United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)

(DS294)

First Written Submission
European Communities

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I. **INTRODUCTION**

1. This case is about a *single issue*: zeroing. The practice of setting at naught negative “dumping margins” – or failing to set-off “dumped” and “non-dumped” transactions that are otherwise considered, for the purposes of the proceeding, comparable.

2. Panels and the Appellate Body have repeatedly found that zeroing generally inflates the margins calculated and can, in some instances, turn a negative margin of dumping into a positive margin of dumping. In the two sample cases before you, zeroing transformed a margin of negative % (deleted for confidentiality reasons) into +2.5 % (in the original investigation in *Stainless Steel Bar From Italy*); and a margin of negative % (deleted for confidentiality reasons) into +1.42 % (in the “periodic review” in *Ball Bearings From Italy*). The inherent bias in zeroing methodology may thus distort not only the magnitude of a margin of dumping, but also a finding of the very existence of dumping.

3. Absent targeted dumping, an investigating authority must use a symmetrical method of comparing normal value and export price. Once the investigating authority has itself defined the parameters of its investigation, whether in terms of the subject product, time, or any other parameter, it becomes bound by its own logic (that is, bound to apply the provisions of the *Anti-Dumping Agreement* consistently to the subject product), and must calculate a margin of dumping in conformity with the definitions in Article VI:1 and VI:2 of the GATT 1994 and Article 2 of the *Anti-Dumping Agreement*.

4. The standard zeroing methodology used by the United States is not in conformity with the obligation to make a fair comparison, as required by Article 2.4 and 2.4.2 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994. Since the accurate calculation of a margin of dumping is fundamental to a proceeding, this defect generates inconsistencies with several other provisions of the *Anti-Dumping Agreement* and the WTO Agreement.
5. In original investigations the United States uses “averaging groups” to effect the type of “model zeroing” previously used by the European Communities, and condemned by the Appellate Body in the EC-Bed Linen and US-Softwood Lumber V cases. Essentially, “model zeroing” is the practice of dividing up the subject product into sub-categories; comparing “normal value” and “export price” for each sub-category; and setting at zero any negative intermediate margins, before calculating the margin of dumping for the subject product as a whole. The inflated margin that results is used to impose anti-dumping duties and estimate anti-dumping duty deposits. Absent a United States “periodic review”, the inflated margin is also used to assess the amount of the anti-dumping duty and to determine final liability for payment.

6. The United States annually conducts, on request and by firm, a “periodic review” (which is, in fact, a retrospective assessment) to determine final liability for payment of anti-dumping duties. The essential point and characteristic of retrospective assessment is that the data for normal value, export price and assessed imports are taken from the same time period. Retrospective assessment therefore entails the investigation and calculation of a new margin of dumping.

7. In “periodic reviews”, for those firms that are investigated, the United States uses a method that the European Communities refers to in this submission as “simple zeroing”. Essentially, “simple zeroing” is the practice of comparing a weighted average “normal value” with an “export price” transaction; and setting at zero any negative intermediate margins, before calculating the margin of dumping for the subject product as a whole. Simple zeroing is even more inherently biased and unfair than “model zeroing” because in model zeroing there is some “set-off” between positive and negative comparison results (within each averaging group or sub-category); whereas in simple zeroing there is no set-off at all. The resulting super-inflated margin of dumping is used for the purposes of anti-dumping duty assessment. In a first “periodic review”, the super-inflated margin is applied from the date on which liquidation was first suspended, thus eclipsing entirely the results of the original investigation. The super-inflated margin is also used to impose a revised estimated anti-dumping duty deposit rate (also referred to as a “cash deposit”) for the future, pending the next “periodic review”. 
8. Thus, in relation to the same period, some firms may be assessed and have to pay anti-dumping duties at the rate resulting from the original investigation and the methodology used therein (model zeroing). Other firms, exporting the same product from the same country during the same period, may be assessed at a revised rate, calculated on the basis of a different methodology (simple zeroing).

9. The European Communities presents 31 specific “as applied” cases, the results of each of which are vitiated by zeroing. There are many more.

10. The United States zeroing methodology is incorporated in and built into the administration’s anti-dumping computer programs. Certain standard procedures in these programs that effect zeroing are the root of the problem. The purpose and effect of these standard procedures is to ensure that future equivalent situations are automatically consistently treated equally (that is, that zeroing is applied systematically), without any scope for administrative or judicial interpretation. The effect of these procedures in future cases is 100% predictable. The European Communities considers that the standard procedures in these computer programs that effect zeroing, as well as certain other elements of the United States legislation, are “as such” inconsistent with the Anti-Dumping Agreement.

11. The European Communities considers that the zeroing methodology used by the United States in new shipper, changed circumstances and sunset reviews is likewise, “as such”, inconsistent with the Anti-Dumping Agreement.

12. In this submission the European Communities first describes the principal elements of the zeroing methodology used by the United States in both original investigations and “periodic reviews”. For each, the European Communities describes: the method of comparing normal value and export price; the zeroing method; and the process of imposition and assessment.

13. The European Communities then explains, in relation to original investigations, why the measures at issue are not in conformity with the Anti-Dumping Agreement, GATT 1994 and the WTO Agreement, both “as applied” (by reference to a sample case), and “as such” – with particular reference to the Standard Zeroing Procedures and certain provisions of the Tariff Act. Each of the specific
cases documented in Exhibits EC-1 to EC-15 is vitiated for the same reasons by the zeroing methodology.

14. Finally, the European Communities explains, in relation to “periodic reviews”, why the measures at issue are not in conformity with the *Anti-Dumping Agreement*, GATT 1994 and the WTO Agreement, both “as applied” (by reference to a sample case), and “as such” – with particular reference to the Standard Zeroing Procedures and certain provisions of the Tariff Act and Regulations. Each of the specific cases documented in Exhibits EC-16 to EC-31 is vitiated for the same reasons by the zeroing methodology.
II. FACTS

A. United States laws, regulations and administrative procedures

15. The European Communities refers to the following measures regulating the conduct of anti-dumping proceedings in the United States: The Tariff Act of 1930; the Statement of Administrative Action (the “SAA”); the Implementing Regulations; the Anti-dumping Manual; and the Standard Computer Programs.

16. There are three “standard” computer programs used by USDOC: arm’s-length test; concordance (or model match); and AD margin program (the “Standard AD Margin Program”) (together, the “Standard Computer Programs”). These standard programs “incorporate the current AD methodology” used by the United States; “the calculation methodology [is] built into these programs”. The Standard AD Margin Program contains the Standard Zeroing Procedures, notably the line “WHERE EMARGIN GT 0” (see further below).

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1 As last amended by the Uruguay Round Agreements Act (the “URAA”) (the “Tariff Act”), Exhibit EC-33 (Title VII, particularly Sections 731 to 783).
2 Exhibit EC-34 (extract). In United States municipal law the SAA provides authoritative guidance for interpreting the URAA (Appellate Body Report, US-OCTG from Argentina, para. 207).
3 Regulations on antidumping and countervailing duty proceedings adopted by the United States International Trade Administration, Department of Commerce (“USDOC”), including the preamble, 62 FR 27296 (the “Regulations”), Exhibits EC-35.1 to EC-35.3.
5 The Manual uses the word “standard” with respect to the computer programs at least 12 times: Manual, Chapter 9, first page of contents, item III.D; Chapter 9, page 2, para 3, line 3; Chapter 9, page 2, para 3, final line; Chapter 9, page 2, para 4, line 5; Chapter 9, page 2, para 4, line 7; Chapter 9, page 8, section III, para 1, line 2; Chapter 9, page 8, section III, para 1, line 5; Chapter 9, page 8, section III, para 1, line 6; Chapter 9, page 8, section III, para 1, penultimate line; Chapter 9, page 9, section D, title; Chapter 9, page 9, final line; Chapter 9, page 10, para 1, line 2; Chapter 9, page 10, para 1, line 6.
6 SAS is a specialised computer software provider – see: www.sas.com.
7 The Manual uses the word “procedure” with respect to the computer programs at least 19 times: Title of Manual; Introduction, page 1, para 1; Introduction, page 5, section D.1, para 1, line 5; Introduction, page 6, title c; Contents, page 4, item 9 III; Chapter 8, page 20; Chapter 8, page 21, para 2; Chapter 8, page 20, para 6; Chapter 8, page 21, para 7; Chapter 8, page 57, section B.1.b, para 3; Chapter 9, contents, item III; Chapter 9, page 1, para 1; Chapter 9, page 8, section III, para 1, line 1; Chapter 9, page 8, section III, para 1, line 3; Chapter 9, page 15, point 1.a; Chapter 9, page 23, point 2.a, line 2; Chapter 9, page 24, point 3.a, line 1; Chapter 9, page 25, final para.
B. Overview of the Tariff Act

17. If foreign merchandise is found to have been sold in the United States at less than fair value and to have injured a United States industry, an antidumping duty is imposed on such merchandise in an amount equal to the amount by which the normal value exceeds the export price.\(^\text{9}\)

18. The term “dumping margin” is defined as the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise; and the term “weighted average dumping margin” is defined as the percentage determined by dividing the aggregate “dumping margins” determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.\(^\text{10}\)

19. Subtitle B of the Tariff Act concerns the imposition of anti-dumping duties, and includes provisions relating to the initiation and termination of “investigations”, as that term is generally used by the United States. Subtitle C contains provisions relating to “reviews”, as that term is generally used by the United States, including “periodic reviews” (which are, in fact, retrospective assessments). Subtitle D contains general provisions, including provisions relating to definitions, export price and constructed export price, and normal value.

C. Original investigation

1. Method of comparing normal value and export price

20. In an original investigation, when comparing normal value and export price, USDOC is required in general to use a weighted-average to weighted-average or a transaction-to-transaction method; and is required to normally use the average-to-average method.\(^\text{11}\) The transaction-to-transaction method is only used in unusual situations, such as when there are very few sales and the merchandise sold in each market is identical or very similar or is custom-made.\(^\text{12}\) Exceptionally, the investigating authority may compare a weighted-average normal value with an

\(^{9}\) Tariff Act, Section 731.

\(^{10}\) Tariff Act, Sections 771(35)(A) and (B).

\(^{11}\) Tariff Act, Section 777A(d)(1)(A) ; Regulations, Sections 351.414(b)(1) and (2).

\(^{12}\) Regulations, Section 351.414(c).
individual export transaction, if there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time, and the administering authority explains why such differences cannot be taken into account using a symmetrical method (a situation referred to in the Regulations as “targeted dumping”).

2. Model zeroing

21. In an original investigation, when calculating the magnitude of any margin of dumping, the United States uses a method that the European Communities refers to in this submission as “model zeroing”. The investigating authority, as well as determining the overall product scope of the proceeding (also referred to as subject product or subject merchandise), will, in applying the average-to-average method, identify those sales of sub-products in the United States considered “comparable”, and will include such sales in an “averaging group”. An averaging group consists of merchandise that is identical or virtually identical in all physical characteristics. Each category of sub-product within the subject merchandise is assigned a control number, or CONNUM. The weighted-average-to-weighted-average comparison between normal value and export price is made within each averaging group. The amount by which normal value exceeds export price is considered by the United States to be a “dumping margin” or dumped amount – referred to by the United States as the Potential Uncollectible Dumping Duties, or PUDD. If export price exceeds normal value (the margin is negative), the

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13 Regulations, Section 351.414(c).
14 Tariff Act, Section 777A(d)(1)(B); Regulations Section 351.414(f). See generally Manual, Chapter 6, page 7, second para; Chapter 7, pages 28 and 29.
15 Tariff Act, Section 771(25).
16 Regulations, Section 351.414(d)(1).
17 Regulations, Section 351.414(d)(2).
18 Manual, Chapter 4, pages 8 and 9; Chapter 5, page 9, second para; Chapter 9, pages 23 and 27.
19 Regulations, Section 351.414(d)(1); Manual, Chapter 7, pages 27 and 28; Chapter 9, pages 23 and 27.
20 The European Communities considers that this concept does not correspond to the term “margin of dumping” as used in, for example, Articles 2.4.2 and 9.3 of the Anti-Dumping Agreement (see further below).
21 Manual, Chapter 6, page 9: “The PUDD is the amount of dumping duties that would have been collected from the U.S. sales under investigated [sic] had an antidumping duty order been in effect during the period investigation [sic] (i.e., before the investigation began). The PUDD is used to establish a dumping margin which will remain in effect until the annual reviews established [sic] rates based upon the entries for which liquidation was suspended pursuant to the preliminary determination and for the year following the Antidumping Duty Order. … The calculation of the PUDD is, in effect, a two-step process. First, PUDD is determined for each U.S. sale by multiplying the per unit dollar margin for that sale by the total number of items sold. Second, the PUDD for each of the U.S.
“dumping margin” or dumped amount or PUDD for that averaging group is considered to be zero. The margin of dumping for the overall product is calculated by combining the averaging group results. The total of the dumped amounts or PUDDs (excluding the negative amounts or treating them as zero) is expressed as a percentage of the total export prices (including all averaging groups). The Standard AD Margin Program contains the following lines of computer code, or code of substantially the same structure or effect (the “Standard Zeroing Procedures – Original Investigation” or the “Standard Zeroing Procedures”) (bold emphasis added):

```
PROC MEANS NOPRINT DATA = MARGIN;
   WHERE EMARGIN GT 0;
   VAR EMARGIN &MUSQTY USVALUE;
   OUTPUT OUT = ALLPUDD (DROP = _FREQ_ _TYPE_ )
      SUM = TOTPUDD MARGQTY MARGVAL;
```

22. A detailed explanation of each element of these standard procedures is set out in Exhibit EC-42. In summary, the Standard Zeroing Procedures separate those sales with positive margins (GT 0) from sales with negative margins and subtotals the dumping amounts (“TOTPUDD”) for sales with positive margins only. The sum is kept in the dataset called “ALLPUDD”, which is used to calculate the final margin of dumping.

23. An averaging group, as well as consisting of merchandise that is identical or virtually identical in all physical characteristics, also consists of merchandise that is sold at the same level of trade. In identifying sales to be included in an averaging group, the United States also takes into account, where appropriate, the region of the United States in which the merchandise is sold, and such other factors as are considered relevant.

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22 Exhibit EC-1.5.1 contains a print-out of an example of a computer program used by USDOC in an original investigation. The Standard Zeroing Procedures used in calculating the company’s overall margin of dumping occurred between lines 1448 to 1488, and zeroing occurred particularly at lines 1454 and 1460.

23 Regulations, Section 351.414 (d)(2).
Having completed its dumping analysis, USDOC publishes a “Final Determination of Sales at Less Than Fair Value”. USDOC also reports its findings to the International Trade Commission.

### 3. Imposition

Following a Preliminary Determination, USDOC generally orders the deposit of estimated anti-dumping duties and suspension of liquidation with effect from the later of the date of publication of the Preliminary Determination or 60 days after the publication of the initiation, for up to 4 or, exceptionally, 6 months.

Following a Final Determination of Sales at Less Than Fair Value, USDOC generally orders the deposit of estimated anti-dumping duties at the revised rate.

If there are final affirmative determinations of both dumping and injury, the administering authority must publish an “Anti-dumping Duty Order”. That order directs customs to assess an anti-dumping duty equal to the amount by which the normal value of the merchandise exceeds the export price, once the administering authority receives satisfactory information upon which the assessment may be based. The order also requires the deposit of estimated anti-dumping duties pending liquidation of future entries. Entries of merchandise, the liquidation of which has been suspended, are subject to the imposition of anti-dumping duties under Section 731 of the Tariff Act.

