This is the reason why Article 2.4.2 of the *AD Agreement*, without mentioning zeroing, prescribes symmetry, under certain conditions. In order to simplify discussions, I shall therefore address both issues together as "zeroing".

9.6 Whether zeroing should be permitted under the *AD Agreement* has been the subject of intensive discussions between the negotiators of the Uruguay Round *AD Agreement*. Those basing themselves on a more economically inspired concept of average price behaviour of an exporter over time confronted those defending a literal interpretation of Article VI of the GATT 1994[394] implying that dumping margins either exist (positive) or do not exist (zero), but can neither be negative nor give any credit to compensate operations below normal value.

9.7 The result has been a compromise laid down in Articles 2.4 to 2.4.2. of the *AD Agreement* [395], which can be summarized as follows:

- A general "fair comparison" principle enshrined in Article 2.4;

- An elaboration of this principle through a series of detailed prescriptions on adjustments and comparison of prices in Article 2.4, second to sixth sentence, and on conversion of currencies in Article 2.4.1; and

- A provision in Article 2.4.2 that, "subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall

[394] Art VI:1 GATT: "…dumping by which products of one country are introduced into the commerce of another country at less than the normal value of the products" (emphasis added).

[395] "2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation. (footnote omitted)

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."

normally be established" in a symmetrical way, i.e. without zeroing, except where there is evidence of targeted dumping.

9.8 While the "fair comparison" principle and the prohibition of zeroing, except for situations of targeted dumping, undoubtedly constituted major progress, the need and effect of the insertion of the words "during the investigation phase" remained unclear.

9.9 The Panel argues that the limitation of the ban on zeroing to original investigations only, which in its opinion resulted from the insertion of the words "during the investigation phase" "could reflect a compromise bridging different interests".[396] However, the reality was more complex. The text of Article 2.4.2 *AD Agreement* changed several times in the course of the negotiations and it was adopted as part of an overall compromise. But who understood when what it was really intended to mean?[397]

9.10 The natural reading and literal similarity of "investigation phase" and "investigation period" assimilated the text to the usual kind of reference to the existence of dumping during the investigation period occurring several times in Article 2.[398] Why therefore should the inexperienced among the approximately 140 delegations, unfamiliar with the particularities of original investigations and assessment and review proceedings under United States municipal law, discover that that text was intended to mean the at that time unthinkable, i.e. that the prohibition of zeroing should apply to original investigations only and become irrelevant in the assessment and review phase? Who could imagine that the more precise dumping calculations, those without zeroing, should be done in the original investigation and the more rudimentary ones, those with zeroing, in the assessment and review stage[399], with the result that inflated duties would be finally assessed in the later stages of the proceedings? The situation would have been different of course if the text had been unambiguous, clearly spelling out the term "original investigation". But this was not the case, and I have the greatest of doubts whether such a text would ever have had a chance of being adopted.

9.11 For the more initiated negotiators discovering the intended meaning, certain in the final stage of the discussions, they were confronted with the delicate choice either to refuse the text with all the incalculable consequences on the *AD Agreement* and the entire Uruguay Round or to accept it on the grounds that its ambiguity and the lack of any similar precedent in the anti-dumping area would inevitably lead to litigation where its drafting and context, and the dramatic consequences of its restrictive interpretation, would lead to a different reading.

9.12 Thus, as in so many international negotiations, ambiguity and the need to conclude finally the Uruguay Round allowed the text to be adopted.

9.13 It is illustrative of this situation that the European Communities in its Regulation (EC) No 384/96[400] implementing the Uruguay Round *AD Agreement*, interpreted the term "during the investigation phase" as not restricting the prohibition of zeroing by Article 2.4.2 of the *AD Agreement*[401] to original investigations.[402] The United States, on the other hand, in the Statement of

[396] *Supra*, para. 7.212.
[397] Even the United States administration, when implementing the *AD Agreement* into United States law, felt the need, in the SAA, to comment on the term "investigations" with the explanatory addition "not reviews". See EC-Rebuttal Submission, para. 217.
[398] Articles 2.2.1, 2.2.2 and 2.4.1 of the *AD Agreement*.
[399] Normally reserved for refinement of calculations.
[400] Article 2, para. 11, OJ No L 56 of 6.3.1996, p.1.
[401] Except for cases of targeted dumping.
[402] Thus, Reg. 384/96 refers to the existence of dumping during the "investigation period".

