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UNITED STATES – CONTINUED EXISTENCE AND APPLICATION OF ZEROING METHODOLOGY

AB-2008-11

Report of the Appellate Body

CASES CITED IN THIS REPORT

Short Title	Full case title and citation
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Argentina – Textiles and Apparel	

Short Title	Full case title and citation
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – Continued Suspension	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Countervailing Duty	

Short Title	Full case title and citation
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, 1937
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006
US – Softwood Lumber V (Article 21.5 – Canada)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW, adopted 1 September 2006, as reversed by Appellate Body Report WT/DS264/AB/RW
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 30 April 2008
US – Stainless Steel (Mexico)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 30 April 2008, as modified by the Appellate Body Report WT/DS344/AB/R
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R and Corr.1, adopted 9 May 2006
US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	**Description**
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
GATT 1947	*General Agreement on Tariffs and Trade 1947*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
Panel Report	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R
panel request	Request for the Establishment of a Panel by the European Communities, WT/DS350/6, attached to the Panel Report as Annex F-1
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
Tariff Act	United States Tariff Act of 1930, Public Law No. 1202-1527, 46 Stat. 741, codified in *United States Code*, Title 19, Chapter 4, as amended
Tokyo Round Anti-Dumping Code	Tokyo Round *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, BISD 26S/171, entered into force 1 January 1980
T-T	transaction-to-transaction
USDOC	United States Department of Commerce
USDOC December 2006 Notice	"Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification", *United States Federal Register*, Vol. 71, No. 248 (27 December 2006) 77722-77725 (Panel Exhibit EC-90)
USITC	United States International Trade Commission
Vienna Convention	*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/5, 4 January 2005
W-T	weighted average-to-transaction
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*
W-W	Weighted average-to-weighted average

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Continued Existence and Application of Zeroing Methodology

European Communities, *Appellant* / *Appellee*
United States, *Other Appellant* / *Appellee*

Brazil, *Third Participant*
China, *Third Participant*
Egypt, *Third Participant*
India, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Mexico, *Third Participant*
Norway, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*
Thailand, *Third Participant*

AB-2008-11

Present:

Zhang, Presiding Member
Baptista, Member
Unterhalter, Member

I. Introduction

1. The European Communities and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Continued Existence and Application of Zeroing Methodology* (the "Panel Report").[1] The Panel was established to consider a complaint by the European Communities concerning the continued application by the United States of anti-dumping duties resulting from anti-dumping duty orders enumerated in 18 cases[2], as calculated or maintained in place pursuant to the most recent proceedings[3] at a level in excess of the margin of dumping that, in the European Communities' view, would have resulted from the correct application of the relevant provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and*

[1]WT/DS350/R, 1 October 2008.

[2]Panel Report, para. 2.1. In the annex to its Request for the Establishment of a Panel, WT/DS350/6, the Europ(correcen and 24.European Co4r50 Tc0 Twnand 24.reemer46PA11.2 TwA 24.reeme(apr46PA11.aoPan)-4.7h1mer48

Trade 1994 (the "*Anti-Dumping Agreement*"). The European Communities also challenged the specific instances of application of the zeroing methodology in four original anti-dumping investigations, 37 periodic reviews, and 11 sunset reviews pertaining to the same 18 cases.[4]

2. Before the Panel, the European Communities claimed that:

(a) the United States had acted inconsistently with Articles VI:1 and VI:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), Articles 2.4, 2.4.2, 9.3, 11.1, and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), f")focwse it 6(t)]s2 1 Tf6.9945 0 22 0 TD0

(c) the United States had acted inconsistently with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.4, 2.4.2, 9.3, and 11.2 of the *Anti-Dumping Agreement* when applying "simple zeroing"[8] in the 37 periodic reviews[9] at issue in this dispute[10]; and

(d) the United States had acted inconsistently with Articles 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *Anti-Dumping Agreement* in the 11 sunset reviews[11] at issue in this dispute[12] when relying on margins of dumping calculated in prior investigations using the zeroing methodology.[13]

3. The European Communities also requested the Panel to suggest, pursuant to Article 19 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that the United States cease to use the zeroing methodology when calculating dumping margins in any anti-dumping proceeding in connection with the 18 cases identified in the annex to the European Communities' panel request.[14]

[8]Before the Panel, the European Communities used the term "simple zeroing" to describe a methodology whereby an investigating authority compares the prices of individual export transactions against monthly weighted average normal values and treats as zero the results of comparisons where the export price exceeds the monthly weighted average normal value when aggregating comparison results. (See Panel Report, paras. 7.7 and 7.160; and European Communities' first written submission to the Panel, Panel Report, Annex

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4. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 1 October 2008, the Panel found that:

(a) the 14 anti-dumping proceedings identified in the European Communities' panel request, bute 4 nel

Agreement into conformity with its WTO obligations

Settlement of Disputes.[33] The participants proposed public observation by means of a simultaneous closed-circuit television broadcast to a separate room, with the transmission being interrupted when any third participant wishing to maintain the confidentiality of its statements took the floor.

8. On 18 November 2008, the Division invited the third participants to comment in writing on the participants' requests to open the hearing to public observation. The Division asked the third participants to provide their views on, in particular, the permissibility of opening the hearing for public observation under the DSU and the *Working Procedures*, and, if they so wished, the specific logistical arrangements proposed by the participants. Comments were received from all of the third participants on 24 November 2008. Japan, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu expressed their support for the requests of the participants. Korea did not object to the opening of the oral hearing to the public in these proceedings, but requested the Appellate Body to treat its written and oral statements as confidential. Brazil, China, Egypt, India, Mexico, and Thailand expressed the view that the provisions of the DSU do not allow public observation of oral hearings at the appellate stage. According to these third participants, the oral hearing forms part of the proceedings of the Appellate Body and is, therefore, subject to the requirement of Article 17.10 of the DSU that "[t]he proceedings of the Appellate Body shall be confidential".

9. On 28 November 2008, the Division issued a Procedural Ruling in which it authorized the public observation of the oral hearing for the participants and the third participants who so requested, and adopted additional procedures for that purpose in accordance with Rule 16(1) of the *Working Procedures*.[34] Oral statements and responses to questions by third participants wishing to maintain the confidentiality of their submissions

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the European Communities – Appellant*

1. The Panel's Terms of Reference – Continued Application of 18 Anti-Dumping Duties

11. The European Communities claims that the

dumping duty is WTO-inconsistent, it may take "the entirely reasonable view that as long as the particular anti-dumping duty based on zeroing remains in place the United States will not have complied."[48] The European Communities argues that the United States' interpretation—that there are a series of different measures, each with a di

'*precise content*' of the 18 measures (that is, the zeroing methodology) was the same as the precise content of the zeroing methodology measure."[60]

22. The European Communities explains what it considers to be the correct legal analysis under Article 6.2 of the DSU. Once it is accepted that an anti-dumping duty is a measure, "it is immediately apparent that it would have been *impossible* for the [European Communities'] Panel Request to be *any more specific*, identifying as it did the document originating each of the 18 measures (in each case, the final order), that is, the specific duties applying to the specific products exported from the European Communities to the United States."[61] According to the European Communities, the Panel should have found that the United States had not raised the issue of whether or not the 18 measures constituted measures within the meaning of Article 3.3 of the DSU. In any event, the European Communities had made out a "*prima facie* case on the existence and precise content of the 18 measures"[62], which the United States did not address or rebut. Referring to the objective of Article 6.2 to protect a defendant's due process rights, the European Communities argues that there was no basis for the United States to assert that it did not understand the allegations being made against it, and contends that the United States was thus "*unilaterally reformulating* the case and requesting a preliminary ruling with respect to that re-formulated case".[63]

23. In addition, the European Communities submits that the Panel erred by confounding its analysis of Articles 3.3 and 6.2 of the DSU when it "erroneously equate[d] the substantive question of the *demonstration* of the existence and precise content of a measure with the procedural requirement that a panel request *identify* the specific measure at issue."[64] The issue of specificity under Article 6.2 is not, as the Panel asserted, a "burden of proof" issue, because a complainant "does not have to discharge its burden of proof, nor make a *prima facie* case, in its panel request".[65] Rather, "[t]he procedural issue under Article 6.2 of the *DSU* is not 'how' the measures have been identified in the panel request, but simply whether or not the [European Communities'] Panel Request *identifies* the specific measure at issue".[66] The European Communities adds that the Panel engaged in a "covert substantive analysis"[67] in which the "Article 3.3 of the *DSU* issue [*was*] decisive of its analysis of the Article 6.2 of the *DSU* issue".[68] The European Communities then faults the Panel for finding that the

[60]European Communities' appellant's submission, para. 47 (original emphasis) (referring to European Communities' response to Panel Question 1 following the first meeting).
[61]European Communities' appellant's submission, para. 50. (original emphasis)
[62]European Communities' appellant's submission, para. 51.
[63]European Communities' appellant's submission, para. 52. (original emphasis)
[64]European Communities' appellant's submission, para. 54 (original emphasis) (referring to Panel Report, para. 7.41).
[65]European Communities' appellant's submission, para. 55 (referring to Panel Report, para. 7.41).
[66]European Communities' appellant's submission, para. 57. (original emphasis)
[67]European Communities' appellant's submission, para. 58.
[68]European Communities' appellant's submission, para. 57. (original emphasis)

27. Finally, the European Communities contends that the Panel Report is inconsistent with Article 12.7 of the DSU because "the Panel did not set out the basic rationale behind its findings and recommendations."[75] The European Communities claims that the Panel offered no explanation supporting its conclusions that an anti-dumping duty constitutes a measure within the meaning of Article 3.3 of the DSU, or that the European Communities' panel request did not identify the specific measures at issue as required by Article 6.2 of the DSU.

28. On this basis, the European Communities requests the Appellate Body to modify or reverse the Panel's findings.[76] In addition, the European Commun

results of the periodic reviews at issue, the USDOC's Standard Margin Program, certain computer Program Logs, and lists of transactions and tables containing the dumping calculations with and without zeroing in those reviews.[90]

37. In addition to these "specific documents showing concrete details of each administrative review", the European Communities points to other evidence in the record "from which it can be inferred that the United States actually used zeroing in those reviews".[91] The European Communities claims that this evidence consists of: a Notice published in the *United States Federal Register* on 27 December 2006[92] (the "USDOC December 2006 Notice") indicating that there would be no policy change to the practice of zeroing in periodic reviews; the Issues and Decision Memoranda in the 37 periodic reviews at issue containing the USDOC's repeated statements regarding its continued practice of using simple zeroing in periodic reviews[93]; and the significant amount of WTO litigation against the use of zeroing by the United States.[94] The European Communities submits that it "also brought to the Panel's attention the fact that the United States remained silent as to whether it had used zeroing in the administrative reviews at issue and did not provide any evidence showing the contrary."[95]

38. The European Communities explains the specific evidence it submitted with respect to each of the seven periodic reviews. Regarding *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3), the European Communities disagrees with the Panel's conclusion that the evidence did not "necessarily show"[96] that simple zeroing was used. The European Communities notes that it had explained that both the USDOC's Standard Margin Program and the Program Log disclosed by the USDOC to the parties contained the zeroing line and that "[t]his alone indicates that the zeroing methodology was part of the measure".[97] The European Communities points to the additional evidence it produced to support its case, and alleges that the Panel ignored the fact that "the application of the USDOC's Standard [Margin] Program[] containing the zeroing line (*i.e.*, WHERE EMARGIN GT 0) shows that only a limited number of transactions (*i.e.*, referred to as 'observations' in the programme log) were taken into account for the purpose of the dumping calculation (*i.e.*, those

[90]See European Communities' appellant's submission, paras. 113-123.
[91]European Communities' appellant's submission, para. 124.
[92]European Communities' appellant's submission, para. 125 (referring to "Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification", *United States Federal Register*, Vol. 71, No. 248 (27 December 2006), 77722-77725 (Panel Exhibit EC-90)). See also *ibid*., paras. 167-169.
[93]European Communities' appellant's submission, para. 126 (referring to Panel Exhibits EC-32 through EC-68). See also *ibid*., paras. 170-172.
[94]European Communities' appellant's submission, para. 127. See also *ibid*., paras. 173 and 174.
[95]European Communities' appellant's submission, para. 128. See also *ibid*., paras. 175-177.
[96]European Communities' appellant's submission, para. 133 (quoting Panel Report, para. 7.151).
[97]European Communities' appellant's submission, para. 133 (referring to the summary provided in Panel Exhibit EC-35).

where the EMARGIN was greater than zero)".[98] The European Communities also alleges that the Panel ignored the relevant tables containing calculations showing that zeroing was being used, as well as the fact that, when the Program Log is considered together with the tables, "the evidence overwhelmingly corroborates the fact that the zeroing methodology was part of the measure and indeed was actually used."[99] The European Communities concludes that "the specific documents contained in the record 'necessarily show' that simple zeroing was 'actually used'", and that the Panel's assertion that certain of the documents were not issued by the USDOC at the time of the review is "both *incorrect* and *irrelevant*".[100]

39. The European Communities presents similar arguments regarding the question whether zeroing was used in four additional periodic reviews.[101] The European Communities explains that, with respect to each of these four reviews, the evidence it submitted—namely, printouts of certain computer programs used by the USDOC, as well as calculation tables prepared on the basis of data supplied by the USDOC—demonstrates that zeroing was used. Because the Panel "ignored" the evidence in the record, it "commi

issue".[105] The European Communities considers that it has "made a *prima facie* case that the zeroing methodology was part of the measure", and that it at least "provided sufficient evidence for the Panel to establish the *presumption* that the USDOC applied zeroing in the administrative reviews at issue".[106] As a result, the Panel should have shifted the burden of proof so that the United States could rebut such a presumption. The European Communities maintains that, "if a Member provides sufficient evidence that a *fact* has occurred, then a panel should conclude from that evidence that there is [a] *presumption* that 'what is claimed is true, the burden then shift[ing] to the other party'."[107]

42. The European Communities maintains that, when a dispute essentially refers to the same measure (that is, a periodic review carried out by the USDOC) where the same provisions have been applied (that is, the United States laws and regulations dealing with periodic reviews), the application of the same burden of proof criteria and requirements to establish the same presumption by panels and the Appellate Body should be expected. The European Communities also notes instances in which panels and the Appellate Body were able to reach findings regarding the application of simple zeroing.[108] The European Communities maintains that, in those cases, the panels and the Appellate ert Panat least

Panel in concluding that "it would be *inappropriate* for a panel to exercise its authority to seek information based on its own judgement as to what information is necessary for a party to prove its

prompt and satisfactory settlement of the dispute, and would help clarify the interpretations made by the panel and the Appellate Body.[118] Thus, the European Communities requests the Appellate Body to make suggestions pursuant to Article 19.1, and invites the Appellate Body to take into account those already made by the European Communities.

