United States – Continued Existence and Application of Zeroing Methodology

(AB-2008-11 / DS350)

Other Appellant Submission of the United States of America

November 21, 2008

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SERVICE LIST

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US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. Introduction and Executive Summary

1. This dispute arises from a challenge by the European Communities ("EC") to the application of the so-called "zeroing methodology" by the United States. The Panel concluded that the U.S. application of "simple zeroing" in the 29 administrative reviews at issue rested on a permissible interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").[1] Yet contrary to Article 17.6(ii) of the AD Agreement, the Panel found that the United States acted inconsistently with the AD Agreement and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") by applying zeroing in the reviews at issue.

2. This result is unfortunate. Nothing in the DSU, including "security and predictability" and the "prompt settlement of disputes" relied on by the Panel, overrides the special requirements of Article 17.6(ii). The United States appeals the Panel's findings of inconsistency as to the 29 administrative reviews, which fail to conform to the standard in Article 17.6(ii). The United States respectfully asks that the Appellate Body reverse the Panel's findings that the use of simple zeroing in the 29 reviews was WTO-inconsistent.

3. The United States also appeals the Panel's preliminary ruling that the 14 administrative reviews and sunset reviews, included in the EC's panel request but not its consultations request, were within its terms of reference. The Panel's finding rests on an incorrect interpretation of Articles 4 and 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), as well as Articles 17.3, 17.4, and 17.5 of the AD Agreement. And lastly, the United States requests that the Appellate Body find that the Panel failed to make an objective assessment of the EC's claims against the eight sunset reviews, as required under Article 11 of the DSU. Specifically, the Panel improperly found that the EC made a *prima facie* case that so-called "model zeroing" was used in the underlying investigations relied on in reaching the sunset review determinations.

4. The United States provides a more detailed summary of its arguments below.

A. The 14 Antidumping Administrative Reviews and Sunset Reviews are not Within the Panel's Terms of Reference

5. The United States requested a preliminary ruling that measures appearing in the EC's panel request, but not in its consultations request, were outside the Panel's terms of reference. The EC's panel request included 14 alleged measures – 7 final and 3 on-going additional sunset reviews, and 3 final and 1 on-going additional administrative reviews. None of these 14 alleged measures were referenced in the EC's consultation request. The Panel, however, fundamentally

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[1]The United States uses the term "simple zeroing," as well as the term "model zeroing," in the same way that the Panel used those terms. *See* Panel Report, paras. 7.7-7.8. As the Panel noted, the terms "model zeroing" and "simple zeroing," which are no where found in the AD Agreement or the GATT 1994, were used by the EC, and similarly by prior panels and the Appellate Body. The Panel also stated, "[w]e would like to underline, however, that such use is for ease of reference only, and does not prejudge our assessment of the WTO-compatibility of the measures at issue." Panel Report, para. 7.8.

misconstrued the requirements of the DSU and found that the 14 measures were within its terms of reference. The United States respectfully requests that the Appellate Body reverse these findings.

6. Under Articles 4 and 6 of the DSU, a Member must first request consultations on a measure before requesting establishment of a panel with respect to that measure. And a measure included in the panel request, but not in the consultations request, cannot fall within the Panel's terms of reference. The Panel misconstrued these provisions and found that as long as the additional measures in the panel request relate to the same dispute or subject matter, they fall within the scope of the proceeding.

7. The Panel misunderstood the requirements of the DSU. It follows from those requirements that measures not identified in the consultations request but subsequently included in the panel request could only be within the terms of reference of the Panel if the additional measures are in essence the same measures as those identified in the consultations request. As the Appellate Body found in *US – Certain EC Products*, legally distinct measures may not be added to a panel request if they were not identified in the consultations request. Here, each additional administrative review and sunset review was separate and legally distinct from those measures listed in the consultations request.

8. The Panel did not apply the approach followed by the Appellate Body in *US – Certain EC Products*. Instead, the Panel identified some supposed "striking similarities" between the measures that the EC had listed in the consultation request and those it had not listed, but nothing in the Appellate Body's report, nor in the DSU, supports the Panel's "striking similarities" test. Moreover, the Panel's focus was on the fact that the EC's legal *claims* were the same in respect of all those measures. Claims and measures are separate aspects of the matter before a panel. Just because a complaining party may wish to raise the same legal claim with respect to two measures does not mean that those measures are not "legally distinct."

B. The Panel Erred in Finding that the use of Simple Zeroing in the 29 Administrative Reviews at Issue was Inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994

9. As the United States demonstrates in this submission, the use of so-called simple zeroing in the 29 administrative reviews at issue rests on a permissible interpretation of the AD Agreement. The Panel in this dispute reached the same conclusion. Nevertheless, the Panel ultimately found that the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by applying simple zeroing in the 29 administrative reviews. This finding was based on an improper application of the standard of review and should be reversed.

1. The Panel Misapplied Article 17.6(ii) of the AD Agreement

10. In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) with respect to the interpretation of provisions of the AD Agreement. According to that provision, "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law," and when "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."

11. Here, the Panel applied the customary rules of interpretation and agreed that the AD Agreement could be interpreted as permitting the use of simple zeroing in administrative reviews. It concluded that the U.S. position reflected at least one permissible interpretation of the relevant provisions of the AD Agreement. Yet the Panel disregarded the standard of review under Article 17.6(ii) and found that the application of zeroing in the reviews at issue was WTO-inconsistent. The Panel's departure from Article 17.6(ii) appears to rely on Articles 3.2 and 3.3 of the DSU. However, nothing in those articles, or elsewhere in the DSU, overrides the special requirements in Article 17.6(ii).

2. The United States did not act Inconsistently with the AD Agreement and the GATT 1994 by Applying Simple Zeroing in the Administrative Reviews at Issue

12. The United States has maintained that its use of so-called simple zeroing in the 29 administrative reviews at issue was consistent with the obligation in Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 because with respect to each transaction, the amount of antidumping duty does not exceed the margin of dumping, where the margin of dumping is the amount by which the transaction price of the product sold and imported in the transaction is less than the normal value of that product. As the Panel recognized, this transaction-specific understanding of the term "margin of dumping," as used in Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement is, at the very least, a permissible interpretation of the AD Agreement.

13. The term "margin of dumping" as used in those provisions can be understood as relating to individual transactions. A transaction-specific meaning of "margin of dumping" is permissible because dumping is defined as occurring in the course of a commercial transaction in which the product, which is the object of the transaction, is "introduced into the commerce" of the importing country at an export price that is "less than normal value." In addition, the term "less than normal value" is defined as when the "price of the product exported . . . is less than the comparable price . . . . " These definitions can easily be applied to individual transactions and do not require an examination of export transactions at an aggregate level.

14. Examination of the term "product" as used throughout the AD Agreement and the GATT 1994 demonstrates that the term "product" in these provisions does not exclusively refer to "product as a whole," nor does it mean that dumping must be determined on an exporter-specific basis. In sum, there is nothing in the ordinary meaning of "product" or "products", or in the context of those terms in the GATT 1994 and the AD Agreement, that compels a reading of those terms that excludes individual transactions. Therefore, the words "product" and "products" as they appear in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 cannot be understood to provide a textual basis for an interpretation that requires margins of dumping established in relation to the "product" must necessarily be established on an aggregate basis for the "product as a whole."

15. Likewise, an examination of the term "margins of dumping" as used in Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 provides no support for the interpretation of the term as solely, and exclusively, relating to the "product as a whole." Additionally, the term "margin of dumping," as used elsewhere in the AD Agreement and the GATT 1994, does not refer exclusively to the aggregated results of comparisons for the "product as a whole." There is no meaningful explanation as to why the text of Article VI precludes the calculation of a margin of dumping on a transaction-specific basis.

16. The position advanced by the EC overlooks any possibility that the definitions of "dumping" and "margin of dumping" incorporate the same flexibility of meaning that derives from the fact that the term "product" ordinarily has a meaning that is either collective or transaction-specific. The definition of these terms, used in a wide variety of contexts throughout the provisions of the AD Agreement and the GATT 1994, incorporate a flexibility of meaning that permits these terms to be understood based on the context in which they are used. Moreover, there seems to be no temporal limit to the extent of the obligation to continue aggregating comparison results.

17. In view of the 1960 report of the Group of Experts, it must be conceded that, historically the concept of dumping has been understood to be applicable at the level of individual export transactions. Thus, Article VI of the GATT 1947 was understood to relate to individual transactions, and although the Uruguay Round negotiators discussed proposals to restrict "zeroing," no such proposal was agreed upon and the text of Article VI remained unchanged.

18. The importer-specific nature of the payment of antidumping duties supports the view that a "margin of dumping" need not be established exclusively on the basis of all of an exporter's transactions considered in the aggregate. A transaction-specific understanding of the term "margin of dumping" is particularly appropriate in the context of antidumping duty assessment. Individual transactions are both the means by which less than fair value prices are established and the mechanism by which the object of the transaction (i.e., the "product") is "introduced into

the commerce of the importing country." Likewise, antidumping duties are assessed on individual entries resulting from those individual transactions. Therefore, the obligation set forth in Article 9.3 to assess no more in antidumping duties than the margin of dumping, is similarly applicable at the level of individual transactions.

19. Requiring that antidumping duty liability be determined for the product "as a whole" on an exporter-specific basis, is inconsistent with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment. Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. There is no reason why liability for payment of antidumping duties may not be similarly assessed on the basis of transaction-specific export prices less than normal value in the retrospective systems applied by the United States. Accepting the interpretation that a Member must aggregate the results of *"all"* comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value system. This result, however, is contrary to the very concept of the prospective normal value system.

20. An interpretation leading to a prohibition on zeroing in reviews would lead to perverse incentives and absurd results because as the Panel noted, it "would favor importers with high margins *vis-à-vis* importers with low margins." Such a competitive disincentive to engage in fair trade could not have been intended by the drafters of the AD Agreement and should not be accepted as consistent with a correct interpretation of Article 9.3.

21. In *US – Zeroing (EC)*, *US – Softwood Lumber Dumping (Article 21.5)*, *US – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)*, each of the panels recognized that the customary rules of interpretation of public international law precluded an interpretation that rendered the targeted dumping provision of Article 2.4.2 redundant due to the fact that, under a general zeroing prohibition, the average-to-average comparison method and the average-to-transaction comparison method would yield identical results. The Panel shared the concerns raised by the panel in *US – Stainless Steel (Mexico)* and tended to agree with the views expressed by the United States that a general prohibition of zeroing would render the second sentence of Article 2.4.2 *inutile* and therefore run counter to the principle of effective treaty interpretation.

22. The Appellate Body's objections to this argument, however, are not persuasive. First, the panels have specifically addressed all of the situations under which it was argued that mathematical equivalence would not obtain and found these situations did not represent methodologies consistent with the AD Agreement. Second, mathematical equivalence is not a "non-tested hypothesis" because the EC itself uses the average-to-transaction comparison in investigations and, when addressing this issue before domestic tribunals, agrees with the United States and the prior panels reports, that a general prohibition of zeroing applied equally to both assessment proceedings and original investigations, would render the average-to-transaction

comparison *inutile*. Third, the fact that the second sentence of Article 2.4.2 is an exceptional methodology does justify accepting an interpretation that would deny the second sentence of Article 2.4.2 the very function for which it was created. Fourth, nothing in the text of the provisions suggests that one part of the identified pattern may be treated in one way (i.e., used in average-to-transaction comparisons) while another part of the identified pattern may be treated differently (i.e., ignored or used in average-to-average comparisons), which would in any event be inconsistent with the Appellate Body's conclusion that "all" export transactions must be included when performing average-to-average or transaction-to-transaction comparisons. Fifth, even if the use of average-to-transaction comparisons with a subset of the export transactions is to be done in conjunction with the use of the average-to-average comparison for the remaining export transactions, then the Appellate Body's conclusion is a *non sequitur* because the mathematical equivalence is not avoided by using average-to-transaction and average-to-average comparisons in combination under the second sentence of Article 2.4.2.