Administrative Action interpreting the URAA, opted for a narrow interpretation, expressly excluding reviews from the scope of Article 2.4.2 of the *AD Agreement* as transposed into United States law.[403]

9.14 This Panel, by a majority of its members, has now confirmed this limited interpretation and has concluded that zeroing is permitted in United States duty assessment proceedings, as well as regular and newcomer reviews, since it is condemned by Article 2.4.2 of the *AD Agreement* for original investigations only. The term "during the investigation phase" in Article 2.4.2 of the *AD Agreement* is interpreted narrowly, assimilating it to the phrase "during the original investigation" and is considered decisive for the interpretation of the fairness principle established by Article 2.4 of the AD Agreement.

9.15 The Panel's interpretation raises four major questions:

1. Whether the meaning of the term "during the investigation phase" in the first sentence of Article 2.4.2 of the *AD Agreement* lies in reading it in conjunction with the preceding part of the sentence (existence of dumping) rather than with the subsequent part (establishment of the dumping margin).

2. What is the meaning of the terms "investigation"/"investigation phase" used in Article 2.4.2 of the *AD Agreement* when compared to other instances where similar words are used in the *AD Agreement*?

3. What is the relationship between Article 2.4.2 of the *AD Agreement* and the general "fair comparison" principle established by the first sentence of Article 2.4 of the *AD Agreement*?

4. What is the relationship between Articles 2.4 and 2.4.2 of the *AD Agreement* and Article 9.3 of the *AD Agreement*?

1. Meaning of the term "during the investigation phase" if linked to the preceding or the subsequent part of Article 2.4.2

9.16 The Marrakesh Agreement establishing the WTO and its annexes have been established in three languages: English, French and Spanish, each text being authentic.[404]

9.17 The English version of the first sentence of Article 2.4.2 of the *AD Agreement* reads as follows:

> "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 … "

The most natural reading of this provision, and the only one which is grammatically correct, is to link the term "during the investigation phase" to the preceding words, i.e. to the existence of margins of dumping. It would be otherwise only if the negotiators had opted for a different drafting, such as:

> "Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping shall, during the investigation phase, normally be established on the basis of a comparison of … "

[403] See discussion of this problem in EC-Response to Panel Question 50, para 163.
[404] WTO Agreement, Art XVI:6.

9.18 The French text reads as follows:

> "Sous réserve des dispositions régissant la comparaison équitable énoncées au paragraphe 4, l'existence de marges de dumping pendant la phase d'enquête sera normalement établie sur la base d'une comparaison entre ... "

Here the situation is even clearer: a link with the second half of the sentence, i.e. the establishment of dumping margins, would not only be not natural and grammatically incorrect but simply impossible. It would be otherwise only if the sentence would have been drafted as:

> "Sous réserve des dispositions régissant la comparaison équitable énoncées au paragraphe 4, l'existence de marges de dumping sera, pendant la phase d'enquête, normalement établi sur la base d'une comparaison entre ... "

or

> "Sous réserve des dispositions régissant la comparaison équitable énoncées au paragraphe 4, l'existence de marges de dumping sera normalement établi pendant la phase d'enquête et sur la base d'une comparaison entre ... "

9.19 The Spanish text reads as follows

> "A reserva de las disposiciones del párrafo 4 que rigen la comparación equitativa, la existencia de márgenes de dumping durante la etapa de investigación se establecerá normalemente sobre la base de una comparación entre … "

As to its interpretation, similar considerations apply as above in French.

9.20 There is therefore only one plausible and correct reading of the term "during the investigation phase": to link it to the existence of margins of dumping and interpreting it as synonymous with "during the period of investigation", the time span relevant for the existence of dumping. This is the terminology used two lines above[405] and in many other places in the *AD Agreement*[406], which neither defines the phrase "during the investigation phase" nor uses it in any other place.[407]

9.21 I realize that the words "investigation phase" and "investigation period" are not identical, no more than "investigation phase" and "original investigation" assimilated by the Panel[408], but in my opinion the difference between "investigation period" and "investigation phase" is not such as to justify the radical conclusions which are drawn from this difference by the Panel. I therefore do not share the Panel's interpretation that Article 2.4.2 of the *AD Agreement* applies to original investigations only.

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[405] At the end of Article 2.4.1 of the *AD Agreement*

[406] E.g., Articles 2.2.1; 2.2.1.1; 9.5.

[407] Contrary to what the Panel posits (*supra*, para. 7.192) such a reading would be perfectly reasonable. Under the *AD Agreement*, dumping must necessarily exist during a certain period "of investigation". This period varies from one phase of the proceeding to the other, but dumping outside an investigation period cannot justify the imposition of measures.

[408] *Supra*, paras. 7.142 *et seq*.

9.22 The Panel's reading is different.[409] I shall therefore now examine if the term "during the investigation phase" would have to be interpreted narrowly, even if one were to follow the Panel's opinion that it has to be understood as related to the establishment, and not the existence, of dumping.