5. Conditional Appeals

47. The European Communities makes two conditional appeals. First, the European Communities recalls the Appellate Body's statements in *US – Stainless Steel (Mexico)* and the conclusions it made in paragraphs 160 to 162 of that report. Should the Appellate Body construe the Panel Report in this dispute "as inconsistent with these prior statements by the Appellate Body"[119], then the European Communities appeals those findings "for all the reasons set out by the Appellate Body in its report in *US – Stainless Steel (Mexico)*".[120]

48. Secondly, if the United States appeals the Panel's findings regarding what the Panel referred to as "the role of jurisprudence", and if the Appellate Body modifies or reverses those findings in whole or in part, then the European Communities appeals "what might be construed as substantive findings or the exercise of false judicial economy in the Panel Report on the substantive issue of zeroing in administrative reviews".[121] The European Communities further refers to its reasoning before the Panel and requests the Appellate Body to complete the analysis on the basis of that reasoning.

B. *Arguments of the United States – Appellee*

1. The Panel's Terms of Reference – Continued Application of 18 Anti-Dumping Duties

49. The United States requests the Appellate Body to reject the European Communities' appeal and affirm the Panel's preliminary ruling that the continued application of 18 anti-dumping duties were outside its terms of reference. Recalling that Article 6.2 of the DSU states that a panel request must identify the specific measure at issue, the United States argues that the European Communities' panel request was "unclear in numerous respects".[122] The United States notes that, in particular, at the time of the European Communities' first written submission, it was uncertain what the European Communities meant by the "most recent"[123] anti-dumping proceeding. The United States considered

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that the reference in the panel request to the application or continued application of anti-dumping duties in 18 cases "included an indefinite number of measures resulting from current, past, and future antidumping determinations" and that these "alleged 18 'duties' were therefore not specifically identified, as required by Article 6.2 of the DSU".[124]

50. The United States alleges that the European Communities admitted the "broad, indeterminate nature" of the 18 duties when, in response to the United States' request for a preliminary ruling, the European Communities noted that its panel request pertained to all "subsequent measures" adopted by the United States with respect to the 18 duties, and to any "subsequent modification" of the measures concerning the level of duty.[125] The United States noted before the Panel that, under the DSU, such subsequent measures, proceedings, and modifications "could not be subject to dispute settlement"[126] since they were not in existence at the time of the Panel's establishment. According to the United States, the European Communities was "improperly trying to include the application or continued application of duties resulting from determinations that have not yet been made"; the United States, however, "could not determine when these determinations were or will be made, what calculations they did or will include, what duty rates they have established or will establish, and what individual companies they did or will cover".[127]

51. The United States submits that the European Communities' concept of "duty as a measure" is "some type of free-standing measure that had a life of its own beyond the 52 particular determinations identified in its panel request".[128] In the view of the United States, the characterization of the measure ignores that, "for any given importation, the antidumping duty imposed or assessed depends on a particular administrative determination"[129], and that the continued existence of an anti-dumping duty order depends on a sunset review. Consequently, the United States submits that the panel request could not fulfil the requirements of Article 6.2 unless it identified the specific determination related to the particular anti-dumping duty. Because these measures could not have existed at the time of its request for consultations, or at the time of the establishment of the Panel, they cannot be within its terms of reference. The United States claims that, by requesting a preliminary ruling, it was not trying to "unilaterally reformulat[e]"[130] the case of the European Communities, but rather understood that "the application or continued application of antidumping duties had to result from an underlying

[124]United States' appellee's submission, para. 59. (footnote omitted)
[125]United States' appellee's submission, para. 60 (referring to European Communities' response to United States' preliminary objections, paras. 47 and 48).
[126]United States' appellee's submission, para. 61.
[127]United States' appellee's submission, para. 61. (footnote omitted)
[128]United States' appellee's submission, para. 62. (footnote omitted)
[129]United States' appellee's submission, para. 62.
[130]United States' appellee's submission, para. 64 (emphasis omitted) (quoting European Communities' appellant's submission, para. 52).

antidumping determination".[131]

the United States alleges that the European Communities "ignores the actual rules governing the Panel's authority to address issues pertaining to its terms of reference, as well as the rules related to the burden of proof in this dispute".[138] The United States argues that, even if it had not raised the preliminary objection, the Panel was entitle

economy".[153] Thus, the Panel was not required to address explicitly each and every argument made by the European Communities. Moreover, Article 7.2 applies to a panel's discharge of the matters within its terms of reference. Thus, where a measure is not within a panel's terms of reference, Article 7.2 "does not operate to expand the terms of reference and require a panel to discuss provisions of the covered agreements with respect to such measures".[154] In addition, the United States submits that, in connection with its claim under Article 11 of the DSU, the European Communities failed "to argue how the Panel allegedly failed to undertake an objective assessment"[155] of the United States' preliminary objection.

60. The United States further asserts that the European Communities' claim under Article 12.7 is unfounded and should be rejected. The United States maintains that the Panel provided a detailed legal and factual analysis of the United States' preliminary objection and "laid out the rationale behind its findings".[156] Moreover, the United States asserts that the European Communities "devoted considerable space" in its appellant's submission "to criticizing the very rationale and analysis that the [European Communities] now says does not exist".[157]

61. On this basis, the United States requests the Appellate Body to uphold the Panel's conclusions that the 18 duties were not within its terms of reference, and to reject the European Communities' request to complete the analysis. If the Panel's conclusions are reversed, the United States asks the Appellate Body to exercise judicial economy and not complete the analysis. Should the Appellate Body decide to complete the analysis, the United States asks the Appellate Body to find that the application or continued application of the 18 anti-dumping duties is not inconsistent with the *Anti-Dumping Agreement*, the GATT 1994, and the *WTO Agreement*.[158]

2. The Panel's Terms of Reference – Four Preliminary Determinations

62. The United States asks the Appellate Body to reject the European Communities' appeal of the Panel's finding that the three preliminary sunset review determinations and one periodic review were outside the Panel's terms of reference. The Un

definitive duties, and it was "entirely possible"[159] that no definitive anti-dumping duties would be levied, or would continue to be levied. The United States also maintains that the Panel "properly concluded" that the European Communities' challenge did not fit within the exception to the finality requirement in Article 17.4 reserved for "provisional measures".[160]

63. The United States contends that the matter before the Panel involved duties "*calculated* or *maintained in place* pursuant to the most recent [anti-dumping proceedings]".[161] The United States submits that the European Communities cannot avoid the finality requirement of Article 17.4 by relying on the notion that the preliminary measures were "subsequent measures"[162] that were part of the European Communities' panel request. The United States maintains that this argument ignores the plain text of Article 17.4, which requires that the investigating authority has taken final action by the time of the panel request. Therefore, neither ongoing periodic reviews (which "do[] not affect the cash deposit rate or the assessment rate"), nor ongoing sunset reviews (which "only result in the continuation of an order, and the imposition of duties ... once a final determination has been made"), can be classified as final action to levy definitive anti-dumping duties.[163] The United States also rejects reliance by the European Communities on Appellate Body rulings that, it asserts, do not address the issue of whether a preliminary determination can be challenged in WTO dispute settlement.[164] Finally, with regard to the argument that the four preliminary determinations were within the Panel's terms of reference, and the request of the European Communities that the Panel consider the "special circumstances"[165] of this dispute, the United States maintains that the Panel properly found that both of these arguments lack a legal basis in the *Anti-Dumping Agreement*, and could not justify a departure from the finality requirement of Article 17.4.

64. On this basis, the United States asks the Appellate Body to reject the European Communities' appeal and affirm the Panel's finding that the four preliminary determinations in the European Communities' panel request were outside the Panel's terms of reference.

3. Article 11 of the DSU – Seven Periodic Reviews

65. The United States asserts that the European Communities failed to meet its burden of

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[159]United States' appellee's submission, para. 112.
[160]United States' appellee's submission, para. 113.
[161]United States' appellee's submission, para. 114 (quoting European Communities' appellant's submission, para. 87 (original emphasis)).
[162]United States' appellee's submission, para. 115.
[163]United States' appellee's submission, para. 116.
[164]United States' appellee's submission, paras. 117-119 (referring to Appellate Body Report, *Guatemala – Cement I*, para. 79; and Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 7.44 and 7.45).
[165]United States' appellee's submission, para. 121 (quoting Panel Report, para. 7.76).

demonstrating that zeroing was employed in the seven periodic reviews at issue, and that the Panel "properly excluded those reviews from its terms of reference".[166] The United States recalls that it had explained to the Panel that it was able to confirm the accuracy of only the USDOC-generated documents, and that, apart from published *Federal Register* Notices and Issues and Decision Memoranda, "the origin of the remaining documents ... was unclear."[167] The United States notes that it further explained to the Panel that it could not confirm the accuracy of documents, program logs, printouts, or margins produced by the European Communities' legal advisors, which the European Communities claims are the result of the USDOC's Standard Margin Program without the application of the zeroing methodology. The United States submits that at no point during the Panel proceedings did the European Communities "identify whether its submitted documentation was [USDOC]-generated, or otherwise inform the Panel as to its source".[168]

66. The United States submits that the Panel's factual determinations in this case as to whether zeroing was employed in the challenged periodic reviews, as distinguished from legal interpretations or legal conclusions by a panel, are, in principle, not subject to review by the Appellate Body. The United States refers to the Appellate Body's statement that it will interfere with a panel's factual finding only if it is satisfied that the panel has exceeded the bounds of its discretion as the trier of facts, and that it will not interfere lightly with the exercise of that discretion.[169] In the view of the United States, the assertions by the European Communities that the Panel "ignored", "misinterpreted", or "misunderstood" the totality of the evidence before it "is based solely on the [European Communities'] disagreement with the Panel's conclusion as to the submitted evidence".[170]

methodology was never established for the seven periodic reviews. The United States argues that the burden rested with the European Communities, as the complaining party, to prove all components of its "as applied" claims. The United States further submits that, "[a]t a minimum, the [European Communities] was required to supply the Panel with documentation showing that 'zeroing' was in fact employed by [the USDOC] in the administrative reviews challenged."[173] The European Communities, however, made "*no* attempt"[174], despite several questions from the Panel concerning the evidence, to authenticate the documentation. Accordingly, the Panel "properly and correctly concluded"[175] that it could not be established that the European Communities' evidence was generated by the USDOC.

68. The United States argues that the European Communities is trying to establish the origin of its documentation for the first time on appeal, and that, because such explanations were never before the Panel, the European Communities' arguments relating to the Panel's breach of Article 11 in this respect must fail. As the United States contends, "[n]ewly formed explanations of evidence and much belated attempts to authenticate its evidence before the Appellate Body have no place in the context of review by the Appellate Body given the prescribed limits of Article 17.6 of the DSU."[176] In addition, the United States argues that the European Communities is placing the Appellate Body in the "untenable position"[177] of weighing evidence never before considered by the Panel, something the Appellate Body has declined to entertain in prior instances.

69. The United States argues that, in any event, the European Communities' new attempt at authenticating evidence also fails to establish that the evidence was generated by the USDOC, and thus does not demonstrate that zeroing was used in these seven periodic reviews. The United States claims that the European Communities' assertions regarding the use of an alleged "standard computer program", which requires negative margins to be treated as zero, must fail since the USDOC "does

demonstrating that such a program could not be altered in particular cases, the European Communities cannot point to a "Standard Margin Program" to support its argument that zeroing was applied in any particular periodic review. Moreover, the United States asserts that the European Communities did not authenticate the Standard Margin Programs or the Program Logs as USDOC-generated documents. The United States also contends that no review-specific documentation was submitted in support of the European Communities' challenges to the two periodic reviews in *Stainless Steel Bar from France* (Case V – Nos. 20 and 21).

70. The United States also submits that, contrary to the European Communities' claim, the Panel applied the correct standard of the burden of proof. The United States argues that the European Communities cannot summarily discharge its burden by "simply claiming that such information is available from the defending Member, while making only cursory efforts on its own behalf to establish the basis for its complaint".[180] Moreover, the United States submits that there is nothing in the Panel Report to suggest that it required a particular type of document, such as the full transaction listing generated by the USDOC. Rather, in the United States' view, "the Panel desired *any* document generated by [the USDOC]"[181] that demonstrated the use of zeroing. The United States also contests the European Communities' argument that it was "impossible" to have obtained documents generated by the USDOC with respect to the challenged reviews, arguing that the European Communities never indicated that it had "attempted, but was unable, to obtain the requisite documentation from [the USDOC's] records office".[182]

71. The United States also disagrees with the European Communities' claim that the Panel erred in its interpretation of Article 13 of the DSU. The United States argues that the Panel was under no obligation to seek further information pursuant to Article 13 of the DSU, and that the European Communities' claim appears to be no more than an improper attempt to shift its rightful burden back to the Panel. Recalling prior Appellate Body jurisprudence concerning Article 13 of the DSU, the

5.

Appellate Body decides to complete the analysis, the United States requests the Appellate Body to reject the European Communities' claims regarding the challenged periodic reviews, and to find instead that the United States did not act inconsistently with the relevant provisions of the GATT 1994 and the *Anti-Dumping Agreement*.

C. *Claims of Error by the United States – Other Appellant*

1. The Panel's Terms of Reference – 14 Additional Measures

77. The United States requests the Appellate Body to reverse the Panel's finding that the 14 periodic and sunset reviews[195]

the European Communities subsequently added 14 "legally distinct" anti-dumping measures to its panel request.[202] The 14 additional measures, even if they pertained to the same subject merchandise as the measures listed in the request for consultations, resulted from different proceedings. Given that the measures "each involved different time frames and different calculations using different information and data"[203], they were "substantively and procedurally"[204] different from the measures in the consultations request. The United States argues th

are less than the transaction-specific normal values".[217]

concerned".[225]

panels have found that a transaction-specific meaning of the term "margin of dumping" is consistent with Article 9.3 of the *Anti-Dumping Agreement*.[233]

88. Moreover, the United States asserts that the prospective normal value assessment system referred to in Article 9.4(ii) of the *Anti-Dumping Agreement* confirms that the term "margin of dumping" may have a transaction-specific meaning. According to the United States, if "individual export transactions at prices less than normal value can attract liability for payment of antidumping duties ... there is no reason why liability for payment of antidumping duties may not be similarly assessed"[234] in the United States. The United States rejects an interpretation of 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. The United States further argues that 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. For the United States, this would, in effect, render prospective normal value systems retrospective.