C. The Panel Failed to Undertake an Objective Assessment of the EC's Claims Related to the Eight Sunset Reviews

23. The Panel here failed to make an objective assessment under Article 11 by finding that the United States acted inconsistently with its obligations under Article 11.3 of the AD Agreement in the eight sunset reviews at issue. More specifically, the Panel reached an erroneous conclusion that the EC made a *prima facie* case that the margins in the underlying prior investigations were obtained through so-called model zeroing, despite the absence of supporting evidence on the record.

24. The Panel's finding with respect to the sunset reviews simply assumed that particular margins at issue were "obtained through model zeroing in prior investigations." The Panel's sole basis for its finding with respect to the particular investigation margins at issue in the eight sunset review determinations was language from a *Federal Register* notice in which Commerce announced that it would no longer use model zeroing in average-to-average comparisons in investigations. Such a general statement does not lead to the conclusion that the margins of all the specific investigations used in the sunset reviews were calculated using zeroing. Yet the Panel erroneously considered this evidence sufficient to establish the reliance by the United States on model zeroing in the underlying investigations. Thus, the Panel failed to undertake an objective assessment of the matter before it.

25. The United States now turns to a more detailed examination of errors by the Panel.

II. The Panel Erred as a Matter of Law in Finding That the 14 Antidumping Administrative Reviews and Sunset Reviews Identified in the EC's Panel Request, But Not in Its Consultations Request, Were Within the Panel's Terms of Reference

26. As noted above, the United States requested a preliminary ruling that measures appearing in the EC's panel request, but not in its consultations request, were outside the Panel's terms of reference.[2] The EC's panel request identified 14 additional alleged measures – 7 final and 3 on-going additional sunset reviews,[3] and 3 final and 1 on-going additional administrative reviews.[4] None of these 14 alleged measures were included in the EC's consultation request, and as the Panel indicated, there was no disagreement between the parties that these 14 alleged measures were not identified in the EC's consultations request.[5] The Panel, however, fundamentally

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[2]U.S. First Written Submission, paras. 42-44, 47-65; U.S. Rebuttal Submission, paras. 9-17. The United States notes the irony that the EC sought to dispense with consultations on measures in this dispute, given its position in past disputes that consultations are "'a fundamental prerequisite for lawful panel proceedings.'" *Mexico – HFCS (Article 21.5) (AB)*, para. 33.

[3]*Compare* WT/DS350/6 (11 May 2007), Annex, *with* WT/DS350/1 (3 October 2006), Annex; WT/DS350/1/Add.1 (11 October 2006), Annex. The additional sunset reviews are the final sunset review determinations: *Ball Bearings and Parts Thereof from Italy*, 71 Fed. Reg. 54,469 (Sept. 15, 2006) (Exhibit EC-71); *Ball Bearings and Parts Thereof from Germany*, 71 Fed. Reg. 54,469 (Sept. 15, 2006) (Exhibit EC-72); *Ball Bearings and Parts Thereof from France*, 71 Fed. Reg. 54,469 (Sept. 2006) (Exhibit EC-73); *Stainless Steel Sheet and Strip in Coils from Germany*, 70 Fed. Reg. 44,886 (Aug. 4, 2005) (Exhibit EC-74); *Stainless Steel Plate in Coils from Belgium*, 70 Fed. Reg. 41,202 (July 18, 2005) (Exhibit EC-75); *Ball Bearings and Parts Thereof from the United Kingdom*, 71 Fed. Reg. 54,469 (Sept. 15, 2006) (Exhibit EC-76); *Stainless Steel Sheet and Strip in Coils from Italy*, 70 Fed. Reg. 44,886 (Aug. 4, 2005) (Exhibit EC-69). The panel request also includes the on-going sunset reviews *Steel Concrete Reinforcing Bars from Latvia*, 72 Fed. Reg. 16,767 (April 5, 2007) (USITC had not yet determined injury at time of panel request) (Exhibit EC-70); *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 72 Fed. Reg. 7604 (Feb. 16, 2007) (preliminary results) (Exhibit EC-77); and *Certain Pasta from Italy*, 72 Fed. Reg. 5266 (Feb. 5, 2007) (USITC had not yet determined injury at time of panel request) (Exhibit EC-78).

[4]*Compare* WT/DS350/6 (11 May 2007), Annex, *with* WT/DS350/1 (3 October 2006), Annex; WT/DS350/1/Add.1 (11 October 2006), Annex. The additional final administrative review determinations are: *Steel Concrete Reinforcing Bars from Latvia*, 71 Fed. Reg. 45,031 (Aug. 8, 2006) (identified as preliminary results in consultation request) (Exhibit EC-65); *Stainless Steel Sheet and Strip in Coils from Germany*, 71 Fed. Reg. 45,024 (Aug. 8, 2006) (identified as preliminary results in consultation request) (Exhibit EC-49); and *Certain Pasta from Italy*, 72 Fed. Reg. 7011 (Feb. 14, 2007) (Exhibit EC-65). The additional on-going administrative review is *Certain Hot Rolled Carbon Steel Flat Products from the Netherlands*, 70 Fed. Reg. 71,523 (December 11, 2006) (preliminary results) (Exhibit EC-59).

[5]The United States also notes that among these fourteen measures were four preliminary measures. The United States asked for a preliminary ruling that these four measures were outside the Panel's terms of reference because they were not final at the time of panel establishment, as required by Article 17.4 of the AD Agreement. The Panel ruled in favor of the United States and found that these four alleged measures were outside its terms of reference. *See* Panel Report, paras. 7.70-7.77. The EC has appealed this ruling. *See* EC Notice of Appeal, Part(b).

misconstrued the requirements of the DSU and found that the 14 measures were within its terms of reference.[6] The United States respectfully requests that the Appellate Body reverse this finding.

27. Under Article 7.1 of the DSU, a panel's terms of reference are in the first place determined by the complaining Member's request for the establishment of a panel which, pursuant to Article 6.2 of the DSU, must "identify *the specific measures at issue.*"[7] There are, however, limits on what measures a complaining Member may include within the panel request (and thus what measures may come within a panel's terms of reference). In particular, a Member may only file a panel request with respect to a measure upon which the consultations process has run its course. Specifically, Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute." In turn, Article 4.4 of the DSU provides that a request for consultations must "includ[e] identification of *the measures at issue*."[8] It follows that under these provisions, a complaining Member may not include in its panel request measures which were outside the request for consultations, and thus a panel's terms of reference cannot include such measures.

Apart from the EC appeal, the United States would only need to seek reversal as to ten findings, although the Panel's terms of reference analysis was flawed with respect to all 14. The United States has included the other four measures because of the pending EC appeal.

[6]Panel Report, para. 7.28, 8.1(a). The United States also objected that the EC's identification of the "continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders" in 18 cases appeared for the first time in the EC's panel request and was therefore outside the Panel's terms of reference. *See* U.S. First Written Submission, paras. 61-65; U.S. Rebuttal Submission, paras. 11, 13. The Panel found that this alleged measure fell outside its terms of reference because it did not meet the specificity requirement set out under Article 6.2 of the DSU. The Panel concluded that "[w]e therefore need not, and do not, address the US assertion that the continued application of the 18 duties at issue also falls outside our terms of reference on the grounds that it was not raised in the EC's consultations request." Panel Report, para. 7.29. The United States notes that the EC has appealed the Panel's finding under Article 6.2 of the DSU. *See* EC Notice of Appeal, Part (a). Should the Appellate Body reverse the Panel's finding on specificity, the United States requests that the Appellate Body find the alleged 18 measures outside the Panel's terms of reference on the grounds that they were identified in the EC's panel request, but not in its consultations request. *See* U.S. First Written Submission, paras. 61-65; U.S. Rebuttal Submission, paras. 11, 13.

[7]Emphasis added.

[8]Emphasis added.

28. These rules apply with equal force to disputes brought under the AD Agreement, and the AD Agreement itself clarifies further the relationship between consultations and panel requests.[9] Article 17.3 of the AD Agreement states that consultations are to be held with the view of "reaching a mutually satisfactory resolution of the matter."[10] Moreover, Article 17.4 provides that when "consultations pursuant to [Article 17.3 of the AD Agreement] have failed to achieve a mutually agreed solution" and "final action has been taken," by the administering authorities, a Member "may refer the matter to the Dispute Settlement Body ("DSB")." And, under Article 17.5, the DSB "shall, at the request of the complaining party, establish a panel to examine the matter." Thus, under the special and additional rules contained in the AD Agreement as well as under the DSU, a measure that is outside the request for consultations cannot be included in a panel request or in a panel's terms of reference.

29. Articles 4 and 6 of the DSU, along with Articles 17.3, 17.4, and 17.5 of the AD Agreement, therefore set forth a fundamental jurisdictional requirement for a complaining Member to request consultations on a matter before that matter may be referred to the DSB for the establishment of a panel. Moreover, pursuant to these provisions, a panel request cannot include measures which were outside the scope of the request for consultations, and thus a panel's terms of reference cannot include such measures either. Here, the EC added 14 distinct determinations to its panel request. These measures were not identified anywhere in its consultations request, and pursuant to Articles 4 and 6 of the DSU, and the parallel provisions in the AD Agreement, they were not within the Panel's terms of reference.

30. The Panel reached the opposite conclusion based on an incorrect reading of the DSU. According to the Panel, "the DSU does not contain a provision that addresses" "the significance,

[9]Pursuant to DSU Article 1.2 and Appendix 2, in disputes arising under the AD Agreement, the provisions of the DSU "apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2," that is, Articles 17.4 through 17.7 of the AD Agreement. To the extent of any differences, which do not exist here, between the rules of the DSU and the AD Agreement, the special rules and procedures in Articles 17.4 to 17.7 would apply. *See* DSU, Article 1.2.

[10]In *Guatemala – Cement (AB)*, the Appellate Body explained that what constitutes the "matter" is the "key concept in defining the scope of a dispute that may be referred to the DSB under the *Anti-Dumping Agreement* and, therefore, in identifying the parameters of a panel's terms of reference in an anti-dumping dispute." *Guatemala – Cement I (AB)*, para. 70. The Appellate Body analyzed the "matter" referenced in Articles 17.3 through 17.6 of the AD Agreement and found that the specific requirements in Article 6.2 of the DSU – identification of the specific measure at issue and the legal basis for the claim – define the "matter" and, accordingly, the panel's terms of reference. *See Guatemala – Cement I (AB)*, paras. 71-73. The Appellate Body also found that the term "matter," has this same meaning in Article 17.3, relating to the request for consultations, and Articles 17.4 and 17.5, relating to the referral of a matter to the DSB and the request for the formation of a panel to examine the matter. *See Guatemala – Cement I (AB)*, para. 76.

if any, that a complaining party's consultations request has on a panel's terms of reference."[11] The Panel further noted that provisions of the DSU "do not directly address the issue of whether a complaining Member is barred from raising claims in connection with measures identified in its panel request, which were not identified in its consultations request."[12] The Panel, however, misconstrued the meaning of the various provisions of the DSU concerning consultations and panel requests, and the relationship between them.

31. When those provisions are read together, it is clear that there is a progression between the measures discussed in consultations conducted pursuant to Article 4 of the DSU and the measures identified in the request to establish a panel pursuant to Article 6, which in turn, form the basis of the panel's terms of reference under Article 7.[13] Indeed, the Appellate Body in *Brazil – Aircraft* stated that:

> Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.[14]

Moreover, the Appellate Body has found that "as a general matter, consultations are a prerequisite to panel proceedings."[15]

32. Other provisions of the DSU support an interpretation of Articles 4 and 6 whereby consultations must first be requested on a measure before a panel may be established concerning that measure. In particular, the Panel's interpretation of Articles 4 and 6 fails to account for the relevant context provided by Article 4.1 of the DSU. Reading Articles 4 and 6 to allow a Member to request a dispute settlement panel on a measure that was not consulted upon appears contrary to the goal under Article 4.1 of the DSU of "strengthen[ing] and improv[ing] the effectiveness of the consultation procedures employed by Members."[16]

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[11]Panel Report, para. 7.20.

[12]Panel Report, para. 7.22.