2. Meaning of the terms "investigation"/"investigation phase" throughout the *AD Agreement*

9.23 The term "investigation" is not defined in the *AD Agreement*. Negotiators realized this but, given differences between prospective and retrospective assessment systems, they renounced to further clarification.[410]

9.24 I agree with the Panel that, in Articles 3.3; 5.10; 7; 10.7 and 18.3 of the *AD Agreement*, the words have to be interpreted narrowly, referring to the original investigation only, as suggested by the United States for Article 2.4.2.[411]

9.25 A broader meaning, covering original investigations as well as assessment and review proceedings - which all, even if pursuing different purposes, involve the same type of investigations into prices or costs[412] and into the existence and the amount of dumping – is, however, implied by rules such as:

- Article 1: "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted an accordance with the provisions of this Agreement". "Initiated" of course refers to the original investigation. The further conduct of these investigations must however include the assessment and review stage. Otherwise these parts of the proceedings would fall outside the disciplines of the *AD Agreement*.

- Articles 2.2.1, 2.2.1, last sentence; 2.4.1: "period of investigation" is applicable not only to original investigations but also to new shipper reviews, changed circumstances reviews and assessment proceedings.

- Article. 2.2.1.1, first sentence; Article 2.2.2, first sentence: "Producer under investigation" of general application throughout all stages of the proceedings.

- Article 2.2.1.1, second sentence: cost allocation data supplied by the producer "in the course of the investigation" - same comment.

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[409] *Supra*, paras. 7.156 *et seq*. It is however interesting to note that, when examining the textual similarity between Articles 2.4.2 and 5.1 of the *AD Agreement*, the Panel systematically refers to "the existence of dumping during the investigation phase".

[410] The term "proceedings" used in Article 8.1 is a souvenir left in the *AD Agreement* of the futile efforts of negotiators to agree on a more precise definition.

[411] I note however that the terminology used by the United States administration under United States law varies and that, under EC law, reviews and refund procedures are "investigations". See for the United States practice *supra*, para. 7.120 and quotations made in paras. 123-126 of the EC-Second Written Submission; and for the EC's legislation, see Article 11.9 of Reg. No 384/96 of 22. 12. 1995, OJ No L 56 of 6.3.1996, p.1.

[412] *Cf.* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para 111: "Art. 11.3" (concerning reviews) "makes it clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Art. 11.3 assigns an active rather than a passive decision-making role to the authorities." The Appellate Body therefore concluded that the prohibition of zeroing in Article 2.4.2 also applies to sunset reviews, *cf.* para. 127.

- Article 3.2: examination of the volume and effect of dumped imports by the "investigating authorities" not limited to original investigations but also valid for reviews.

- Article 8.4: completion of "investigations" in case of undertakings - same comment.

This confirms that the meaning of the term "investigation" is not limited to original investigations throughout the *AD Agreement*[413] but varies, depending on the context.

9.26 Opinions expressed by Panels and the Appellate Body also vary:

- The European Communities points, in favor of a broad interpretation, to e.g. the panel report on *US – DRAMS* and to the panel report on *US – Countervailing Measures on Certain EC Products*[414] which have used the words "investigated" and "investigation" in connection with annual and sunset reviews carried out by the United States.

- The Panel, for its part[415], considers that the Appellate Body reports in *US – Carbon Steel*[416], *US – Corrosion Resistant Steel Sunset Review*[417] and *US – Oil Country Tubular goods Sunset Reviews*[418] support its interpretation. These Appellate Body reports in fact differentiate between investigations and reviews or the imposition and collection of duties, which indeed constitute different phases of antidumping proceedings. The key question, however, is another one: whether the term "investigation" in Article 2.4.2 of the *AD Agreement* has to be interpreted broadly or narrowly. This is an issue on which neither panels nor the Appellate Body have had an occasion to pronounce themselves. The reports, important as they are, therefore do not necessarily support the Panel's conclusions.

9.27 In the Panel's opinion[419], the analysis should focus on the meaning of the phrase "existence of margins of dumping during the investigation phase" as a whole and not on the word "investigation" taken in isolation. I do not see how this could justify the Panel's assimilation between "investigation phase" and "original investigation". First, if the term "investigation phase" is read in conjunction with the existence of dumping, it can only be assimilated with the term "investigation period" which under Article 2 of the *AD Agreement* is the time span relevant for the existence of dumping. Second, if the words "investigation phase" are read as related to the establishment of dumping, the word "phase" does not solve the problem either. For those interpreting the term "investigation" narrowly it might refer to the original investigation. For those, however, reading the term broadly it would simply distinguish the formal overall proceedings from the more informal pre-initiation stage of Article 5.3 of the *AD Agreement* where a more summary examination of dumping than prescribed by Article 2 of

[413] I note that the same view has been expressed by China (Oral Statement of 17.3.2005, para. 14); Hong Kong, China (*supra*, para. 7.136); Korea (Oral Statement of 17.3.2005, para. 11 *et seq*.); Mexico (Oral Statement of 17.3.2005); Norway (Oral Statement of 17.3.2005, paras. 5 and 6) and Turkey (Oral Statement of 17.3.2005, paras. 10 *et seq*).