89. The United States submits that a prohibition of zeroing in periodic reviews "would favor importers with high margins *vis-à-vis* importers with low margins".[235] According to the United States, if "the amount of the antidumping duty must be reduced to account forduc8oTj1

90. The United States contends that any general prohibition of zeroing that applies beyond the context of weighted average-to-weighted average ("W-W") comparisons in original investigations would render the remaining text of Article 2.4.2 redundant. In particular, it would reduce the second sentence of Article 2.4.2 to "inutility" because the targeted dumping methodology would "yield the same result as [a W-W] comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons".[239] The United States finds support for its position in the findings in prior panel reports addressing zeroing.[240]

91. The United States takes issue with the Appellate Body's finding that "mathematical equivalence" occurs only in "certain situations" and is a "non-tested hypothesis".[241] First, the United States argues that all of the situations under which it has been argued that mathematical equivalence would not occur have been addressed by panels and found to be inconsistent with the *Anti-Dumping Agreement*.[242] Secondly, the United States argues that "mathematical equivalence is not a 'non-tested hypothesis'"[243] because, according to the United States, the complaining party in this case actively uses this methodology. The United States also rejects the Appellate Body's conclusion 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".[244] According to the United States, this reading of Article 2.4.2 would be contrary to the principle of effective treaty interpretation. The United States also questions the Appellate Body's conclusion "that it may be permissible to apply the targeted dumping methodology to a subset of export transactions."[245] The United States argues that nothing in the language of Article 2.4.2 provides for selecting a subset of transactions when conducting a targeted dumping analysis. The United States submits that the word "pattern" in the second sentence of Article 2.4.2 "incorporates export prices that differ significantly" and does not suggest "that one part of the identified pattern may be treated in one way (i.e., used in [weighted] average-to-transaction ["W-T"] comparisons) while another part of the identified pattern may be treated differently (i.e., ignored or used in [W-W] comparisons)."[246] Further, selecting a subset of

[239]United States' other appellant's submission, para. 101. (footnote omitted)
[240]United States' other appellant's submission, para. 102 (referring to Panel Report, *US – Zeroing (EC)*,

export transactions would, in the United States' view, be contrary to the Appellate Body's conclusion that "all"[247] export transactions should be considered wh

evidence as to whether zeroing was in fact employed in [calculating] the

Communities further argues that the Appellate Body's reasoning in *Brazil – Aircraft*—that "the additional measures included in the panel request did not change the *essence* of the subsidy scheme

100. The European Communities contends that the United States' interpretation cannot be "permissible" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement* "[i]f *all* of the interpretative elements in the *Vienna Convention* support the position of the European Communities, and disprove the position of the United States".[260] According to the European Communities, past panel and Appellate Body reports

In the European Communities' view, "it is for the Appellate Body to change its own mind; not for a panel to do it on the Appellate Body's behalf."[268]

107. The European Communities also asserts that is not necessary to consider preparatory work or other historical materials. In any event, the European Communities argues that there is a "strong indication of consensus that the interests of both sides in the asymmetry and zeroing debate was accommodated in the targeted dumping provisions that eventually became the second sentence of Article 2.4.2."[269] The European Communities further argues

amount of [duty] must not exceed the *exporter's* dumping margin."[275] Fourthly, the European Communities contends that it is incorrect to say that "an 'offset' is provided for the so-called non-dumped transactions; it is rather a question of properly calculating a margin of dumping for each *exporter* by taking all transactions fully into account, regardless of whether they are above or below normal value."[276]

110. Finally, the European Communities points out that the argument that "a general prohibition on zeroing would render the targeted dumping provisions redundant"[277] has been carefully considered and rejected in past cases. The European Comm

consideration, it is crucial that the original 38 measures and the additional 14 measures "all concern the application of the *same zeroing methodology* to the *same products* from the *same countries*, under the *same anti-dumping orders*, and they provide *succeeding bases for the continued application and imposition* of anti-dumping duties under that order."[287]

114. Brazil asserts that the Panel correctly held that the United States acted inconsistently with the provisions of the *Anti-Dumping Agreement* and the GATT 1994 by applying simple zeroing in periodic reviews. Brazil contends that the United States' position that "dumping" and "margin of dumping" may be established for individual export transactions is not supported by a proper interpretative analysis. In Brazil's view, the United States' position that the term "dumping" can refer to "anything from one transaction to all transactions ... seeks to replace a uniform multilateral definition with an empty vessel that each Member's authority can unilaterally fill as it wishes, with the meaning possibly changing from one proceeding to another."[288] Brazil also disagrees with the support the United States draws from the fact that Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* both use the word "price" in the singular. According to Brazil, "[t]he immediate context in Article 2.1 shows that the two singular prices mentioned—home market price (or normal value) and export price—are collective prices for the 'product' as a whole."[289] Brazil also maintains that the term "like product" is used in the *Anti-Dumping Agreement* in the collective sense, and that the three methodologies in Article 2.4.2, each of which requires a comparison with "export prices" in multiple transactions, show that the single price is obtained by aggregating prices of multiple export transactions.

115. Brazil argues that the United States' view that dumping can be determined for an individual export transaction cannot be reconciled with the context provided by Articles 5.8, 6.10, 8.1, 9.1, 9.3, and 9.5 of the *Anti-Dumping Agreement*. According to Brazil, Article 6.10 requires a single margin of dumping to be determined with respect to each exporter. As a consequence, the decision to terminate or pursue an investigation under Article 5.8 is based on a single dumping determination made for all transactions relating to the product; for the purpose of injury determination under Article 3, all entries of the product are treated as dumped; and reme

the definition of "dumping" that applies to the entire Agreement. Allowing the meaning to change from one type of proceeding to another "would lead to arbitrary and unpredictable results: for a given set of export transactions, at identical prices, for an identical product and exporter, there could be 'dumping' in one type of anti-dumping proceeding but not in another."[292]

116. Brazil challenges certain of the United States' contextual arguments. Brazil argues that, although the word "product" is used in Articles VI:1 and VII:3 of the GATT 1994, this does not mean that the word carries the same meaning in each of those provisions. According to Brazil, the different contexts for these provisions shows that the word has different meanings with respect to each provision. Brazil also rejects the United States' argument that paragraph 1 of *Ad* Article VI of the GATT 1994 "provides for importer specific comparisons".[293] Brazil argues that paragraph 1 of *Ad* Article VI, like Article 2.3 of the *Anti-Dumping Agreement*, "simply permits an authority to use the importer's resale price to an independent buyer as the starting-point for its determination of export price, in circumstances where the importer is related to the exporter."[294] Brazil also rejects arguments of the United States regarding Article 2.2 of the *Anti-Dumping Agreement*, noting that, "whether or not normal value is constructed for some or all models under Article 2.2, the results of the intermediate comparisons must all be aggregated to determine 'dumping' on a product-wide basis to meet the definition of Article 2.1."[295] Regarding the application of Article 9.4(ii) to a prospective normal value system under the *Anti-Dumping Agreement*, Brazil argues that reliance on a specific definition of "dumping" is misplaced because this argument "conflates"[296] two distinct concepts: the "amount of anti-dumping duty" under Article 9.4 and the "margin of dumping" determined under Article 2. According to Brazil, "the amount of duties imposed on importers with respect to individual imports of a product is *not* a 'margin of dumping' determined for that entry."[297] Brazil disagrees with the United States that, in a review under Article 9.3.2, it is not possible to determine an exporter's margin, because the importer has to make the request for the review, and the importer does not possess all the information regarding the exporter. For Brazil, this argument overlooks examples of similar situations in the *Anti-Dumping Agreement*, such as Articles 5, 11.2, and 11.3, in which, "like Article 9.3.2, the party making a duly substantiated request is *not* the exporter, yet a determination is made regarding the exporter."[298] Finally, Brazil disagrees with the proposition that a general prohibition of zeroing would render the second sentence of Article 2.4.2 *inutile*. In Brazil's view, this

[292]Brazil's third participant's submission, para. 62.
[293]Brazil's third participant's submission, para. 70 (referring to United States' other appellant's submission, para. 68).
[294]Brazil's third participant's submission, para. 71.
[295]Brazil's third participant's submission, para. 72.
[296]Brazil's third participant's submission, para. 73.
[297]Brazil's third participant's submission, para. 74. (original emphasis)
[298]Brazil's third participant's submission, para. 78. (original emphasis)

dispute does not concern zeroing under Article 2.4.2, but "whether zeroing is permitted in a [W-T] comparison in a periodic review under Article 9.3".[299] Accordingly, in the circumstances of this dispute, "any exceptional right that sentence *might* afford for zeroing is simply irrelevant to the periodic reviews at issue."[300]

117. Brazil takes issue with the United States' argument that defining "dumping" in relation to the product as a whole leads to "perverse incentives and absurd results".[301] For Brazil, this argument is based on the proposition that "'dumping' *should* be defined on a transaction-specific basis to allow the importing Member to *maximize* the amount of duties collected, without the 'dumping' found in one transaction being offset by the prices of other transactions."[302] Brazil argues that this policy position is not reflected in the text of the treaty, and believes that Members agreed to a single "dumping" determination for each exporter because this approach "strikes an appropriate balance between the interests of an importing Member in protecting its domestic industries against the unfair pricing of a 'product', and those of exporting Members in enjoying the market access concessions it secured in the Uruguay Round."[303]

118. Brazil agrees with the Panel that the European Communities made out a *prima facie* case regarding the application of zeroing in the eight sunsetoing iyeone domestic 2plicatir 298.22 T6 Nothee3.1(Tjanno.

evidence of factual findings in recently adopted panel and Appellate Body reports".[307] According to Brazil, these adopted reports contain findings that establish that the USDOC has always used zeroing procedures in periodic reviews during the period covered by the investigations of the seven periodic reviews at issue. Moreover, Brazil maintains that factual findings in adopted panel and Appellate Body reports create "legitimate expectations concerning the existence and application of particular measures", particularly where "an adopted report may include findings regarding the *existence* and the *nature* of an *identical* measure of the *same* defending party during the *same* time period at issue in a later dispute."[308] Brazil finds support for its position in WTO jurisprudence regarding Article 21.5 compliance proceedings. According to Brazil, "the notion that later disputes involving measures subject to factual findings in adopted reports form part of a 'continuum of events' of which the panel in the later dispute must take account, and failing some relevant change, from which it may not depart, should not be limited to compliance disputes under Article 21.5."[309] In this case, the Panel was dealing with a "consistent continuum" of findings regarding zeroing in periodic reviews, and if the Panel wished to depart from factual findings in adopted reports, it should have provided a "reasoned and adequate explanation setting out a relevant change of circumstances".[310] Brazil also contends that it would have been appropriate for the Panel *sua sponte* to have taken notice of the relevant findings of fact in prior adopted reports.

120. Brazil argues that the Panel also breached Article 11 of the DSU by failing to seek information from the United States as to whether it had applied simple zeroing in the seven periodic reviews. Brazil asserts that the Panel "refused" to request of the United States "detailed data and other information about its margin calculations" despite its relevance, the European Communities' contingent request, the Panel's own conclusion that such information was relevant to its final determination, and the "undoubted fact" that only the United States had access to this information.[311] Brazil rejects as "legally incorrect"[312] the Panel's view that, "unless and until a complaining party has made its *prima facie* case during the course of the proceedings, there is no obligation by a defending party to provide *any* information, even if such information would be highly relevant to the claims or defenses at issue in the dispute."[313] According to Brazil, "[a]n objective examination of the facts presupposes that the 'facts' examined are as complete as possible in view of the evidence *available*—whether because it has been submitted by a party, or because it is of significance to the panel's inquiry

[307]Brazil's third participant's submission, para. 107.
[308]Brazil's third participant's submission, para. 116. (original emphasis)
[309]Brazil's third participant's submission, para. 121.
[310]Brazil's third participant's submission, para. 122.
[311]Brazil's third participant's submission, para. 125.
[312]Brazil's third participant's submission, para. 131.
[313]Brazil's third participant's submission, para. 130 (original emphasis) (referring to Panel Report, para. 6.20).

but not in the public domain. Assessment of the facts without the benefit of the best available information runs the risk of non-objectivity, or decisions made on the basis of an incomplete record."[314] Further, Brazil argues that parties to a WTO dispute are bound by a "duty to cooperate and to produce information ... regardless of which party bore the ultimate burden of proof to establish a *prima facie* case."[315]

121. Brazil contends that Article 13.1 of the DSU does not require a panel to wait for a request by one party in order to request information from the other party. In addition, a panel does not "make the case" for one party by seeking information from the other because "every request by a panel under Article 13.1 necessarily relates to some element of a claim or defense."[316] Thus, Brazil submits that the failure of the Panel to seek information from the United States to examine the authenticity and accuracy of the European Communities' documentation for each periodic review in question constitutes a failure by the Panel to conduct an objective assessment of the facts. In addition, the Panel's failure to agree to the European Communities' request to seek information resulted in the Panel assessing facts that were "significantly incomplete".[317] While Brazil "appreciates" the Appellate Body's reluctance to second-guess a panel's exercise of discretion "regarding the quantum or completeness of evidence in the record", Brazil adds that "[t]here are limits to a [p]anel's discretion *not* to act and *not* to collect sufficient facts to ensure that its decision is based on the best information available."[318]

122. Finally, Brazil argues that the Panel failed to conduct an objective assessment of the facts because it "did not properly evaluate and explain th

submits that the due process requirement of Article 6.2, as well as the "specific circumstances in the specific dispute"[324], should be taken into account when deciding whether the measure is properly identified in the panel request. Specific circumstances in this dispute include the previous zeroing disputes brought before WTO panels and the Appellate Body that, according to Japan, demonstrate that the United States continues to use the zeroing methodology. Japan further points to the USDOC December 2006 Notice demonstrating that the zeroing methodology underlying the measures at issue "continues to exist".[325]

128. Japan submits that the Panel erred when it concluded that the European Communities' claims regarding the four preliminary determinations at issue were outside the Panel's terms of reference. Japan argues that the Panel's reasoning was premised on the understanding that these were "provisional measures" under Article 17.4, and thus subject to the conditions under Articles 7.1 and 17.4 of the *Anti-Dumping Agreement*. Japan agrees with the European Communities that the preliminary determinations are not necessarily "provisional measures", and that Article 17.4 is not necessarily limited to a "final action", an "acceptance of a price undertaking", or a "provisional measure" under Article 17.4.[326] Japan contends that it was therefore reasonable for the European Communities to argue that any act or decision taken by the United States, even if not final, was covered by the Panel's terms of reference.

129. Japan asserts that the Panel was correct to find that the 14 periodic and sunset reviews that were identified in the European Communities' panel request, but not in the request for consultations, were within the Panel's terms of reference. Japan argues that, because these 14 determinations were "part of the same 'dispute' with respect to which consultations were requested"[327], they fell within the Panel's jurisdiction.