[13]The same progression is found between the measures identified under Article 17.3 of the AD Agreement, and the measures referred to a panel under Articles 17.4 and 17.5 of the AD Agreement.

[14]*Brazil – Aircraft (AB)*, para. 131.

[15]*Mexico – HFCS (Article 21.5) (AB)*, para. 58.

[16]*See also* DSU Article 3.3 ("The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance

33. The Panel incorrectly rejected the U.S. preliminary objection on the grounds that the panel request referred to the "same dispute" or "same subject matter" as the consultation request, and considered that the 14 additional measures involved the same dispute or subject matter.[17] However, the Panel ignored the relevant inquiry where measures not identified in the consultation request are identified in the panel request. As the United States explained,[18] the critical question under the DSU is whether the measures added to the panel request are in essence the *same measures* as those identified in the consultations request. Where, as here, additional, legally distinct measures are included in the panel request, but not the consultations request, they may not be included in the panel's terms of reference. The Appellate Body's reasoning in the *US – Certain EC Products* report supports this view.

34. The United States noted that the reasoning of the Appellate Body report in *US – Certain EC Products* supports the view that the 14 additional measures could not be within the Panel's terms of reference.[19] The Panel, however, concluded: "we do not agree that the Appellate Body's reasoning in *US – Certain EC Products* undermines our own reasoning [that the 14 additional measures are within the terms of reference]."[20] The Panel failed to understand the relevance of that report to the present dispute. In *US – Certain EC Products*, the EC's request for consultations made reference to the increased bonding requirements levied by the United States as of March 3, 1999, on EC listed products in connection with the *EC – Bananas* dispute, but *not* to U.S. action taken on April 19, 1999, to impose 100 percent duties on certain designated EC products.[21] When the EC sought findings with respect to both the March 3rd measure *and* the April 19th action, the panel found that the March 3rd measure and April 19th action were legally distinct, and that the April 19th action did not fall within the panel's terms of reference.[22] The Appellate Body upheld the panel, finding that the scope of measures subject to establishment of a panel is defined by the consultations request, and that a separate and "legally distinct" measure may not be added in the panel request.

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between the rights and obligations of Members.").

[17]Panel Report, paras. 7.23, 7.28.

[18]U.S. Rebuttal Submission, para. 13.

[19]*See, e.g.*, *US – Certain EC Products (AB)*, paras. 59-60.

[20]Panel Report, paras. 7.27.

[21]*US – Certain EC Products (AB)*, para. 70.

[22]*US – Certain EC Products (AB)*, para. 82.

35. Here, the EC identified in its consultations request separate antidumping measures that are legally distinct under U.S. law; the EC subsequently added 14 legally distinct antidumping measures to its panel request. The four additional administrative review determinations and 10 additional sunset review determinations, even if they pertained to the same subject merchandise as the measures listed in the consultations request, resulted from completely different proceedings than those identified in the consultations request. They each involved different time frames and different calculations using different information and data. The administrative reviews, conducted by the Department of Commerce alone, each established an assessment rate for entries occurring during a particular period of review and set a cash deposit rate that applied to new entries with respect to certain identified exporters until the conclusion of the next administrative review. By contrast, the sunset reviews resulted in a determination about whether certain antidumping orders, as a whole, regardless of individual exporter, should be revoked going forward. As part of the sunset review proceedings, the Department of Commerce issued a determination of the likelihood of the recurrence or continuation of dumping, while the U.S. International Trade Commission, a distinct independent agency – which plays no role in an administrative review – issued a determination of the likelihood of the recurrence or continuation of material injury. All of these factors together demonstrate that each additional measure was separate and legally distinct from the measures listed in the consultations request, and like in *US – Certain EC Products*, those additional measures fell outside the Panel's terms of reference.

36. The Panel did not apply the approach followed by the Appellate Body in *US – Certain EC Products*. Instead, the Panel identified some supposed commonalities between the measures that the EC had listed in the consultation request and those it had not listed. The Panel called these similarities "striking,"[23] but nothing in the DSU or the Appellate Body's report in *US – Certain EC Products* supports the Panel's "striking similarities" test. Moreover, the Panel's focus was on the fact that the EC's legal *claims* were the same in respect of all those measures. That approach confused two aspects of the "matter" that has been referred to the Panel to examine by the DSB. As the Appellate Body first noted in its report in *Guatemala – Cement I*, claims and measures are separate aspects of the matter before a panel.[24] Just because a complaining party may wish to raise the same legal claim with respect to two measures does not mean that those measures are not "legally distinct."

37. To the contrary, as explained above,[25] examining the 14 additional measures shows their distinctiveness. The additional administrative review and sunset review determinations differ substantively and procedurally from the measures in the consultations request. The additional

[23]Panel Report, para. 7.27.

[24]*Guatemala – Cement I (AB)*, paras. 69-73, 83-89.

[25]*See* para. 35, *supra*.

measures were separate and legally distinct, and the Panel erred as a matter of law in finding that these measures, which were included in the EC's panel request, but not in its consultations request, were within its terms of reference.

38. The Panel's reliance on the dispute settlement reports in *Brazil – Aircraft* is also misplaced.[26] In that dispute, the Appellate Body considered whether certain regulatory instruments relating to the Brazilian regional aircraft export subsidies program PROEX were properly before the panel.[27] Canada had included new regulatory measures under PROEX in its panel request, but not in its request for consultations. The new regulatory instruments were simply periodic re-enactments of identical measures that were identified in the consultations request as part of Canada's challenge to payments under those measures. The Appellate Body found that the new regulations "did not change the essence" of the export subsidies that were at issue in the dispute and included in the request for consultations, and that they therefore were properly before the panel.[28] In other words, the Appellate Body recognized that the consultations and panel request contained essentially the same measures, unlike the situation here.

39. For the above reasons, the United States respectfully requests that the Appellate Body reverse the Panel's findings that the 14 additional, legally distinct measures identified in the EC's panel request, but not in its consultations request, were within the Panel's terms of reference.

III. The Panel Erred as a Matter of Law in Finding That the United States Acted Inconsistently With the AD Agreement and the GATT 1994 by Applying Simple Zeroing in 29 Periodic Reviews

40. The United States has maintained that its use of so-called simple zeroing in the 29 administrative reviews at issue was consistent with the obligation in Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 because with respect to each transaction, the amount of antidumping duty does not exceed the margin of dumping, where the margin of dumping is the amount by which the transaction price of the product sold and imported in the transaction is less than the normal value of that product. This transaction-specific understanding

[26]Panel Report, para. 7.23. The Panel also cited to the panel reports in *Japan – Agricultural Products II* and *Mexico – Rice*. *See* Panel Report, para. 7.23, n. 39. In both of those reports, the panel was considering whether the complaining Member had improperly added to the *legal basis* for its complaint. *See Japan – Agricultural Products II (Panel)*, para. 8.4(i); *Mexico – Rice (Panel)*, paras. 7.41-7.43. This issue is not the same as whether *measures* identified in a panel request, but not in a consultations request, are within a panel's terms of reference.

[27]*Brazil–Aircraft (AB)*, paras. 127-29.

[28]*Brazil–Aircraft (AB)*, para. 132.

of the term "margin of dumping," as used in Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 is, at the very least, a permissible interpretation of the AD Agreement.

41. As we discuss more fully below, the interpretation that "margin of dumping" as used in these provisions has a transaction-specific meaning is permissible because, *inter alia*, the text of the relevant provisions define "dumping" in terms of the "price" of a "product" that is "introduced into the commerce of another country," and the ordinary meaning of these terms include a meaning that relates to an individual sales transaction. Thus, in the *US – Zeroing (Japan)* dispute, the panel correctly concluded that the definition of dumping itself "undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions."[29] Moreover, Article VI of the GATT 1947 was understood to relate to individual transactions, and although the Uruguay Round negotiators discussed proposals to restrict "zeroing," no such proposal was agreed upon and the text of Article VI remained unchanged. Likewise, in the context of Article 9, antidumping duties are assessed on individual entries for which importers bear the liability on a transaction-specific basis such that an transaction-specific understanding of the "amount of antidumping duty" and the "margin of dumping" is appropriate.

42. Additional reasons favor an interpretation that does not prohibit zeroing in the context of assessment proceedings. Prospective normal value system of assessing antidumping duty liability would necessarily be transformed into retrospective systems. The second sentence of Article 2.4.2 would be rendered *inutile*, and a perverse disincentive to engage in fair trade would be created that could not have been intended by the drafters of the AD Agreement.

43. The Panel agreed with the United States, and found that the U.S. position reflected a permissible interpretation of the AD Agreement.[30] Nevertheless, the Panel, out of a concern for "security and predictability" and the "prompt settlement of disputes," disregarded the relevant standard of review under Article 17.6(ii) and found that the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. This finding constitutes legal error and should be reversed.

A. The Panel Misapplied the Standard of Review Under Article 17.6(ii) of the AD Agreement

1. Article 17.6(ii) of the AD Agreement

[29] *US – Zeroing (Japan) (Panel),* para. 7.106; *see also US – Stainless Steel (Mexico)(Panel)*, para. 7.117-7.123.

[30] Panel Report, para. 7.169, n. 131.

44. Article 11of the DSU defines generally a panel's mandate in reviewing the consistency with the covered agreements of measures taken by a Member; that is, a panel is to undertake 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." In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) with respect to the interpretation of provisions of the AD Agreement.[31] Article 17.6(ii) supplements the standard of review under Article 11.[32] Under Article 17.6(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.

45. The central question under Article 17.6(ii) is whether an investigating authority's action rests upon a permissible interpretation of the AD Agreement. As the Appellate Body has noted, "[t]he *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* 'shall' interpret the provisions of the *Anti-Dumping 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'*)."[33] Further, according to the Appellate Body, 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 *Anti-Dumping Agreement*, which, under that Convention, would both be '*permissible* interpretations'. In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* 'if it rests upon one of those permissible interpretations.'"[34] As one panel recalled, "in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are *compelled* to accept it."[35]

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[31] *See EC – Bed Linen (Article 21.5) (AB)*, paras. 108, 114, and 118.

[32] *US – Hot-Rolled Steel (AB)*, para. 62.

[33] *US – Hot-Rolled Steel (AB)*, para. 57.

[34] *US – Hot-Rolled Steel (AB)*, para. 59.

[35] *Argentina – Poultry (Panel)*, para. 7.45 (emphasis added).

46. Article 17.6(ii) confirms that there are provisions of the AD Agreement that "admit[] of more than one permissible interpretation." The existence of such a provision in the AD Agreement confirms that Members were aware that the antidumping text would pose particular challenges. In many instances, the antidumping text permits more than one interpretation because it was drafted to cover multiple antidumping systems around the world and long-standing differences regarding methodology. Thus, the negotiators indicated that it would be a legal error for a panel not to respect a permissible interpretation of the AD Agreement.

2. The Panel's Legal Error

47. Before proceeding to a legal analysis of the EC's claims, the Panel examined the relevant standard of review, including Article 17.6(ii) of the AD Agreement.[36] The Panel stated that, under Article 17.6(ii), "if we find more than one permissible interpretation of a provision of the Anti-Dumping Agreement, we are required to uphold a measure that rests on one of those interpretations."[37]

48. The Panel then assessed whether the use of simple zeroing in the 29 reviews at issue would render those reviews inconsistent with the AD Agreement and the GATT 1994. The Panel emphasized that the "EC's claim regarding simple zeroing in periodic reviews raises a number of important issues of treaty interpretation"[38] and noted that the panels in *US – Zeroing (EC)*, *US – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)* all found simple zeroing in periodic reviews to be permissible under the AD Agreement.[39] In conducting its legal analysis, the Panel agreed that the AD Agreement could be interpreted as permitting the use of simple zeroing in administrative reviews.[40]

49. The Panel first considered the EC's argument that under the AD Agreement, dumping had to be determined for the product under consideration as a whole, and that zeroing was impermissible because it failed to take into account all export transactions pertaining to the

[36]Panel Report, paras. 7.1-7.5.

[37]Panel Report, para. 7.5 (emphasis in original).

[38]Panel Report, para. 7.162.

[39]Panel Report, para. 7.162, n.112.