[414] EC-Second Written Submission, paras. 168-170.

[415] Paras. 7.173 *et seq.*

[416] Paras. 58-97.

[417] Para. 107.

[418] Para. 279.

[419] *Supra*, paras. 7.153 *et seq*.

the *AD Agreement* is sufficient.[420] Thus I do not see any reason whatsoever for imposing the conclusion that the term "phase" used in Article 2.4.2 designates the original investigation only.[421]

9.28 The Panel[422] makes this step because it notes a textual similarity between the phrase "… the existence of margins of dumping during the investigation phase shall normally be established …" in Article 2.4.2 and the term "an investigation to determine the existence … of any alleged dumping" in Article 5.1 of the *AD Agreement*. But the existence of dumping is not only examined in original investigations. Assessment and review proceedings require the same kind of investigation into the existence of dumping. Also, Article 5.1 of the *AD Agreement* expressly underlines that investigations must determine not only the existence but also the degree of dumping, a task which, in the Panel's opinion, is typical for the assessment stage.[423] There may be a "similarity" of expressions used in Article 2.4.2 and 5.1 *AD Agreement* but it does not prove that the term "investigation", occurring more than 30 times in the *AD Agreement*, is used as synonymous to "original investigation" in Article 2.4.2 of the *AD Agreement*.

9.29 Article 9 of the *AD Agreement* is also highlighted by the Panel[424] in order to demonstrate the qualitative differences between investigations and reviews justifying a narrow interpretation of Article 2.4.2. But paragraph 4 of this Article 9 concerning sampling uses the term "investigation" irrespective of the fact that this may relate to an original investigation or to a later review. Similar considerations apply to Article 9.5 and its newcomer reviews, which refers to "period of investigation".

9.30 As to the cross-references in Article 11 and 12 of the *AD Agreement*, I am also not convinced by the Panel's argument[425] that they can only be explained by the fact that provisions applicable to "investigations" are not automatically applicable to review proceedings. For me they, on the contrary, confirm that original investigations and reviews involve the same kind of investigation into the existence and the amount of dumping.

9.31 Under those conditions, I consider that the term "investigation" in Article 2.4.2 of the *AD Agreement*, when compared to the other instances where the *AD Agreement* uses similar terms, does not present itself as limited to original investigations only.

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[420] The Panel, *supra*, para. 7.196, argues that, in a pre-initiation investigation, no margin calculations have to be made and that, therefore there was no need to highlight in Article 2.4.2 *AD Agreement* that this proviso should refer to post-initiation formal proceedings only. The Panel errs: no *prima facie* case can be established without comparing normal value and export prices in the pre-initiation phase, and zeroing can have a significant effect on the outcome of even summary investigations.

[421] This is confirmed by the following reflection: Article 2.4.2 of the *AD Agreement* second sentence admits asymmetry, i.e. zeroing, where there is targeted dumping. There is no reference to any "investigation phase" in this sentence. Therefore, if the first sentence were to be interpreted narrowly, prescribing symmetry and thus prohibiting zeroing for the investigation period only, which would then be the regime applicable after the original investigation? Since the second sentence entitles authorities to use zeroing in the presence of targeted dumping only, and this in all phases of the proceeding, it seems logical that, absent targeted dumping, symmetry and no zeroing should be prescribed in all phases of the proceedings too. This excludes a narrow interpretation of the first sentence limiting its validity to original investigations only. The term "during the investigation phase" must have another meaning.

[422] *Supra*, para. 7.156.

[423] *Supra*, para. 7.200.

[424] *Supra*, para. 7.201.

[425] *Supra*, para. 7.168.