130. Japan submits that the Panel erred in its finding that the European Communities failed to demonstrate that simple zeroing was used by the USDOC in the seven periodic reviews at issue. Japan further maintains that the Panel failed to carry out an objective assessment of the facts as required by Article 11 of the DSU. In particular, Japan submits that the Panel committed an "egregious error"[328] when assessing the evidence before it because it failed to give consideration to the totality of the evidence. Japan argues that the Panel should have considered the Appellate Body's findings in *US – Zeroing (Japan)*—that simple zeroing in periodic reviews is "as such" inconsistent

[324]Japan's third participant's submission, para. 29.
[325]Japan's third participant's submission, para. 31.
[326]Japan's third participant's submission, para. 39.
[327]Japan's third participant's submission, para. 49.
[328]Japan's third participant's submission, para. 61.

with the *Anti-Dumping Agreement*—and that the United States "openly stated its reluctance to abandon simple zeroing in administrative reviews".[329]

131. Japan takes issue with the burden of proof that the Panel imposed on the European Communities. Japan argues that, if the United States did not rebut the facts claimed by the European Communities, there was no need for the Panel "to deny the facts claimed because of the incompleteness of the evidence introduced to prove the facts".[330] Compared to other zeroing disputes, Japan argues, the European Communities was subject to a "higher demand regarding the evidence".[331] Japan submits the Appellate Body should "consider the balance with respect to the standard of proof among the disputes which are dealing with the same issue".[332] Japan also contends that the Panel erred when it disregarded the European Communities' request for the Panel to ask for further information pursuant to Article 13.1 of the DSU. Japan argues that the Panel should have requested a copy of the detailed calculations from the United States, and that, by not doing so, it placed "an unbalanced burden to collect information [on] the other party".[333]

132. Japan reiterates that simple zeroing in periodic reviews is inconsistent with the requirements

meaning of Article 3.3 of the DSU "as long as and to the extent"[336] the Panel found that the underlying zeroing methodology constitutes a measure under that provision. Korea adds that these 18 duties not only contain the same "precise content", but they are also "more specific and narrower" in their scope than the zeroing methodology, which itself constitutes a measure under Article 3.3.[337] Further, Korea argues that previous Appellate Body decisions stand for the proposition "that a panel must look at the panel request in its entirety and collectively."[338] Korea submits that a panel should "respect the discretion given to a complaining party as to how to formulate its own claims as long as it identifies a discernible measure in its Panel Request".[339] 135.Tj-TT21 1 Tf10.75410 TD0 Tc0

137. Finally, Korea submits that the Panel erred in finding that the European Communities failed to make out a *prima facie* case regarding the use of simple zeroing in the seven periodic reviews at issue because it "failed to observe what is obvious on the record".[346] Korea maintains that there was a "great deal of evidence"[347] other than the Issues and Decision Memoranda showing that simple zeroing was used in the seven periodic reviews, and notes that the United States does not assert that zeroing was not used in these reviews. Korea submits that the Panel's conclusion, based on the mere absence of an explicit reference to zeroing in the Issues and Decision Memoranda alone, is "clearly erroneous and misplaced"[348] and constitutes a violation of Article 11.

138. For the foregoing reasons, Korea submits the Appellate Body should "modify or reverse the legal findings and conclusions of the Panel and complete the necessary analysis".[349] Korea also submits that the Appellate Body should ensure that the relevant provisions of the *Anti-Dumping Agreement* and the DSU "are construed in their proper context and in accordance with the applicable Appellate Body precedents".[350]

7. Mexico

139. Pursuant to Rule 24(2) of the *Working Procedures*, Mexico chose not to submit a third participant's submission, but notified its intention to appear at the oral hearing. At the oral hearing, Mexico expressed views relating to the consequences that follow the decision of a respondent not to submit evidence in response to assertions of a complainant, and concerning the relationship between different determinations in an anti-dumping proceeding.

8. Norway

140. Pursuant to Rule 24(2) of the *Working Procedures*, Norway chose not to submit a third participant's submission, but notified its intention to appear at the oral hearing. At the oral hearing, Norway argued that it follows from the Appellate Body's findings in prior disputes involving zeroing that the use of simple zeroing in periodic reviews is inconsistent with WTO law. Norway also disagreed with the United States' analysis of Article 17.6(ii) of the *Anti-Dumping Agreement*. For Norway, a panel must first apply customary rules of interpretation of public international law to the language of the contested provisions. The purpose of this exercise is to assist the treaty interpreter in arriving at one single interpretation, except in the rarest of cases. The second sentence would apply only as a last resort to settle an interpretative question in favour of the investigating authority.

[346] Korea's third participant's submission, par [illegible]

(b) If the Appellate Body reverses the Panel's finding that the European Communities failed to comply with the requirements of Article 6.2 of the DSU, then whether the Appellate Body should complete the analysis and find that:

(i) the continued application of the 18 anti-dumping duties fell within the Panel's terms of reference; and

(ii) the continued application of the 18 anti-dumping duties is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1 and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.

(c) Whether the Panel erred in finding that the European Communities' claims concerning four preliminary measures were outside the Panel's terms of reference.

(d) If the Appellate Body reverses the Panel's finding that the European Communities' claims concerning the four prelim

145. Regarding zeroing in periodic reviews, the following issue is raised on appeal by the United States:

- Whether the Panel erred in finding that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by using simple zeroing in 29 periodic reviews.

146. Regarding zeroing in periodic reviews, the following issues are raised on appeal by the European Communities:

(a) Whether the Panel acted inconsistently with its duties under Article 11 of the DSU in finding that the European Communities had failed to demonstrate that the United States Department of Commerce (the "USDOC") used simple zeroing in seven of the periodic reviews at issue; and

(b) If the Appellate Body reverses the Panel's finding that the European Communities had not shown that simple zeroing was used in seven periodic reviews, then whether the Appellate Body should complete the analysis and conclude that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in respect of these reviews.

147. Regarding zeroing in sunset reviews, the following issue is raised on appeal by the United States:

- Whether the Panel acted inconsistently with its duties under Article 11 of the DSU in finding that the United States failed to comply with its obligations under Article 11.3 of the *Anti-Dumping Agreement* in the eight sunset review determinations at issue in this dispute.

148. Regarding the Panel's recommendations, the following issue is raised on appeal by the European Communities:

- Whether the Panel erred in rejecting the European Communities' request for a suggestion pursuant to Article 19.1 of the DSU.

IV. The Panel's Terms of Reference

149. We begin with the participants' appeals relating to the Panel's terms of reference. First, we review the Panel's finding that the European Communities failed to identify the specific measures at issue, as required by Article 6.2 of the DSU, in relation to its claims regarding the "continued

application of the 18 anti-dumping duties"[351] by the United States. Next, we examine whether the Panel erred in finding that the European Communities' claims regarding four preliminary determinations did not fall within the Panel's terms of reference. Furthermore, we address the issue of whether the Panel erred in finding that the European Communities' claims concerning 14 periodic and sunset review proceedings were within the Panel's terms of reference despite the fact that these proceedings were not identified in the European Communities' consultations request.[352] Finally, we review the United States' conditional request[353] that the Appellate Body find that the continued application of the 18 anti-dumping duties fell outside the Panel's terms of reference on the grounds that they were not identified in the European Communities' consultations request.

A. *The Continued Application of the 18 Anti-Dumping Duties*

150. The European Communities alleges that the Panel erred in concluding that the claims concerning the continued application of the 18 anti-dumping duties fell outside the Panel's terms of reference because the European Communities' panel request did not identify the specific measures at issue in relation to these claims, as required by Article 6.2 of the DSU. The European Communities requests the Appellate Body to reverse the Panel's conclusions and to complete the analysis by finding that the continued application of the 18 anti-dumping duties is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1, and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.[354]

1. The Panel's Findings

151. The United States requested the Panel to make a preliminary ruling that, in relation to the European Communities' claims regarding the "continued application of, or the application of"[355] 18 anti-dumping duties, the panel request failed to identify the specific measures at issue, "[i]nsofar as" the alleged measure is "deemed indeterminate".[356] At the outset, the Panel noted the European Communities' explanation that it was not pursuing a claim against zeroing "as such" and found that

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[351]Panel Report, para. 7.61. The European Communities' panel request refers to, *inter alia*, the "continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request". (WT/DS350/6, Panel Report, Annex F-1, p. F-4) For ease of reference, the Panel referred to "the continued application of the 18 duties" to describe the subject of the European Communities' challenge. (See, for example, Panel Report, footnote 4 to para. 2.1. See also *ibid.*, paras. 7.49-7.61) In this Report, we use the term "the continued application of the 18 anti-dumping duties" in the same manner.

[352]Panel Report, para. 7.28.

[353]The United States makes this request in the event that the Appellate Body reverses the Panel's finding that the European Communities' panel request does not identify the specific measures at issue, as required under Article 6.2 of the DSU. (United States' other appellant's submission, footnote 6 to para. 26)

[354]

the European Communities' claims "are to be considered as challenging particular instances of application of the zeroing methodology".[357] For the Panel, the description in the panel request was "ambiguous, particularly because the panel request [did] not sufficiently distinguish between the continued application of the 18 duties and the use of zeroing in the 52 specific proceedings"[358] that were also listed in the annex to the panel request. The Panel reasoned that, "if the European Communities wishes to raise claims in connection with the continued application of the 18 duties at issue, it has to, in the first place, identify that measure independently from other measures with regard to which it raises other claims."[359]

152. The Panel further considered that the European Communities did not "demonstrate the existence and the precise content of the purported measure" and that "the continued application of the 18 duties", in isolation from any proceeding in which such duties had been calculated, did not "represent a measure in and of itself".[360] The Panel added that the remedy sought by the European Communities would "affect the determinations that the USDOC might make in anti-dumping proceedings that may be conducted in the future".[361] The Panel reasoned that "[t]here may be exceptional cases where panels may consider to make findings on measures not identified in the complaining party's panel request".[362] For that to happen, however, the new measure would "have to constitute 'a measure' within the meaning of Article 6.2 of the DSU" and would "have to come into existence during the panel proceedings".[363]

153. Based on this analysis, the Panel concluded that the European Communities had "failed to identify the specific measure at issue in connection with its claims regarding the continued application of the 18 anti-dumping duties".[364] As a consequence, the Panel concluded that such claims did not fall within its terms of reference.[365]

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measures at issue with respect to the continued application of the 18 anti-dumping duties.[366] The European Communities maintains that "it would have been *impossible*" for its panel request "to be *any more specific*, identifying as it did the document originating each of the 18 measures (in each case, the final order), that is, the specific duties applying to the specific products exported from the European Communities to the United States."[367] The European Communities argues that the Panel confused the "procedural legal analysis" under Article 6.2 of the DSU with the "substantive legal analysis" under Article 3.3 of the DSU.[368]

158. In considering the participants' arguments on appeal, we examine, first, the issue of whether the European Communities' panel request identifies the specific measures at issue, as required by Article 6.2 of the DSU.

3. The Specificity of the Panel Request

159. Article 6.2 of the DSU provides, in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

160. There are two main requirements under Article 6.2 of the DSU, namely, the identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint.[381] Together, these elements comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[382] These requirements are intended to ensure that the complainant "present[s] the problem clearly" in the panel request. This appeal concerns the first of the two requirements under Article 6.2, namely, the identification of the specific measures at issue.[383]

161. The Appellate Body has observed previously that the requirements in Article 6.2 serve two

> the case may be, original proceedings and changed circumstances or sunset review proceedings listed in the Annex are inconsistent with [Articles 1, 2.1, 2.4, 2.4.2, 5.8, 9.1, 9.3, 9.5, 11, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.][389] (footnote omitted)

164. The European Communities thus challenges two distinct sets of "measures". First, the European Communities challenges the continued application of the duties resulting from the 18 anti-dumping duty orders listed in the annex to its panel request, as calculated or maintained in the most recent proceeding pertaining to such duties. Secondly, the European Communities challenges the use of the zeroing methodology in 52 specific anti-dumping proceedings (four original investigations, 37 periodic reviews, and 11 sunset reviews) that pertain to the duties resulting from these 18 anti-dumping duty orders.

165. It is with respect to the first set of measures that the issue of specificity under Article 6.2 arises in this appeal. The panel request makes explicit reference to the definitive anti-dumping duties resulting from 18 anti-dumping duty orders, each imposed on a specific product exported to the United States from a specific country. The orders imposing these definitive duties are also listed in the annex to the European Communities' panel request. For each of these 18 anti-dumping duty orders, a citation is provided. The panel request further indicates that the European Communities is challenging the "continued application of, or

paid by importers ... in excess of the dumping margin which would have been calculated using a WTO consistent methodology".[392]

166. Thus, the panel request links the following three elements in seeking to identify the measures at issue: (i) duties resulting from the anti-dumping duty orders in the 18 cases listed in the annex; (ii) the most recent periodic or sunset review proceedings pertaining to these duties; and (iii) the use of the zeroing methodology in calculating the level of these duties in such proceedings. Taken together, the United States could reasonably have been expected to understand that the European Communities was challenging the use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which the anti-dumping duties are maintained.

167. The Panel found that the panel request does not meet the specificity requirement under Article 6.2 because the European Communities failed to "demonstrate the existence and the precise content of the purported measure" and that "the continued application of the 18 duties" does not "represent a measure in and of itself".[393]

expected to present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten norms.[396] Moreover, although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue. Thus, an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement. Such consideration may have to be explored by a panel and the parties during the panel proceedings, but is not prerequisite for the establishment of a panel. To impose such prerequisite would be inconsistent with the function of a panel request in commencing panel proceedings and setting the jurisdictional boundaries of such proceedings. Therefore, we reject the proposition that an examination of the specificity requirement under Article 6.2 of the DSU must involve a substantive inquiry as to the existence and precise content of the measure.

170. Furthermore, in the Panel's view, the European Communities' panel request did "not sufficiently distinguish between the continued application of the 18 duties and the use of zeroing in the 52 specific proceedings at issue."[397] The Panel reasoned that, "if the European Communities wishes to raise claims in connection with the contin

remedy sought by the complainant may provide further confirmation as to the measure that is the subject of the complaint. As discussed, we are of the view that it can be discerned from the panel request, read as a whole, that the measures at issue consist of an ongoing conduct, that is, the use of the zeroing methodology in successive proceedings in each of the 18 cases whereby anti-dumping duties are maintained. The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future. Moreover, it is not uncommon for

'as applied' claims."[408] The Panel cautioned that "the distinc

The European Communities' claim regarding these measures is not an "as such" claim[415], in that its

At the oral hearing, the European Communities confirmed that it is not seeking the revocation of the 18 anti-dumping orders but, rather, the cessation of the use of the zeroing methodology by which the duties are calculated and maintained in these 18 cases.[420] In our view, the European Communities, in seeking an effective resolution of its dispute with the United States, is entitled to frame the subject of its challenge in such a way as to bring the ongoing conduct, regarding the use of the zeroing methodology in these 18 cases, under the scrutiny of WTO dispute settlement.

182. The European Communities takes issue with the Panel's finding that "the continued application of 18 duties" was "in isolation from any proceeding in which such duties have been calculated".4 2

between 1 May 2001 and 30 April 2005.[427] The Panel further found that, in the sunset review pertaining to this order (of which the likelihood-of-dumping determination was issued on 5 October 2005), the USDOC relied on the margin from the original investigation, which was calculated with the zeroing methodology.[428] The Panel record further indicates that the sunset review (No. 9)[429] resulted in continuation of the original anti-dumping duty order. Thus, the Panel's factual findings show that the USDOC used the zeroing met

the application or continued application of duties in the 18 'cases'".[443] Specifically, the United States maintains that "[i]t is not even certain that in some periods there will be sales above normal value, so there would not even be the possibility of applying so-called zeroing."[444] According to this argument, in a particular case where all export prices happen to be below the normal value, zeroing would not be applied. However, the use of zeroing is relevant only when there are transactions with export prices above normal value, whereby the negative comparison results between the export prices and the normal value would be treated as zero. Thus, even if zeroing may not manifest itself as a result of the particular factual circumstances of a case in which all export prices are below the normal value, this does not negate the fact that the repeated action by the USDOC in a string of determinations relating to these four cases confirms the use of the zeroing methodology as an ongoing conduct.