Thus, following the publication of an Anti-dumping Duty Order, duties are imposed and estimated anti-dumping duties are deposited, but final assessment does not take place immediately.

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24 Tariff Act, Section 735(d); Manual, Chapter 16. See, for example, Exhibit EC-1.1.1 at 3159.
25 Tariff Act, Section 733(d). Article 7 of the Anti-Dumping Agreement. Article 7.5 of the Anti-Dumping Agreement provides that “[t]he relevant provisions of Article 9 shall be followed in the application of provisional measures.”
26 Tariff Act, Section 735(c).
27 Tariff Act, Section 735(c)(2).
28 Tariff Act, Section 736(a)(1).
29 Tariff Act, Section 736(a)(3).
30 Tariff Act, Section 736(b)(1).
4. Automatic assessment

28. As explained further below, the United States has a retrospective assessment system under which final liability for anti-dumping duties is determined after merchandise is imported. Generally, the amount of duties to be assessed is determined in a “review” of the order covering a discrete period of time. However, if a “review” is not requested, duties are assessed at the rate established in the completed “review” covering the most recent prior period or, if no “review” has been completed, the rate applicable at the time merchandise was entered.31

29. Thus, if there is no “periodic review” for a particular firm, entries from that firm are assessed anti-dumping duties at the rate applicable to the time of entry.32 USDOC sends automatic assessment instructions to customs to that effect.33 Thus, in this scenario, the period of time from which the data used to calculate the margin of dumping are taken, and the period of time during which import transactions that are subject to the anti-dumping duty take place, do not generally coincide.

D. Retrospective assessment (“Periodic review” of amount of duty)

30. As indicated above, the United States has a retrospective assessment system under which final liability for anti-dumping duties is determined after merchandise is imported.34

31. Section 751(a) of the Tariff Act provides for a “periodic review” of the amount of any anti-dumping duty at least once during each 12 month period beginning on the anniversary of the date of publication of an Anti-dumping Duty Order, if a request has been received. A “periodic review” is sometimes referred to, by reference to the more general title of Section 751 of the Tariff Act, as an administrative review under Section 751(a)(1) of the Tariff Act, which reference is sometimes

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32 Regulations, Section 351.212(a).
33 Manual, Chapter 18, page 3, final para; page 6, final para. See Exhibit EC-1.7.1.
34 Regulations, Sections 351.212 and 351.213; Article 9.3.1 of the Anti-Dumping Agreement: “When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place…”.
35 See, for example, Regulations, Section 351.213(a), second sentence.
shortened to simply “administrative review”\textsuperscript{36}, in accordance with the definition in Section 351.102(b) of the Regulations. Under the Tariff Act, however, the term “administrative review”, encompasses all the types of reviews under Section 751 of the Tariff Act (including, for example, so-called new shipper reviews\textsuperscript{37}, changed circumstances reviews\textsuperscript{38} and five year reviews\textsuperscript{39}). In this submission the European Communities will refer to “periodic review of the amount of duty” – or “periodic review” for the sake of brevity. That is the terminology used by the Tariff Act, which gives the best indication of the essential nature of the exercise: temporal and concerned with assessing the amount of the duty. “Periodic reviews” are also sometimes referred to as “annual reviews”\textsuperscript{40}.

32. Each year during the anniversary month of the publication of an Anti-dumping Duty Order, a domestic interested party, a foreign government of the exporting/manufacturing country, an exporter or producer covered by an order, or an importer of the subject merchandise may request a “periodic review” of the amount of duty\textsuperscript{41}. Each month USDOC publishes in the Federal Register a “Notice of Opportunity to Request Administrative Review”, informing interested parties that they may request a “periodic review” of the amount of duty, and listing those orders with an anniversary month corresponding to the month of publication of the “Opportunity Notice”\textsuperscript{42}. Following a request, USDOC promptly publishes in the Federal Register a notice of initiation; and sends to appropriate interested parties or other persons questionnaires requesting factual information, normally no later than 30 days after the date of publication of the notice of initiation. USDOC then conducts an investigation. Questionnaires request information on export sales, domestic sales and costs of production during the period of review\textsuperscript{43}. USDOC determines the normal value and export price of each entry of the subject merchandise\textsuperscript{44}. USDOC conducts, if appropriate, verifications; issues and

\textsuperscript{36} See, for example, Regulations, Section 351.212(a), third sentence.
\textsuperscript{37} Tariff Act, Section 751(a)(2)(B).
\textsuperscript{38} Tariff Act, Section 751(b).
\textsuperscript{39} Tariff Act, Section 751(c).
\textsuperscript{40} See, for example, Manual, Chapter 6 page 9.
\textsuperscript{41} Regulations, Section 351.213(b) ; Article 9.3.1 of the Anti-Dumping Agreement : “… a request for a final assessment of the amount of the anti-dumping duty has been made …”.
\textsuperscript{42} Manual, Chapter 18, page 3.
\textsuperscript{43} Manual, Chapter 18, page 4; Chapter 4.
\textsuperscript{44} Tariff Act, Section 751(a)(2)(A)(i).
publishes preliminary and final results in the Federal Register; and promptly instructs customs to assess anti-dumping duties. In general, preliminary results must be issued within 245 days after the last day of the anniversary month in which the request was made, and final results within a further 120 days, unless these periods are extended. In case of judicial review, an injunction against liquidation may be requested, in which case suspension of liquidation is continued. These provisions correspond very closely to the provisions of Article 9.3 of the Anti-Dumping Agreement. Within USDOC the same team follows the same case from the original investigation through the “periodic review” process, in order to ensure consistency in the handling of the same case.

33. “Periodic reviews” of the amount of duty will generally be conducted in relation to particular firms. Thus, in relation to the same period, some firms may be assessed and be subject to anti-dumping duties at the rate resulting from the original investigation and the methodology used therein (model zeroing). Other firms, exporting the same product from the same country during the same period, may be subject to a revised rate, calculated on the basis of a different methodology (simple zeroing).

34. The period of “review” will normally be 12 months. The first “periodic review” period will generally be longer, also extending back to the date on which provisional measures were first applied or liquidation was first suspended (that is, the withholding of appraisement within the meaning of Article 7 of the Anti-Dumping Agreement). The results of the first “periodic review” will thus eclipse entirely the results of the original investigation.

45 Article 9.3.1 of the Anti-Dumping Agreement: “Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this subparagraph.”

46 Regulations, Section 351.213(h); Article 9.3.1 of the Anti-Dumping Agreement: “… the determination … shall take place … normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.”

47 Manual, Chapter 18, pages 6 and 7; Article 9.3.1 of the Anti-Dumping Agreement, footnote 20: “It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial proceedings.”

48 Particularly Articles 9.3.1 and 9.3.3. See SAA, page 874, section 7.a, where it is explained that Article 9.3 of the Anti-Dumping Agreement establishes rules for administrative reviews.


50 Regulations, Section 351.213(e).
35. Thus, if there is a “periodic review” pursuant to Section 751(a) of the Tariff Act, USDOC establishes final liability for the payment of anti-dumping duties in relation to the period of review, which entails determining the extent to which there have been sales at less than fair value (that is, a margin of dumping) during the period of review by the investigated firm. By comparison, in particular, with the original investigation, the period of time from which the data used to calculate the (up-dated) margin of dumping are taken, and the period of time during which export transactions to be subject to the duty take place, will generally coincide. This temporal retrospective match for the purposes of final liability is the essential point and “basic purpose” of United States “periodic reviews”\textsuperscript{51}.

1. Method of comparing normal value and export price

36. In “periodic reviews”, when comparing normal value and export price, the investigating authority normally uses the average-to-transaction method\textsuperscript{52}. When normal value is based on the weighted average of sales of the foreign like product, the averaging of such prices will be limited to sales incurred during the contemporaneous month\textsuperscript{53}.

2. Simple zeroing

37. In “periodic reviews” of the amount of duty, when calculating the magnitude of any margin of dumping and the estimated anti-dumping duty deposit rate, the United States uses a method that the European Communities refers to in this submission as “simple zeroing”. When comparing a weighted-average normal value with an individual export transaction, the amount by which normal value exceeds export price is considered to be the “dumping margin”\textsuperscript{54} or amount for that export transaction\textsuperscript{55}. If export price exceeds normal value (the margin is negative), the “dumping margin” or amount for that export transaction is considered to be zero. The overall margin of dumping is calculated by combining the results of each comparison. The total dumping amount (excluding the negative

\textsuperscript{51} Manual, Chapter 18, page 3.
\textsuperscript{52} Regulations, Section 351.414 (c)(2); Manual, Chapter 6, page 7.
\textsuperscript{53} Tariff Act, Section 777A(d)(2); Regulations, Section 351.414(e); Manual, Chapter 6, page 7.
\textsuperscript{54} The European Communities considers that this concept does not correspond to the term “margin of dumping” as used in, for example, Articles 2.4.2 and 9.3 of the Anti-Dumping Agreement (see further below).
amounts or treating them as zero) is expressed as a percentage of the total export price (including all export transactions). The Standard AD Margin Program contains the following lines of computer code, or code of substantially the same structure or effect (the “Standard Zeroing Procedures – Periodic Reviews” or the “Standard Zeroing Procedures”) (bold emphasis added):

    PROC MEANS NOPRINT DATA = MARGIN;
    BY &USCLASS;
    WHERE EMARGIN GT 0;
    VAR WTDQTY WTDMRG WTDVAL;
    OUTPUT OUT = ALLPUDD (DROP = _FREQ_ _TYPE_)
    SUM = TOTPUDD MARGQTY MARGVAL;

38. A detailed explanation of each element of these standard procedures is set out in Exhibit EC-42. In summary, the Standard Zeroing Procedures separate those sales with positive margins (GT 0) from sales with negative margins and subtotals the dumping amounts (“TOTPUDD”) for sales with positive margins only. The sum is kept in the dataset called “ALLPUDD”, which is used to calculate the final dumping margin56.

3. Appraisement instructions and assessment rate

39. The importer is liable to pay the final anti-dumping duty, as it results from the “periodic review” of the amount of duty. USDOC sends appraisement instructions to customs, determining “an assessment rate” and thus the final anti-dumping duty to be paid57. USDOC considers it imperative that the programming language which will calculate assessment rates is incorporated in the dumping analysis program used for the preliminary and final results of the “periodic review”58. Assessment rate calculation procedures are thus already integrated in the final determination59.

55  Tariff Act, Section 751(a)(2)(A); Section 777A(d)(2).
56  Exhibit EC-16.3.1 contains a print-out of an example of a computer program used by USDOC in a “periodic review”. The Standard Zeroing Procedures used in calculating the company’s overall margin of dumping occurred between lines 1852 to 4862, and zeroing occurred particularly at lines 4854 and 4860.
57  Regulations, Section 351.212(b)(1).
59  See, for example, Exhibit EC-16.3.1, line 4773 and following (calculation of assessment rates) – zeroing occurs at line 4792. See also (in the context of an original investigation), Exhibit EC-1.5.1, lines 1381 to 1443, particularly line 1403, which calculate assessment rates by importer (with zeroing), even though the initial results will not be used in the original investigation.
40. When USDOC gives percentage instructions, it calculates an assessment rate, to be applied by customs to all entries during the relevant period\(^{60}\). This reflects the fact that, according to USDOC, the Customs Service is not in a position to know which entries of merchandise are “dumped” and which are not. Spreading the estimated liability for “dumped” sales across all investigated sales allows the Customs Service to apply the same rate to all merchandise entered after an Anti-dumping Duty Order goes into effect\(^{61}\). For the purpose of calculating an assessment rate, USDOC divides the total margin or amount of dumping calculated during the period of review (a number that has been calculated using simple zeroing), by the entered values of the products sold\(^{62}\). Because of differences between entries and sales the assessment rate may not be identical to the duty rate – but these considerations are irrelevant for the purposes of the present discussion. Thus, because the total margin or amount of dumping calculated during the period of review is super-inflated, due to the use of simple zeroing, the assessment rate is similarly super-inflated.

(a) Sales and entered values

41. There are at least two reasons why the dumping amount or margin and the assessment amount or rate are likely to be different\(^{63}\).

42. First, dumping is calculated by reference to sales made during the period of review; whilst the assessment rate is calculated also by reference to the entered values of merchandise sold during the period of review; and duties are assessed on merchandise entered during the period of review whether or not sold during the period of review. Some merchandise might be sold just before but enter just after the start and the end of the period of review. And vice versa (if merchandise is held in inventory before sale).

43. Second, for a given transaction, the export price or constructed export price might be different from the entered value.

\(^{60}\) Manual, Chapter 18, pages 11 and 12; Regulations, Section 351.212(b)(1).
\(^{61}\) See, for example, Exhibit EC-1.3, comment 1, penultimate para.
\(^{62}\) Regulations, Section 351.212(b)(1).
\(^{63}\) Manual, Chapter 18, page 13, final para.
44. The European Communities does not take issue with these aspects of the United States methodology in these panel proceedings. The European Communities explains these differences only in order to clarify why the dumping margin or amount and the assessment rate might not be identical.

(b) **Importer specific assessment rates**

45. There is a difference between appraisement instructions involving export price, and those involving constructed export price, there being, in each case, different types of importers involved. In export price situations, importers are not affiliated with the exporter and appraisement instructions are therefore by importer. In such a case, export transactions are first sorted by importer. Once this is done, USDOC proceeds in the way described above, but for each importer, to yield a percentage assessment rate *per importer*. If the dumped amount for an importer is negative, the assessment rate for that importer is considered to be zero. If the dumped amount for a second importer is positive, there is no set-off between the first and second importers, even if they import the same products from the same producer.

4. **Imposition**

46. USDOC uses the result of the margin of dumping calculation also to fix the *estimated anti-dumping duty deposit* rate, for the relevant particular firm, to be applied in relation to a future period, normally the following 12 months, until such time as there is a further “periodic review”.

E. **New shipper, changed circumstances and sunset reviews**

47. In new shipper, changed circumstances and sunset reviews, when comparing normal value and export price, the investigating authority normally uses the *average-to-transaction method*, and relies on the simple zeroing methodology.

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64 Regulations, Section 351.212(b)(1); Manual, Chapter 6, pages 8 and 9; Chapter 18, pages 13 to 16.
65 Tariff Act, Section 751(a)(2)(C); Regulations, Section 351.221(b)(7); Manual, Chapter 18, page 3, first para; page 6, penultimate para.
66 Tariff Act, Section 751(a)(2)(B); Regulations, Section 351.102. In fact, the provisions of the Tariff Act concerning new shipper reviews are part of the provisions concerning “periodic review of amount of duty”.
67 Tariff Act, Section 751(b).
68 Tariff Act, Section 751(c).
69 Regulations, Section 351.414 (c)(2); Manual, Chapter 6, page 7.
F. “As applied” measures

1. Original investigations

(a) Sample case (Stainless Steel Bar From Italy)

48. The European Communities refers to the Notice of Final Determination, as amended and the Order, as amended, including the Issues and Decision Memorandum, in the case concerning Stainless Steel Bar From Italy70. At Comment 1 of the Issues and Decision Memorandum, entitled “Treatment of Sales Above Normal Value” USDOC stated its position with regard to the respondents’ arguments concerning zeroing. USDOC refers to its practice in prior cases71. It explains that it considers itself directed by United States Statute to use the zeroing methodology. It explains its view that, because the “zeroed” export sales are included in the denominator of the calculation, they are sufficiently taken into account. It asserts that zeroing is justified because the Customs Service applies a single assessment rate to all merchandise entered after an order goes into effect. USDOC considers that it has no obligation to act on the basis of the Panel and Appellate Body Reports in the EC-Bed Linen case.