[40]*See, e.g.*, Panel Report, paras. 7.162-7.169. The United States discusses more fully the Panel's rationale in Part III.B, *infra*. This section will explain why the Panel was right to consider as permissible the interpretation upon which the U.S. measures rested.

product subject to review.[41] However, the Panel was "inclined to agree" with the U.S. interpretation of the AD Agreement that, "for the reasons stated most recently by the panel in *US – Stainless Steel (Mexico)* case", "dumping may be determined for individual export transactions."[42] Moreover, in a related vein, the Panel "tend[ed] toward the view that [under the AD Agreement] dumping is not necessarily and exclusively an exporter-specific concept", as the EC had claimed.[43] As the Panel explained, "[a]ccording to the panel [in *US – Stainless Steel (Mexico)*], the proposition that a margin of dumping can be determined for individual importers represents a permissible interpretation of the relevant treaty provisions within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement."[44] The Panel also "tend[ed] to agree with the proposition that the recognition in the Agreement of a prospective normal value system reinforces the argument that dumping may be determined on the basis of individual export transactions, and note[d] that the panel in *US – Stainless Steel (Mexico)* also agreed with this point of view."[45] And the Panel found convincing the argument that a general prohibition on zeroing would give rise to mathematical equivalency between the results of the different comparison methodologies listed under Article 2.4.2 and render the targeted dumping provision of AD Agreement Article 2.4.2 *inutile*, contrary to the rules of effective treaty interpretation.[46]

50. The Panel concluded:

> We note, as the Appellate Body has recognized . . . that Article 17.6(ii) of the Anti-Dumping Agreement allows for the possibility of more than one permissible interpretation of its provisions. *We are of the view that the position of the United States, as reflected in the aforementioned panel reports, reflects at least one permissible interpretation of the relevant provisions of the Anti-Dumping Agreement*. While the interpretation presented by the European Communities, and reflected in the Appellate Body reports on zeroing and the separate opinion of one Member of the Panel . . . may also be a permissible interpretation, we do not believe that it is the only one.[47]

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[41]Panel Report, para. 7.162.

[42]Panel Report, para. 7.162.

[43]Panel Report, para. 7.163.

[44]Panel Report, para. 7.163.

[45]Panel Report, para. 7.164.

[46]Panel Report, paras. 7.167-7.168.

[47]Panel Report, para. 7.169, n. 131 (emphasis added).

51. Despite expressly considering the use of simple zeroing in administrative reviews to rest on a permissible interpretation of the AD Agreement, the Panel went on to find that the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by applying simple zeroing in the 29 reviews at issue.[48] The Panel's ultimate conclusion rests on a misapplication of the provisions of Article 17.6(ii). Where, after applying the customary rules of treaty interpretation, there were at least two permissible interpretations of the AD Agreement, the Panel was "required" to uphold the U.S. actions if they rested on one of those interpretations.[49] It is clear that the Panel viewed the AD Agreement as admitting of more than one permissible interpretation, and that the use of simple zeroing in administrative reviews rested on one of those interpretations.[50] The Panel therefore should have found the application of simple zeroing in the 29 reviews to be permissible under the AD Agreement, but failed to do so.

52. The Panel did not explicitly justify its failure to apply the provisions of Article 17.6(ii). It did, however, invoke Articles 3.2 and 3.3 of the DSU and argued that those Articles provided a legal basis for its ultimate conclusion.[51] The basic analytical flaw in the Panel's approach is this: Nothing in those articles, or elsewhere in the DSU, overrides the requirements of Article 17.6(ii). To the contrary, Article 1.2 of the DSU explicitly makes the provisions of the DSU "subject to" the special or additional rules listed in Appendix 2 to the DSU. Article 17.6(ii) of the AD

[48]Panel Report, para. 7.183; 8.1(e). The finding of inconsistency with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 relates to a single substantive obligation that the antidumping duty not exceed the margin of dumping. The language in Article VI:2 of the GATT 1994, "a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product," is reflected in Article 9.3 of the AD Agreement, "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." The Appellate Body has made this relationship clear: "[E]ven if we were to assume that zeroing was permitted under Article VI of the GATT 1947, Article VI of the GATT 1994 has to be interpreted now in conjunction with the relevant provisions of the Anti-Dumping Agreement, such as Article 2.1, 2.4, and 9.3." *US – Stainless Steel (Mexico)(AB)*, para. 131. A finding of inconsistency with either provision rests ultimately on the interpretation of the term "margin of dumping," used in both provisions, and accordingly, Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement are not independent bases of the finding of inconsistency.

[49]Panel Report, para. 7.5 (emphasis in original).

[50]The dissenting panelist expressly departed from the majority because that panelist viewed the AD Agreement as only having one permissible interpretation, rather than two. *See* Panel Report, Separate Opinion, paras. 9.4.-9.5.

[51]Panel Report, paras. 7.179, 7.182.

Agreement is such a special or additional rule, and thus cannot be overridden by the provisions of the DSU.[52]

53. The United States, and other Members, negotiated Article 17.6(ii) as a recognition that some provisions of the AD Agreement would be susceptible to multiple permissible interpretations. The Panel concluded that the U.S. application of simple zeroing in administrative reviews rested on a one such permissible interpretation.[53] Instead of applying Article 17.6(ii) properly, the Panel erred by setting aside that carefully negotiated standard of review, and improperly found that the United States acted inconsistently with the AD Agreement in the 29 reviews at issue. The Appellate Body should reverse this legal error.

B. The Panel's Ultimate Finding of Inconsistency with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 is Incorrect as a Matter of Law

54. The Panel found that the United States acted inconsistently with its obligations under Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.[54] Like each of the three panels before it to examine whether zeroing is permissible in administrative reviews, this panel too reasoned that the AD Agreement could be interpreted as permitting the United States to assess antidumping duties on dumped transactions in the full amount by which the export price is less than normal value, without requiring that offsets be provided for non-dumped transactions.[55] As discussed above, the Panel considered "persuasive" the reasoning of past panel reports finding the use of zeroing in administrative reviews to be WTO-consistent.[56] For the reasons set forth below, the Panel was correct in its assessment that zeroing in administrative reviews is permitted by the AD Agreement, and the Panel therefore erred in making an ultimate finding that the use of zeroing in the administrative reviews in question was inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.

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[52]In addition, DSU Article 3.2 (cited by the Panel), as well as DSU Article 19.2, establish that the DSB's recommendations and rulings, and the findings and recommendations of panels and the Appellate Body, cannot add to or diminish the rights and obligations of Members under the covered agreements. The AD Agreement is a "covered agreement" within the meaning of Article 1.1 of the DSU as it is listed in Appendix 1 to the DSU. So, the DSU reinforces that the Panel was not free to disregard the express terms of Article 17.6(ii) of the AD Agreement.

[53]Panel Report, para. 7.169, n. 131.

[54]Panel Report, paras. 7.183, 8.1(e).

[55]Panel Report, paras. 7.162, 7.169, n. 112, n. 131; *US – Stainless Steel (Mexico) (Panel)*, para. 8.1(c); *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284.

[56]Panel Report, para. 7.169.

1. The U.S. System for Assessment of Antidumping Duties

55. As the United States explained to the Panel,[57] the U.S. antidumping duty law, consistent with the AD Agreement, provides for two distinct phases in antidumping proceedings: the investigation phase and the assessment phase. In the investigation phase, the United States determines whether dumping existed during the period of investigation and whether an industry in the United States is materially injured, or threatened with material injury, by reason of the dumped imports. If both determinations are affirmative, the investigation phase ends and the second phase of the antidumping proceeding – the assessment phase – begins. In the assessment phase, the focus is on the calculation and assessment of antidumping duties on specific entries by individual importers.

56. The AD Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment phase. There are two basic types of assessment systems – prospective and retrospective. In a prospective system, normal values or an *ad valorem* duty rate are established and applied to the merchandise subject to the antidumping measure upon importation on an entry-by-entry basis. While *ad valorem* systems apply duties to all subject imports, in prospective normal value systems, those imports for which the export price is greater than or equal to the normal value do not result in duty liability. However, no offset is provided on other transactions where the export price is below normal value.

57. The United States has a retrospective assessment system. Under the U.S. system, an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Rather, importers deposit security in the form of a cash deposit at the time of entry. Once a year (during the anniversary month of the orders) interested parties may request an administrative review to determine the amount of duties owed on each entry made during the previous year.[58] In such an administrative review, Commerce carries out two calculations: it calculates the importer's final liability for antidumping duties, and it calculates a new cash deposit rate for each exporter's future entries. As in prospective duty systems, antidumping duties are calculated on a transaction-specific basis and are paid by the importer of the merchandise. If the final antidumping duty liability for an entry ends up being less than the amount deposited as security, the difference is refunded. If no review is requested, the amount deposited as security on each entry made during the period is automatically assessed as the final duties.

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[57]U.S. First Written Submission, paras. 13-19.

[58]The period of time covered by U.S. assessment proceedings is normally twelve months. However, in the case of the first assessment proceeding following the investigation, the period of time may extend to a period of up to 18 months to cover all entries that may have been subject to provisional measures.

58. In an administrative review, the amount of antidumping duty calculated for each transaction is the amount by which the normal value exceeds the export price. Margins of dumping are determined on a transaction-specific basis by comparing the export price of each U.S. transaction against the monthly weighted average normal value calculated for each model of the covered merchandise subject to the review. Where the export price for a transaction exceeds the relevant normal value, the importer is not liable for any antidumping duties on the basis of that transaction. To simplify the collection of duties calculated on a transaction-specific basis, the absolute amount of duties calculated for the transactions of each importer are summed up and divided by the total entered value of that importer's transactions, including those for which no duties were calculated. U.S. customs authorities then apply that rate to the entered value of the imports to collect the correct total amount of duties owed. The exporter's cash deposit rate is calculated in a similar fashion with respect to the exporter's transactions.

2. The Use of Zeroing in the 29 Administrative Reviews at Issue is Permissible Under the AD Agreement and the GATT 1994

59. This dispute over the use of zeroing in administrative reviews is ultimately about the definitions of "dumping" and "margin of dumping." As the Panel recognized,[59] the issue can be understood as whether dumping and margins of dumping are concepts that have a meaning in relation to individual transactions, or if they necessarily must refer to an aggregation of transactions. If these terms, as used in Article 9.3 of the AD Agreement and Article VI of the GATT 1994, apply to the difference between export price and normal value for *individual transactions*, the U.S. assessment of antidumping duties in administrative reviews does not exceed the margin of dumping within the meaning of those provisions.[60] The Panel was right to consider that such an interpretation was permissible.

a. The Concepts of "Dumping" and "Margin of Dumping" and the Term "Product" Have a Meaning in Relation to Individual Transactions

60. A proper starting point for understanding why the Panel's interpretation is permissible begins with an examination of Article 2.1 of the AD Agreement and Article VI of the GATT 1994. These provisions do not define "dumping" and "margins of dumping" so as to require that

[59]Panel Report, paras. 7.162-7.163.

[60]*See, e.g.*, U.S. First Written Submission, paras. 82-98; 119-40.

export transactions be examined at an aggregate level.[61] The definition of "dumping" in these provisions references "product . . . introduced into the commerce of another country at less than its normal value." This definition describes the real-world commercial conduct by which a product is imported into a country, i.e., transaction by transaction.[62] Thus, dumping is defined as occurring in the course of a commercial transaction in which the product, which is the object of the transaction, is "introduced into the commerce" of the importing country at an export price that is "less than normal value."

61. In addition, the term "less than normal value" is defined as when the "price of the product exported . . . is less than the comparable price . . . . "[63] Again, this definition describes the real-world commercial conduct of pricing such that one price is less than another price. The ordinary meaning of "price" as used in the definition of dumping is the "payment in purchase of something."[64] This definition "can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level."[65]

62. The EC in this dispute erroneously considers that "dumping" and "margins of dumping," apply exclusively to the product under investigation "as a whole."[66] The interpretation advanced by the EC relies on the term "product" as being solely and exclusively synonymous with the concept that dumping may only be determined on an exporter-specific basis. In particular, it denies that the ordinary meaning of the word "product" or "products" used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. However, as the panel report in *US – Zeroing (Japan)* explained, "there is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis . . . ."[67]

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[61] Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 are definitional provisions that, "read in isolation, do not impose independent obligations." *US – Zeroing (Japan) (AB)*, para. 140. Nevertheless, these definitions are important to the interpretation of other provisions of the AD Agreement at issue in this dispute.