193. In contrast, the existing factual findings of the Panel and undisputed facts in the Panel record in relation to 6 of the 18 cases concern only one proceeding in each case whereby duties were applied with the use of zeroing. More specifically, the Panel found that the zeroing methodology was used in the original investigations in four cases.[445] No other determinations in those cases were in the Panel record. In one other case, the Panel found that, in the sunset review, the USDOC relied on the original margin calculated with zeroing.[446] However, no other determination concerning successive stages in this case was in the Panel record. In yet another case, the only specific evidence submitted by the European Communities concerns one periodic review.[447] In this case, the Panel found that there was insufficient evidence showing that simple zeroing was used.[448] In our view, the Panel' fficient evidenc10.98 2c3rtmputd facts i8(a)1.9(l vr-21.case, the P.7268 TDr-21.case, the P.7268 TDTdotual 3ce s
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a determination as to what conclusions may be drawn from the remaining evidence in the record, would be more appropriately conducted by a panel, with the assistance of the parties.

196. Finally, for the one remaining case[457], the Panel found that simple zeroing was used in two of the periodic reviews. Nonetheless, the Panel made no findings on one periodic review and the sunset review in that case, having excluded them from its terms of reference.[458] As the Panel also noted, this anti-dumping duty was revoked during the course of the Panel proceedings.[459] Given that the duty in this case has already been terminated, we do not consider it appropriate to make any finding in this respect.

197. In sum, we find that relevant factual findings by the Panel and undisputed facts in the record establish that, with respect to the anti-dumping duties in four of the cases listed in the panel request, the zeroing methodology has been used in successive periodic reviews and in the sunset review, in each of these cases, whereby these duties are maintained.

198. We recall that the European Communities requests us to find that the continued application of the zeroing methodology in the 18 cases, as identified in its panel request, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1, and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.[460] In section V of this Report, we find that the zeroing methodology, as applied in periodic reviews, is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*. In addition, the Panel, referring to relevant jurisprudence of the Appellate Body, concluded that, to the extent an 41752 TV0 7.0 In dt.uTnsiserrinaumetr

dumping duties is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 to the extent that the duties are maintained at a level calculated through the use of the zeroing methodology in the periodic reviews in the following four cases: *Ball Bearings and Parts Thereof from Italy* (Case II), *Ball Bearings and Parts Thereof from Germany* (Case III); *Ball Bearings and Parts Thereof from France* (Case IV); and

provisions of Article 7.1".[466] Noting that Article 7.1 lays down three conditions for the imposition of a provisional anti-dumping measure, the Panel stated that the European Communities' claim regarding the four preliminary measures "may be accepted only if the European Communities proves that the conditions set out under Article 7.1 ... have not been met with regard to such measures."[467] The Panel further noted that the European Communities had not raised a claim under Article 7.1 of the *Anti-Dumping Agreement*. Therefore, the Panel concluded that the European Communities' claims regarding the four preliminary determinations were not within the Panel's terms of reference.[468]

203. On appeal, the European Communities maintains that the Panel rejected the European Communities' claims on the "assumption" that the European Communities had argued that the four preliminary determinations were "provisional measures".[469] The European Communities argues that, as it explained to the Panel and the Panel admitted[470], it was not challenging the four preliminary determinations as "provisional measures" within the meaning of Articles 7.1 and 17.4 of the *Anti-Dumping Agreement*. Rather, it was challenging "the continued application of zeroing in connection with the definitive anti-dumping duties identified in [its] Panel Request (i.e., the 18 measures)."[471]

Articles 2.1, 2.4, 2.4.2, 11.1, and 11.3 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.[474]

204. The United States submits that the Panel properly excluded the four preliminary determinations from its terms of reference.[475] The United States submits that, pursuant to Article 17.4 of the *Anti-Dumping Agreement*, a matter may only be referred to a panel if "final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties."[476] Yet, the four preliminary determinations challenged by the European Communities were not "final action" because, at the time of the panel request, the United States had not yet made a decision to levy definitive duties.[477] The United States further contends that the only exception to Article 17.4 of the *Anti-Dumping Agreement* is that a provisional measure may be challenged if the conditions set out in Article 7.1 are met. Thus, the United States asserts, the Panel properly understood that the only way a non-final action could be challenged under the *Anti-Dumping Agreement* would be if it were a provisional measure, and properly concluded that the European Communities' challenge against these four preliminary determinations did not fulfil the conditions set forth in Article 7.1.[478] Furthermore, the United States notes the European Communities' argument that its challenge against the continued application of the 18 duties includes "any subsequent 'measure'"[479], such as the preliminary determinations. The United States maintains that this argument ignores the plain text of Article 17.4, because "[n]either on-going administrative reviews, nor on-going sunset reviews, can be classified as final action to levy definitive anti-dumping duties."[480]

205. Article 17.4 of the *Anti-Dumping Agreement* provides:

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

[474]European Communities' appellant's submission, paras. 6 and 94; Panel Report, para. 3.1(c) and (d).

> *consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7*, that Member may also refer such matter to the DSB. (emphasis added)

206. Article 17.4 of the *Anti-Dumping Agreement* stipulates, therefore, that a Member may refer the matter to the DSB if two conditions are met: (i) consultations "have failed to achieve a mutually agreed solution"; and (ii) *final action* has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings. In addition, under the second sentence of Article 17.4, a Member may request the establishment of a panel in the case of a *provisional measure* if: (i) that measure has a "significant impact"; and (ii) the Member that requested consultations considers that the measure was taken contrary to the provisions of Article 7.1.[481]

207. Before the Panel, the European Communities expressly stated that it was "not challenging provisional measures within the meaning of Article 17.4 of the *Anti-Dumping Agreement*."[482] The Panel, however, excluded these four measures from its terms of reference for the reason that the European Communities "does not raise any claims under Article 7.1 [of the *Anti-Dumping Agreement*] in these proceedings" and had not "prove[d] that the conditions set out under Article 7.1 ... have not been met" with regard to provisional measures.[483] We note, however, that in this dispute, the European Communities was not challenging provisional measures within the meaning of Article 7.1 of the *Anti-Dumping Agreement*. Instead, the European Communities listed among the 52 specific proceedings three preliminary results in sunset reviews and one preliminary result in a periodic review.[484] These reviews were conducted by the USDOC, subsequent to the imposition of duties pursuant to the original anti-dumping investigations, to assess the duty liabilities and cash deposit rates (in the case of periodic review), and to determine whether a duty should be revoked or continued (in the case of sunset reviews). In contrast, a provisional measure, within the meaning of Article 7 of the *Anti-Dumping Agreement*, is an interim measure taken by an investigating authority in the context of an original investigation to prevent further injury to the domestic industry, pending the final outcome of the original investigation. Therefore, we fail to see the Panel's rationale in excluding

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[481]Article 7.1 of the *Anti-Dumping Agreement* provides:

> Provisional measures may be applied only if:
> (i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;
> (ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and
> (iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

[482]Panel Report, para. 7.75.
[483]Panel Report, para. 7.73.
[484]Panel Report, para. 7.70.

these measures from its terms of reference on the grounds that the European Communities did not bring any claims under Article 7.1 concerning the conditions for imposing provisional measures. As a result, the Panel's finding that the four preliminary determinations were outside its terms of reference, which was made on the basis of the European Communities' failure to bring claims under Article 7.1, cannot stand.

final anti-dumping duty were assessed in excess of the margin of dumping or that the USDOC would have relied on the margin calculated with zeroing in deciding to continue the duty.

211. With respect to the remaining two determinations, the documents referred to by the European Communities are final likelihood-of-dumping determinations issued by the USDOC in the sunset reviews in *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 4)[489] and in *Certain Pasta from Italy* (Case XIII – No. 47).[490] With respect to the former, the European Communities submitted the Issues and Decision Memorandum accompanying the final results, which indicates that the USDOC relied on the margin calculated in the original investigation for its likelihood determination.[491] The original investigation in that case was conducted prior to the date on which the USDOC announced that it would no longer apply model zeroing in original investigations.[492] Nonetheless, we note that both sunset review proceedings were still pending before the USITC at the time the Panel was established. Thus, the USITC had not yet determined, for either case, whether expiry of the anti-dumping duty order would be likely to lead to the continuation or recurrence of injury.[493] Under these circumstances, we do not consider that completion of the analysis as to whether these measures are inconsistent with the covered agreements would be appropriate.

212. On this basis, we decline the European Communities' request for completion of the analysis and for a finding that the four preliminary determinations are inconsistent with "the provisions of the GATT 1994 and the *Anti-Dumping Agreement* cited in the Panel proceedings".[494]

C. *Certain Measures Allegedly Not Included in the Request for Consultations*

213. We turn now to consider the United States' allegation that the Panel erred in finding that 14 periodic and sunset reviews identified in the European Communities' panel request were within the Panel's terms of reference even though they were not listed in the European Communities' request for consultations.[495] We also consider the United States' request for a finding that the

[489]Panel Exhibit EC-70, Appendix I.
[490]Panel Exhibit EC-78, Appendix I.
[491]"Issues and Decision Memorandum for the Sunset Review of the Anti-Dumping Duty Order on Steel Concrete Reinforcing Bars from Latvia; Final Result" (Panel Exhibit EC-70, Appendix II), p. 6.
[492]See USDOC December 2006 Notice, *supra*, footnote 92.
[493]United States' appellee's submission, footnote 111.
[494]European Communities' appellant's submission, para. 94. The provisions cited in the Panel proceedings include Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1, 11.2, and 11.3 of the *Anti-Dumping Agreement*. (Panel Report, para. 3.1(c) and (d))
[495]For ease of reference, we refer to these periodic reviews and sunset reviews jointly as the "14 additional measures".

continued application of the 18 anti-dumping duties were outside the Panel's terms of reference because they were not included in the European Communities' consultations request.[496]

1. The Panel's Findings

214. Before the Panel, the United States requested a preliminary ruling that the following measures were outside the Panel's terms of reference because they were not identified in the request for consultations: (i) 14 of the 52 anti-dumping proceedings listed in the annex to the panel request; and (ii) the continued application of the 18 anti-dumping duties.[497]

215. The Panel noted that Article 6.2 of the DSU "requires that a panel request mention whether consultations were held, but it does not stipulate that the scope of the consultations request limits the scope of the claims that may subsequently be raised before a panel."[498] The Panel further noted that, pursuant to Article 4.7 of the DSU and Article 17.4 of the *Anti-Dumping Agreement*, "as long as the consultations request and the panel request concern the same matter, or dispute, claims raised in connection with measures identified in the ... panel request would fall within a panel's terms of reference even if those precise measures were not identified in the consultations request."[499] The Panel found that the 52 anti-dumping measures, including the 14 additional measures not identified in the consultations request, all concerned "different determinations pertaining to the same products originating in the same countries".[500] Moreover, they entailed the alleged use of the same

[496]United States' other appellant's submission, footnote 6 to para. 26.
[497]

methodology, zeroing, which, in the Panel's words, was the "gist of the [European Communities'] claims" before the Panel.[501] For the Panel, this "substantive similarity" between the measures at issue and the fact that they concerned the same country and the same product "outweighed" the fact that

not make such a request in its Notice of Other Appeal, the Appellate Body should reject this request.[518] In any event, the European Communities argues, the European Communities' consultations request "did refer to the zeroing methodology, and this was simply narrowed in the Panel Request to refer to the zeroing methodology as embedded in the 18 measures."[519]

3. Whether the 14 Additional Measures Fell within the Panel's Terms of Reference

220. In considering the United States' arguments on appeal, we begin with the text of the relevant provisions of the DSU. Article 4 of the DSU provides, in relevant part, that:

> *Consultations*
>
> 1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.
>
> ...
>
> 4. ... Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

221.

227. With respect to the specific anti-dumping proceedings, the European Communities requested consultations regarding, *inter alia*, 33 periodic reviews and one sunset review in which the zeroing methodology was allegedly applied. In the panel request, the European Communities challenges the application of the zeroing methodology in 52 specific anti-dumping proceedings. Among them, four periodic reviews and 10 sunset reviews were not expressly listed in the consultations request.

228. We recall that the Appellate Body has cautioned against a standard that is too "rigid" in terms of requiring the "precise and exact identity" between the scope of the request for consultations and the panel request, as long as the complaining party does not "expand the scope of the dispute".[533] Here, the 14 additional measures identified in the panel request pertain to the same anti-dumping duties that are included in the consultations request. Among the 14 additional measures are the sunset review proceedings concerning the continuation of 10 anti-dumping duties, in relation to which the successive periodic reviews are identified in the consultations request.[534] The remaining four additional measures are more recent periodic reviews to the ones listed in the consultations request, including two final results issued subsequent to the preliminary results that were listed in the consultations request.[535] The proceedings listed in the consultations request and the panel request are therefore successive stages subsequent to the issuance of the same anti-dumping duty orders. More specifically, as regards the periodic reviews, the subsequent measures assessed actual duty liabilities

Products that, although a measure was listed in the panel request, it nevertheless fell outside the panel's terms of reference because it was "legally distinct" from the measure included in the consultations request.[538]

230. We note that, in reaching its finding in *US – Certain EC Products*, the Appellate Body took into account several particular factors arising in that dispute. For example, the Appellate Body noted that the contents of these two measures were different: while one provided for increased bonding requirements, the other provided for the imposition of 100 per cent customs duties. It also noted that these two measures were taken by two separate agen

alone, does not lead to the conclusion that the 14 additional measures necessarily fell within the Panel's terms of reference. However, we do not consider that the Panel made such a finding. Rather, the Panel was distinguishing the current dispute from that in *US – Certain EC Products*, in which the

listed in the consultations request also involve essentially the same practice as the successive periodic reviews identified in the panel request, that is, the assessment of duty liabilities and cash deposit rates. Moreover, the European Communities' claims against the periodic and sunset reviews listed,

241. On this basis, we dismiss the United States' request and conclude that the continued application of the anti-dumping duties in each of the 18 cases was identified in the European

this cannot be reconciled with the interpretation and application of several provisions of the *Anti-Dumping Agreement*, including a determination of injury under Article 3.[560]

246. Secondly, the Panel examined the issue of "whether dumping is necessarily an exporter-specific concept or whether it may also be determined for individual importers."[561] The Panel said that it "tend[ed] toward the view that dumping is not necessarily and exclusively an exporter-specific concept".[562] However, referring to the Appellate Body's reasoning that "certain elements of the definitional provisions contained in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 compel the notion that dumping reflects the exporter's behaviour"[563], the Panel observed that the Appellate Body had reversed the findings of prior panels that had considered the determination of importer-specific margins permissible. The Panel further noted that the Appellate Body "found contextual support for its interpretation in other provisions of the Agreement, including Articles 2.3, 5.2(ii), 6.1.1, 6.7, 5.8, 6.10, 9.5, 8.1, 8.2, 8.5 and 9.4(i) and (ii)."[564] In addition, the Appellate Body "restated the overarching requirement of Article 9.3 that the level of anti-dumping duty cannot exceed the margin of dumping as established under Article 2 of the Agreement [and] reasoned that dumping can only be determined for the exporter and in connection with the product under consideration as a whole, and considered that this definition of 'dumping' applies throughout the Agreement."[565]

247. Thirdly, the Panel stated that it shared the United States' concern that "prohibiting simple zeroing in periodic reviews would favour importers with high margins *vis-à-vis* importers with low margins."[566] However, in this regard, the Panel recalled the Appellate Body's explanation "that the prohibition of simple zeroing in periodic reviews does not preclude Members from carrying out an importer-specific inquiry in determining liability for the collection of anti-dumping duties, as long as the duty collected does not exceed the exporter-specific margin of dumping established for the product under consideration as a whole."[567]

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[560]Panel Report, para. 7.162 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 99).
[561]Panel Report, para. 7.163.
[562]Panel Report, para. 7.163.
[563]Panel Report, para. 7.163 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 83-96).
[564]Panel Report, para. 7.163 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 83-96).
[565]Panel Report, para. 7.163.
[566]Panel Report, para. 7.164.
[567]Panel Report, para. 7.164 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 113).