49. Exhibit EC-1 also includes a copy of USDOC’s original “Calculation Memorandum” for the company Acciaierie Valbruna Srl/Acciaierie Bolzano S.p.A (“Valbruna”)72; and the “Final Margin Program Log and Output” to which it refers73. Finally, there is an analysis of the dumping calculation with and without zeroing,74 which links to USDOC’s calculations.

50. The portion of the Final Margin Program Log and Output calculating the overall margin of dumping for Valbruna are lines 1448 to 1488. The specific lines at

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70 Exhibits EC-1.1.1, EC-1.1.2; EC-1.2.1; EC-1.2.2; and EC-1.3 (the Issues and Decision Memorandum is referred to at Exhibit EC-1.1.1, at 67 FR 3158, right hand column, first para.).
71 USDOC refers in particular to the first case in which the zeroing issue was raised before USDOC after the Appellate Body Report in the EC-Bed Linen case – Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands (Exhibit EC-5). Comment 1 in the Issues and Decision Memorandum in that case (Exhibit EC-5.3) sets out USDOC’s position at some length, and the European Communities refers to the full explanation given in that document.
72 Exhibit EC-1.4.
73 Exhibit EC-1.5.1 - Attachment 2 to USDOC’s Calculation Memorandum (see page 6 of the Calculation Memorandum). The “Log” runs from line 1 to line 1519. The “Output” consists of pages 1 to 36.
74 Exhibit EC-1.6.1.
which zeroing occurred are lines 1454 and 1460 ("WHERE EMARGIN GT 0;")\(^{75}\).
That there were negative intermediate margins (set to zero by USDOC) appears from the negative numbers in the Output\(^{76}\).

51. The dumping margin of 2.5 % referred to in the Order, and the TOTAL PUDD (deleted for confidentiality reasons) and TOTAL U.S. VALUE (deleted for confidentiality reasons) used to calculate it, are on page 36 (the final page)\(^{77}\) of the Final Margin Program Log and Output\(^{78}\); and on the first page of the “without zeroing” analysis\(^{79}\). There are some small differences in the numbers due to the fact that USDOC used exchange rates to the fifth and sixth decimal places, and it is not possible to discern the extent to which USDOC rounded these exchange rates. The tables in the “without zeroing” analysis, the entries in which can be linked to USDOC’s analysis, show the total amount of negative dumping zeroed by USDOC. The first page of the “without zeroing” analysis shows that without zeroing the dumping margin would have been negative % (deleted for confidentiality reasons) (instead of + 2.5 %).

52. To illustrate how the documents may be linked:

- Highest constructed export price (CEP) negative margin : control number 1949 (negative % - deleted for confidentiality reasons) in Exhibit EC-1.6.1, page 2, observation 1; also found at Exhibit EC-1.5.1, page 28, observation 60, fourth and penultimate columns. The total on page 14 of Exhibit EC-1.6.1 (negative - deleted for confidentiality reasons) also appears on the first page of Exhibit EC-1.6.1.

- Highest export price (EP) negative margin : negative (deleted for confidentiality reasons) for control number 720 (Exhibit EC-1.6.1, page 15, observation 1) corresponds to Exhibit EC-1.5.1, page 33, observation 87, fourth and penultimate columns (deleted for confidentiality reasons); and the number negative (deleted for confidentiality reasons) may be found at Exhibit EC-1.6.1, pages 16 and 1.

\(^{75}\) Lines 1381 to 1443 concern the calculation of assessment rates by importer and the initial results of such calculations are not used in an original investigation. Line 1327 sets negative extended margins to zero only for a printing summary.

\(^{76}\) See, for example, Exhibit EC-1.5.1, page 28, final line, penultimate entry (deleted for confidentiality reasons), discussed further below.

\(^{77}\) Only the last 36 pages are numbered, because the observations lines are numbered sequentially in the preceding pages.

\(^{78}\) The disclosure document at Exhibit EC-1.5.1 contains only a sample of the calculations, for the highest 10 and lowest 5 margins for each type of comparison, at pages 21 to 35 of the print out.

\(^{79}\) Exhibit EC-1.6.1.
• Highest CEP positive margin: (Exhibit EC-1.6.1, page 17, observation 1, control number 4091, (deleted for confidentiality reasons); Exhibit EC-1.5.1, page 23, observation 16, fourth and penultimate columns, (deleted for confidentiality reasons); total (deleted for confidentiality reasons) at Exhibit EC-1.6.1, pages 23 and 1).

• Highest EP positive margin: (deleted for confidentiality reasons) for control number 798 (Exhibit EC-1.6.1, page 24, observation 1: Exhibit EC-1.5.1, page 32, observation 73, fourth and penultimate columns, (deleted for confidentiality reasons); total (deleted for confidentiality reasons) at Exhibit EC-1.6.1, pages 24 and 1).

• And so on.

53. USDOC reported to the ITC an alleged margin of dumping of 2.5% by Valbruna.

54. USDOC instructed customs to liquidate all entries for all firms for the period 2 August 2001 to 28 February 2003 (the first “review” period), with the exception of Foroni S.p.A and Ugine Savoie-Imphy; and with the exception of Valbruna with respect to the period 2 August 2001 to 28 February 2002. With respect to the period 1 March 2002 to 28 February 2003 Valbruna was assessed at the rate resulting from the original investigation (2.5%)81. Thus, Foroni and Ugine Savoie-Imphy would, in the normal course of events, eventually be assessed on the basis of the simple zeroing methodology, such assessment stretching back in time and eclipsing entirely the results of the original investigation (see further the facts and arguments in this submission concerning simple zeroing in “periodic reviews”). The same is true of Valbruna in relation to the period 2 August 2001 to 28 February 2002. At the same time, in relation to the period 1 March 2002 to 28 February 2003, Valbruna, exporting the same product from the same country during the same period, was assessed on the basis of the model zeroing methodology. The same would be true of the other companies to which the Order refers (Rodacciai S.p.A and Cogne Acciai Speciali Srl) in respect of the period 2 August 2001 to 28 February 2003.

55. Documents are also provided for the company Foroni S.p.A. (“Foroni”).

80 Exhibit EC-1.1.1.
81 See the liquidation instructions issued by USDOC to customs at Exhibit EC-1.7.1 in relation to the period 2 August 2001 to 28 February 2003.
(b) Other cases

56. Exhibits EC-2 to EC-15 contain documents for the other “as applied” cases: generally, the Final Determination; Anti-dumping Duty Order; Issues and Decision Memorandum\(^82\); Final Margin Program Log and Outputs; and margin calculation without zeroing. These documents generally demonstrate: that model zeroing was used; that there were some negative intermediate margins – set to zero by USDOC; and the inflationary effect of model zeroing on the margin calculated. A table summarising the effect of zeroing on the margins of dumping in these cases is at Exhibit EC-32.

2. Retrospective assessments (“Periodic reviews” of amount of duty)

(a) Sample case (Ball Bearings From Italy)

57. Similar documents are provided in Exhibit EC-16 with respect to a “periodic review” relating to Ball Bearings From Italy (period of review 1 May 2000 to 30 April 2001). In the “Final Results of Antidumping Duty Administrative Reviews” notice published in the Federal Register\(^83\) a margin of dumping was calculated for FAG Italia S.p.A of 1.42 %.

58. At point 2 of the Issues and Decision Memorandum\(^84\), entitled “Margin Calculation (Zeroing of Positive Margins)” USDOC stated its position with regard to the respondents’ arguments concerning zeroing, which is the same as that outlined above in the context of the sample original investigation “as applied” case. In the Final Margin Program Log\(^85\), the Standard Zeroing Procedures appear, in particular, from lines 4858 to 4862 (in relation to the dumping margin and estimated anti-dumping duty rate)\(^86\) and lines 4790 to 4794 (in relation to importer

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\(^{82}\) Prior to February 2000, the content of Issues and Decision Memoranda were integrated in the Final Determinations published in the Federal Register. For these cases, therefore, there is no separate Issues and Decision Memorandum.

\(^{83}\) Exhibit EC-16.1.

\(^{84}\) Exhibit EC-16.2.

\(^{85}\) Exhibit EC-16.3.1.

\(^{86}\) Line 4860 reads “WHERE EMARGIN GT 0;”.
specific assessment rates)\textsuperscript{87}. The negative intermediate margins are apparent from the Output.

59. For FAG there is also a “without zeroing” analysis\textsuperscript{88}, which may similarly be linked to USDOC’s analysis, and which shows that, without zeroing, the dumping margin would have been negative \% (deleted for confidentiality reasons) (instead of + 1.42 \%). There was no targeted dumping analysis in this case.

60. Documents are also provided for the company SKF.

(b) Other cases

61. Exhibits EC-17 to EC-31 contain documents for the other “as applied” cases: generally, the Final Results; Issues and Decision Memorandum; Final Margin Program Log and Output; and margin calculation without zeroing. These documents generally demonstrate: that simple zeroing was used; that there were some negative intermediate margins – set to zero by USDOC; the super-inflationary effect of simple zeroing; and that there was no targeted dumping analysis. A table summarising the effect of zeroing on the margins of dumping in these cases is at Exhibit EC-32.

\textsuperscript{87} Line 4792 reads “WHERE EMARGIN GT 0;”.

\textsuperscript{88} Exhibit EC-16.4.1.
III. CLAIMS AND ARGUMENTS

62. The European Communities considers that the United States failure to comply with its obligations under the Anti-Dumping Agreement is particularly egregious, given that the Appellate Body has now twice, in the EC-Bed Linen and US-Lumber V cases, expressly condemned zeroing, carried out on the basis of the very same Standard Computer Programs referred to in this submission, as unfair. Contrary to Article 4.2 of the DSU, the United States has so far failed to give any consideration at all – let alone sympathetic consideration - to the European Communities representations on this matter. Mindful of the fact that the DSU is aimed at achieving a satisfactory settlement of the matter; of the possibility of mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements; and of the obligation on all Members to engage in procedures in good faith in an effort to resolve dispute – the European Communities once again invites the United States to comply with its obligations under the Anti-Dumping Agreement.

A. Original investigation

1. Sample “as applied” case (Stainless Steel Bar From Italy)

   (a) The measures at issue

63. The measures at issue in the sample “as applied” model zeroing case include the Final Determination and any amendments to the Final Determination. The Final Determination refers to the Issues and Decision Memorandum, which in turn refers to the “Margin Calculations”, that is, the Calculation Memoranda and the Final Margin Program Log and Outputs for all the firms investigated. The measures at issue also include the Anti-dumping Duty Order and any...
amendments\textsuperscript{96} including the assessment instructions to which it likewise refers\textsuperscript{97}; and the ITC injury determination (on which the Anti-dumping Duty Order is in any event based).

(b) **Article 2.4 of the Anti-Dumping Agreement**

64. The European Communities considers that the “model zeroing” method used by the United States in this case was not in conformity with obligations imposed on the United States by Article 2.4 of the *Anti-Dumping Agreement*.

65. Article 2.4 of the *Anti-Dumping Agreement* provides:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.\textsuperscript{7} In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

\textsuperscript{7} It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

\textit{i) Overarching and independent obligation}

66. Thus, Article 2.4 of the *Anti-Dumping Agreement* provides that “[a] fair comparison shall be made between the export price and the normal value.”\textsuperscript{98}

Article 2.4 of the *Anti-Dumping Agreement* therefore establishes an overarching

\textsuperscript{96} Exhibits EC-1.2.1 and EC-1.2.2.

\textsuperscript{97} Exhibit EC-1.2.1, at 67 FR 10384, middle column, penultimate para.; see the example at Exhibit EC-1.7.1.

\textsuperscript{98} “This comparison [i.e. the fair comparison referred to in the preceding sentence] shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.” … “The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.”
and independent obligation to make a fair comparison between export price and normal value: the general principle or rule is that a fair comparison must be made. United States municipal law implementing Article 2.4 of the Anti-Dumping Agreement, also contains an independent and separate rule to that effect.

In this respect, the European Communities recalls that the text of the Uruguay Round Anti-Dumping Agreement contains an important and significant innovation by comparison with the text of the previous Tokyo Round Anti-Dumping Code. Under the Tokyo Round Anti-Dumping Code, the equivalent or similar provisions to the first and second sentences of Article 2.4 of the Uruguay Round Anti-Dumping Agreement were contained in the same sentence. In the Uruguay Round Anti-Dumping Agreement, however, the words “fair comparison … between the export price and the normal value” were lifted up and placed on their own in a new first sentence of Article 2.4. The drafters would not have done this without a purpose. This change confirms that Article 2.4 contains an overarching and independent obligation to make a fair comparison, that goes beyond the obligations to make due adjustment described in Article 2.4. This is also consistent with and confirmed by the Appellate Body’s findings in EC-Bed Linen that model zeroing was a violation of the fair comparison requirement, although such zeroing is not mentioned expressly as a prohibited practice in Article 2.4.


100 Tariff Act, Section 773(a) : “In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. …”. See also SAA (Exhibit EC-34) at page 809 : “Article 2.4 establishes guidelines for comparing normal value and export price to calculate the margin of dumping. It includes a general requirement that comparisons be fair …”; Regulations, at 62 FR 27350, middle column, at “Other Comments Concerning Section 351.401”.

101 Tokyo Round Anti-Dumping Code, Article 2.6, first sentence : “In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1 (b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.”
ii) United States zeroing unfair

68. The European Communities submits that the obligation imposed by Article 2.4 of the Anti-Dumping Agreement to conduct a fair comparison precluded the model zeroing method used by the United States in this case. Given the common and ordinary meaning of the word “fair”, the obligation to make a fair or equivalent comparison must necessarily normally involve a fairly balanced comparison, being one based on equivalent methodologies – that is, a symmetrical comparison. A symmetrical comparison for the purposes of calculating a margin of dumping and eventually imposing a duty, in relation to a given product or time, is necessarily one that precludes model zeroing. The United States in fact used a model zeroing method, and for that reason acted in a manner inconsistent with its obligation to make a fair comparison, pursuant to Article 2.4 of the Anti-Dumping Agreement.