3. Relationship between Article 2.4.2 and the "fair comparison" requirement in the first sentence of Article 2.4

9.32 Article 2.4 of the *AD Agreement* starts with a "Leitmotiv" placed at its very beginning: "A fair comparison shall be made between export price and normal value". The corresponding text resulting from the Tokyo Round was constructed differently[426]: what is now a separate first sentence of Article 2.4 of the *AD Agreement* was part of the present second sentence, worded in terms of an explanatory introduction to the more substantive rules which followed. By singling it out and placing it into a separate sentence the Uruguay Round has strengthened this "Leitmotiv", elevating it to a general principle governing all of Article 2.4 and its subparagraphs.[427]

9.33 The second to sixth sentences of Article 2.4 and its subparagraphs 2.4.1 and 2.4.2 elaborate this general and "overarching" principle, with however an exception for targeted dumping. According to the rules of interpretation of the *Vienna Convention*, they cannot exhaust it since otherwise they would deprive it of its meaning so that the first sentence would become a nullity, serving no purpose.[428] The first sentence thus constitutes an independent obligation which can be violated by an action that is not inconsistent with the other requirements of paragraph 4.

9.34 As to its scope, i.e. whether this is limited to price comparability, "the general subject matter expressly addressed in paragraph 4, ... or whether its reach extends beyond this paragraph",[429] the Panel concludes[430] that the provisions of Article 2.4.1 on currency conversion, of Article. 2.4.2 on the establishment of dumping margins and the provisions of the "chapeau" of Article 2.4 are part of a whole. "Since the subject matter of Article 2.4.2 in particular is different from price comparability, the inclusion of paragraph 2.4 and sub-paragraphs 2.4.1 and 2.4.2 in a single provision supports the interpretation that "fair comparison" in Article 2.4 is not limited to price comparability"[431] "by selecting comparable transactions or making adjustments but also applies to the issue of the calculation of margins of dumping."[432] The Panel thus follows the Appellate Body which had chosen as formulation: "Article 2.4 '... informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in [Article 2.4]"'.[433]

9.35 I agree with all these conclusions. My disagreement with the Panel starts where it measures zeroing against what it considers to be the "substantive meaning" of the term "fair comparison".[434] The Appellate Body has several times taken position on this issue:

> "Furthermore, we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of '**zeroing**' at issue in this dispute – **is not a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2**."[435]

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[426] "In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to Art. VI:1(b) of the General Agreement, the two prices shall be compared at the same level of trade…."

[427] Appellate Body Report, *EC – Bed Linen*, para 59.

[428] Supra, para. 7.253.

[429] *Supra*, para. 7.252.

[430] *Supra*, para. 7.254.

[431] *Supra*, para. 7.254.

[432] *Supra*, para. 7.258.

[433] Appellate Body Report, *EC – Bed Linen*, para. 59.

[434] *Supra*, para. 7.259.

[435] Appellate Body report, *EC – Bed Linen*, para. 55, emphasis added.

> "When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin**, whether in original investigations or otherwise**, that methodology will tend to **inflate the margins calculated**. Apart. from inflating the margins, such a methodology **could, in some instances, turn a negative margin of dumping into a positive margin of dumping.** As the Panel itself recognized in the present dispute, 'Zeroing' … may lead to a affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing. Thus the **inherent bias in a zeroing methodology** of this kind may **distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.**"[436] (footnote omitted)

> "Zeroing means, in effect, that at least in the case of some export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the entirety of the prices of some export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. **Zeroing thus inflates the margin of dumping** for the product as a whole."[437] (footnote omitted).

9.36 These decisions clearly support the suggestion that zeroing is unfair and inconsistent with the "fair comparison" requirement in Article 2.4 of the *AD Agreement*.[438]

9.37 The Panel argues, however, that the importance and value of these decisions is limited by the fact that the Appellate Body "has not actually made any legal findings that zeroing is inconsistent with Article 2.4 of the *AD Agreement*".[439] This may be correct, but I nevertheless consider that the Appellate Body's statements are more than *obiter dicta*. For me they are too well reasoned, too consistent to be considered as unsupported statements.

9.38 Also, the Appellate Body, in *EC – Bed Linen*[440] specifically refers to the "fair comparison" required by Article 2.4 and by Article 2.4.2 of the AD Agreement.

9.39 In *US – Corrosion Resistant Steel Sunset Review*, the Appellate Body upholds that decision, stressing that in *EC – Bed Linen* it "emphasized that a comparison such as that undertaken by the European Communities in that case is not a 'fair comparison' between export price and normal value as required by Articles 2.4 and 2.4.2 of the *AD Agreement*".[441] It is true that, in this case, the Appellate Body was not in a position to complete its analysis because the panel report did not contain sufficient factual findings.[442] The Appellate Body's statements are however legal, not factual, and there was no reason for the Appellate Body to make them if it was not convinced that they were justified.