248. Fourthly, while expressing the view that an opinion presented in the 1960 Second Report by the Group of Experts on Anti-Dumping and Countervailing Duties[568] (the "1960 Group of Experts Report") "supports the conclusion that dumping could be determined for individual importers"[569], the Panel recalled that the Appellate Body "rejected this argument, finding that interpretation of the Agreement in this regard does not necessitate an analysis of supplementary means of interpretation provided for under Article 32 of the Vienna Convention."[570] The Appellate Body further reasoned that the 1960 Group of Experts Report "does not clarify whether simple zeroing in periodic reviews is allowed under the Anti-Dumping Agreement because it only reflects the views of some of the negotiating parties well before the Anti-Dumping Agreement came into force."[571]

249. Fifthly, the Panel said it "tend[ed] to agree" with the proposition that recognition in the *Anti-Dumping Agreement* of a prospective normal value system "reinforces the argument that dumping may be determined on the basis of individual export transactions".[572] The Panel noted, however, that the Appellate Body "highlighted the fact that the duty collected at the time of importation under a prospective normal value system does not represent the margin of dumping within the meaning of Article 9.3 and noted that such duty is subject to review under Article 9.3.2."[573]

250. Finally, the Panel said it "tend[ed] to agree" with the United States and the panel in *US – Stainless Steel (Mexico)* that, if the *Anti-Dumping Agreement* was read to prohibit zeroing generally, then Article 2.4.2 would yield the same mathematical result as the first methodology, rendering the second sentence of Article 2.4.2 *inutile*.[574] However, the Appellate Body dismissed this concern, explaining that, "if the determination of weighted average normal values was based on *different time periods*, dumping margin calculations under these two methodologies would yield different mathematical results."[575] The Appellate Body also reiterated its view that "[b]eing an exception, the

251. Although it had "generally found the reasoning of earlier panels on these issues to be persuasive"[577], the Panel noted that it was "faced with a situation where the Appellate Body reports, adopted by the DSB, have consistently reversed the findings in the mentioned panel reports that simple zeroing in periodic reviews is not WTO-inconsistent."[578] Thus, "before setting out any definitive findings", the Panel turned to consider what it referred to as "an important systemic question".[579]

252. Referring to the "consistent line of reasoning underlying the Appellate Body's conclusion regarding simple zeroing in periodic reviews"[580], the Panel turned to consider the role of prior jurisprudence. The Panel noted the Appellate Body's finding that, although "Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties"[581], they are nevertheless "often cited by parties in support of

which "establishes that the WTO dispute settlement system is intended to provide security and predictability to the multilateral trading system".[586] The Panel agreed that such security and predictability may "be furthered by the development of consistent jurisprudence and applying it to the same legal questions, absent cogent reasons to do otherwise".[587] However, while concluding that "it is obviously incumbent upon any panel to consider prior adopted Appellate Body reports, as well as adopted panel reports, and adopted GATT panel reports, in undertaking the objective assessment required by Article 11"[588], the Panel said it did not believe that "the development of binding jurisprudence is a contemplated element to enable the dispute settlement system to provide security and predictability to the multilateral trading system."[589]

255. The Panel reasoned as follows:

> Clearly, it is important for a panel to have cogent reasons for any decision it reaches, regardless of whether or not there are any relevant adopted reports, and whether or not the panel follows such reports. ... In our view, however, a panel cannot simply follow the adopted report of another panel, or of the Appellate Body, without careful consideration of the facts and arguments made by the parties in the dispute before it. To do so would be to abdicate its responsibilities under Article 11. By the same token, however, neither should a panel make a finding different from that in an adopted earlier panel or Appellate Body report on similar facts and arguments without careful consideration and explanation of why a different result is warranted, and assuring itself that its finding does not undermine the goals of the system.[590] (emphasis omitted)

256. Consequently, while the Panel said it "share[d] a number of concerns" expressed by the panel in *US – Stainless Steel (Mexico)*, the Panel recognized that the Appellate Body had reversed the findings of that panel and that the Appellate Body report had "gained legal effect through adoption by the DSB."[591] The Panel also noted that "this continues a series of consistent recommendations made by the DSB over the past several years following reports that addressed the same issues based largely on the same arguments."[592]

257. The Panel further observed that:

> In addition to the goal of providing security and predictability to the multilateral trading system, ... Article 3.3 of the DSU provides that "[t]he prompt settlement of situations in which a Member considers

[586]Panel Report, para. 7.179.
[587]Panel Report, para. 7.179.
[588]Panel Report, para. 7.179.
[589]Panel Report, para. 7.179.
[590]Panel Report, para. 7.180.
[591]Panel Report, para. 7.181.
[592]Panel Report, para. 7.181.

that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Given the consistent adopted jurisprudence on the

> 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.

270. The Appellate Body has reasoned that 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'."[620] Where that is the case, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations." As the Appellate Body has said, "[i]t follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*."[621]

271. The second sentence of Article 17.6(ii) must therefore be read and applied in the light of the first sentence. We wish to make a number of general observations about the second sentence. First, Article 17.6(ii) contemplates a sequential analysis. The first step requires a panel to apply the customary rules of interpretation to the treaty to see what is yielded by a conscientious application of such rules including those codified in the *Vienna Convention*. Only *after* engaging this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies. The structure and logic of Article 17.6(ii) therefore do not permit a panel to determine first whether an interpretation is permissible under the second sentence and then to seek validation of that permissibility by recourse to the first sentence.

272. Secondly, the proper interpretation of the second sentence of Article 17.6(ii) must itself be consistent with the rules and principles set out in the *Vienna Convention*. This means that it cannot be interpreted in a way that would render it redundant, or that derogates from the customary rules of interpretation of public international law. However, the second sentence allows for the possibility that the application of the rules of the *Vienna Convention* may give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible and must be given effect bw.6(ii) 84fg ,ial aTj/TT2cy9r

product" when destined for consumption in the "exporting" country. By virtue of the opening phrase of Article 2.1—"[f]or the purpose of this Agreement"—this definition of "dumping" applies throughout the *Anti-Dumping Agreement*.[628] In the interpretation of the concept of "dumping", the discipline imposed by the opening phrase of Article 2.1 of the *Anti-Dumping Agreement* is important because it requires that the definitional content of "dumping" must be capable of application throughout the *Anti-Dumping Agreement* in a coherent fashion. This definition cannot be of variable content or application.

281. Turning to the concept of "margin of dumping", we note that Article VI:2 speaks of the difference between the normal value and the export price and establishes the link between "dumping" and "margin of dumping".[629] Article VI:2 further clarifies that the "margin of dumping" is in respect of the dumped "product". In our view, there must be clarity as to the definition of "dumping" because it becomes a fundamental part of the basic concepts that underlie the *Anti-Dumping Agreement*, such as the "margin of dumping".

282. Mere scrutiny of the particular terms—such as "product" and "export price"—in Article 2.1 does not resolve the issue of whether the concept of dumping is concerned with individual transactions or whether it is necessarily an aggregative concept attributable to an exporter. However, as we have indicated above, the interpretative exer67 -eechit becomee3.72.4(ular term)8.5(s—s)-7..4(erpr)]TTT8 13

product at the various stages of anti-dumping duty proceedings.[633]

286. Article 9.3.1 of the *Anti-Dumping Agreement* is subject to the overarching requirement in Article 9.3 that the amount of anti-dumping duty "shall not exceed the margin of dumping as established under Article 2" of that Agreement. Based on an examination of the context of Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, the Appellate Body has found that the term "margin of dumping", as used in those provisions, relates to the "exporter" of the "product" under consideration. Furthermore, the Appellate Body has clarified that the definitions

the basis of an examination of the exporter's pricing behaviour as reflected in all of its transactions

that the possibility that aggregation of multiple comparisons results in a periodic review would yield a negative value for a particular importer "would not mean that the authorities would be required ... to compensate an importer for the amount of that negative value (that is, when export prices exceed normal value)."[643]

4. Prospective Normal Value Systems

292. We turn next to examine the United States' arguments relating to the calculation of the liability for payment of anti-dumping duties on the basis of a so-called "prospective normal value"[644] referred to in Article 9.4(ii) of the *Anti-Dumping Agreement*.

293. The United States argues that Article 9.4(ii) of the *Anti-Dumping Agreement* lends support to the proposition that "dumping" may be interpreted in relation to individual export transactions. For the United States, it would be "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."[645] The United States further argues that 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, in order to take into account all of the exporters' transactions. For the United States, this would, in effect, render prospective normal value systems retrospective.

294. In addressing similar arguments by the United States in previous appeals, the Appellate Body has emphasized that the anti-dumping duty collected at the time of importation, "under a prospective normal value system, does not represent the 'margin of dumping' under Article 9.3, which, as the Appellate Body has found, is the margin of dumping for an exporter for all of its sales of the subject merchandise into the country concerned."[646] This is not changed by the fact that, in such a system, the *liability* for payment of anti-dumping duties may be *final* at the time of importation. Rather, Article 9.3.2 contemplates that the amount of duties collected on a prospective basis is subject to review pursuant to Article 9.3 of the *Anti-Dumping Agreement*, which provides that "[*t*]*he amount of the anti-dumping duty* shall not exceed the margin of dumping as established under Article 2."[647]

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[643]Appellate Body Report, *US – Zeroing (EC)*, footnote 234 to para. 131; Appellate Body Report, *US – Zeroing (Japan)*, para. 155.

[644]In a prospective normal value system, duties are assessed on the basis of the difference between a "prospective normal value" and the prices of individual export transactions.

[645]United States' other appellant's submission, para. 89 (referring to Panel Report, *US – Stainless Steel (Mexico)*, para. 7.133).

[646]Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 120.

[647]Emphasis added.

295. Thus, Article 9.4(ii) does not mean that the basic disciplines governing the calculation of margins of dumping, contained in Article VI of the GATT 1994 and Article 2 of the *Anti-Dumping Agreement*

comparison methodology in the second sentence of Article 2.4.2 (weighted average-to-transaction) alone cannot determine the interpretation of the two methodologies provided in the first sentence, that is, transaction-to-transaction and weighted average-to-weighted average."[653] Moreover, it could be

300. In *US – Stainless Steel (Mexico)*, the Appellate Body did not reason in the way the United States suggests. Rather, the Appellate Body said that the 1960 Group of Experts Report "did not resolve the issue of whether the negotiators of the *Anti-Dumping Agreement* intended to prohibit zeroing".[658] The Appellate Body added that, "even if it were to assuu d( )5.5(1x816was xpemittre)71(ed)]TJ122.1

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the differences in the prospective and retrospective systems of duty assessment; its critics think otherwise.

312. There is little point in further rehearsing the fine points of these interpretations. In my view, there is every reason to survey this debate with humility. There are arguments of substance made on both sides; but one issue is unavoidable. In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. The membership of the WTO is entitled to rely upon these outcomes. Whatever the difficulty of interpreting the meaning of "dumping", it cannot bear a meaning that is both exporter-specific and transaction-specific. We have sought to elucidate the notion of permissibility in the second sentence of Article 17(6)(ii). The range of meanings that may constitute a permissible interpretation does not encompass meanings of such wide variability, and even contradiction, so as to accommodate the two rival interpretations. One must prevail. The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come.

313. For these reasons, I concur in the decision reached by the Division in section E that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by using simple zeroing in periodic reviews.

E. *Conclusion on the European Communities' Claim under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994*

314. As noted above, Article 9.3.1 of the *Anti-Dumping Agreement* is subject to the overarching requirement in Article 9.3 that the amount of anti-dumping duty "shall not exceed the margin of dumping as established under Article 2" of that Agreement. Also as noted above, under Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter. We see no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the *Anti-Dumping Agreement* for disregarding the results of comparisons where the export price exceeds the normal value.

315. When applying "simple zeroing" in periodic reviews, the USDOC compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amounts by which the export prices exceed the monthly weighted average normal values, when

aggregating the results of the comparisons to calculate the going-forward cash deposit rate for the exporter and the duty assessment rate for the importer concerned. In this way, simple zeroing results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping, which, under Article 9.3 of the *Anti-Dumping Agreement*, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by an exporter.

316. In the light of the above, we uphold the Panel's finding that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement*

to 28 February 2003 (No. 34), the Panel did not indicate whether the margin calculation program evidence was generated by the USDOC[676], or whether it was able to determine from that evidence whether simple zeroing was used.

323. In the case of the two reviews in *Stainless Steel Bar from Italy* (Case XI – No. 39) and *Certain Pasta from Italy* (Case XIII – No. 43), the Panel concluded that the calculation tables submitted by the European Communities were "not produced by the USDOC".[677] With respect to *Certain Pasta from Italy*, the Panel also found that it was not "readily discernable from such tables that simple zeroing was used".[678] The Panel did not indicate for either of these reviews whether the margin calculation program evidence was generated by the USDOC[679], or whether it was able to determine from that evidence whether simple zeroing was used.