69. The inherently unfair zeroing method used by the United States can have a dramatic effect on the outcome of the calculation – an effect that may be far more significant than the effects associated with the due adjustments referred to in Article 2.4 of the Anti-Dumping Agreement. This inherent unfairness is illustrated in Table 1. Table 1 shows a hypothetical dumping calculation for three models (A, B, C) and four customers (1 to 4). Without zeroing the margin of dumping is 2.8%. With model zeroing the margin of dumping is 4.7%. Thus, the effect of the model zeroing method used by the United States is to inflate the margin of dumping that would otherwise be found. This is precisely what happened in this case. Indeed, for Valbruna, the model zeroing methodology had the effect of producing a margin of dumping (of +2.5%) where none in fact existed (without model zeroing the margin calculated would have been negative - % - deleted for confidentiality reasons). A methodology that converts a negative % (deleted for confidentiality reasons) margin into a +2.5% margin is, to use the words of the Appellate Body, inherently biased and is therefore unfair within the meaning of Article 2.4 of the Anti-Dumping Agreement. The other firms were also subject to the same calculation, that is, the same Standard AD Margin Program containing

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102 Exhibit EC-37.
103 Exhibit EC-1.
the same Standard Zeroing Procedures, having the same inflationary effect on the margins of dumping calculated.

\[iii\] Existing case law confirms United States zeroing unfair

70. These conclusions are confirmed by the findings of the Appellate Body in the EC-Bed Linen case:

“Article 2.4 sets forth a general obligation to make a “fair comparison” between export price and normal value.”\(^{104}\)

“Furthermore, we are also of the view that a comparison between export price and normal value that does not fully take into account the prices of all comparable export transactions – such as the practice of “zeroing” at issue in this dispute – is not a “fair comparison” between export price and normal value, as required by Article 2.4 and by Article 2.4.2.”\(^{105}\)

71. They are further confirmed by the findings of the Appellate Body in US-Carbon Steel from Japan:

“However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provision in the Anti-Dumping Agreement according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the Anti-Dumping Agreement.”\(^{106}\)

“It follows that we disagree with the Panel’s view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3. Accordingly, we reverse the Panel’s consequential finding, in paragraph 8(1)(d)(ii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4.”\(^{107}\)

“As explained above, if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then

\(^{104}\) Appellate Body Report, EC-Bed Linen, para 59.
\(^{105}\) Appellate Body Report, EC-Bed Linen, para 55.
this defect taints the likelihood determination too. Thus, the consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of USDOC’s likelihood determination in the CRS sunset review. In the CRS sunset review, USDOC based its determination that “dumping is likely to continue if the [CRS] order were revoked” on the “existence of dumping margins” calculated in the administrative reviews. If these margins were indeed calculated using a methodology that is inconsistent with Article 2.4 – an issue that we examine below – then USDOC’s likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3.”

72. The Appellate Body went on to recall its findings in the EC-Bed Linen case, and stated that:

“When investigating authorities use a zeroing methodology such as that examined in EC-Bed Linen to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, “zeroing … may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing.” Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.”

73. These conclusions were again essentially confirmed by the Panel Report in US-Softwood Lumber V, the issue before the panel being whether United States model zeroing was “consistent with the obligations imposed by Article 2.4.2 and the “fair comparison” requirement in Article 2.4 of the Anti-Dumping Agreement”

“[z]eroing means, in effect, that at least in the case of some export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the entirety of the prices of some export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as whole.”

74. The European Communities submits that, in the present case, the model zeroing methodology used by the United States involved an inherent bias that had the effect of inflating the margin of dumping, and even of turning a negative margin into a positive one\(^{112}\). The determination in this case was therefore inconsistent with the obligation imposed on the United States by Article 2.4 of the Anti-Dumping Agreement to make a fair comparison between normal value and export price. The model zeroing method used by the United States was not fair within the meaning of Article 2.4 of the Anti-Dumping Agreement. It failed to duly reflect the actual prices of the export transactions that took place during the period of investigation, as it should have done once the United States had fixed the parameters of its investigation in terms of subject product.

(c) Article 2.4.2 of the Anti-Dumping Agreement

75. Article 2.4.2 Anti-Dumping Agreement provides in relevant part:

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

76. It results from the wording of Article 2.1 Anti-Dumping Agreement that an anti-dumping proceeding concerns a product (the subject product), and that, therefore, the margin of dumping to which Article 2.4.2 refers must be the margin of dumping for the subject product. **“Dumping” for the purposes of the Anti-Dumping Agreement can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model or category of that product**\(^{113}\). The intermediate margins calculated by the United States were not “margins of dumping” within the meaning of Article 2.4.2

\(^{112}\) Exhibits EC-1.6.1 and EC-1.6.2.
of the Anti-Dumping Agreement. Other provisions of the Anti-Dumping Agreement confirm this view.

77. The United States defined the subject product in this case. The European Communities does not take issue, in this case, with that definition. Having defined the subject product, the United States was obliged to ensure that the margin of dumping for that subject product was calculated in conformity with Article 2.4.2 of the Anti-Dumping Agreement. The United States had become bound by its own logic.

78. The establishment by the United States of “averaging groups” was, in itself, permissible under Article 2.4.2 of the Anti-Dumping Agreement. However, the Anti-Dumping Agreement did not require the United States to establish different averaging groups, and to make a separate calculation of “dumping” for each averaging group. Article 2.4 Anti-Dumping Agreement requires only that due allowance and a fair comparison be made. Due allowance could have been made by adjusting the relevant prices to take account of differences in physical characteristics affecting price comparability, before making the (single) comparison referred to in Article 2.4 Anti-Dumping Agreement, and thus before calculating a (single) margin of dumping.

79. The United States having decided to establish averaging groups, it considered itself under an obligation to compare weighted-average “normal value” with a weighted-average of prices of all comparable export transactions, for each averaging group. For this purpose, the United States considered that the weighted-

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115 See, for example, Articles 9.2 and 6.10 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994 – Appellate Body Report, US-Softwood Lumber V, para 94.
116 Exhibit EC-1.1.1, 67 FR 3155, middle column, section entitled “Scope of the Investigation”.
118 That is, bound to apply the provisions of the Anti-Dumping Agreement consistently to the subject product. Appellate Body Report, EC-Bed Linen: “But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.” (para 60, final sentence). See also paras 57 and 58, and para 62, final sentence of the Appellate Body Report. Appellate Body Report, US-Softwood Lumber V, para 93 and para 99: “We see no basis, under the Anti-Dumping Agreement, for treating the very same sub-group transactions as “non-dumped” for one purpose and “dumped” for other purposes.”
average “normal value” was that for the relevant averaging group. The “comparable export transactions” were those relating to the same averaging group, country and exporter. The “weighted-average of prices of all comparable export transactions” was calculated in respect of all export transactions, including export transactions that exceeded the “normal value” used for that averaging group. The United States considered that the word “all” precluded it from excluding relevant transactions, in whole or in part, from these comparisons. There was no “zeroing” within an averaging group. Export prices in excess of normal value were fully incorporated, before the comparison between “normal value” and export price, mathematically, in the calculation of the weighted-average export price.

80. The United States then combined the margins calculated for each averaging group, in order to calculate the margin of dumping for the subject product. In this second stage of the calculation the weighted-average normal value was that for the subject product, and necessarily so. The comparable export transactions must, by definition, necessarily have been those that related to the same subject product, country and exporter. The “prices” of those export transactions were reflected in the total value of exports, which total value was incorporated, mathematically, in the margins calculated for each averaging group, whether positive or negative. Just as in the first stage of the calculation the United States considered that the word “all” required that the margin for the averaging group was calculated in respect of all export transactions, including those that exceeded “normal value”, so, in the second stage of the calculation, the word “all” required that the average for the subject product be calculated in respect of all export transactions, including those that exceeded “normal value”121. Just as in the first stage, in the second stage “negative margins” for averaging groups should have been incorporated, mathematically, in the calculation of the weighted-average of prices of all comparable export transactions for the subject product before the comparison between normal value and export price122.

120 Appellate Body Report, EC Bed Linen, para 53, fifth sentence.
81. Further support for this view may be found in a consideration of the ordinary meanings of the words “comparison” and “margin” in Article 2.4.2 of the Anti-Dumping Agreement. Article 2.4.2 requires a simple comparison\(^\text{123}\) between normal value and export price. If there is a difference, according to the text, that difference is a margin. A margin is the amount by which one thing differs from another. Normal value may exceed export price. Or export price may exceed normal value. In both cases there is a margin\(^\text{124}\). It is not possible to conclude in either case that there is no margin, or that the margin is zero. That would only be the case if normal value and export price were equal. Article 2.4.2 does not prejudge how the two elements to be compared are juxtaposed, nor, thus, whether each one of a series of intermediate “margins” is expressed as positive or negative.

82. Nor is it possible to prematurely conclude, before the final calculation is complete, that, in relation to some discrete model or type or category of exports, when “export price” exceeds “normal value”, there is no or a zero margin of dumping, because Article 2.4.2 of the Anti-Dumping Agreement is precisely concerned with determining whether or not there is a margin of dumping for the subject product. It is not possible to use in an analysis in progress a premise that, by definition, cannot yet have been substantiated, being one of the possible conclusions of that analysis in progress. That would be circular.

83. Article 2.4.2 of the Anti-Dumping Agreement requires a “comparison”, and particularly a value or price comparison. Article 2.4 also requires that the two things that are compared be comparable. As a matter of logic, a difference in prices (whether positive or negative) is not by itself something that determines whether or not prices are comparable, it is the very price comparison that the provisions require\(^\text{125}\).

84. In summary, the European Communities submits that, in the second stage of the calculation, the United States was bound by the obligations contained in Article

\(^{123}\) Comparison: “The action or an act of likening, or representing as similar … Capacity of being likened or compared; comparable condition or character. (Always with negative expressed or implied.)” (The New Shorter Oxford English Dictionary).

\(^{124}\) Margin: “an amount of space, time, money, material, etc. by which something exceeds or falls short of what is required” (The New Shorter Oxford English Dictionary).

2.4.2 of the Anti-Dumping Agreement, and particularly the obligation to make a fair comparison between a weighted-average normal value and a weighted-average of prices of all comparable export transactions.\textsuperscript{126} In EC-Bed Linen and US-Softwood Lumber \textit{V} the Appellate Body rejected the notion that, in circumstances where there is more than one averaging group based on differences in physical characteristics, and two stages to the calculation, the second stage falls outside Article 2 of the Anti-Dumping Agreement and indeed outside the Anti-Dumping Agreement altogether.\textsuperscript{127} The precise and detailed rules set out in the Anti-Dumping Agreement would be pointless if, in the final step of the calculation, the importing Member would be free to make an unfair comparison.

85. As the Appellate Body has confirmed in \textit{US-Softwood Lumber V}, this analysis is not affected by the use of the plural (margins of dumping) in Article 2.4.2 of the Anti-Dumping Agreement. Nothing in the Anti-Dumping Agreement precludes a single proceeding relating to more than one country.\textsuperscript{128} This was precisely the situation in Stainless Steel Bar From Italy, which concerned Italy, France, Germany, the United Kingdom and Korea.\textsuperscript{129} Furthermore, according to the first sentence of Article 6.10 of the Anti-Dumping Agreement, the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. This is also what occurred in Stainless Steel Bar From Italy.\textsuperscript{130} For these reasons, a single proceeding may result in more than one margin of dumping. Hence the reference in Article 2.4.2 of the Anti-Dumping Agreement to “margins of dumping” (plural) has a logic to it, whether or not the importing Member elects to establish averaging groups.\textsuperscript{131}

86. This analysis is similarly unaffected by the use of the word “comparable” in the phrase “all comparable export transactions” in the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. Having decided that all the merchandise within the

\textsuperscript{126} Panel Report, EC-Bed Linen, para 6.117, final two sentences.
\textsuperscript{128} Articles 3.3(a) and 6.10, second sentence of the Anti-Dumping Agreement.
\textsuperscript{129} 67 FR 10384 (Italy, Exhibit EC-1.2.1); 67 FR 10381 (United Kingdom, Exhibit EC-4.2.1); 67 FR 10382 (Germany, Exhibit EC-3.2.1); 67 FR 10385 (France, Exhibit EC-2.2.1); 67 10381 (Korea).
\textsuperscript{130} 67 FR 10384 (Exhibit EC-1.2.1) : Foroni 7.07 %; Traflerie (excluded); Rodacciai 3.83 %; Cogne Acciai Speciali 33 %, as amended.
subject product was sufficiently comparable to justify the calculation of a single overall margin of dumping, and the imposition of a single duty, the United States was not entitled to decide that certain export transactions, namely those with negative margins, had allegedly become, for that reason alone, not fully comparable\(^{132}\). There are other examples of export transactions that might not be comparable, within the meaning of Article 2.4.2 of the *Anti-Dumping Agreement*, depending on all the circumstances: transactions in relation to merchandise outside the scope of the proceeding; transactions made at a time outside the investigation period; transactions in relation to another geographical region; transactions that relate to another exporting country; etc.

87. The European Communities considers that the view that “dumping” and “margins of dumping” can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping investigation. Thus, having defined the product under investigation, the investigating authority must treat that product as a whole for, *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. Furthermore, according to Article VI:2 of the GATT 1994 and Articles 9.2 and 9.3 of the *Anti-Dumping Agreement*, an anti-dumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole, and so-called “non-dumped” export transactions should not be excluded. There is no basis in the *Anti-Dumping Agreement* for treating a transaction as “non-dumped” for one purpose and “dumped” for other purposes, as the United States did in the present case\(^{133}\).

88. Furthermore, the European Communities observes that Article 2.4.2 of the *Anti-Dumping Agreement* contains no express language that permits an investigating authority to disregard the results of multiple comparisons at the aggregation stage. Other provisions of the *Anti-Dumping Agreement* are explicit regarding the


permissibility of disregarding certain matters. For example, Article 2.2.1 of the *Anti-Dumping Agreement*, which deals with the calculation of normal value, sets forth the only circumstances under which sales of the subject product may be disregarded. Similarly, Article 9.4 of the *Anti-Dumping Agreement* expressly directs investigating authorities to “disregard” zero and *de minimis* margins of dumping, under certain circumstances, when calculating the weighted average margin of dumping to be applied to exporters or producers that have not been individually investigated. Thus, when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly\(^\text{134}\).

89. For all of these reasons, the European Communities concludes that, having defined the subject product, it was not entitled to set at zero the negative margins calculated for certain averaging groups based on differences in physical characteristics. The use of such a method by the United States in this case was not in conformity with obligations imposed on the United States by Article 2.4.2 of the *Anti-Dumping Agreement*.

\[(d)\text{ Other inconsistencies}\]

\[i)\text{ Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement}\]

90. The European Communities considers that, as a consequence of the unlawful zeroing method described in this submission, the United States acted in this case in a manner inconsistent with obligations imposed on it by Articles 3.1, 3.2 and 3.5 of the *Anti-Dumping Agreement*. The European Communities refers to the text of those articles, which, in the interests of brevity, it does not repeat.

91. Because the investigating authorities used the unlawful zeroing method described in this submission, the volume of imports determined to be dumped was also inflated. In particular, for example, in *Stainless Steel Bar From Italy*, Valbruna’s imports should have been excluded because there was no dumping. The United States therefore acted inconsistently with Article 3.1 of the *Anti-Dumping Agreement*, because it did not base its injury determination on an objective examination of the volume of dumped imports. The figure used by the United States

\[\text{\underline{134}}\text{ Appellate Body Report, }US\text{-}Softwood Lumber V, \text{ para 100.}\]
States did not correspond to the volume of dumped imports. It included non-dumped imports.

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

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

   ii) Article 9.3 of the Anti-Dumping Agreement

94. The European Communities considers that, as a consequence of the unlawful zeroing method described in this submission, the United States acted in this case in a manner inconsistent with obligations imposed on it by Article 9.3 of the Anti-Dumping Agreement. Article 9.3 of the Anti-Dumping Agreement provides, inter alia:

   The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2. (emphasis added)

95. In this case, the United States established an inflated margin of dumping of +2.5% for Valbruna having unlawfully used the zeroing method described in this submission. Had the United States not employed the unlawful zeroing method described in this submission the margin of dumping would have been de minimis or zero or negative. It would in fact have been negative % (deleted for confidentiality reasons).
96. In relation to the companies and time periods indicated in the factual section of this submission, the United States imposed and assessed anti-dumping duties on the basis of its unlawful margin of dumping, the inflated dumping margin resulting in a similarly inflated assessment\textsuperscript{135}.

\begin{quote}
\textit{iii) Article 1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of GATT 1994}
\end{quote}

97. The European Communities considers that the United States acted in this case in a manner inconsistent with obligations imposed on it by Article 1 of the \textit{Anti-Dumping Agreement} and Articles VI:1 and VI:2 of GATT 1994.