9.40 The most interesting aspect of this Appellate Body's decision is however the fact that it is made in the context of a case which involved a review and that the Appellate Body underlined that its evaluation of the zeroing methodology as unfair applied irrespective of whether zeroing took place "in an original investigation or otherwise".[443] Since its factual information was insufficient, the Appellate

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[436] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135, emphasis added.
[437] Appellate Body Report, *US – Softwood Lumber V*, para. 101, emphasis added.
[438] This position is also taken also by the following third parties in this dispute: Argentina, Brazil; Hong Kong, China; India; Japan; Korea; Mexico and Norway.
[439] *Supra*, para. 7.270.
[440] Appellate Body Report, *EC – Bed linen*, para. 55.
[441] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 134 and 135.
[442] *Supra.* para. 7.273.
[443] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.

Body was not obliged to make this statement, but it made it, thus pronouncing itself on the crucial issue in the present dispute of whether there should be any differentiation between original investigations and later stages of the proceedings.[444]

9.41 As to the *US – Softwood Lumber V* case, it is true, as the Panel states[445], that the Appellate Body has examined zeroing only in the context of weighted average-to weighted-average comparisons, finally condemning it because, *inter alia*, it does not take full account of the prices of all export transactions and "thus inflates the margin of dumping for the product ...".[446] But zeroing presupposes averaging and, even if there would be no reference to weighted averages in Article 2.4.2, would it be fair within the meaning of Article 2.4 of the *AD Agreement* to apply arithmetical averages to dumping calculations or not to take full account of all transactions?

9.42 This leads me to the key element in the Panel's decision, the argument[447] that "to determine whether an approach is unfair there must be a discernible standard of appropriateness or rightness within the four corners of the *AD Agreement* which would provide a basis for reliably judging that there has been an unfair departure from the standard". Since Article 2.4.2 of the *AD Agreement*" is the only provision of the *AD Agreement* that specifically addresses the subject methods of determining margins of dumping", the Panel, interpreting Article 2.4.2 narrowly as limited to original investigations, then concludes that zeroing is not unfair within the meaning of Article 2.4 and inconsistent with Article 2.4.2 in original investigations only.

9.43 With all respect to the Panel and its thorough examination of the dispute, I find this argumentation inconceivable because of the results to which it leads, contradictory because in conflict with the independent nature of the fairness requirement under Article 2.4 of the *AD Agreement* recognized by the Panel[448] [449] and artificial because it seeks interpretation of the basic principle "informing all of Article 2"[450] in one of its most enigmatic subparagraphs. But even more important, the Panel's decision ignores a very important aspect, that Article 2.4.2 is preceded by the "subject to the provisions governing fair comparison in paragraph 4" requirement. This double security, additional to the independent principle established in the first sentence of Article 2.4, clearly subordinates Article 2.4.2 to the "fair comparison" rule of Article 2.4 with the consequence that, in case of conflict, the fairness principle prevails.

9.44 Therefore, the Panel's decision has made of Article 2.4 of the *AD Agreement* with its fairness principle "informing all of Article 2.4"[451] and of the "subject to" requirement heading Article 2.4.2 a nullity serving no purpose, thus also bypassing the *Vienna Convention*.

9.45 As to the "discernible standard of appropriateness or rightness within the four corners of the agreement which would provide a basis for reliably judging that there has been an unfair departure

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[444] A possibility which the Appellate Body denies**.**

[445] *Supra*, para. 7.273.

[446] Appellate Body Report, *US – Softwood Lumber V*, para. 101.

[447] *Supra*, paras. 7.260 *et seq*.

[448] *Supra*, para. 7.253.

[449] The Panel, in its rebuttal comments on my dissenting opinion posits that its interpretation of the "fair comparison" requirement in no way negates the legal effect of this provision as an independent obligation and that "the meaning of the 'fair comparison' requirement must be rooted in the concept of dumping and that … it is necessary to take into account the manner in which specific rules contained in the *AD Agreement* address that particular issue". This again ignores the fact that, due to the "subject to" provision, Article 2.4.2 is subordinated to the fairness principle in Article 2.4 first sentence. This clearly establishes a predominance and requires that, in order to avoid conflict, Article 2.4.2 is applied and interpreted in a manner compatible with Article 2.4.

[450] Appellate Body Report, *EC – Bed Linen*, para. 59.

[451] Appellate Body Report, *EC – Bed Linen*, para. 59.

from the standard"[452] of fairness, I am convinced that there at least four, either specifically related to the comparison exercise or more general in nature, permeating the entire *AD Agreement*, but also relevant in the context of price comparisons.