[62] *US – Zeroing (EC) (Panel)*, para. 7.285.

[63] GATT 1994, Article VI:1; AD Agreement, Article 2.1.

[64] *New Shorter Oxford English Dictionary (1993)*, p. 2349.

[65] *US – Zeroing (Japan) (Panel)*, para. 7.106.

[66] EC First Written Submission, para. 194.

[67] *US – Zeroing (Japan) (Panel)*, para. 7.105 (quoting *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, n. 32); *see also US – Stainless Steel (Mexico)(Panel)*, para. 7.118, 7.119, 7.123.

63. Examination of the term "product" as used throughout the AD Agreement and the GATT 1994 demonstrates that the term "product" in these provisions does not exclusively refer to "product as a whole," nor does it mean that dumping must be determined on an exporter-specific basis. Instead, "product" can have either a collective meaning or an individual meaning. For example, Article 2.6 of the AD Agreement – which defines the term "like product" in relation to "the product under consideration" – plainly uses the term "product" in the collective sense. By contrast, Article VII:3 of the GATT 1994 – which refers to "[t]he value for customs purposes of any imported product" – plainly uses the term "product" in the individual sense of the object of a particular transaction (i.e., a sale involving a specific quantity of merchandise that matches the criteria for the "product" at a particular price). Therefore, it cannot be presumed that the same term has such an exclusive meaning when used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994.

64. As the panel in *US - Softwood Lumber Dumping (Article 21.5)* explained, "an analysis of the use of the words product and products throughout the GATT 1994, indicates that there is no basis to equate product with 'product as a whole'. . . Thus, for example, when Article VII:3 of the GATT refers to 'the value for customs purposes of any imported product', this can only be interpreted to refer to the value of a product in a particular import transaction."[68] The panel detailed numerous additional instances where the term "product," as used in the AD Agreement and GATT 1994 do not support a meaning that is solely, and exclusively, synonymous with "product as a whole":

> To extend the Appellate Body's reference to the concept of "product as a whole" in the sense that Canada proposes to the T-T methodology would entail accepting that it applies throughout Article VI of GATT 1994, and the AD Agreement, wherever the term "product" or "products" appears. A review of the use of these terms does not support the proposition that "product" must always mean the entire universe of exported product subject to an anti-dumping investigation. For instance, Article VI:2 states that a contracting party "may levy on any dumped product" an anti-dumping duty. Article VI:3 provides that "no countervailing duty shall be levied on any product". Article VI:6(a) provides that "no contracting party shall levy any anti-dumping or countervailing duty on the importation of any product...". Similarly, Article VI:6(b) provides that a contracting party may be authorized "to levy an anti-dumping or countervailing duty on the importation of any product". Taken together, these provisions suggest that "to levy a duty on a product" has the same meaning as "to levy a duty on the importation of that product". Canada's position, if applied to these provisions, would mean that the phrase "importation of a product" cannot refer to a single import transaction. In

[68] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23, n. 36.

> many places where the words product and products are used in Article VI of the GATT 1994, an interpretation of these words as necessarily referring to the entire universe of investigated export transactions is not compelling.[69]

65. In sum, there is nothing in the ordinary meaning of "product" or "products," or in the context of those terms in the GATT 1994 and the AD Agreement, that compels a reading of those terms that excludes individual transactions. Therefore, the words "product" and "products," as they appear in Article 2.1 of the AD Agreement and Article VI of the GATT 1994, cannot be understood to provide a textual basis for an interpretation that requires margins of dumping established in relation to the "product" must necessarily be established on an aggregate basis for the "product as a whole."

66. Likewise, an examination of the term "margins of dumping" itself provides no support for the EC's interpretation of the term as solely, and exclusively, relating to the "product as a whole."[70] As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed:

> Article VI:2 of the GATT 1994 provides that, for the purposes of Article VI, "the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1" of Article VI. Paragraph 1 of Article VI defines dumping as a practice "by which products of one country are introduced into the commerce of another country at less than the normal value of the products" (emphasis supplied). ... Article VI:1 provides that "a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product in the exporting country" (emphasis supplied). In other words, there is dumping when the export "price" is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase "price difference", it would be permissible for a Member to interpret the "price difference" referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that "price difference" as the "margin of dumping".[71]

67. Thus, the panel saw "no reason why a Member may not . . . establish the 'margin of dumping' on the basis of the total amount by which transaction-specific export prices are less

[69] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23.

[70] EC First Written Submission, para. 196.

[71] *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.27.

than the transaction-specific normal values."[72] Although the panel was examining margins of dumping in the context of the transaction-to-transaction comparison method in investigations under Article 2.4.2, its reasoning is equally applicable to margins of dumping established on a transaction-specific basis in an assessment proceeding under Article 9.3.

68. Additionally, the term "margin of dumping," as used elsewhere in the GATT 1994 and the AD Agreement, does not refer exclusively to the aggregated results of comparisons for the "product as a whole." As used in the Note Ad Article VI:1, which provides for an importer-specific price comparison, the term "margin of dumping" cannot relate to aggregated results of all comparisons for the "product as a whole" because an exporter or foreign producer may make export transactions using multiple importers.

69. Similarly, under the EC's view, the term "margin of dumping" as used in Article 2.2 of the AD Agreement would require the use of constructed value for the "product as a whole," even if the condition precedent for using constructed value under Article 2.2 relates only to a portion of the comparisons. The panel in *US – Softwood Lumber Dumping (Article 21.5)* observed that this "would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2 . . . . We are not convinced that the Appellate Body could have intended its *US - Softwood Lumber Dumping* findings to be applied in this manner."[73]

70. The Panel here initially stated its agreement with the conclusion that "it is a permissible interpretation of the Agreement that dumping may be determined for individual export transactions" for the reasons stated by the panel in *US – Stainless Steel (Mexico)*.[74] The Panel also recalled two other prior panels that had addressed this same issue and reached the same conclusion.[75] However, the Panel also acknowledged that the Appellate Body in all three of those disputes had reversed the panels' findings.[76]

71. The Appellate Body in *US – Stainless Steel (Mexico)* reasoned as follows:

> [T]he *notion* that a "product is introduced into the commerce of another country at less than its normal value" . . . *suggests* to us that the determination of

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[72] *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.28.

[73] *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.62.

[74] Panel Report, para. 7.162.

[75] Panel Report, para. 7.162, n. 112.

[76] Panel Report, para. 7.162, n.112.

> dumping with respect to an exporter is properly made not at the level of individual export transactions, but on the basis of the totality of an exporter's transactions of the subject merchandise over the period of investigation.[77]

72. This reasoning, however, does not cite to any actual text that directs the calculation of a margin of dumping to occur at the level of multiple transactions, nor any text that would preclude the calculation of a margin of dumping from occurring at a transaction-specific level. In fact, the language upon which the Appellate Body's report relied does not support its interpretation of Article VI:1 as precluding the calculation of margins of dumping on a transaction-specific basis. There is no meaningful explanation as to why the text of Article VI:1 precludes the calculation of a margin of dumping on a transaction-specific basis. Indeed, the ordinary meaning of the text, read in context, does not support the conclusion that the only interpretation of Article VI:1 is one involving multiple transactions.

73. The Appellate Body report in *US – Stainless Steel (Mexico)* did not address the panel's textual analysis of the definitions of "dumping" and "margin of dumping." In particular, the Appellate Body report overlooked any possibility that the definitions of "dumping" and "margin of dumping" incorporate the same flexibility of meaning that derives from the fact that the term "product" ordinarily has a meaning that is either collective or transaction-specific. The Appellate Body report overlooked the fact that the definition of these terms, used in a wide variety of contexts throughout the provisions of GATT 1994 and the AD Agreement, incorporate a flexibility of meaning that permits these terms to be understood based on the context in which they are used. The Appellate Body explained that it could not see how to reconcile the possibility of a transaction-specific meaning for the terms with several provisions of the AD Agreement.[78] This conclusion, however, resulted from imposing an inflexibly rigid definition upon the terms "dumping" and "margin of dumping" that ignored the ordinary meaning of the word "product," which can have either a transaction-specific or collective meaning, or both, depending on the context.

74. Moreover, the implications of the interpretation offered in *US – Stainless Steel (Mexico) (AB)* are difficult to reconcile with any plausible understanding of the AD Agreement. In particular, there seems to be no temporal limit to the extent of the obligation to continue aggregating comparison results. Nothing in the text of the relevant provisions of the AD Agreement specifies the applicable time period as being the period of investigation, nor does the text specify the period to be used after the period of investigation. Any attempt to set an end date to the obligated aggregation would appear to arbitrarily subdivide the "product as a whole" such that subsequent non-dumped transactions may be "zeroed" due to the fact they would be

[77] *US – Stainless Steel (Mexico) (AB)*, para. 98 (emphasis added).

[78] *US – Stainless Steel (Mexico) (AB)*, para. 99.

precluded from offsetting current antidumping duty liability. Indeed, it would seem to require that no margin could be determined until all imports had ceased permanently or the order had been withdrawn. This is clearly contrary to the intent of Article VI of the GATT 1994 that antidumping duties would be a remedy to offset or prevent injurious dumping.

75. For the above reasons, the U.S. interpretation of the terms "dumping" and "margin of dumping" is at the very least a permissible interpretation of the AD Agreement. And the United States recalls that the Panel itself found the U.S. interpretation to be a permissible one.[79]

b. The Concept of Dumping Has Been Historically Understood to Apply to Individual Transactions

76. Well before the recent debates about "zeroing" or "offsets," a Group of Experts convened in 1960 to consider numerous issues with respect to the application of Article VI of the GATT 1947. In this report, the Group of Experts considered that the "ideal method" for applying antidumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product concerned."[80] In view of this report, it must be conceded that, as the panel in *US – Zeroing (Japan)* found, "historically the concept of dumping has been understood to be applicable at the level of individual export transactions."[81]

77. Taking the same view, the panel in *US - Softwood Lumber Dumping (Article 21.5)* reasoned:

> In referring to a "determination . . . of . . . dumping . . . in respect of each single importation of the product concerned", the Group of Experts clearly envisaged the calculation of transaction-specific margins of dumping. This would suggest that the Group of Experts did not consider that there was anything in the definition of dumping set forth in Article VI of the GATT that would preclude the calculation of such transaction-specific margins.[82]

78. The Panel acknowledged that the Group of Experts' report supported the conclusion that dumping could be determined for individual importers; however, the Panel also noted that the

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[79]Panel Report, para. 7.169, n. 131.

[80]*Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, L/1141, adopted on 27 May 1960, BISD 9S/194, para. 7.

[81]*US – Zeroing (Japan) (Panel),* para. 7.107.

[82]*US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.64.

Appellate Body in *US – Stainless Steel (Mexico)* rejected the relevance of the report to the U.S. argument.[83] The Appellate Body's basis for rejecting the interpretation inherent in the Group of Experts' statement was the following: the Group of Experts recognized that such a method was impracticable, particularly with respect to an injury determination,[84] and that the WTO Agreement entered into force "long after" the Group of Experts' report. This rationale indicates that the Appellate Body misapprehended the relevance of the Group of Experts' statement for purposes of interpreting Article VI of the GATT 1947. The Appellate Body failed to explain why the fact that a particular system for determining injury is administratively impracticable leads to the conclusion that Members, when negotiating the Tokyo Round Code or the Uruguay Round AD Agreement, necessarily agreed to a completely different concept of calculating a margin of dumping, i.e, one that has no meaning in relation to individual transactions. Remarkably, the Appellate Body also considered that a report far closer in time to the conclusion of the provision at issue was of little relevance because it was too old.