98. As a result of the unlawful zeroing method described in this submission, the United States applied an anti-dumping measure other than under the circumstances provided for in Article VI of GATT 1994 and other than pursuant to investigations initiated and conducted in accordance with the provisions of the \textit{Anti-Dumping Agreement}. In taking action under its domestic anti-dumping legislation, the United States failed to respect the provisions of the \textit{Anti-Dumping Agreement}, as set out above, which provisions govern such action, and which provisions the United States should have respected. Accordingly, the United States acted in a manner inconsistent with the obligations imposed on it by Article 1 of the \textit{Anti-Dumping Agreement}.

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

\textsuperscript{135} Exhibit EC-1.7.1.
iv) Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement

100. The European Communities considers that, as a consequence of the unlawful zeroing method described in this submission, the United States acted in a manner inconsistent with obligations imposed on it by Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organisation (the “WTO Agreement”).

101. In this case, as a result of the unlawful zeroing method described in this submission, the United States has failed to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Agreement, and has thus acted in a manner inconsistent with obligations imposed on it by Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

2. Other “as applied” cases

102. The same unlawful zeroing method was used by the United States, to similar effect, in each of the cases listed and documented in Exhibits EC-2 to EC-15. Accordingly, for the same reasons, in each of these cases, the United States acted inconsistently with the obligations imposed on it by Articles 2.4, 2.4.2, 3.1, 3.2, 3.5, 9.3, 1 and 18.4 of the Anti-Dumping Agreement; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement. There is also a breach of Article 5.8 of the Anti-Dumping Agreement where the correction for unlawful zeroing would take the margin of dumping below 2% for the exporting country. The effects of zeroing in these cases are summarised in Exhibit EC-32. The European Communities does not claim, for the purposes of these proceedings, any consequential inconsistency with Article 3 of the Anti-Dumping Agreement where the correction for unlawful zeroing does not take the margin of dumping below 2% for individual exporters; or with Article 5.8 of the Anti-Dumping Agreement, where the correction for unlawful zeroing does not take the margin of dumping below 2% for the exporting country.
3. “As such”

(a) The measures at issue

103. It is appropriate in this case to have an overview of the relevant United States laws, regulations and administrative procedures: the Tariff Act; the SAA; the Regulations; the Manual; the Standard Computer Programs; the Standard AD Margin Program; the Standard Zeroing Procedures (or methodology); and the United States standard practice. Different elements of the system have contributed, in their own way, to the zeroing problem. However, the root of the problem is, in particular, the Standard Zeroing Procedures (notably: WHERE EMARGIN GT 0), the Manual to the extent it refers to the Standard Computer Programs, and the United States methodology or practice of zeroing – as well as the Tariff Act - and these are the measures that the European Communities will therefore focus on in this submission. The European Communities reserves the right, however, to develop its arguments on this point further in the light of the United States first written submission.

(b) The Standard Zeroing Procedures

i) The Standard Zeroing Procedures are a measure or part of a measure

104. The European Communities refers to the Appellate Body Report in US-Carbon Steel from Japan.137

105. Article 3.3 of the Dispute Settlement Understanding (the “DSU”) refers to “situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member.” This phrase identifies the relevant nexus, for the purposes of dispute settlement proceedings, between the “measure” and a “Member”. In principle, any act or omission attributable to a WTO Member can be a measure of that Member for the purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.

106. In GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could constitute a “measure”, irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member’s obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated.

107. There are no limitations on the type of measures that may, as such, be the subject of dispute settlement under the DSU or the Anti-Dumping Agreement. The reasoning previously followed by the Appellate Body also applies in this case. That reasoning was based on the GATT acquis and the language of the Anti-Dumping Agreement, in particular Articles 17.3 and 18.4.\textsuperscript{138}

108. The provisions of the Anti-Dumping Agreement setting forth a legal basis for matters to be referred to consultations and thus to dispute settlement, are also cast broadly. Article 17.3 establishes the principle that when a complaining Member “considers” that its benefits are being nullified or impaired “by another Member or Members”, it may request consultations. This language underlines that a measure attributable to a Member may be submitted to dispute settlement provided only that another Member has taken the view, in good faith, that the measure nullifies or impairs benefits accruing to it under the Anti-Dumping Agreement. There is no

\textsuperscript{137} Particularly paras 73 to 101. Confirmed by the Appellate Body Report in US-OCTG from Argentina, paras 177 to 189.

\textsuperscript{138} Appellate Body Report, Guatemala – Cement I, para 69, footnote 47; Panel Report Japan – Semiconductors, para 107; Panel Report, Japan – Agricultural Products I.
threshold requirement, in Article 17.3, that the measure in question be of a certain type.

109. The provisions of Article 18.4 of the Anti-Dumping Agreement are also relevant to the question of the type of measure that may, as such, be submitted to dispute settlement under that Agreement. Article 18.4 contains an explicit obligation for Members to “take all necessary steps, of a general or particular character” to ensure that their “laws, regulations and administrative procedures” are in conformity with the obligations set forth in the Anti-Dumping Agreement. Taken as a whole, the phrase “laws, regulations and administrative procedures” encompasses the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. The scope of each element in this phrase must be determined for the purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member’s domestic law and practice.

110. The European Communities concludes that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the Anti-Dumping Agreement, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the Anti-Dumping Agreement. This conclusion is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to “preserve [their] rights and obligations … under the covered agreements, and to clarify the existing provisions of those agreements.” As long as Members respect the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their “judgment as to whether action under these procedures would be fruitful” and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits. If the European Communities can find language to adequately explain and delineate the problem in abstract terms, particularly if that language is contained in a document or
documents drawn up by the United States itself; and if the European Communities is prepared to expend the time and resources required for a dispute settlement procedure on the point, that is enough.

111. The rules set out in Article 2.4 and 2.4.2 of the Anti-Dumping Agreement became part of United States law when the United States implemented the Uruguay Round agreements through the URAA. The URAA consists of a broad-ranging package of new laws as well as modifications to existing United States trade laws, such as the Tariff Act. With respect to Article 2.4 and 2.4.2 Anti-Dumping Agreement, the URAA added the relevant sections to the Tariff Act. These statutory provisions were in turn implemented through amendments to the Regulations. Section 351.414 of the Regulations sets forth a number of detailed rules and procedures for USDOC to follow when comparing normal value and export price. The Manual, Standard Computer Programs, Standard AD Margin Program and Standard Zeroing Procedures form part of the overall framework within which anti-dumping investigations are conducted in the United States. The Manual “... incorporates changes to Title VII of the Tariff Act of 1930 (the Act) as a result of the passage of the Uruguay Round Agreements Act (URAA) on December 8, 1994. The manual also includes procedural and technical information from the Administration’s Statement of Administrative Action (SAA), as well as 19 CFR 351, the Department of Commerce (DOC) antidumping regulations.”

112. The “Antidumping Procedures Manual” is published by USDOC on the internet, together with “as applied” measures and other laws, regulations and administrative procedures, including Policy Bulletins, which are also measures. The Manual refers to and explains the Standard Computer Programs, Standard AD Margin Program and Standard Zeroing Procedures, stating that the United States antidumping methodology, including zeroing, is built into and incorporated in the Computer Programs. Computer programs, including the Standard Computer

139 DSU, Article 3.2.
141 http://ia.ita.doc.gov/ (Exhibit EC-36, page 1).
143 Manual, Chapter 9, pages 9 and 10.
Programs, are also referred to repeatedly in the Regulations\textsuperscript{144}. The Standard Computer Programs, and particularly the Standard AD Margin Program and Standard Zeroing Procedures are disclosed by USD\textsuperscript{29} to hundreds and thousands of companies and persons in the context of the very large number of determinations that USD\textsuperscript{29} makes. They are a matter of public knowledge.

113. Article 18.4 of the \textit{Anti-Dumping Agreement} expressly refers to “administrative procedures”. Article 18.5 refers in more general terms to “the administration of such laws and regulations”. The Manual states that it is intended for the “… guidance\textsuperscript{145} of Import Administration (IA) personnel …”\textsuperscript{146}. It further states that “… the primary responsibility of IA is to administer the antidumping (AD) … laws … This introduction provides a brief description of the AD … laws, and an overview of the methodologies and procedures used by IA in the implementation of AD … trade remedies.”\textsuperscript{147} The Manual explains that within USD\textsuperscript{29} the Office of Policy “… formulates and disseminates policies which govern the administration of the AD … laws …”\textsuperscript{148}. The Manual (and Standard Computer Programs) are adopted by the Import Administration, and the Manual is called the “Anti-dumping Procedures Manual”. The Manual states that it contains “procedural … information” from the SAA and the Regulations. As regards the Computer Programs the Manual repeatedly refers to the “programming procedures”\textsuperscript{149}. The dictionary definition of the word “procedure” includes computer procedures or sub-routines, such as the Standard Zeroing Procedures\textsuperscript{150}.

114. The United States would not dispute that the Final Determinations, Orders and Final Results in the 31 specific “as applied” cases are correctly before the panel. These documents do not bear the title “law” or “regulation”, but “Determination” or “Order” or “Result”. Furthermore, they expressly incorporate within themselves other documents that bear other titles, notably “Issues and Decision

\textsuperscript{144} Regulations, at 62 FR 27304, first column, first para; 62 FR 27326, third column, second para; 62 FR 27327, final column, first para; 62 FR 27339, first column, first para and second column; 62 FR 27407, first column, final para.
\textsuperscript{146} Manual, Introduction, page 1.
\textsuperscript{147} Manual, Introduction, page 5.
\textsuperscript{149} See, for example, Manual, contents page; and Chapter 9, contents page and pages 1 and 8 (twice).
Memorandum”. The Issues and Decision Memoranda themselves refer to the Margin Calculations, that is, to the Calculation Memorandum and Final Margin Program Log and Output. These documents are not currently published in the Federal Register, or at all. They consist of documents by which one person employed by USDOC communicates certain expressions of fact and opinion to another. We may conclude that neither the title that a document bears, nor whether or not it is published in the Federal Register, or at all, nor the identity of the employee authorised by USDOC to sign or agree the relevant document, determine whether or not it is a measure.

115. Similarly, the United States would not dispute that the Regulations are capable of being referred to this Panel. This is so despite the fact that they were not adopted by the United States Congress, but merely by USDOC itself, like the Determinations, Orders, Results and Memoranda. We may conclude that the mere fact that a document is adopted by USDOC, and not by the United States Congress, is not sufficient reason to conclude that it is not a measure.

116. DOC itself is entitled to amend or change (including withdraw) the Determinations, Orders, Results, Memoranda and Regulations. The “as applied” measures include several such amendments. The United States no doubt accepts that all these matters are nevertheless properly before this Panel. We may conclude that the mere fact that USDOC itself might change a document, including changing a relatively abstract document (such as the Regulations), to be applied in its changed form in the future, does not prevent such document from being a measure.

117. The Manual and Standard Computer Programs are also adopted by or on the authority of USDOC, just like the Determinations, Orders, Results and Memoranda. There is certainly an equivalent or similar set of internal rules in place that determine who at what level within USDOC has the authority to approve such matters, and that person would certainly have to sign-off on any changes, just as in the case of Determinations, Orders, Results or Memoranda.

150 Procedure : “… Computing. A set of instructions for performing a specific task which may be invoked in the course of a program; a subroutine.” (The New Shorter Oxford English Dictionary).
118. Article 12.2.2 of the Anti-Dumping Agreement requires that a public notice concluding such proceedings contains or otherwise makes available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures. In particular, such notice or report must contain the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2. It is not by placing such matters in the Manual and Standard Computer Programs, rather than in the Final Determinations or Orders or Results or the Tariff Act or Regulations, that the United States can escape this Panel’s scrutiny. The Standard Zeroing Procedures cannot fall into some kind of “loophole” or “twilight zone” or “no-man’s land”, outside the law. That would be a licence and invitation for Members to construct their entire anti-dumping systems entirely beyond the reach of panels and the Appellate Body. That would not constitute a good faith interpretation of the WTO Agreement, the Anti-Dumping Agreement and the DSU.

119. An investigating authority must state the reasons for its determinations; and must treat equivalent situations equally, where appropriate applying the same statement of reasons. If, instead of simply deciding each individual concrete case on the same point, time after time, the applying authority itself elects to lift out of those individual decisions the repetitive reasoning or rule, and to place it in a separate document, that is itself ample demonstration that the investigating authority has decided that the matter is susceptible to being examined in abstract terms, and that certain equivalent situations will be treated equally (subject to the rule being changed). In fact, it probably means that this is the only convenient and effective means to deal with the matter. If USDOC can do this; and if the European Communities can identify the matter, and the measure in which it is expressed, and is content to proceed against that measure; why should this Panel be prohibited from examining it? There is nothing in the Anti-Dumping Agreement that places any such restriction on panels.

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151 Article 12.2.1(iii) of the Anti-Dumping Agreement.
152 Article 12.2.2 of the Anti-Dumping Agreement.
153 Article 9.2 of the Anti-Dumping Agreement.
120. USDOC is required to publish the facts and conclusions supporting its determination; including a full explanation of the methodology used in establishing dumping margins; and the primary reasons for the determination. It is also required to provide an explanation of the basis for its determinations that address relevant arguments made by interested parties concerning the establishment of dumping\textsuperscript{154}. If USDOC would adopt a measure in direct contradiction to a rule in the Manual or Standard Computer Programs (such as refusing to model zero in one original investigation in relation to one exporter), it would inevitably be called upon in any subsequent national litigation to give reasons for such a departure from the standard rule. The Manual itself refers in many places to previous determinations, that is, to USDOC practice\textsuperscript{155}. Absent such reasons, USDOC’s legal position would be precarious. And if USDOC adopted a series of measures, using a series of different rules, each time treating equivalent situations differently, absent any reasons, there would come a point when at least one of its measures would be considered unlawful in the United States. Thus, the Manual and Standard Computer Programs to which it refers can only be correctly described as having, at least potentially, some legal effects. They might not have the same force of law as the Tariff Act, but to assert that they are worthless in United States courts would be to overstate the point\textsuperscript{156}. In reality, USDOC treats the Standard Zeroing Procedures as binding, at least until changed.

121. The \textit{Anti-Dumping Agreement} itself contains a mandatory rule according to which an anti-dumping duty can only be imposed on a non-discriminatory basis on imports from all sources found to be dumped and causing injury\textsuperscript{157} – a specific expression of a more general non-discrimination principle that is re-iterated

\textsuperscript{154} Tariff Act, Sections 777(i)(1); 777(i)(2)(A)(iii)(II) ; and 777(i)(3)(A).

\textsuperscript{155} See, for example, Manual, Chapter 7, page 8. There are many other examples.