9.46 First: the requirement of consistency. The *AD Agreement* is based on the principle of a unique definition of dumping applying throughout all anti-dumping proceedings.[453] Nowhere in the *AD Agreement* is there any provision foreseeing different calculation methods for different stages of the proceedings:

- Article 2.1 defines the conditions under which sales below cost may be treated as not being in the ordinary course of trade;
- Article 2.4 prescribes in great detail which adjustments have to made under which circumstances;
- Article 2.4.1 does the same for exchange rates;
- Article 2.5 does this for indirect dumping.

9.47 It has never been argued that any of these rules should not apply at the assessment and the review stage. Depending on the circumstances, the effect of zeroing can be much more dramatic than many of the adjustments or calculations made under the above Articles. Is it possible, under these circumstances, to admit that zeroing is the only practice for which it would be fair to take a different line in the different stages of a proceeding?

9.48 All substantive definitions on injury and causality[454] apply to all stages of anti-dumping proceedings, from initiation to review and refund. Procedural requirements for initial investigations are, at least *mutatis mutandis*, equally valid for reviews[455] and price undertakings.[456] Is it fair, in these circumstances that the results of the original investigations, moderated by the absence of zeroing, are eclipsed by higher duties fixed in the assessment or review stage? In other words, is it possible that what is an unfair comparison for one stage of the proceeding becomes fair at another stage, that the concept of fairness varies with the context?

9.49 The argument now advanced by the Panel[457] in favour of such a contextual concept justifying the differentiation between original investigations and assessment and review proceedings is that a narrow interpretation of Article 2.4.2 would have a protective effect for exporters since "the limitation would make it more difficult to impose an anti-dumping duty in the first instance". Unfortunately, reality does not confirm this. The most recent Semi-Annual Report under Article 16.4 of the United States, covering the period 1 July to 31 December 2004[458], shows that anti-dumping activities undertaken by the United States during that period involved 248 cases. Not a single one of these cases has been terminated because of a No Dumping finding in the period under consideration! Margins may have been lower in the original investigations but expectations founded on this by exporters and importers must have been deceived in many or most of the cases by the heavier results in the assessment and review stage.

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[452] *Supra*, para. 7.260.
[453] Articles 1 and 2.1 of the *AD Agreement***.**
[454] Articles 1, 2 and 3 of the *AD Agreement*.
[455] Articles 11.4 and 12.3 of the *AD Agreement*.
[456] Articles 11.5 of the *AD Agreement*.
[457] *Supra*, para. 7.212.
[458] WTO doc. No ADP/N/126/USA, dated 8 March 2005.

9.50 Second: fairness of aggregation. Article 2.4.2 specifically calls for weighting of averages when establishing dumping margins. The Panel argues that the requirements of Article 2.4.2 are limited to original investigations. But even if this were the case, would it be possible to qualify as fair within the meaning of Article 2.4, creating obligations independent from Article 2.4.2, aggregations not taking full account of all comparable transactions?

9.51 Third: legal security and predictability of administrative action. Importers and exporters have to be informed of intended action[459] and provisional measures must indicate the estimated amount of duty[460] and, if the duty is higher than the provisional duty paid or payable, the difference shall not be collected. Therefore, can it be fair that exporters which have increased their export prices by the amount of the original dumping margin have to realize in the assessment or review phase that this was not enough to avoid further collection of duties?

9.52 Fourth: non-discrimination: the principle is specifically referred to in Article 9.2 of the *AD Agreement* but is of general importance for all anti-dumping and trade policy activity. Can it be fair therefore within the meaning of Article 2.4 of the *AD Agreement* that, in review proceedings, newcomers are subject to another, more radical method of calculation than exporters subject to the original investigation?

My answer to all these questions is negative.

9.53 The Panel argues[461] that "the fairness of the methodology logically cannot be divorced from the underlying conception of what dumping means". This leads back to the traditional dispute between the two schools on dumping. But the Appellate Body has consistently condemned zeroing as unfair in cases involving original investigations and this Panel follows the Appellate Body on this, thus adhering to the average concept of dumping for original investigations. Is it conceivable, under those circumstances, that there is now a new formation between the schools of dumping: one for the original stage and a different school for assessment and review proceedings?

4. Relationship between Articles 2.4. and 2.4.2 and Article 9.3 of the *AD Agreement*

9.54 Article 9.3 of the *AD Agreement* provides that the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2. It thus refers back to Article 2 enshrining the fairness principle, independent from Article 2.4 but "informing all of Article 2", and where the answers to the key question of this dispute are found. My disagreement with the Panel on the interpretation of this provision is not affected by Article 9.3 of the *AD Agreement*.