79. It bears recalling that the AD Agreement was negotiated against the background of the Tokyo Round Antidumping Code and the antidumping investigation methodologies of individual Contracting Parties under the Code.[85] The methodology of not offsetting dumping based on comparisons where the export price was greater than normal value was examined by two GATT panels and was found to be consistent with the Antidumping Code.[86] In view of these disputes, the Uruguay Round negotiators actively discussed whether the use of "zeroing" should be restricted.[87] The text of Article VI of the GATT 1947, however, did not change as a

[83]Panel Report, para. 7.165.

[84]*US – Stainless Steel (Mexico) (AB)*, n. 213.

[85]For a detailed discussion of the negotiating history of the provisions at issue, *see* U.S. Rebuttal Submission, paras. 68-88.

[86]*EC – Audiocassettes,* para. 360; *EC – Cotton Yarn*, para. 502.

[87]*See, e.g., Communication from Japan*, MTN.GNG/NG8/W/30 (20 June 1988), item I.4(3), in which Japan expressed concern about a methodology wherein "negative dumping margins, i.e., the amount be which export price exceeds normal value, are ignored."; *Proposed Elements for a Framework for Negotiations: Principles and Objectives for Anti-dumping Rules, Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (Oct. 13, 1989), at item II.E.(d) (proposing that in calculating dumping margins "'negative' dumping should be taken into account, i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value"); *Communication from the Delegation of Hong Kong,* MTN.GNG/NG8/W46 (July 3, 1989), at 7.

result of the Uruguay Round agreements.[88] The normal inference one draws from the absence of a change in language is that the drafters intended no change in meaning.[89]

c. Article 9.3's Use of the term "Margin of Dumping" is Consistent with a Transaction-Specific Meaning

80. The Panel properly recognized, as the U.S. had argued, that the importer-specific nature of the payment of antidumping duties supports the view that a "margin of dumping" need not be established exclusively on the basis of all of an exporter's transactions considered in the aggregate.[90] Although noting the Appellate Body's reversal of similar findings by the panel in *US – Stainless Steel (Mexico)*, the Panel nevertheless considered that the U.S. position rested on a permissible interpretation of Article 9.3.[91]

81. Article 9 of the AD Agreement relates, as its title indicates, to the imposition and collection of antidumping duties. In particular, Article 9.3 states that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." For the reasons set forth in detail above, the term "margin of dumping," as defined in Article 2.1 of the AD Agreement and Article VI of the GATT 1994, may be applied to individual transactions. This understanding of the term "margin of dumping" is particularly appropriate in the context of antidumping duty assessment. In the real world of administering antidumping regimes, the individual transactions are both the means by which less than fair value prices are established and the mechanism by which the object of the transaction (i.e., the "product") is "introduced into the commerce of the importing country." Likewise, antidumping duties are assessed on individual entries resulting from those individual transactions. Therefore, the obligation set forth in Article 9.3 to assess no more in antidumping duties than the margin of dumping is similarly applicable at the level of individual transactions.

82. The claim of inconsistency with Article 9.3 of the AD Agreement asserted by the EC in this dispute is that the amount of the antidumping duty has exceeded the margin of dumping

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[88]Similarly, the text of Article 2.1 of the AD Agreement mirrors the text of the Tokyo Round Antidumping Code.

[89]Instructive in this regard is *US – Underwear (AB)*, p. 17, in which the Appellate Body found that the disappearance in the *Agreement on Textiles and Clothing* of the earlier *Multi-Fibre Agreement* provision for backdating the operative effect of a restraint measure, "strongly reinforced the presumption that such retroactive application is no longer permissible." The corollary, however, is that when a provision is not changed, there is a presumption that behavior that previously was permissible remains permissible.

[90]Panel Report, para. 7.163.

[91]Panel Report, para. 7.163.

established under Article 2.[92] This claim however necessarily depends upon whether the EC's preferred interpretation of "margin of dumping," which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the AD Agreement. Under such a view, a Member breaches Article 9.3 by failing to provide offsets because Members are required to calculate margins of dumping on an exporter-specific basis for the product "as a whole" and, consequently, a Member is required to aggregate the results of "all" "intermediate comparisons," including those for which the export price exceeds the normal value. The United States notes that the terms upon which such an interpretation rests are conspicuously absent from the text of both Articles 2.1 and 9.3, and thus such an interpretation is not mandated by the definition of dumping contained in Article 2.1, as described in detail above.

83. As the panel in *US – Zeroing (EC)* correctly concluded, there is "no textual support in Article 9.3 for the view that the AD Agreement requires an exporter-oriented assessment of antidumping 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."[93] An exporter-orientation does not, of itself, require that transactions be aggregated under Article 9.3 because a dumping margin determined on the basis of an exporter's action with respect to an individual transaction is no less exporter-specific than one determined on the basis of multiple transactions by that exporter. As the Appellate Body has noted, a transaction-specific meaning is equally exporter-specific and importer-specific since each transactions has both an exporter and an importer.[94]

84. The panel in *US – Zeroing (Japan)* rejected the conclusion that the "margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value."[95] The panel found that "there are important considerations specific to Article 9 of the AD Agreement that lend further support to the view that it is permissible . . . to interpret Article VI of the GATT 1994 and relevant provisions of

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[92]EC First Written Submission, paras. 193-97.

[93]*US – Zeroing (EC) (Panel)*, para. 7.204 ("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.").

[94]*US – Stainless Steel (Mexico) (AB)*, para. 101, n. 219.

[95]*US – Zeroing (Japan) (Panel)*, para. 7.199. The panel in *US – Zeroing (EC)* expressed essentially the same view. *See US – Zeroing (EC) (Panel)*, paras. 7.204 - 7.207 and 7.220-7.223.

the AD Agreement to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing."[96] In particular, the panel explained that such a requirement is inconsistent with the importer-and import-specific obligation to pay an antidumping duty:

> In the context of Article 9.3, a margin of dumping is calculated for the purpose of determining the *final liability for payment of anti-dumping duties* under Article 9.3.1 or for the purpose of determining *the amount of anti-dumping duty* that must be *refunded* under Article 9.3.2. An anti-dumping duty is paid by an importer in respect of a particular import of the product on which an anti-dumping duty has been imposed. An importer does not incur liability for payment of an anti-dumping duty in respect of the totality of sales of a product made by an exporter to the country in question but only in respect of sales made by that exporter to that particular importer. Thus, the obligation to pay an anti-dumping duty is incurred on an *importer*-and *import*-specific basis. Since the calculation of a margin of dumping in the context of Article 9.3 is part of a process of assessing the amount of duty that must be paid or that must be refunded, this importer- and import-specific character of the payment of anti-dumping duties must be taken into account in interpreting the meaning of "margin of dumping."[97]

85. Similarly, the panel in *US – Zeroing (EC)* explained:

> 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. . . . [I]n 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 antidumping duties by importers in respect of specific import transactions.[98]

86. As demonstrated above, previous panels have found that the use of the term "margins of dumping" in Article 9.3 of the AD Agreement is consistent with a transaction-specific meaning. The Panel explicitly found the reasoning of the panel in *US – Stainless Steel (Mexico)* to be

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[96] *US – Zeroing (Japan) (Panel)*, para. 7.196.

[97] *US – Zeroing (Japan) (Panel)*, para. 7.198 - 7199 (emphasis in original).

[98] *US – Zeroing (EC) (Panel),* para. 7.201.

"persuasive" on this issue and agreed with the U.S. interpretation, which it found to be a permissible one.[99]

d. That Article 9.4(ii) Provides for a Prospective Normal Value Assessment System Confirms that Margin of Dumping May Have a Transaction-Specific Meaning

87. The Panel noted that "[t]he United States asserts that Article 9.4 (ii) of the Agreement which provides for the prospective normal value systems, lends support to the proposition that dumping may be interpreted in relation to individual export transactions."[100] Moreover, the Panel found the U.S. view reflected at least one permissible interpretation of the AD Agreement, stating that it "tend[ed] to agree with the proposition that the recognition in the Agreement of a prospective normal value system reinforces the argument that dumping may be determined on the basis of individual export transactions. . . ."[101]

88. Requiring that antidumping duty liability be determined for the product "as a whole," or on an exporter-specific basis, is inconsistent with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment. Article 9.4(ii) of the AD Agreement "expressly refers to the calculation of the liability for payment of antidumping duties on the basis of a prospective normal value system."[102] Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value.[103] For example, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payments of antidumping duties. The converse is also true. A liability for a dumped sale would be determined by comparing the price of an individual export transaction with prospective normal value and the prices of other transactions have no relevance to this determination.[104] As

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[99]Panel Report, para. 7.163; 7.169, n. 131..

[100]Panel Report, para. 7.166.

[101]Panel Report, para. 7.166.

[102]*US – Zeroing (Japan) (Panel)*, para. 7.201.

[103]*US – Zeroing (Japan) (Panel)*, para. 7.201; *See also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53.

[104]*US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53 ("Under a prospective normal value duty assessment system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a prospective normal value. . . . In the context of such transaction-specific duty assessment, it makes no sense to talk of a margin of dumping being established for the product as whole, by

the panel in *US – Zeroing (Japan)* found, "there is no textual support in Article 9 for the proposition that export prices in other transactions are of any relevance."[105]

89. If in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, there is no reason why liability for payment of antidumping duties may not be similarly assessed on the basis of export prices less than normal value in the retrospective systems applied by the United States.[106] It would be manifestly absurd to interpret Article 9 as requiring offsets between importers in a retrospective assessment system while capping the importer's liability based on individual transactions in a prospective system.[107] As the panel in *US – Zeroing (Japan)* concluded, "the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transaction below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value."[108]

90. Further, accepting the interpretation that a Member must aggregate the results of *"all"* comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value system, to take into account "*all*" of the exporters' transactions. The results of the retrospective review would be to determine antidumping duty liability on a retrospective basis. This result, however, is contrary to the very concept of the prospective normal value system. As the panel in *US – Zeroing (Japan)* explained, the "liability for payment of anti-dumping duties is final in a prospective normal value system at the time of importation of a product."[109] In effect, prospective normal value systems will become retrospective. If, in fact, Members had required prospective normal value

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aggregating the results of all comparisons, since there is only one comparison at issue.").

[105] *US – Zeroing (Japan) (Panel)*, para. 7.201.

[106] *US – Zeroing (Japan) (Panel)*, para. 7.208 ("We see no textual basis in Articles 9.3 and 9.4 for the view that if an authority assesses the amount of the anti-dumping duty on a retrospective basis by examining export transaction that have occurred during a certain period, it is obligated to take into account export prices above the normal value that it would not have been required to take into account if it had applied a prospective normal value system.").

[107] *US–Zeroing (Mexico) (Panel)*, para. 7.133.

[108] *US – Zeroing (Japan) (Panel)*, para. 7.205; *see also US – Zeroing (EC) (Panel)*, para. 7.206.

[109] *US – Zeroing (Japan) (Panel)*, para. 7.205.

systems to have such reviews, one would have expected Members to have provided for this in explicit agreement language.

91. There is a further flaw with this transformed conception of prospective normal value assessment systems. In particular, Article 9.3.2 conditions a request for a refund on a request *by the importer*, duly substantiated with evidence. If the basis for requesting such a review is to recalculate the prospective normal value it is not clear how an importer will know whether a recalculation would result in a refund. If the recalculated normal value is based on how the AD Agreement defines normal value, then the importer would not have the necessary evidence of normal value in the exporting country. If instead, as the Appellate Body supposes, the "proper" normal value is the one that does not exceed the margin of dumping calculated for the "product as a whole," it equally unclear how a single importer could obtain the necessary evidence from other importers who may be commercial competitors. It would have been illogical for the AD Agreement to authorize an importer to request a refund without any basis for knowing whether it is in fact entitled to any such refund to begin with and to require it to do so on the basis of evidence that is not in its possession.

e. A Prohibition of Zeroing in Assessment Proceedings Leads to Perverse Incentives and Absurd Results

92. The Panel shared the same concerns with the United States that an interpretation leading to a prohibition on zeroing in reviews "would favor importers with high margins *vis-à-vis* importers with low margins."[110] And the Panel noted that "the panel in *US – Stainless Steel (Mexico)* agreed with the U.S. arguments in this regard."[111]

93. Although, as stated by the Appellate Body in *US - Zeroing (Japan),* dumping involves differential pricing behavior of exporters or producers between its export market and its normal value,[112] under both prospective and retrospective assessment systems, the remedy for dumping in Article VI:2 of GATT 1994 – antidumping duties – is applied at the level of individual customs entries and paid by importers who thereby incur liability for the additional duties. In this way, the importer may be induced to raise resale prices to cover the amount of the antidumping duty, thereby preventing the dumping from having further injurious effect. If instead, the amount of the antidumping duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer, the antidumping duty will be insufficient to have the intended effect. The

[110]Panel Report, paras. 7.164.