\textsuperscript{156} See, for example : the United States Court of International Trade, decision of 5 September 2002 in \textit{The Timken Company v United States}, at pages 38 and 39, and footnote 24, referring to USDOC’s practice and relying on the Manual, which while “not a binding legal document, .. does give insight into the internal operating procedures of Commerce” (Exhibit EC-41). See likewise the CIT decision of 8 March 2000 in \textit{Koenig & Bauer-Albert AG, et al v United States}, at pages 19 and 20 (Exhibit EC-41). Similarly, the United States Court of Appeals for the Federal Circuit observed in its judgment of 16 January 2004 in \textit{The Timkin Company v United States}, with respect to USDOC’s practice of zeroing, referring to an earlier case, \textit{Zenith}, that “… Commerce’s “longstanding and consistent administrative interpretation is entitled to \textit{considerable weight}” and “we refuse to overturn the zeroing practice based on \textit{EC-Bed Linen}.” (Exhibit EC-41).

\textsuperscript{157} Article 9.2 of the \textit{Anti-Dumping Agreement}. 
throughout the WTO Agreements. If an investigating authority establishes a rule, especially one such as the Standard Zeroing Procedures, the purpose and effect of which is that equivalent situations are automatically and consistently treated equally\(^{158}\), then that rule must by definition be capable of affecting the operation of the *Anti-Dumping Agreement*. It therefore necessarily falls within the phrase “any matter affecting the operation of the Agreement”\(^{159}\), and may consequently be referred to this Panel.

122. The United States might say that, following a finding by the Panel in one specific “as applied” case that the United States had acted, with respect to zeroing, in a manner inconsistent with the *Anti-Dumping Agreement*, the United States would implement not only by withdrawing the offending measure, but by refraining from adopting any further measures incorporating identical reasoning to that condemned by the DSB. Logically, that would only be possible if the Standard Zeroing Procedures were changed. If the United States agrees that this would be the result, then the United States would not appear to have any interest in disputing that the “as such” matter is correctly before the Panel, and would surely refrain from doing so. If the Parties agree that a matter is correctly before the Panel, all other things being equal, the Panel is free to examine the matter and make recommendations in relation to it, without further ado.

123. A computer program and the procedures it contains are perhaps the paradigm example of normative rules that apply mechanistically and automatically to a given set of facts, without further human intervention. There is no room for administrative or judicial interpretation. The effect of the Standard Zeroing Procedures in future cases is utterly predictable. The Standard Zeroing Procedures provide certainty and security (at least for United States industry) for the conduct of future trade. They represent a degree of purity in normative terms that makes them *ideally suited* as the vehicle by which the problem or matter can best be apprehended and dealt with at its root.

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\(^{158}\) Manual, Chapter 9, page 8 : “The purpose of the [PC programming] procedures is to improve accuracy and *consistency* of computer calculations … Calculation *consistency* occurs when every program uses the same standard calculation methodology. *Consistency* is achieved by insuring that the standard programs conform with current AD calculation methodology …”.

\(^{159}\) Article 17.2 of the *Anti-Dumping Agreement*. 
124. In conclusion, why should the Standard Zeroing Procedures not be considered a measure properly before this Panel? Not because they are abstract; not because they are not published in the Federal Register or at all; not because they do not bear the title “law” or “regulation”; not because they are adopted by USDOC rather than Congress; not because USDOC is entitled, subject to certain procedures, to change or withdraw them for the purposes of future determinations; and not because they are irrelevant in United States courts. In the submission of the European Communities, the only possible conclusion is that these are measures that are correctly before this Panel.

125. Having regard to all these considerations, the European Communities invites this Panel to find or conclude that there is an “as such” “measure” before it in these proceedings, consisting of or including the Standard Zeroing Procedures (and the Manual to the extent it refers to the Standard Computer Programs), or the United States practice or methodology of zeroing, and to formulate its findings and recommendations accordingly.

\[ \text{ii) The Standard Zeroing Procedures are not in conformity with the Anti-Dumping Agreement} \]

126. The relevant standard for an “as such” determination is whether or not the measure is in conformity with the relevant provision of the Anti-Dumping Agreement, as is clear from Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement. The test is not whether the measure is “mandatory” as opposed to “discretionary”, or whether or not it is “binding”\(^{160}\), or whether or not it obliges a Member to act in a WTO inconsistent manner in all cases\(^{161}\) – if that is the result in some cases, that may be sufficient.

127. In any event, whichever test would be used, the Standard Zeroing Procedures are “as such” inconsistent with the Anti-Dumping Agreement. The mathematical character of a computer program makes this “as such” determination inevitable, once it is established that “model zeroing” is inconsistent with the Anti-Dumping Agreement, and that the model zeroing methodology is incorporated into the

Standard Computer Programs, and particularly the Standard Zeroing Procedures, as expressly stated in the Manual.

128. A “normal” rule is something usual or a standard. A “standard”, as that word is repeatedly used by the United States to describe the Standard Computer Programs, is also something that is usual. Article 2.4.2 of the Anti-Dumping Agreement mandates Members to apply a normal or usual or standard rule as set out in that provision. The United States applies a normal or usual or standard rule, in the form of the Standard Zeroing Procedures, that is different from the normal or usual or standard rule provided for in Article 2.4.2. The Standard AD Margin Program and its Standard Zeroing Procedures are not therefore in conformity with that provision.

129. For all of the foregoing reasons, including the observations with respect to the “as applied” sample case, the European Communities submits that the measure that consists of or includes the Standard Zeroing Procedures – Original Investigations (and the Manual to the extent it refers to the Standard Computer Programs), or the United States practice or methodology of zeroing, is “as such” not in conformity with the obligations imposed on the United States by Articles 2.4, 2.4.2, 5.8, 9.3, 1 and 18.4 of the Anti-Dumping Agreement; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.

(c) Sections 771(35)(A) and (B) and 731 of the Tariff Act

130. The European Communities considers that Sections 771(35)(A) and (B) of the Tariff Act are “as such” inconsistent with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement; Articles 9.3, 1 and 18.4 of the Anti-Dumping Agreement; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.

131. Sections 771(35)(A) and (B) state:

162 Normal: “Constituting or conforming to a type or standard; regular, usual, typical; ordinary, conventional …”. Normally: “In a regular manner; regularly … Under normal or ordinary conditions; as a rule, ordinarily … In a normal manner, in the usual way …” (The New Shorter Oxford English Dictionary).

163 Standard: “Serving or used as a standard of measurement, weight, value, etc. … Of a prescribed or normal size, amount, quality, etc. Also, commonly used or encountered (esp. of a practice) customary, usual; … constantly repeated … ranking as an authority, having a recognized and long-lasting value …” (The New Shorter Oxford English Dictionary).
(35) Dumping margin ; weighted average dumping margin

(A) Dumping margin. The term “dumping margin” means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

(B) Weighted average dumping margin. The term “weighted average dumping margin” is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

132. A normal value and an export price are positive numbers. The same is true of their averages, and their weighted averages. Articles 2.4 and 2.4.2 Anti-Dumping Agreement require a simple comparison between these two positive numbers. If there is a difference, according to the text of the Anti-Dumping Agreement, that difference is a “margin of dumping”. A margin is the amount by which one thing differs from another. Normal value may exceed export price. Or export price may exceed normal value. In both cases there is a margin. It is not possible to conclude in either case that there is no margin, or that the margin is zero. Nor is it possible to conclude that, when export price exceeds normal value, there is no or a zero margin of dumping, because Article 2.4.2 Anti-Dumping Agreement is precisely concerned with determining whether or not there is a margin of dumping for the subject product. It is not possible to use in an analysis in progress a premise that, by definition, cannot yet have been substantiated, being one of the possible conclusions of that analysis in progress. That would be circular. In short, the text of the first sentence of Article 2.4.2 Anti-Dumping Agreement and particularly the word “margin”, requires a simple and complete comparison between normal value and export price, being one that does not prejudge how the two elements to be compared are juxtaposed, nor, thus, whether each one of a series of margins is expressed as positive or negative.

133. Section 771(35)(A) of the Tariff Act prejudges these matters, for three reasons.

134. First, the juxtaposition of the two elements to be compared is fixed. Instead of providing for a simple or complete comparison, as it should, it expressly provides only for the measurement of the amount by which normal value exceeds export price. It does not provide for the measurement of the amount by which export
price exceeds normal value. Thus, it provides only for a *limited or modified or conditional* comparison. This is the interpretation that has been adopted by USDOC, and defended by USDOC before the United States municipal courts.

135. Second, the use of the word “amount”, which does not appear in the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, requires or at the very least strongly suggests a positive result. The word is derived from the Latin for mountain, and has at least the strong connotation of something that is there, or present, or positive\(^{164}\), rather than something that is absent or missing or negative.

136. Third, Section 771(35)(A) of the Tariff Act defines the amount resulting from this limited or modified or conditional comparison as a “dumping margin” – a term almost indistinguishable from the term used in Article 2.4.2 *Anti-Dumping Agreement* (“margins of dumping”) – but, according to USDOC, with a *different* meaning ascribed to it – obfuscating the proper application of the *Anti-Dumping Agreement* to such an extent as to render Section 771(35)(A) of the Tariff Act not in conformity with Article 2.4.2 of the *Anti-Dumping Agreement*.

137. For each of these three reasons, and particularly when the overall effect is considered, the action of the United States in maintaining in force Section 771(35)(A) of the Tariff Act is not consistent with its obligations under Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.

138. Should the United States assert that, when export price exceeds normal value, the application of Section 771(35)(A) of the Tariff Act results in normal value *exceeding* export price by a negative *amount*, and thus results in a negative “dumping margin”, the European Communities would turn to the next stage of the calculation: the “aggregate dumping margin”, which is defined, in Section 771(35)(B) of the Tariff Act.

139. Article 2.4.2 of the *Anti-Dumping Agreement* uses the word average, rather than the word aggregate. The word “average” essentially has the mathematical sense of an arithmetic mean: the result obtained by adding the numbers in a set (whether

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\(^{164}\) *Amount*: “The total to which anything amounts; the total quantity or number, etc” (The New Shorter Oxford English Dictionary).
negative or positive) and dividing the total by the number of members in the set\textsuperscript{165}. The word “aggregate” has a different, less mathematical nuance. It rather suggests the grouping together of separate “units”, each being an “undivided whole”\textsuperscript{166}. That suggests something that is positive, rather than negative.

140. The use of the plural “dumping margins” in relation to a specific exporter is also inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. The Appellate Body has made it clear that intermediate calculation results are not “margins of dumping”, and that “dumping” for the purposes of the Anti-Dumping Agreement can be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model or category of that product\textsuperscript{167}. The use of the plural “margins of dumping” in Article 2.4.2 of the Anti-Dumping Agreement is explained by the possibility of one anti-dumping proceeding involving more that one country, or more than one exporter.

141. Thus, if this is the provision on the basis of which the United States applies its zeroing methodology, then the European Communities considers that the action of the United States in maintaining in force Section 771(35)(B) of the Tariff Act is not consistent with its obligations under Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.

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

\textsuperscript{165} Average : “The determination of a medial estimate or arithmetic mean” (The New Shorter Oxford English Dictionary).
\textsuperscript{166} Aggregate : “Collected into one body … Constituted by the collection of many particles or units into one body … A complex whole, mass, or body formed by the union of numerous units or particles …”. Unit : “The quantity of one considered as an undivided whole and the basis of all numbers …” (The New Shorter Oxford English Dictionary).
143. In making these submissions the European Communities would emphasise that the relevant standard in an “as such” case is not whether the municipal measure in all cases leads to a WTO inconsistent result. The question is just whether or not the municipal measure is in conformity with the Anti-Dumping Agreement – that is, whether or not it is a sound implementation. If a municipal law provision contributes forcefully to the adoption of a series of “as applied” measures that are inconsistent with the Anti-Dumping Agreement, then there is every reason to suppose that the root of the problem lies, at least in part, with the relevant provision of municipal law. In this case, USDOC has repeatedly stated that it considers that it is bound by the Tariff Act to zero, and has made strenuous representations to that effect in the highest United States courts. These provisions therefore did more than merely contribute to the problem – they were and remain, at least in part, the very source of the “as such” inconsistency, at least in the eyes of USDOC, and they should therefore be amended accordingly.

(d) Section 777A(d) of the Tariff Act

144. Similar comments apply with respect to Section 777A(d) of the Tariff Act. It provides in relevant part as follows:

(d) Determination of Less Than Fair Value.

(1) Investigations.

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

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

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

(B) Exception. The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if
(i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and

(ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

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

145. The European Communities considers that this provision is also not in conformity with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement; Articles 9.3, 1 and 18.4 of the Anti-Dumping Agreement; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement. First, it refers only to the possibility of determining that the subject merchandise is being sold in the United States at less than fair value, instead of providing for a simple comparison, as in Article 2.4 of the Anti-Dumping Agreement. Second, it uses the word “comparable”, when it should use the words “all comparable”, as in Article 2.4 of the Anti-Dumping Agreement. Third, the juxtaposition between “investigations” and “reviews”, as those terms are generally used by the United States, indicates that the provisions of Section 777A(d)(1) may be abandoned during reviews, including during “periodic reviews” of the amount of duty. However, since “periodic reviews” of the amount of duty must be conducted in a manner consistent with Article 9.3 of the Anti-Dumping Agreement, this renders the Tariff Act not in conformity with Article 9.3 of the Anti-Dumping Agreement, which expressly provides that : “[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2” (see further below).

(e) Other types of averaging groups

146. For the reasons that have already been given, the European Communities considers that, insofar as the United States defines “the same level of trade” at which the comparison is to be made, and decides to calculate a single margin of dumping, it

168 Article 2.4, second sentence of the Anti-Dumping Agreement.
is not entitled to set at zero the negative margins calculated for certain averaging groups, established on the basis of, *inter alia*, different *levels of trade*. In this respect, it is highly significant that the Appellate Body has clearly stated that: "‘Dumping’, within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product.” (emphasis added)\(^{169}\). The use of such a method by the United States is thus inconsistent with obligations imposed on the United States by Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, whether considered separately or taken together, and with the other WTO provisions set out in this submission.

147. In more general terms, for the same reasons, the European Communities considers that, insofar as the United States defines the *other parameters* of the comparison to be made, and decides to calculate a single margin of dumping, it is not entitled to set at zero the negative margins calculated for certain averaging groups based, *inter alia*, on such other parameters or criteria. The use of such a method by the United States is inconsistent with obligations imposed on the United States by Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, whether considered separately or taken together, and with the other WTO provisions set out in this submission.

B. Retrospective assessment ("Periodic review" of amount of duty)

1. Sample “as applied” case (Ball Bearings From Italy)

   (a) The measures at issue

148. The measures at issue in the sample “as applied” simple zeroing case include the Final Results and any amendments to the Final Results\(^{170}\). The Final Results also refer to the Issues and Decision Memorandum\(^ {171}\), which in turn refers to the “Margin Calculations”\(^ {172}\), that is, the Final Margin Program Log and Outputs for the firms investigated, and the assessment instructions\(^ {173}\).

   (b) Article 2.4 of the Anti-Dumping Agreement

      i) Overarching and independent obligation

149. As set out above in the context of original investigations, Article 2.4 of the Anti-Dumping Agreement provides that “[a] fair comparison shall be made between the export price and the normal value.”\(^ {174}\) Article 2.4 of the Anti-Dumping Agreement therefore establishes an overarching and independent obligation to make a fair comparison between export price and normal value: the general principle or rule is that a fair comparison must be made\(^ {175}\). United States municipal law implementing Article 2.4 of the Anti-Dumping Agreement, also contains an independent and separate rule to that effect\(^ {176}\).