9.55 For clarity's sake, I would however like to note that I am not convinced by the Panel's argument that the qualitative differences between assessment proceedings under Article 9.3 and original investigations "could" be a rational basis for differentiating between the comparison methods applied for these operations.[462] Of course, there are differences of purpose, not of nature, between original investigations and sunset reviews[463] or assessment proceedings. This however by no means proves that there is a rational justification for applying different methods of comparison for the different stages of one and the same proceeding. Duties collected in the final instance are higher but it is difficult to conceive that this could be qualified as a rationale for such a differentiation.

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[459] Articles 6.9 and 12.1 of the *AD Agreement*.
[460] Article 7.2 of the *AD Agreement*.
[461] *Supra*, para 7.260.
[462] *Supra*, para. 7.201, double negative turned into the positive.
[463] Appellate Body Report, *US –Carbon Steel*, para. 58 - 97

9.56 As to whether administrations should follow an "exporter-oriented" or an "importer-oriented" assessment and refund system, the Panel argues[464] that "while the present *AD Agreement* … explicitly reflects the existence of retrospective and prospective duty assessment systems, Articles 9.3 and 9.4 provide little detail as regards the substantive methodology to be followed by an authority to determine the basis for attributing liability in respect of any particular transaction". This may be the case. Nevertheless, there can be no doubt that, from the point of view of fairness towards those subject to anti–dumping proceedings, an exporter–oriented approach, such as applied by the European Communities, has the advantage to take full account, via refund procedures, of "negative" dumping margins established for certain importers, while retrospective systems, such as utilized by the United States and certain other countries, achieve an effect equivalent to that of the now generally condemned model zeroing, insofar as they limit themselves to collecting "zero" from importers with negative margins without any compensation in an overall assessment of the exporter concerned.

9.57 Finally, retrospective and prospective assessment systems are both recognized by the *AD Agreement*.[465] Great care is taken by the *AD Agreement* to ensure immediate refunds if there has been excessive collection of duties under any of those systems. I cannot see any textual support in the *AD Agreement* for the assertion that the methods of comparison used for calculating such refunds should differ from one system to the other. I therefore disagree with the Panel when it posits[466] that there is no requirement that in identical situations retrospective and prospective duty assessment systems should lead to the same level of protection against dumped imports. In order to avoid that users of retrospective systems are advantaged the level of protection obtained, if not identical, should be at least comparable.

5. Conclusion

9.58 For all these reasons, I am not in a position to admit that the disciplines established for zeroing by Articles 2.4 and 2.4.2 are limited to original investigations.

9.59 Remains one last and final question: whether, under Article 17.6 of the *AD Agreement*, the United States is entitled to opt for a narrow interpretation of Article 2.4.2 of the *AD Agreement* because there is more than one permissible interpretation of this Article.

9.60 I would certainly have been tempted by such an approach in the early years after Marrakech. Since the year 2000 however, there has been a substantial and consistent body of Panel and Appellate Body jurisprudence with regard to zeroing, its nature and effects. WTO Members which were condemned have aligned their legislation or practice, without differentiating between original investigations and assessment and review proceedings.

9.61 This has created a new situation where the difference between the traditional two schools of thought on dumping[467] has become a moot issue. In fact, at least for original investigations, it is generally admitted by Panels and the Appellate Body now that:

- Article 2.4.2 of the *AD Agreement* prescribes symmetry and thus rules out simple zeroing, except where there is targeted dumping; and

- Model zeroing is incompatible with Article 2.4 and/or Article 2.4.2 of the *AD Agreement*, as this Panel has just confirmed.

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[464] *Supra*, para. 7.204
[465] Article 9.
[466] Supra, paras. 7.208 et seq.
[467] It should be noted also that Article 2.2.1 regarding sales below cost is based on the average behaviour over time concept of dumping.

"*De facto*" the overall price behavior concept of dumping, generally supported by modern economists, has therefore prevailed, and it would be unconceivable to have different "schools" on dumping for different stages of anti-dumping proceedings.

9.62 Under these circumstances, I do not think that there is more than one permissible interpretation of Articles 2.4 and 2.4.2 of the *AD Agreement* any longer and I would accept the claims of the European Communities:

(a) that simple and model zeroing are inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement* in assessment proceedings[468], except where there is targeted dumping;

(b) that § 351.414 (c)(2) of the United States Anti-Dumping Regulations[469], which foresees simple zeroing in review proceedings, is inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement*; and

(c) that the United States zeroing methodology used in assessment and review proceedings is inconsistent with Articles 2.4 and 2.4.2 of the *AD Agreement*.

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[468] Technically speaking, there is no claim of the European Communities in respect of review proceedings. The legal situation is the same however, and this is the reason why I have generally mentioned assessment and review proceedings together.

[469] Fed. Reg. Vol. 62, No 96 of 19.5.1997, p. 27415.