[111]Panel Report, paras. 7.164.

[112]*US – Zeroing (Japan) (AB)*, para. 156.

importer of the dumped product would remain in a position to profitably resell the product at a price that continues to be injuriously dumped. For this reason, if the EC's interpretation of the margin of dumping is adopted as the sole permissible interpretation of Article 9.3, the remedy provided under the AD Agreement and the GATT 1994 will be prevented from addressing injurious dumping.

94. These above concerns led the panels in *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)* to reject the same interpretation that the EC has offered in this dispute.[113] The panel in *US – Zeroing (Japan)* observed that the implication of this interpretation was that Members with retrospective assessment systems "may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value."[114] The panel found that this result was not supported by the text of Article 9.3, which "contains no language requiring such an aggregate examination of export transactions in determining the final liability for payments of antidumping duties."[115]

95. It also follows that if a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the export price is less than normal value to the greatest extent will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports. Indeed, even if one were not to impose duties on importers whose entries were not responsible for the finding of dumping, the importers buying at non-dumped prices would still be significantly disadvantaged because the importers buying at the dumped prices would still have a cost advantage, since the duties they pay on the dumped merchandise would be reduced by the amount by which the non-dumped merchandise exceeded normal value. Under this interpretation of Article 9.3, antidumping duties would be prevented from fulfilling their intended purpose under Article VI:2 of the GATT 1994, because importers that contribute the most to injurious dumping would be favored over other importers (and domestic competitors) that price fairly. The panel in *US – Stainless Steel (Mexico)* agreed that such "competitive disincentive to engage in fair trade could not have been intended by the

[113] *US –Zeroing (Japan)(Panel)*, para. 7.199, *US – Stainless Steel (Mexico)(Panel)*, para. 7.146.

[114] *US – Zeroing (Japan) (Panel)*, para. 7.199.

[115] *US – Zeroing (Japan) (Panel)*, para. 7.199.

drafters of the Antidumping Agreement and should not be accepted . . . as consistent with a correct interpretation of Article 9.3."[116]

96. As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed, the perverse incentives created by providing offsets also arise in the context of prospective assessment systems:

> [An] obligation to take all (including non-dumped) comparisons into account in determining the margin of dumping for the product as a whole ... is illogical, as it would provide importers clearing dumped transactions with a double competitive advantage vis-à-vis other importers: first, they would benefit from the lower price inherent in a dumped transaction; second, they would benefit from offsets, or credits, "financed" by the higher prices paid by other importers clearing non-dumped, or even less-dumped, transactions.
> ...
> Again, this makes no sense in the context of a prospective normal value duty assessment system, because (as even Canada acknowledges) the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. And if other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers. We are unable to accept that the Appellate Body could have intended such absurd results to follow from its interpretation of the phrase "margins of dumping" in US - Softwood Lumber V.[117]

97. In responding to the above arguments in *US – Stainless Steel (Mexico)*, the Appellate Body did not explain how the amount of duty that would be imposed pursuant to its interpretation of Article 9.3 would be sufficient to cause the merchandise upon which the duty is assessed to be sold at fairly traded prices upon assessment of the duty.[118] The reduction of the margin of dumping and consequently the amount of duty assessed to account for the extent to which some transactions are sold at price above normal value, necessarily means that the duty will not equal the amount by which merchandise was sold at prices below normal value. Thus, even after the imposition of an antidumping duty order, the consequences of below normal value

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[116] *US – Stainless Steel (Mexico)*, para. 7.146 (quoting Oral Statement of the United States at the Second Meeting, para. 18).

[117] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.54-5.57.

[118] *US – Stainless Steel (Mexico) (AB),* paras. 112-14.

export prices is an opportunity by the importer to profitably resell the unfairly priced merchandise at prices that continue to be below normal value. Consequently, the antidumping duties cannot fulfill their intended purpose under Article VI:2 of the GATT 1994 to prevent or offset dumping.

98. In that regard, to the extent a foreign producer or exporter receives an export price above normal value, it is the foreign producer or exporter itself that receives a benefit. The domestic producers of similar merchandise that are injured by other transactions made at less than fair value are not beneficiaries of their foreign competitor's commercial success. The fact that a remedy in the form of an antidumping duty is only permitted with respect to the unfairly priced transactions, does not logically lead to the conclusion that the fairly priced transactions constitute an alternative remedy that may preclude the remedy provided in the agreements. Indeed, there is nothing in the GATT 1994 or the AD Agreement to suggest that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. As the panel in *US – Stainless Steel (Mexico)* explained, "the injury suffered by the domestic industry because of dumped imports would not be removed by imports at non-dumped prices."[119]

f. A General Prohibition on Zeroing Renders the Second Sentence of Article 2.4.2 *Inutile*

99. The problem of mathematical equivalency arising from the Appellate Body's interpretation of Article 2.4.2 of the AD Agreement cannot be ignored, particularly when Members such as the EC, are actively involved in administering antidumping duty regimes that apply the targeted dumping provision. Yet, as the Panel noted, "the Appellate Body in *US – Stainless Steel (Mexico)* did not address this concern."[120] The Panel shared the concerns raised by the panel in *US – Stainless Steel (Mexico)* and tended to agree with the views expressed by the United States that a general prohibition of zeroing would render the second sentence of Article 2.4.2 *inutile* and therefore run counter to the principle of effective treaty interpretation.

100. Any general prohibition of zeroing that applies beyond the context of average-to-average comparisons in investigations would be inconsistent with the remaining text of Article 2.4.2 of the AD Agreement, which provides for an alternative "targeted dumping" methodology. The "targeted dumping" methodology was drafted as an exception to the obligation to engage in symmetrical comparisons in an investigation. By the terms of Article 2.4.2, it may be used "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods." When the investigating authority provides an explanation

[119] *US – Stainless Steel (Mexico) (Panel),* para. 7.147.

[120] Panel Report, para. 7.168.

as to why these "differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison," it may use the asymmetrical average-to-transaction comparison to establish the existence of margins of dumping during the investigation phase.

101. The mathematical implication of a general prohibition of zeroing, however, is that the targeted dumping clause would be reduced to inutility. That is because the targeted dumping methodology, provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons.[121] In this respect, a general zeroing prohibition would render the targeted dumping exception in Article 2.4.2 a complete nullity. Such an interpretation would be disfavored under a key tenet of the customary rules of treaty interpretation, namely that an "interpretation must give meaning and effect to all the terms of a treaty."[122]

102. In *US – Zeroing (EC)*, *US – Softwood Lumber Dumping (Article 21.5)*, *US – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)*, each of the panels recognized that the customary rules of interpretation of public international law precluded an interpretation that rendered the targeted dumping provision of Article 2.4.2 redundant due to the fact that, under a general zeroing prohibition, the average-to-average comparison method and the average-to-transaction comparison method would yield identical results.[123] The United States provides Attachment US-1, which was previously provided to the Panel and demonstrates that, absent zeroing, the targeted dumping methodology provided for under Article 2.4.2 of the AD Agreement yields the same mathematical result as the average-to-average methodology.[124] The mathematical equivalence demonstrated in Attachment US-1 is a mathematical fact that will hold regardless of the particular values chosen for the quantity or price of any normal value or export transactions and regardless of whether or not additional transactions or models are taken into consideration.

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[121]The reason for this is that, if offsetting is required, then all non-dumped sales (i.e., negative values) will offset the margins on all of the dumped sales (*i.e.*, positive values). It makes no difference mathematically whether the calculation of the final overall dumping margin is based on comparing weighted-average export prices to weighted-average normal values or on comparing transaction-specific export prices to weighted-average normal values. In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.

[122]*US – Gasoline (AB)*, p. 23.

[123]*US – Zeroing (EC) (Panel),* para. 7.266; *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.52; *US – Zeroing (Japan) (Panel),* para. 7.127; *US – Stainless Steel (Mexico) (Panel)*, paras. 7.130-7.133.

[124]For the convenience of the Appellate Body, Attachment US-1 replicates the table found in the U.S. Answer to Panel Question 10(a), Feb. 22, 2008.

103. Despite the panels' findings that the results of the targeted dumping methodology "will necessarily always yield a result identical to that of an average-to-average comparison,"[125] under a general prohibition of zeroing, the Appellate Body has found this concern to be "overstated."[126] The Appellate Body has asserted that mathematical equivalence will occur only in "certain situations"[127] and represents "a non-tested hypothesis"[128] because "[the United States] has never applied the [targeted dumping] methodology, nor provided examples of how other WTO Members have applied this methodology."[129] These objections, however, are not persuasive. First, the panels have specifically addressed all of the situations under which it was argued that mathematical equivalence would not obtain and found these situations did not represent methodologies consistent with the AD Agreement.[130] The targeted dumping provision is rendered *inutile* if the only alternative methodologies that do not result in mathematical equivalence are, themselves, not consistent with the AD Agreement. Second, mathematical equivalence is not a "non-tested hypothesis" because the EC, a Member that actively utilizes this methodology, is actually faced with this problem in administering its antidumping duty regime, as described in detail below.

104. The Appellate Body has also rejected the reasoning of the panels on the basis that the second sentence of Article 2.4.2 is an exception and, therefore, cannot determine the interpretation of methodologies contained in the first sentence of Article 2.4.2. This response, however, does not begin to address the issue. The drafters of the AD Agreement provided for an exception to the symmetrical comparison methods contained in the first sentence of Article 2.4.2. Any interpretation of the AD Agreement that renders this exception a nullity would be contrary to the principle of effective treaty interpretation. As the panel in *US – Zeroing (EC)* explained, a general prohibition of zeroing that applied to the targeted dumping methodology "would deny the second sentence [of Article 2.4.2] the very function for which it was created."[131]

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[125] *US – Zeroing (Japan) (Panel),* para. 7.127.

[126] *US – Softwood Lumber Dumping (Article 21.5) (AB),* para. 100.

[127] *US – Zeroing (Japan) (AB),* para. 133.

[128] *US – Softwood Lumber Dumping (Article 21.5) (AB),* para. 97.

[129] *US – Softwood Lumber Dumping (Article 21.5) (AB),* para. 97.

[130] *US – Zeroing (Japan) (Panel)*, paras. 7.127-7.137; *US – Zeroing (EC) (Panel)*, para. 7.266; *US – Softwood Lumber Dumping (Article 21.5) (Panel),* paras. 5.33-5.52.

[131] *US – Zeroing (EC) (Panel),* para. 7.266; *see also US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.52 ("[A] general prohibition of zeroing . . . would deprive the second sentence of Article 2.4.2 of effect."); *US – Zeroing (Japan) (Panel),* para. 7.127 ("If zeroing is prohibited in the case of the average-to-

105. In rejecting the analysis of the panel in *US – Zeroing (Japan)*, the Appellate Body dismissed the redundancy caused by mathematical equivalence by concluding that it may be permissible to apply the targeted dumping methodology to a subset of export transactions.[132] The United States is unaware of any Member ever having done this, nor has any Member ever suggested it would administer its antidumping regime in this manner. The language of the AD Agreement also says nothing about selecting a subset of transactions when conducting a targeted dumping analysis.

106. The Appellate Body's examination of the problem of the inutility of the second sentence of Article 2.4.2, has failed to resolve the issue persuasively. As the panel in *US - Stainless Steel (Mexico)* explained:

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

transaction comparison, the use of this method will necessarily always yield a result identical to that of an average-to-average comparison.").