324. As regards the two periodic reviews in *Stainless Steel Bar from France* (Case V – Nos. 20 and 21), the European Communities submitted evidence for each review consisting of the applicable *Federal Register*

no specific reference to periodic reviews and the methodologies that may be used in such reviews", the Panel found that the statement in the USDOC Notice was "too broad to support the [European Communities'] argument that the USDOC used simple zeroing in all periodic reviews carried out before the effective date of the policy change at issue".[685]

326. The European Communities also argued before the Panel that, given the various WTO rulings against the United States' use of the zeroing methodology, it should not be disputed that simple zeroing was used in the seven periodic reviews at issue.[686] The Panel disagreed with the European Communities. The Panel considered that the existence of prior adverse rulings regarding the use of zeroing did not discharge the European Communities' burden of proving that simple zeroing was used in the periodic reviews at issue, and that "every dispute stands on its own merits" even if it concerns "the same measure that is at issue in these proceedings".[687]

327. The European Communities also pointed to the margin calculation programs and calculation tables that had been provided and argued that these documents, when read together, show that simple zeroing was used in each of the periodic reviews at issue.[688] The United States maintained that, because the calculation tables were not generated by the USDOC, the United States could not confirm their accuracy, and they therefore do not show that zeroing was applied in the periodic reviews at issue.[689] The United States also asserted that there is no such thing as a "standard computer programme" that requires zeroing in periodic reviews, and therefore called upon the Panel to reject the European Communities' arguments.[690] After considering the comments of the European Communities, the Panel found no reason to change its conclusion "that the European Communities failed to show *prima facie* that the USDOC used simple zeroing in such reviews".[691]

328. The Panel also addressed arguments of the European Communities that it had no further documentation available to it, and that it was therefore for the United States to rebut the *prima facie* case made out by the European Communities. Remarking that the European Communities must submit evidence of the underlying factual assertion that the United States used simple zeroing in the periodic reviews at issue, the Panel found that the European Communities had not done so.[692]

[685]Panel Report, para. 6.9.
[686]Panel Report, para. 6.11.
[687]Panel Report, para. 6.11.
[688]Panel Report, paras. 6.13-6.16.
[689]Panel Report, para. 6.17.
[690]Panel Report, para. 6.17.
[691]Panel Report, para. 6.18.
[692]Panel Report, para. 6.20.

Accordingly, the Panel found that it "[could not] expect the United States to rebut a *prima facie* case that has not been made by the European Communities".[693]

329. Finally, the Panel addressed the contention of the European Communities that the United States was withholding relevant information, and th

general and prospective application.[705] The European Communities also refers to USDOC statements in the Issues and Decision Memoranda in other periodic reviews acknowledging the use of simple zeroing in periodic reviews, and the USDOC December 2006 Notice announcing that, apart from eliminating zeroing in W-W comparisons in original investigations, the USDOC was not modifying any other comparison methodologies for dumping determinations or any other segment of an anti-dumping proceeding. The European Communities asserts that the Panel should have drawn the conclusion from these statements that simple zeroing was used in the periodic reviews at issue in this dispute.[706] Finally, the European Communities argues that "the *fact* that the United States *could* show that zeroing was not used in the specific administrative reviews ... but *did not do so* should have allowed the Panel to infer that zeroing was actually used."[707]

334. In its findings regarding the seven periodic reviews, the Panel evaluated individual pieces of case-specific evidence submitted by the European Communities. In connection with its consideration of the periodic review in *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3), for example, we note that the Panel referred in two instances to

proof.[712] We note, however, that the Panel may not have required that evidence "necessarily show" the existence of simple zeroing for the other periodic reviews; in those reviews, the Panel stated that it was not "readily discernable"[713] from particular documents that simple zeroing was used, or that certain evidence did not "demonstrate" or "show" that simple zeroing was used.[714]

336. However, even if the Panel did not in all cases require that the European Communities provide evidence "necessarily showing" that simple zeroing was used, we remain concerned by the Panel's approach to the evidence, in which it assessed whether specific pieces of evidence, taken alone, proved the use of simple zeroing, without considering that evidence in relation to other factual evidence. As we noted above, a panel has a duty under Article 11 of the DSU to evaluate evidence in its totality, by which we mean the duty to weigh collectively all of the evidence and in relation to each other, even if no piece of evidence is by itself determinative of an asserted fact or claim. In the Panel's consideration of the periodic review in *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3), we note that the Panel made the following successive statements: (1) the final results published in the *Federal Register* "do not mention whether simple zeroing was used"; (2) the margin calculation programs "do not necessarily show that the simple zeroing methodology was used"; (3) the tables containing results with and without zeroing do not "necessarily show that simple zeroing was actually used"; and (4) the Issues and Decision Memorandum "does not mention whether simple zeroing was applied".[715] On the basis of these statements, the Panel concluded "that the European Communities has failed to demonstrate as a matter of fact that simple zeroing was used by the USDOC in this periodic review."[716] The Panel applied a similar approach to the other periodic reviews at issue, referring to individual pieces of evidence that do not "demonstrate" or "show" that simple zeroing was used, and then concluding that the European Communities had therefore failed to demonstrate that simple zeroing was used by the USDOC in that periodic review.[717]

337. In our view, the Panel's reasoning reflects that it segregated and analyzed individual pieces of evidence in order to determine whether any of the pieces, by itself, proved the existence of simple zeroing. Even if the Panel were correct in assessing the value of individual pieces of evidence, and in

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[712]In *US – Wool Shirts and Blouses*, the Appellate Body explained that international tribunals "have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof", and that the burden of proof "rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence". (Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323, at 335)

[713]Panel Report, para. 7.154 (concerning *Stainless Steel Bar from Germany* (Case IX – No. 33)); and Panel Report, para. 7.157 (concerning *Certain Pasta from Italy* (Case XIII – No. 43)).

[714]Panel Report, paras. 7.152-7.153 (concerning *Stainless Steel Bar from France* (Case V – Nos. 20 and 21)); and Panel Report, paras. 7.155 and 7.156 (concerning *Stainless Steel Bar from Germany* (Case IX – No. 34) and *Stainless Steel Bar from Italy* (Case XI – No. 39)).

[715]Panel Report, para. 7.151.

[716]Panel Report, para. 7.151.

[717]Panel Report, paras. 7.152-7.157.

concluding that no single piece of evidence demonstrated an asserted fact at issue, it was not proper for it to have foreclosed the possibility that the consideration of all of the evidence taken together might be sufficient proof of that fact. We note, in particular, the argument of the European Communities that, when the margin calculation programs are considered *together with* the tables showing detailed calculations, "the necessary conclusion is that the evidence overwhelmingly corroborates the fact that the zeroing methodology was part of the measure and indeed was actually used."[718] The Panel referenced this argument of the European Communities, but appears not to have

identical to the electronic version provided by [the] USDOC".[728] We also note the argument of the European Communities that the United States does not allege that the printouts have been altered, or otherwise challenge that the content or underlying data of the documents was generated by the USDOC.[729] Accordingly, the printouts of the margin calculation programs appear to have their origins in original USDOC documents, and we see no basis to conclude that such documentation differs in any material respect from the original program. Thus, while an authenticated USDOC document may have offered greater certainty as to its content, we do not agree that this renders a document that has not been authenticated not probative of the fact asserted, particularly if it is produced or replicated from documents or data supplied by the USDOC.

341. We agree with the United States that the issue of whether documents submitted by the European Communities were authenticated as USDOC-generated appears to have been "pivotal"[730] to the Panel's finding regarding the seven periodic reviews. While the Panel does not explain the extent to which the probative value of submitted evidence was, in its view, undermined by its non-authentication, the fact of non-authentication was one of two factors, and at times the *only* factor, cited by the Panel for its conclusion that the European Communities had failed to demonstrate the use of simple zeroing in particular periodic reviews.[731] We therefore consider that the Panel, by insisting on authenticated USDOC documents to demonstrate or show the use of simple zeroing, also failed to make an objective assessment by allowing a challenge to the authenticity of evidence originating from the USDOC, but later reproduced by interested parties, to skew its consideration of the probative value of that evidence.

342. We now turn to address the European Communities' arguments that the Panel erred in its interpretation of Article 13 of the DSU when it concluded that the European Communities did not ask the Panel to seek detailed, transaction-specific margin calculations from the United States, and that the request the European Communities made in its written response to questions from the Panel "does not suffice as a request to the Panel to seek specific factual information from the USDOC pursuant to its authority under Article 13".[732] The European Communities requests the Appellate Body to find

[728]European Communities' appellant's submission, para. 117. (emphasis omitted)
[729]Participants' responses to questioning at the oral hearing. See also European Communities' appellant's submission, paras. 117, 119, 121 and 128.
[730]United States' appellee's submission, para. 140.
[731]In the periodic reviews for

that the Panel erred in its interpretation of Article 13, and to find that it would have been "appropriate" for the Panel, before finding against the European Communities, to seek further information corroborating the use of simple zeroing in the periodic reviews at issue.[733]

343. Article 13 of the DSU gives panels "the right to seek information and technical advice from any individual or body which it deems appropriate". The Appellate Body has explained that this is a discretionary authority that panels may exercise in seeking information "from any relevant source".[734] The Appellate Body has also explained that, while panels have "broad authority to pose such questions to the parties as it deems relevant for purposes of considering the issues that are before it"[735], such authority cannot be used "to make the case for a complaining party".[736]

344. The European Communities claims it explained to the Panel that the USDOC does not disclose a complete listing of all transactions and comparisons made in each periodic review. As a result, the European Communities posited to the Panel that, "should the Panel consider further corroboration appropriate, the Panel should request the United States to provide copies of the detailed margin calculations for each of the seven administrative reviews at issue."[737] We do not consider that the Panel acted inconsistently with Article 13 of the DSU when it did not seek such information. As noted, a panel's authority to request information under Article 13 of the DSU is discretionary, and there is therefore no error that can be attributed to the Panel for its conduct in respect of that Article.

345. Article 11 of the DSU, however, regulates a panel's exercise of its discretion. The Appellate Body has noted the "comprehensive nature" of a panel's authority under Article 13, and has affirmed that this authority is "indispensably necessary" to enable a panel to discharge its duty imposed by Article 11.[738] Moreover, the Appellate Body has underscored the importance of a panel's investigative function:

> [A] panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the

[733]European Communities' appellant's submission, paras. 206 and 211.
[734]Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84.
[735]Appellate Body Report, *US – Zeroing (EC)*, para. 260.
[736]Appellate Body Report, *Japan – Agricultural Products II*, para. 129.
[737], 20 Tc0 Tw34

> responding Member, as the case may be, has established a *prima facie* case or defence.[739] (original emphasis)

346. In explaining why it did not request information from the United States, the Panel stated not only that the European Communities' request was not sufficiently specific, but that it would not have been appropriate for the Panel to have done so. As the Panel explained:

> [W]e consider that it would be inappropriate for a panel to exercise its authority to seek information based on its own judgement as to what information is necessary for a party to prove its case, as opposed to seeking information in order to elucidate its understanding of the facts and issues in the dispute before it.[740]

347. As we have said, the Panel appears to have considered that a margin calculation program, or other document, only established the use of simple zeroing if it originated from the USDOC at the time of the review. Once the Panel set out that standard, however, we see no indication that it got to

351. With respect to the case-specific evidence for these reviews, we recall the United States' position that, unless it could be established that a particular document was generated by the USDOC, the United States could not confirm its content.[747] As we noted, the United States does not argue that these documents were altered, and has not directly challenged the content of these documents or the data on which they were based.[748] We also note that the margin calculation programs contain information, uncontested by the parties, that indicates that they represent the margin calculation programs used by the USDOC for the relevant periodic review.[749] For the periodic review in *Stainless Steel Bar from Germany* (Case IX – No. 33), the United States submits that the evidence offered by the European Communities at Appendix II to Panel Exhibit EC-57 does not consist of a margin calculation program.[750] The European Communities submitted two additional documents before the Panel that purportedly reflect margin calculation programs used in this review, and "refer to various macros forming part of the macro program included under Appendix II of [Panel] Exhibit EC-57 and which contains the zeroing code".[751] As we noted above, the European Communities also prepared and submitted calculation tables for each of these reviews which, it asserts, show margin calculation results that reflect the use of zeroing, and what those results would have been without the use of zeroing.

352. As we have also noted, the United States does not contest the underlying information of these documents other than to say that, because they appear to have been reproduced by interested parties after the periodic review at issue, the United States was not in a position to confirm them. The European Communities observes that the United States adduced no evidence or argument that it did not apply simple zeroing in these reviews[752], and we see no evidence in the Panel record to suggest that the United States *did not* apply simple zeroing in these reviews. When asked at the oral hearing,

[747]United States' responses to questioning at the oral hearing.
[748]See *supra*, footnote 729.
[749]During questioning at the oral hearing, it was noted that the documents advanced by the European Communities as margin calculation programs reflect the case number for the periodic review, the covered product, the name of the foreign exporter or producer, the name of the USDOC analyst identified in the *Federal Register* Notice, and the line of computer programming code that indicates that simple zeroing was applied. (Participants' responses to questioning at the oral hearing) The European Communities introduced an exhibit before the Panel that described various programming code designations that are used in margin calculation

the United States was not in a position to confirm whether or not it applied simple zeroing in the periodic reviews at issue.[753]

353. We have carefully considered the Panel record in its totality regarding the seven periodic reviews. On the basis of the factual findings and uncontested facts in connection with five of these reviews—that is,

regarding a particular fact or claim on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence.

VII. The European Communities' Conditional Appeals

358. The European Communities submits what it characterizes as two "conditional appeals". First, the European Communities argues that, if the Panel Report is construed as finding that a panel can invoke "cogent reasons" for departing from previous Appellate Body rulings on the same issue of legal interpretation, then the European Communities requests the Appellate Body to "modify or reverse" that finding by the Panel. Secondly, if

the covered agreements under Article IX:2 of the WTO Agreement."[775] For the United States, treating prior reports as binding outside the scope of the original dispute would add to the obligations of WTO Members, inconsistently with Articles 3.2 and 19.1 of the DSU. On this basis, the United States submits that the European Communities "cannot treat the statements from a prior report as authoritative and then ask the Appellate Body under Article 17.6 of the DSU to assess whether the Panel acted consistently with them or not".[776]

361. We begin by examining the European Communities "conditional appeal" regarding the relevance of prior Appellate Body reports.

A. *The Relevance of Prior Appellate Body Reports*

362. Appellate Body reports adopted by the DSB are binding and must be unconditionally accepted by the parties to the particular dispute.[777] The Appellate Body has also said that adopted panel and Appellate Body reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute.[778] Following the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same.

Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements."[782] The Appellate Body found that failure by the panel in that case to follow previously adopted Appellate Body reports addressing the same issues undermined the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.[783] The Appellate Body added that:

> Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in

substantive findings" *or* the exercise of judicial economy by the Panel with respect to the "substantive issue of zeroing" in periodic reviews.[794]

368. We have upheld the Panel's finding that the United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by applying simple zeroing in 29 periodic reviews. Accordingly, we are not required to rule on this aspect of the European Communities' conditional appeal.