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\(^{170}\) Exhibit EC-16.1.

\(^{171}\) Exhibit EC-16.1, at 67 FR 55780, right hand column, final para.

\(^{172}\) Exhibit EC-16.2, at pages 1 and 10.

\(^{173}\) Exhibit EC-16.1, at 67 FR 55781, right hand column, penultimate para.

\(^{174}\) “This comparison [i.e. the fair comparison referred to in the preceding sentence] shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.” … “The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.”


\(^{176}\) Tariff Act, Section 773(a) : “In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or
150. In this respect, the European Communities recalls that the text of the Uruguay Round *Anti-Dumping Agreement* contains an important and significant innovation by comparison with the text of the previous Tokyo Round *Anti-Dumping Code*. Under the Tokyo Round *Anti-Dumping Code*, the equivalent or similar provisions to the first and second sentences of Article 2.4 of the Uruguay Round *Anti-Dumping Agreement* were contained in the same sentence. In the Uruguay Round *Anti-Dumping Agreement*, however, the words “fair comparison … between the export price and the normal value” were lifted up and placed on their own in a new first sentence of Article 2.4. The drafters would not have done this without a purpose. This change confirms that Article 2.4 contains an overarching and independent obligation to make a fair comparison, that goes beyond the obligations to make due adjustment described in Article 2.4. This is also consistent with and confirmed by the Appellate Body’s findings in *EC-Bed Linen* that model zeroing was a violation of the fair comparison requirement, although such zeroing is not mentioned expressly as a prohibited practice in Article 2.4.

**ii) United States zeroing unfair**

151. The European Communities submits that the obligation imposed by Article 2.4 of the *Anti-Dumping Agreement* to conduct a fair comparison precluded the simple zeroing method used by the United States in this case. Given the common and ordinary meaning of the word “fair”, the obligation to make a fair or equivalent comparison must necessarily normally involve a fairly balanced comparison, being one based on equivalent methodologies – that is, a symmetrical comparison. A symmetrical comparison for the purposes of calculating a margin of dumping and eventually imposing a duty, in relation to a given product or time, is necessarily one that precludes simple zeroing. The United States in fact used an asymmetrical comparison and a simple zeroing method without any justification, and for that

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177 Tokyo Round *Anti-Dumping Code*, Article 2.6, first sentence: “In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1 (b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.”
reason acted in a manner inconsistent with its obligation to make a fair comparison, pursuant to Article 2.4 of the Anti-Dumping Agreement.

152. The inherently unfair zeroing method used by the United States can have a dramatic effect on the outcome of the calculation – an effect that may be far more significant than the effects associated with the due adjustments referred to in Article 2.4 of the Anti-Dumping Agreement. This inherent unfairness is illustrated in Table 1\textsuperscript{178}. Table 1 shows a hypothetical dumping calculation for three models (A, B, C) and four customers (1 to 4). Without zeroing the margin of dumping is 2.8 %. With model zeroing the margin of dumping is 4.7 %. With simple zeroing the margin of dumping is 6.7 %. Thus, the effect of the zeroing method used by the United States in “periodic reviews” of the amount of duty is that, even if an exporter’s selling prices and quantities are identical to those examined in the original investigation, USDOC will find a higher margin of dumping, simply because it has switched from model zeroing to simple zeroing, as was the case in Ball Bearings From Italy\textsuperscript{179}. If model zeroing in an original investigation does not involve a “fair comparison” as required by Article 2.4 of the Anti-Dumping Agreement, it cannot be that simple zeroing such as that used by the United States in this case, which leads to an even higher margin of dumping, constitutes a fair comparison within the meaning of that provision. A methodology that converts a negative % (deleted for confidentiality reasons) margin into a +1.42 % margin is, to use the words of the Appellate Body, inherently biased and therefore unfair within the meaning of Article 2.4 of the Anti-Dumping Agreement.

153. These conclusions are confirmed if one considers the situation from the exporter’s point of view. Having been made subject to an anti-dumping duty following the original investigation, an exporter will most likely wish to remedy this situation by increasing its prices so as to eliminate the margin of dumping as established during the original investigation. This basic principle is enshrined, for example, in Article 8.1 of the Anti-Dumping Agreement, which provides for the suspension or termination of proceedings without the imposition of duties, if an exporter undertakes to increase prices so as to eliminate the margin of dumping. However,

\textsuperscript{178} Exhibit EC-37.
\textsuperscript{179} Exhibit EC-16
the removal of the original margin of dumping will not prevent the exporter from being subject to the further imposition of a duty following a United States “periodic review” of the amount of duty, unless the exporter actually increases its prices by more than the margin of dumping. Thus, in the example in Table 2\(^{180}\), even if the exporter raises its prices so as to eliminate the margin of dumping found by USDOC in the original investigation, USDOC will still calculate a margin of dumping of 3.6 %. This is precisely what happened in this case. This cannot be consistent with the general overarching principle that comparisons between normal value and export price be fair.

154. Another aspect of the inherent unfairness of the zeroing methodology used by the United States in “periodic reviews” of the amount of duty is illustrated in Table 3\(^{181}\). In the logic of the United States, liability for anti-dumping duties may depend entirely on the frequency and size of sales in the United States. The table shows a hypothetical example in which two exporters, A and B, both sell 1000 units of an identical product to the same customer in the United States at an average price of $100 per unit, normal value also being $100. However, exporter A chooses to sell at the same time in one large transaction, whilst exporter B chooses to sell at five different times in five separate transactions. USDOC will calculate a dumping margin of zero for exporter A, and a dumping margin of 4 % for exporter B, despite the fact that the pricing policy of both is the same to the same customer, and the return on their export sales is identical. This is an absurd result. In effect, the United States appears to be making its assessment on the basis that exporter B is engaged in some kind of targeted dumping simply because its shipments are carried out as five transactions instead of one. There is nothing in Articles 2.4 or 2.4.2 of the Anti-Dumping Agreement that would permit this, as there is nothing in those provisions that would permit a targeted analysis on the basis of the model zeroing condemned in the EC-Bed Linen case. In truth, the proposition that exporter B is engaged in “dumping” in such circumstances is an illusion – nothing more than that.

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\(^{180}\) Exhibit EC-38.

\(^{181}\) Exhibit EC-39.
iii) Existing case law confirms United States zeroing unfair

155. These conclusions are confirmed by the findings of the Appellate Body in the EC-Bed Linen case:

“Article 2.4 sets forth a general obligation to make a “fair comparison” between export price and normal value.” 182

“Furthermore, we are also of the view that a comparison between export price and normal value that does not fully take into account the prices of all comparable export transactions – such as the practice of “zeroing” at issue in this dispute – is not a “fair comparison” between export price and normal value, as required by Article 2.4 and by Article 2.4.2.” 183

156. They are further confirmed by the findings of the Appellate Body in US-Carbon Steel from Japan:

“However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provision in the Anti-Dumping Agreement according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the Anti-Dumping Agreement.” 184

“It follows that we disagree with the Panel’s view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3. Accordingly, we reverse the Panel’s consequential finding, in paragraph 8(1)(d)(ii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4.” 185

“As explained above, if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too. Thus, the consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of USDOC’s likelihood determination in the CRS sunset

review. In the CRS sunset review, USDOC based its determination that “dumping is likely to continue if the [CRS] order were revoked” on the “existence of dumping margins” calculated in the administrative reviews. If these margins were indeed calculated using a methodology that is inconsistent with Article 2.4 – an issue that we examine below – then USDOC’s likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3.”

157. The Appellate Body went on to recall its findings in the EC-Bed Linen case, and stated that:

“When investigating authorities use a zeroing methodology such as that examined in EC-Bed Linen to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, “zeroing … may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing.” Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.” (emphasis added)

158. The word “otherwise” makes it particularly clear that the findings of the Appellate Body in that case are just as valid whenever a margin of dumping is calculated, and not just in original investigations.

159. These conclusions were again essentially confirmed by the Panel Report in US-Softwood Lumber V, the issue before the panel being whether United States model zeroing was “consistent with the obligations imposed by Article 2.4.2 and the “fair comparison” requirement in Article 2.4 of the Anti-Dumping Agreement”188. The Appellate Body in that case again found that:

“Zeroing means, in effect, that at least in the case of some export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the entirety of the prices of some export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal

value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as whole.” 189

160. The European Communities submits that, in the present case, the zeroing methodology used by the United States involved an inherent bias that had the effect of inflating (or super-inflating) the margin of dumping, and even of turning a negative margin into a positive one190. The determination in this case was therefore inconsistent with the obligation imposed on the United States by Article 2.4 of the Anti-Dumping Agreement to make a fair comparison between normal value and export price. The simple zeroing method used by the United States was not fair within the meaning of Article 2.4 of the Anti-Dumping Agreement. It failed to duly reflect the actual prices of the export transactions that took place during the period of review, as it should have done once the United States had fixed the parameters of its investigation, for example in terms of subject product, or by deciding that “the same time”191 for the purposes of its analysis was the period of review, thus becoming bound by its own logic (that is, bound to apply the provisions of the Anti-Dumping Agreement consistently to the subject product).

(c) Article 2.4.2 of the Anti-Dumping Agreement

i) Method for comparing normal value and export price

161. The European Communities considers that the main purpose of Article 2.4.2 of the Anti-Dumping Agreement is to provide for an exception (asymmetrical comparison in the case of targeted dumping) to the normal methods of comparison (symmetrical comparison) in order to ensure a fair comparison within the meaning of Article 2.4 of the Anti-Dumping Agreement. An asymmetrical comparison can only be used if the circumstances defined in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement are met. Thus, it transformed a comparison method (weighted-average-to-transaction) commonly used before the Uruguay Round Anti-Dumping Agreement was adopted into an exception subject to strict conditions.

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190 Exhibits EC-16.4.1 and EC-16.4.2.
191 Article 2.4 of the Anti-Dumping Agreement.
162. In this case, in order to establish the existence of a margin of dumping for the subject product during the period of review, the United States did not use either of the normal methods of comparison provided for in the first sentence of Article 2.4.2 of the Anti-Dumping Agreement (weighted-average-to-weighted-average or transaction-to-transaction). Rather, the United States compared a normal value established on a weighted-average basis to prices of individual export transactions. That corresponds to the asymmetrical method described in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

163. Further to the second sentence of Article 2.4.2, the asymmetrical method may only be used if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted-average-to-weighted-average or transaction-to-transaction comparison. Thus, in order for the United States to use the asymmetrical method, the conditions laid out in Article 2.4.2 of the Anti-Dumping Agreement should have been met. Furthermore, to the extent that the asymmetrical method was not available, the United States was under an obligation to use one of the normally applicable methods provided for in the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. Thus, in this case, on this point, the United States acted inconsistently with the Anti-Dumping Agreement because it used the asymmetrical method when none of the conditions were fulfilled; and failed to use a symmetrical method when that was the only lawful option.

   ii) Simple zeroing

164. In this case, in establishing a margin of dumping for the subject product during the period of review, the United States used a simple zeroing method.

165. Just as an anti-dumping proceeding concerns “a product” (the subject product), so it also concerns a margin of dumping based on a comparison of sales made at as nearly as possible “the same time”\(^{192}\) (the investigation or review period). Just as the Anti-Dumping Agreement contains no express rule governing the definition of the “subject product”, so it contains no express rule governing the definition of the
period of investigation or the period of review. The “same time” might be a shorter period or a longer period (such as a year). Just like product characteristics, time (along with geography) is typically a parameter by reference to which markets – that is, categories of goods or services with a certain competitive relationship or degree of comparability - are defined. Just as the United States defined the “subject product”, so the United States defined the period of review. Just as the European Communities does not take issue, in this case, with the definition of the subject product, so the European Communities does not take issue, in this case, with the definition of the period of review. Just as in the case of “model zeroing”, having defined the period of review, the United States was obliged to ensure that the margin of dumping for that period of review was calculated in conformity with Article 2.4.2 of the *Anti-Dumping Agreement*. The United States had become bound by its own logic.\(^\text{193}\)

166. The United States having fixed the period of review, it had effectively decided that “the same time” in this case was the period of review. In principle, and due account being taken of all necessary adjustments, any transaction during the period of review, at whatever time it was made, was considered by the United States potentially comparable with any other transaction during the period of review, at whatever time it was made.

167. In short, the reasoning of the Appellate Body in the *EC-Bed Linen* and *US-Softwood Lumber V* cases in relation to model zeroing also applies whenever an investigating authority decides to fix the parameters of its investigation, whether in relation to subject product, time, level of trade, region, or any other parameter. The investigating authority thereby becomes bound by its own logic, and must complete its analysis on the basis of the same logic.\(^\text{194}\)

168. The European Communities finds contextual support for the preceding analysis in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, which refers

\(^{192}\) Article 2.4 of the *Anti-Dumping Agreement*.

\(^{193}\) Appellate Body Report, *EC-Bed Linen* : “But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.” (para 60, final sentence). See also paras 57 and 58, and para 62, final sentence. See also Appellate Body Report, *US-Softwood Lumber*, paras 93 and 99.

expressly to certain other parameters of the determination, including “time periods”. These words indicate that, having fixed the temporal parameters of its investigation and imposition, the United States had become bound by its own logic, unless the exceptional situation described in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement* was present (which it was not). The same is true in respect of any other parameters of the investigation fixed by the investigating authority, notably the purchasers and regions concerned, these also being matters referred to in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. The simple zeroing method used by the United States is, at least potentially, offensive to any one of these parameters, because it is performed at the most disaggregated level, that is, at the level of individual transactions. In other words, instead of treating all the relevant export transactions as a whole, the United States methodology results in treating each export transaction individually in the same manner as model zeroing results in treating each model separately.

169. Further contextual support may be found in a number of other provisions of the *Anti-Dumping Agreement* which indicate that temporal considerations are relevant to the calculation of a dumping margin. For example, below cost domestic sales may only be disregarded if they are made within an extended period of time. That period of time should normally be one year (the typical length of an investigation) but in no case less than six months. Cost allocations must be adjusted appropriately for non-recurring items of cost which benefit future production (such cost items do not immediately produce “dumping”). Exporters must be allowed at least 60 days to have adjusted prices to reflect sustained movements in exchange rates. In the ordinary course of trade costs and prices typically vary in the very short term, even if in the medium term things average out. Dumping only occurs when a situation in which export prices are below normal value becomes the norm, or “the ordinary course of trade”. Similar contextual support may be found in the *Anti-Dumping Agreement* in relation to both purchasers and regions.

195 Article 2.2.1 of the *Anti-Dumping Agreement*.
196 Article 2.2.1, footnote 4 of the *Anti-Dumping Agreement*.
197 Article 2.2.1.1 of the *Anti-Dumping Agreement*.
198 Article 2.4.1 of the *Anti-Dumping Agreement*.
199 Article 2.1 of the *Anti-Dumping Agreement*. 
170. The European Communities also refers to the arguments set out above (which apply with equal force): regarding the fact that dumping can be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model or category of that product; to the fact that intermediate margins are not “margins of dumping”; to the meaning of the words “comparison” and “margin”; to the fact that the final stage of the calculation cannot fall outside the scope of Article 2.4 of the Anti-Dumping Agreement, or indeed outside the Anti-Dumping Agreement altogether; to the use of the plural “margins of dumping”; to the word “comparable”; to the need for a consistent treatment of the subject product in an anti-dumping investigation; and to the absence of any express language permitting sales to be disregarded\(^{200}\).