[132] *US – Zeroing (Japan) (AB),* para. 135.

> results with the results obtained through the WA-T methodology for the prices that fall within the pattern, we note that such an approach would also lead to the same mathematical result as the WA-WA methodology. We therefore do not consider that the Appellate Body's approach invalidates the mathematical equivalence problem.[133]

107. As indicated by the panel in *US – Stainless Steel (Mexico)*, the language of Article 2.4.2 of the AD Agreement says nothing about selecting a subset of transactions when conducting a targeted dumping analysis. Instead, the provision refers to a "pattern of export prices which differs significantly among different purchasers, regions or time periods . . . [that] cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."[134] The word "pattern" has the ordinary meaning: "An arrangement or order discernable in objects, actions, ideas, situations, *etc.*"[135] In this context, the "pattern" incorporates export prices that differ significantly. Nothing in the text of the provisions or in the meaning of the word "pattern" suggests that one part of the identified pattern may be treated in one way (i.e., used in average-to-transaction comparisons) while another part of the identified pattern may be treated differently (i.e., ignored or used in average-to-average comparisons).

108. Furthermore, the use of a sub-group of merchandise when using a targeted dumping comparison is inconsistent with the Appellate Body's conclusion that "all" export transactions must be included when performing average-to-average or transaction-to-transaction comparisons. Moreover, this interpretation appears to render trivial the requirement in the text of Article 2.4.2 to provide an explanation "as to why such differences cannot be taken into account appropriately by the use of" one of the two symmetrical comparison types. The Appellate Body would have an investigating authority account for the differences by merely disregarding a subset of transactions that are the basis for the differences, i.e., the part "outside the relevant pattern." In that way, the requirement to provide an explanation, set forth in the second sentence of Article 2.4.2, appears to be reduced to a mere observation of the fact that the universe of transactions can be truncated when a pattern of differences has been found. Contrary to the implication of the text, the explanation need not have any basis in the symmetrical or asymmetrical nature of the available comparison types.

109. Alternatively, as the panel in *US – Stainless Steel (Mexico)* explained, if the Appellate Body's statements are understood to mean that the use of average-to-transaction comparisons

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[133] *US – Zeroing (Mexico) (Panel)*, p. 7.139 (cited in Panel Report, para. 7.168).

[134] AD Agreement, Article 2.4.2, second sentence.

[135] *New Shorter Oxford English Dictionary*, 1993 ed., Vol. 2, p. 2126, def. 6d.

with a subset of the export transactions is to be done in conjunction with the use of the average-to-average comparison for the remaining export transactions, then the Appellate Body's conclusion is a *non sequitur*. The United States provides Attachment US-2, also previously provided to the Panel, which illustrates the combined results of such comparisons will be mathematically equivalent to the results obtained through the use of average-to-average comparisons.[136] Attachment US-2, utilizing the same transactions set as in Attachment US-1, demonstrates that the mathematical equivalence demonstrated in Attachment US-1 is not avoided by using average-to-transaction and average-to-average comparisons in combination under the second sentence of Article 2.4.2. The result of such combination is identical to the results demonstrated in Attachment US-1 using solely average-to-average or solely average-to-transaction comparisons.

110. The redundancy that results from this mathematical equivalence appears to have already led the EC, attempting to reconcile the issue before its municipal tribunals, to advance an interpretation of the AD Agreement that is contrary to the interpretation the EC necessarily relies on in this dispute.[137] Specifically, the Council of the European Union argued before the Court of First Instance that:

> the asymmetrical method, as compared with the first symmetrical method, makes sense only if the zeroing technique is applied. Without that mechanism, that method would mathematically lead to the same result as the first symmetrical method and it would be impossible to prevent the non-dumped exports from disguising the dumping of the dumped exports.[138]

111. The Court agreed, finding that:

> as the Council pointed out in its written proceedings, the zeroing technique has proved to be mathematically necessary in order to distinguish, in terms of its results, the asymmetrical method from the first symmetrical method. In the

[136]For the convenience of the Appellate Body, Attachment US-2 replicates the table found in the U.S. Answer to Panel Question 10(c), Feb. 22, 2008.

[137]U.S. First Written Submission, para. 116.

[138]Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006, para. 94 (Exhibit US-3). Notwithstanding making this argument before its municipal tribunals, the EC has taken a contrary position in WTO dispute proceedings. *See*, *e.g. Softwood Lumber Dumping (Article 21.5) (AB)*, para. 49 ("The European Communities rejects the 'mathematical equivalence' argument... .").

> absence of that reduction, the asymmetrical method will always yield the same result as the first symmetrical method . . . .[139]

112. Thus, the EC itself, a Member that has used the average-to-transaction comparison in investigations, when addressing this issue before domestic tribunals, agrees with the United States and the panel reports cited above, that a general prohibition of zeroing applied equally to both assessment proceedings and original investigations, would render the average-to-transaction comparison *inutile*.

113. For the above reasons, the United States respectfully requests that the Appellate Body reverse the Panel's finding that the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by applying simple zeroing in the 29 administrative reviews at issue. The Panel found that the use of zeroing in those reviews rested on a permissible interpretation of the AD Agreement. And the United States has demonstrated why the Panel was correct to find that the U.S. position reflected a permissible interpretation. Nevertheless, the Panel failed to adhere to the proper standard of review under Article 17.6(ii) of the AD Agreement, and found that the United States acted inconsistently with its WTO obligations. This finding constitutes legal error and should be reversed.

IV. The Panel Failed to Undertake an Objective Assessment in Finding That the United States Acted Inconsistently With the AD Agreement by Allegedly Using, in the Eight Sunset Reviews at Issue, Antidumping Margins Obtained Through Model Zeroing in Prior Investigations

114. Article 11 of the DSU provides that "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. . . ."[140] The question as to whether a panel has made an "objective assessment" is a "*legal* one, that may be the subject of an appeal."[141] In reviewing claims under Article 11, the Appellate Body also has stated that panels may not make affirmative findings that "lack a basis in the evidence contained in the panel record."[142]

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[139]Ritek Corp., para. 109.

[140]Emphasis added.

[141]*United States – Wheat Gluten (AB)*, para. 151.

[142]*United States – German Steel (AB)*, para. 142.

115. As the United States sets forth below, the Panel here failed to make an objective assessment under Article 11 by finding that the United States acted inconsistently with its obligations under Article 11.3 of the AD Agreement in the eight sunset reviews at issue.[143] More specifically, the Panel reached an erroneous conclusion that the EC made a *prima facie* case that the margins in the underlying prior investigations were obtained through so-called model zeroing, despite the absence of supporting evidence on the record.[144]

116. The complaining Member in a dispute bears the burden of making its *prima facie* case, that is, of "bringing forth sufficient evidence and legal argument to demonstrate that, *prima facie*, another Member's measure is inconsistent with a relevant obligation of that other Member under the covered agreements."[145] The Panel described the *prima facie* case as "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."[146] The Panel properly applied this standard to the EC's claims with respect to administrative reviews,[147] but failed to hold the EC to the same burden with respect to the eight sunset reviews. Instead, the Panel drew incorrect inferences from the evidence on the record to find that the EC had properly discharged its burden.

117. With respect to the EC's claims of inconsistency as to the administrative reviews at issue, the Panel required the EC to produce evidence demonstrating that the margins in those reviews were, in fact, calculated using zeroing.[148] The Panel found that as to seven administrative reviews, the EC failed to prove that the *particular dumping margin at issue* had been calculated using zeroing, and excluded those reviews from its findings.[149]

118. The Panel also stated that it had to be satisfied that the EC "demonstrated *as a matter of fact* that the USDOC relied, in the sunset reviews at issue, on prior margins obtained through

[143] *See, e.g.*, Panel Report, paras. 7.192-7.202; 8.1(f).

[144] Panel Report, para. 7.200.

[145] *US - 1916 Act (AB)*, para. 96 (*citing US - Wool Shirts (AB)*, pp.14-17; *EC - Hormones (AB)*, para. 109 n. 24).

[146] Panel Report, para 7.6.

[147] Panel Report, para. 6.9. 7.150-7.158.

[148] Panel Report, paras. 6.9, 7.150-7.158.

[149] Panel Report, para. 7.158.

zeroing."[150] The EC "buil[t] its claim mainly on the use of margins obtained through model zeroing in the underlying investigations."[151] In order to succeed on that claim, the EC would therefore have had to provide evidence from the investigations in which the dumping margins at issue were calculated showing that model zeroing was employed in calculating those *particular dumping margins*. However, the EC did not do this; instead, the Panel's finding with respect to the sunset reviews simply assumed that particular margins at issue were "obtained through model zeroing in prior investigations."[152]

119. The Panel's sole basis for its finding with respect to the particular investigation margins at issue in the eight sunset review determinations was language from a *Federal Register* notice in which Commerce announced that it would no longer use model zeroing in average-to-average comparisons in investigations.[153] Thus, the Panel inferred that what would not be done in the future – model zeroing in investigations using average-to-average comparisons – must necessarily have been employed in *all* of the margins determined in prior investigations, including the particular investigations at issue in the eight challenged sunset reviews.[154] Such a general statement, however, does not provide evidence as to whether zeroing was in fact employed in the specific margins relied upon in each of the challenged sunset reviews. Thus, such a general statement also does not lead to the conclusion that the margins of all the specific investigations used in the sunset reviews were calculated using zeroing. Yet the Panel erroneously considered this evidence sufficient to establish the reliance by the United States on model zeroing in the underlying investigations.

120. None of the other evidence submitted by the EC supported a finding that model zeroing was used to calculate margins in the investigations underlying the eight sunset reviews. The EC submitted the original dumping orders, none of which discuss zeroing.[155] The EC also submitted the sunset review determinations and continuation orders, which do not discuss zeroing, and the Issues and Decisions memoranda accompanying the likelihood

[150]Panel Report, para. 7.197 (emphasis added).

[151]Panel Report, para. 7.198.

[152]Panel Report, para. 7.202.

[153]Panel Report, paras. 6.9, 7.200.

[154]Panel Report, para. 7.200.

[155]*See* Exhs. EC-69(IV), EC-71(III), EC-72(IV), EC-73(IV), EC-75(IV), EC-76(IV), EC-79(IV).

determinations,[156] none of which demonstrates that zeroing was employed in calculating all of the margins from the investigations at issue.

121. As demonstrated above, the Panel's finding that model zeroing was used in the investigations underlying the eight sunset reviews "lack[s] a basis in the evidence contained in the panel record."[157] Thus, the Panel failed to undertake an objective assessment of the matter before it. The United States respectfully requests that the Appellate Body reverse the Panel's findings on the sunset reviews in question as inconsistent with Article 11 of the DSU.

V. Conclusion

122. For the reasons set out above, the United States respectfully asks the Appellate Body to find that:

(1) the Panel's finding that the 14 periodic reviews and sunset reviews that were identified in the EC's panel request, but not in the EC's consultations request, were within the Panel's terms of reference is in error;[158]

(2) the Panel's conclusion that the United States acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement by applying simple zeroing in the 29 periodic reviews at issue in this dispute is in error;[159] and

(3) the Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as required by Article 11 of the DSU with respect to the EC's claims that the United States acted inconsistently with its obligations under Article 11.3 of the AD Agreement in the eight sunset reviews at issue, including the erroneous finding that the EC made a *prima facie* case that the margins in the underlying prior investigations were obtained through so-called model zeroing [160]

[156] *See* Exhs. EC-69(I), (II), (III); EC-71 (I), (II); EC-72(I), (II), (III); EC-73(I), (II), (III); EC-74(I), (II), (III); EC-75(I), (II), (III); EC-76(I), (II), (III); EC-79(I), (II), (III).

[157] *United States – German Steel (AB)*, para. 142.

[158] *See, e.g.*, Panel Report, paras. 7.17-7.28; 8.1(a).

[159] *See, e.g.*, Panel Report, paras. 7.162-7.169; 7.178-7.183; 8.1(e).

[160] *See, e.g.*, Panel Report, paras. 7.192-7.202; 8.1(f).