VIII. The Eight Sunset Reviews

369. We turn now to address the United States' claim that the Panel failed to undertake an objective assessment of the matter before it, as required by Article 11 of the DSU, in finding that the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* by allegedly using, in the eight sunset reviews at issue, dumping margins obtained through model zeroing in original investigations.[795]

370. Before the Panel, the European Communities challenged the use of zeroing in eight[796] sunset reviews carried out by the USDOC, arguing that, as part of its sunset review determinations, the USDOC relied on dumping margins calculated through zeroing in original investigations or in the subsequent reviews.[797] The Panel noted that, "[a]s the factual basis" for this claim[798], the European Communities submitted copies of the Issues and Decision Memoranda, issued by the USDOC in the eight sunset reviews, which showed that the USDOC used dumping margins obtained in the underlying original investigations.

371. The Panel further noted that these underlying original investigations were carried out before the effective date of the USDOC's policy change published in the USDOC December 2006 Notice, in which the USDOC announced that it would "no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons".[799] On this basis, the Panel found that "the European Communities ha[d] shown *prima facie* that the margins in the investigations at issue were obtained through model zeroing".[800] Noting that the United States had not submitted

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[794]European Communities' appellant's submission, para. 230.
[795]United States' other appellant's submission, paras. 114-121.
[796]The European Communities' challenge initially concerned 11 sunset reviews. (Panel Report, para. 7.184) The Panel noted that, with respect to three of the 11 sunset reviews, the European Communities' challenge concerned preliminary determinations. Recalling its finding that the preliminary determinations challenged by the European Communities were outside its terms of reference, the Panel stated that it would make findings only with regard to the remaining eight sunset reviews. (*Ibid*., para. 7.191)
[797]Panel Report, para. 7.184.
[798]Panel Report, para. 7.198.
[799]Panel Report, para. 7.199 (quoting USDOC December 2006 Notice, *supra*, footnote 92).
[800]Panel Report, para. 7.200.

the panel record".[809] On this basis, the United States requests that the Appellate Body reverse the Panel's finding that it acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*.

373. The European Communities argues that the Panel was entitled to conclude from the evidence in the record that, "in the eight sunset reviews at issue, the USDOC relied, either exclusively or along with margins obtained in prior periodic reviews, on margins obtained through model zeroing in prior investigations".[810] In reaching this conclusion, the Panel properly drew inferences from the facts available in the record, including the fact that there was a concrete policy change declared by the USDOC to depart from its practice of using model zeroing in original investigations, and the fact that the original investigations underlying the sunset reviews at issue took place before this policy change.[811] The European Communities further maintains that the United States did not submit any evidence to rebut the European Communities' assertion concerning the sunset reviews at issue, and that the Panel properly took this additional fact into account in drawing its final conclusion.[812] Therefore, the European Communities requests the Appellate Body to reject the United States' claim and to find, instead, that the Panel "made an objective assessment of the facts when finding that the European Communities demonstrated that in the sunset reviews at issue, the USDOC relied ... on margins obtained through model zeroing in prior investigations."[813]

374. We recall that, before the Panel, there was no disagreement between the parties that, in the eight sunset reviews at issue, the USDOC used margins obtained in the underlying original investigations.[814] Furthermore, the United States did not contest the Panel's reliance on the Appellate Body's finding, in *US – Zeroing (Japan)*, that to the extent that a sunset review determination is based on previous margins obtained through a methodology that is inconsistent with the covered agreements, the resulting sunset review determinations would also be inconsistent with the covered agreements.[815] Neither did the United States contest the Panel's finding that the model zeroing methodology in original investigations is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[816]

375. Thus, in order to make findings on the European Communities' claims relating to the eight sunset reviews, the remaining issue before the Panel was whether the dumping margins from the

[809]United States' other appellant's submission, para. 121 (quoting Appellate Body Report, *US – Carbon Steel*, para. 142).
[810]European Communities' appellee's submission, para. 73 (quoting Panel Report, para. 7.200).
[811]European Communities' appellee's submission, paras. 75 and 76.
[812]European Communities' appellee's submission, para. 78.
[813]European Communities' appellee's submission, para. 79.
[814]Panel Report, para. 7.198.
[815]Panel Report, paras. 7.195 and 7.196.
[816]Panel Report, para. 7.196. See also *ibid.*, para. 7.104.

original investigations underlying the eight sunset reviews, which the USDOC relied upon to make its likelihood determinations, were calculated on the basis of the model zeroing methodology. The Panel found that these margins were calculated using the model zeroing methodology on the basis of the following: (i) an announcement in the USDOC December 2006 Notice stating that the USDOC would no longer apply the model zeroing methodology in original investigations; and (ii) the fact that the original investigations underlying the eight

It is undisputed that before 22 February 2007, the USDOC applied model zeroing in weighted average dumping margin calculations during the original investigation. As stated in the USDOC Notice dated 27 December 2006:

> The [USDOC] is modifying its methodology in antidumping investigations with respect to the calculation of the weighted–average dumping margin. This final modification is necessary to implement the recommendations of the World Trade Organization Dispute Settlement Body. Under this final modification, the [USDOC] will no longer make average–to-average comparisons in investigations without providing offsets for non–dumped comparisons. (…)
>
> *Prior to this modification*, when aggregating the results of the averaging groups in order to determine the weighted–average dumping margin, the [USDOC] did not permit the results of averaging groups for which the weighted–average export price or constructed export price exceeds the normal value to offset the results of averaging groups for which the weighted–average export price or constructed export price is less than the weighted–average normal value.[822] (emphasis added by the European Communities)

380. As background, we recall that "model zeroing" refers to the use of zeroing in investigations where the normal value and the export price are compared on a weighted average-to-weighted average basis.[823] Thus, pursuant to the model zeroing methodology, where the weighted-average export price exceeds the weighted-average normal value, the results of the comparison will be regarded as zero, so as not to "offset" the comparison results in which the weighted-average export price is less than the weighted-average normal value. Therefore, by stating that it did not permit such "offsets" in original investigations conducted before the announced change, the USDOC made it cm68n2Cin ins

382. The Appellate Body has interpreted Article 11 of the DSU as requiring panels not to wilfully disregard or distort the evidence put before them, and not to make affirmative findings that lack a basis in the evidence.[825] Provided that panels' actions remain within these limits, the Appellate Body has consistently held that it would not interfere lightly with the a panel's exercise of its discretion in the assessment of the facts.[826] In this dispute, the United States alleges that the Panel acted inconsistently with Article 11 in finding that the model zeroing methodology was used in the investigations underlying the eight sunset reviews, arguing that this finding lacked a basis in the evidence contained in the Panel record. However, we have found that the Panel's finding was

386. The Panel noted that Article 19.1 of the DSU stipulates that "when a panel or the Appellate Body finds a measure to be inconsistent with a covered agreement, it shall recommend that the measure be brought into conformity with the relevant agreement" and that, in such cases, "the panel or the Appellate Body may suggest ways in which such recommendation may be implemented."[830] Having found that the United States acted inconsistently with its obligations under the *Anti-Dumping Agreement* and the GATT 1994, the Panel declined to make a suggestion as to how the DSB recommendations and rulings could be implemented by the United States. The Panel said that it is "evident" under the DSU, including Article 19.1, that "Members must implement DSB recommendations and rulings in a WTO-consistent manner."[831] The Panel added that it could not "presume that Members might act inconsistently with their WTO obligations in the implementation of DSB recommendations and rulings."[832] On this basis, the Panel declined the European Communities' request for a suggestion under the second sentence of Article 19.1.

387. On appeal, the European Communities raises two issues concerning Article 19.1 of the DSU. First, the European Communities asserts that the Panel committed "legal error"[833] by declining to make a suggestion regarding implementation. Secondly, the European Communities asks that the Appellate Body exercise its discretion under Article 19.1 of the DSU to make such a suggestion in this appeal.[834]

388. We begin our analysis by examining the text of Article 19.1 of the DSU, which provides, in relevant part, as follows:

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

389. Article 19.1 contains two components. The first sentence is mandatory, *requiring* panels or the Appellate Body, if they find the challenged measure to be inconsistent with a provision of the covered agreements, to recommend that the respondent Member bring its measure into conformity with that agreement. The second sentence confers a discretionary right, authorizing panels and the Appellate Body to suggest ways in which those recommendations may be implemented. Therefore, as the right to make a suggestion is discretionary, a panel declining a request for such a suggestion does

[830]Panel Report, para. 8.6.
[831]Panel Report, para. 8.7.
832(831)Tj10.08scretionTm( )Tj6.0831

not act contrary to Article 19 of the DSU. Accordingly, we do not find that the Panel committed legal error in declining to make a suggestion under the second sentence of Article 19.1.

390. We now consider the European Communities' request for the Appellate Body to make a suggestion pursuant to Article 19.1. We begin by detailing the request that the European Communities made to the Panel.

391. The European Communities asked the Panel to suggest that the United States cease using zeroing when calculating dumping margins in any anti-dumping proceeding with respect to the 18 measures identified in the annex to the European Communities' panel request.[835] According to the European Communities, "[t]his suggestion would be

393.

(iv) finds that the continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 anti-dumping duty orders are maintained, constitute measures that can be challenged in WTO dispute settlement;

(v) regarding *Ball Bearings and Parts Thereof from Italy* (Case II),

(ii) declines the European Communities' request for a finding that the four preliminary determinations are inconsistent with "the provisions of the GATT 1994 and the *Anti-Dumping Agreement* cited in the Panel proceedings";

(c) upholds the Panel's finding that the 14 periodic and sunset reviews were within the Panel's terms of reference;

(d) upholds the Panel's finding that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying simple zeroing in the 29 periodic reviews, and accordingly declines to rule on the conditional appeals of the European Communities regarding the Panel's finding;

(e) as regards the European Communities' claims concerning the seven periodic reviews:

(i) finds that the Panel acted inconsistently with Article 11 of the DSU when it found that the European Communities had not shown that simple zeroing was used in the seven periodic reviews at issue and, consequently, reverses this finding of the Panel;

(ii) completes the analysis and finds that the European Communities has shown that simple zeroing was used, and that the United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by applying simple zeroing in the periodic reviews in *Steel Concrete Reinforcing Bars from Latvia* (Case I – No. 3); *Stainless Steel Bar from Germany* (Case IX – No. 33); *Stainless Steel Bar from Germany* (Case IX – No. 34); *Stainless Steel Bar from Italy* (Case XI – No. 39); and *Certain Pasta from Italy* (Case XIII – No. 43); and

(iii) declines to complete the analysis in respect of the periodic reviews in *Stainless Steel Bar from France* (Case V – No. 20) and *Stainless Steel Bar from France* (Case V – No. 21);

(f) dismisses the United States' claim that the Panel acted inconsistently with Article 11 of the DSU in finding that the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* with regard to the eight sunset reviews and, consequently, upholds this finding of the Panel; and

(g)

Signed in the original in Geneva this 20th day of January 2009 by:

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Yuejiao Zhang
Presiding Member

_____ _____

Luiz Olavo Baptista
Member

David Unterhalter
Member

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS350/11
10 November 2008

(08-5429)

Original: English

UNITED STATES – CONTINUED EXISTENCE AND APPLICATION OF ZEROING METHODOLOGY

Notification of an Appeal by the European Communities
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 6 November 2008, from the Delegation of the European Communities, is being circulated to Members.

- is inconsistent with Article 7.1 of the *DSU* regarding a panel's terms of reference; with Article 12.1, Appendix 3 and paragraphs 4 and 13 of the Working Procedures of 24 July 2007 regarding the timeliness of submissions including requests for preliminary rulings; with the rule that the United States had the burden of raising an

2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.

ANNEX II

WORLD TRADE ORGANIZATION

WT/DS350/12
21 November 2008

(08-5691)

Original: English

UNITED STATES – CONTINUED EXISTENCE AND APPLICATION OF ZEROING METHODOLOGY

Notification of an Other Appeal by the United States

3. The United States requests the Appellate Body to find that 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.[3] The Panel's failure to undertake an objective assessment includes 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.

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

ANNEX III

ORGANISATION MONDIALE DU COMMERCE

ORGANIZACIÓN MUNDIAL DEL COMERCIO

WORLD TRADE ORGANIZATION

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the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made." Confidentiality of the deliberations is necessary to protect the integrity, impartiality, and independence of the appellate process. In our view, such concerns do not arise in a situation where, following requests from the participants, the Appellate Body authorizes the lifting of the confidentiality of the participants' statements at the oral hearing.

8. The Appellate Body has fostered the active participation of third parties in the appellate process in drawing up the *Working Procedures* and in appeal practice. Article 17.4 provides that third participants "may make written submissions to, and be given an opportunity to be heard by, the Appellate Body." In its *Working Procedures*, the Appellate Body has given full effect to this right by providing for participation of third participants during the entirety of the oral hearing, while third parties meet with panels only in a separate session at the first substantive meeting. The rights of third participants are distinct from those of the main participants to a dispute. They have a systemic interest in the interpretation of the provisions of the covered agreements that may be at issue in an appeal. Although their views on the questions of legal interpretation that come before the Appellate Body are always valuable and thoroughly considered, these issues of legal interpretation are not inherently confidential. However, it is not for the third participants to determine how the protection of confidentiality in the relationship between the participants and the Appellate Body is best dealt with. We do not consider that the third participants have identified a specific interest in their relationship with the Appellate Body that would be adversely affected if we were to authorize the participants' requests.

9. The requests for public observation of the oral hearing in this dispute have been made by the European Communities and the United States. As we explained earlier, the Appellate Body has the power to authorize the requests by the participants to lift confidentiality, provided that this does not affect the confidentiality of the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process. The participants have suggested alternative modalities that allow for public observation of the oral hearing, while safeguarding the confidentiality protection enjoyed by the third participants that seek such protection. The modalities include simultaneous or delayed closed-circuit television broadcasting in a room separate from the room used for the oral hearing. Finally, we do not see the public observation of the oral hearing, using the means described above, as having an adverse impact on the integrity of the adjudicative functions performed by the Appellate Body.

10. For these reasons, the Division authorizes the public observation of the oral hearing in these proceedings on the terms set out below. Accordingly, pursuant to Rule 16(1) of the *Working Procedures*, we adopt the following additional procedures for the purposes of this appeal:

(a) The oral hearing will be open to public observation by means of simultaneous closed-circuit television. The closed-circuit television signal will be shown in a separate room to which duly registered delegates of WTO Members and members of the general public will have access.

(b) Oral statements and responses to questions by third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation.

(c) Any third participant that has not already done so may request that its oral statements and responses to questions remain confidential and not be subject to public observation. Such requests must be received by the Appellate Body Secretariat no later than 5:00 p.m. Geneva time on Thursday, 4 December 2008.

(d) An appropriate number of seats will be reserved for delegates of WTO Members in the room where the closed-circuit broadcast will be shown.

(e) Notice of the oral hearing will be provided to the general public through the WTO website. WTO delegates and members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat.

(f) Should practical considerations not allow simultaneous broadcast of the oral hearing, deferred showing of the video recording will be used in the alternative.

Geneva, 28 November 2008