\(^{iii}\) The word “investigation” in Article 2.4.2 of the Anti-Dumping Agreement

171. According to the United States, the word “investigation” in Article 2.4.2 of the Anti-Dumping Agreement means, \textit{a contrario}, that the methodologies set out in that provision are irrelevant for what the United States refers to as “reviews” – using that term as it is generally used in the United States (that is, including “periodic reviews of the amount of duty”)\(^{201}\). The European Communities disagrees with that assertion.

172. First, the European Communities notes that the word “investigation”, together with the other terms of the first sentence of Article 2.4.2, occur in the same sentence, and relate to establishing the existence of margins of dumping under Article 2.4.2. In these circumstances, the Appellate Body has made it clear that all the relevant terms must be interpreted “in an integrated manner”\(^{202}\). The same is true of the first and second sentences of Article 2.4.2, and of Article 2.4 as a whole.

173. Second, the kind of \textit{a contrario} reasoning relied on by the United States is inherently weak. In effect, the United States would have the Panel replace the words “during the investigation” in Article 2.4.2 of the Anti-Dumping Agreement.

\(^{200}\) See Section III.A.1(c) of this submission.

\(^{201}\) See SAA, at page 140 (Exhibit EC-34). \textit{Mexico-OCTG}, United States First Written Submission, paras 208, 212.
with the words “, except during a review,”. The United States would thus have the Panel read into the text of Article 2.4.2 of the Anti-Dumping Agreement words that are simply not there.

174. Third, the European Communities is of the opinion that the “periodic review of amount of duty” carried out in the United States must be consistent with the provisions of Article 9, particularly Articles 9.3, 9.3.1 and 9.3.3 of the Anti-Dumping Agreement. The word “review” does not appear in these provisions. Furthermore, Article 2.4.2 of the Anti-Dumping Agreement does not contain the words (for example) “, except during a retrospective assessment,” – as the United States would, in effect, have it. As for the previous point, if the drafters of the Anti-Dumping Agreement had wished to they could easily have used such words. But they chose not to. The United States cannot unilaterally add to or diminish the rights and obligations of Members under the Anti-Dumping Agreement.

175. In fact, the United States proposition would fly directly in the face of the text of the Anti-Dumping Agreement (also in the context of original investigations) because Article 9.3 of the Anti-Dumping Agreement expressly provides that the amount of duty shall not exceed the margin of dumping, (as opposed to the margin of dumping referred to in Article 2.4.2) as defined, and as calculated under Article 2. Given that the express text of the Anti-Dumping Agreement expressly limits the amount of anti-dumping duty assessed pursuant to Article 9 by reference to the margin of dumping calculated pursuant to Article 2, it is legally impossible, based only on a contrario reasoning, to break that express textual link. Such weak a contrario reasoning cannot defeat the express text of the Anti-Dumping Agreement.

176. Fourth, the European Communities does not agree with the United States that, as a matter of WTO law, the terms “investigation” and “review” as used in the Anti-Dumping Agreement are mutually exclusive. The Anti-Dumping Agreement, after the statement of principles in Article 1, contains definitions in Articles 2 (dumping), 3 (injury) and 4 (domestic injury). The definitions then stop. There is no definition of the terms “investigation” or “review”. The word review is used in

the Anti-Dumping Agreement in at least five different senses (newcomer review, sunset review, changed circumstances review, judicial review, operational review). The word “investigation” is also used in different senses, including initial or original investigation within the meaning of Article 5 of the Anti-Dumping Agreement; and in the more general sense of Article 6 of the Anti-Dumping Agreement, which must in any event apply to “reviews” within the meaning of Article 11 of the Anti-Dumping Agreement because of the express cross-reference from Article 11.4 to Article 6, and absent the words mutatis mutandis, which are used in Article 11.5 of the Anti-Dumping Agreement. It is not possible to apply the provisions of Article 6 of the Anti-Dumping Agreement in a United States “periodic review” of the amount of duty and assert that there is no investigation, when that word is used repeatedly – there must at least be a review investigation, conducted by investigating authorities. The word “investigation” in Article 2 of the Anti-Dumping Agreement has the same general and unqualified meaning as in Article 6. If the drafters had intended otherwise, they would have inserted words to that effect, which they chose not to do. There is no reason based on context or purpose to conclude otherwise. The Panel should not read into that provision words such as “original” or “initial” or “Article 5” that are simply not there. That would be to diminish the rights accruing to the European Communities under the Anti-Dumping Agreement. This vocabulary is customary in WTO anti-dumping law, and indeed is also reflected in the United States anti-dumping provisions.

177. Fifth, the exercise conducted by the United States in a “periodic review” of the amount of duty corresponds, objectively, to an investigation or assessment by an investigating authority. In both cases the procedures are virtually identical: questionnaires are sent out; verification visits take place; and hearings are organised.

178. Sixth, the definitions of “dumping” and “margin of dumping” in Articles VI:1 and VI:2 of GATT 1994, as elaborated in Article 2 of the Anti-Dumping Agreement, go beyond a cross-reference, and, unlike the definition of injury, are not qualified by the words “unless otherwise specified”. These definitions must therefore also apply in any context in which a margin of dumping is calculated, including in the
context of a United States “periodic review” of the amount of duty203. The word “investigation” is used repeatedly elsewhere in Article 2, and indeed in Article 1 of the Anti-Dumping Agreement, and yet these provisions clearly apply in the context of a United States “periodic review”, as expressly provided by United States municipal law204.

179. Seventh, even if the United States would be correct, that would not mean that simple zeroing would be permitted in “periodic reviews” – it would still be prohibited by Article 2.4 of the Anti-dumping Agreement, as analysed above.

180. Eighth, if the United States would be correct on its interpretation of the word “investigation” in Article 2.4.2 of the Anti-Dumping Agreement, that could effectively only mean that the negotiators, when agreeing to transform a commonly used method of comparison into an exception subject to certain conditions, decided to limit the scope of application of such method to original investigations only. Any other conclusion, including the one suggested by the United States, would imply that Members would be entitled to use the exception outside original investigations without being subject to any conditions at all. That would be a very strange conclusion that would be at odds with the overall obligation to make a fair comparison in all circumstances. The United States has offered no context or reason to explain why the exception could become the norm outside original investigations. The European Communities considers that such proposition, if accepted, would severely undermine the overall obligation to make a fair comparison in all margin of dumping determinations205.

181. Ninth, if the United States would be correct in respect of both Articles 2.4.2 and Article 2.4 of the Anti-Dumping Agreement, that would open up in the Anti-

204 Article 2.2.1, final sentence - Sections 751(a)(2)(A)(i) and 773(b)(2)(D) of the Tariff Act; Article 2.2.1.1, first sentence - Section 773(f)(1)(A) of the Tariff Act; Article 2.2.1.1, final sentence - Section 773(f)(1)(C)(i) of the Tariff Act; footnote 6, second phrase - Section 773(f)(1)(C) of the Tariff Act; footnote 6, third phrase - Section 773(f)(1)(C) of the Tariff Act; Article 2.2.2 - Section 773(e)(2)(A) of the Tariff Act; Article 2.2.2(ii) - Section 773(e)(2)(B)(ii) of the Tariff Act. See : SAA, page 137, final para to page 139, third para; and the Action Required or Appropriate to Implement the Agreement, SAA, pages 149 to 171, penultimate para, for a description of how all these provisions of the Anti-Dumping Agreement will be implemented in United States municipal law, for both “investigations” and “reviews”. Panel Report, US-DRAMs, footnote 504.
205 US-Stainless Steel, para 6.11.
Dumping Agreement a vast loophole on the fundamental issue of how to calculate a margin of dumping. It would make the results of an original investigation effectively worthless. It would void entirely of content the overarching and independent obligation in Article 2.4 of the Anti-Dumping Agreement to make a fair comparison. It would mean that, when it comes to the final calculation of a margin of dumping, anything goes.

182. Tenth, the view expressed by the United States would appear to be an attempt to create a gross distortion between systems of retrospective collection and those of prospective collection, as provided for in Article 9.3 of the Anti-Dumping Agreement. It would effectively allow the United States to re-introduce unlawful zeroing methodology “by the back door”, in a “periodic review” conducted as soon as possible following the imposition of duties, the results of which would eclipse entirely the results of the original investigation. There are no provisions of the Anti-Dumping Agreement that support such a proposition, and it should be rejected by the Panel.

(d) Articles 11.1 and 11.2 of the Anti-Dumping Agreement

i) Categorisation of United States “periodic reviews” under the Anti-Dumping Agreement

183. The European Communities considers that United States “periodic reviews” of the amount of duty correspond to and fit within Article 9.3 of the Anti-Dumping Agreement. By such “periodic review” : “ … the amount of the anti-dumping duty [is] assessed …”; that assessment is made “ … on a retrospective basis …” ; and there is a “… determination of the final liability for payment of anti-dumping duties …”. The timing rules in Article 9.3.1 Anti-Dumping Agreement, as well as the rule regarding judicial review in footnote 20 Anti-Dumping Agreement correspond to rules in the United States. The “refund” referred to in Article 9.3.1 Anti-Dumping Agreement is the repayment of estimated anti-dumping duty

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206 Particularly Articles 9.3.1 and 9.3.3. Exhibit EC-40.
207 Review : “A general survey or reconsideration of some subject or thing (freq. in in review, under review); a retrospect, a survey of the past … “ (The New Shorter Oxford English Dictionary).
208 Retrospective : “Looking back on or dealing with the past …” (The New Shorter Oxford English Dictionary).
deposits in excess of final liability. This analysis is confirmed by footnote 21 of the Anti-Dumping Agreement, which states:

A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article [Article 11.2 Anti-Dumping Agreement].

184. Consequently, what we are faced with, in Anti-Dumping Agreement terms, is investigation and assessment, that is, with the retrospective assessment of the amount of the anti-dumping duty in accordance with Articles 9.3 of the Anti-Dumping Agreement. In relation to these matters, the United States is obliged to comply, in particular, with the provisions of Articles 2 and 9 of the Anti-Dumping Agreement.

185. The United States decision to impose a revised estimated anti-dumping duty deposit in the future is likewise subject to the disciplines of Articles 2 and 9 of the Anti-Dumping Agreement. The United States legislation provides for a different type of review – a changed circumstances review, that being what is governed by Article 11.2 of the Anti-Dumping Agreement. The decision to impose a revised estimated anti-dumping duty deposit for the future does not sit within Article 11.2 of the Anti-Dumping Agreement, given that it does not, as a rule, lead to the termination of the duty itself. Footnote 22 of the Anti-Dumping Agreement makes

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209 See SAA, page 874, section 7.a, where it is explained that Article 9.3.1 of the Anti-Dumping Agreement establishes rules for administrative reviews; and SAA, page 878, which refers to changed circumstances reviews.


211 Tariff Act, Section 751(b); Regulations, Section 351.216. US-Softwood Lumber III, para 7.151: “In view of the nature of Canada’s claim the first question that we must address is the nature of the obligations under Article 21.2 SCM Agreement, and in particular, whether that provision requires "administrative reviews" as that term is used in this dispute, i.e. the yearly review procedure undertaken by the United States in its retrospective duty assessment system. Here, we agree with the United States that Article 21.2 SCM Agreement deals with different kinds of review mechanisms, requiring the authority to provide for the right of interested parties to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Thus, the first type of review addresses the question of whether subsidization is present at all, while the second type of review, by its very terms, has to do primarily with injury questions, that is, the effect on the domestic industry of changing or removing entirely the countervailing duty. This second type of review thus does not have to do with finalizing the rate of countervailing duty during a particular period for which estimated duties have been collected, but rather with the underlying need and rationale, from the standpoint of the affected domestic industry, for maintaining a countervailing duty. In short, Article 21.2 SCM Agreement is silent on the question of "administrative reviews".” (emphasis added)
it clear that a finding that no duty is to be levied does not require the duty itself to be terminated.

186. United States municipal law refers 4 times to the imposition of “estimated anti-dumping duty deposits” : once after Provisional Determinations; once after Final Determinations of Sales at Less Than Fair Value; once after Anti-Dumping Duty Orders; and finally once after the Final Results of a “periodic review”. There is no doubt that on each of the first 3 occasions that concept is subject to the disciplines of Article 2 and/or 9 of the Anti-Dumping Agreement. There is nothing in the Anti-Dumping Agreement capable of supporting the view that the fundamental principles provided for in Articles VI:1 and VI:2 of the GATT 1994 can be abandoned on to the fourth occasion. United States legislation itself refers to the collection of estimated anti-dumping duty deposits (before final assessment and payment), supporting the view that estimated anti-dumping duty deposits fall within Article 9 of the Anti-Dumping Agreement (the title of which refers to the “collection” of anti-dumping duties). Thus, the use of the word “review” in the United States “periodic review” would appear to be, also in this respect, a misnomer. At least the word “review” is not being used by the United States in the same sense as the word is used in the Anti-Dumping Agreement. The Panel must look beyond the label attached to the measure by the United States, and examine its substance.

\[\text{ii) Articles 11.1 and 11.2 of the Anti-Dumping Agreement}\]

187. Assuming, only for the sake of argument, that part of the measure (the decision to apply a revised estimated anti-dumping duty deposit rate for the future) in this case was a “review” within the meaning of Article 11.2 of the Anti-Dumping Agreement, for the purposes of that review, the United States made a dumping determination, based on a comparison between normal value and export price. That dumping determination was used by the United States as the basis for determining whether or not the continued imposition of the duty was “necessary to offset dumping”, within the meaning of Article 11.2 of the Anti-Dumping Agreement.

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212 See Article 7.5 of the Anti-Dumping Agreement with regard to provisional measures. The United States does not dispute the application of Articles 2 and 9 to original investigations.

213 Regulations, Section 351.221(b)(7).
Agreement. That determination was made pursuant to the right expressly conferred on interested parties by Article 11.2 of the Anti-Dumping Agreement, second sentence.

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

189. The European Communities observes that there is a certain logical sequence to the articles in Part I of the Anti-Dumping Agreement, which is an integral part of the text. Thus, after the statement of principles (Article 1), Articles 2 (determination of dumping), 3 (determination of injury) and 4 (definition of domestic injury) set out what are clearly the basic building blocks. Articles 5 (initiation and subsequent investigation) and 6 (evidence) are more procedural. Articles 7, 8, 9 and 10 concern the various measures that may be taken. Article 11 concerns reviews. Articles 12 to 15 may fairly be described as miscellaneous.

190. Articles 2, 3 and 4 of the Anti-Dumping Agreement assume particular significance, given the relative brevity of Article 1. They are definitions. Article 2, confirming the definitions of “dumping” and “margin of dumping” in Articles VI:1 and VI:2 of GATT 1994, begins with the text “For the purposes of this Agreement, a product is to be considered as being dumped …”\(^\text{214}\). Article 3 begins with the introductory phrase of Article 2.1 is identical to the phrase used in Article 1 of the SCM Agreement: “For the purposes of this Agreement, a subsidy shall be deemed to exist …”. See Appellate Body Report, US-Carbon Steel, para 80 : “... Article 1 of the SCM Agreement sets out a definition of “subsidy” that applies to the whole of that Agreement ...”. See also Panel Report EC-Bed Linen (Article 21.5 - India), para 6.124 and Appellate Body Report EC-Bed Linen (Article 21.5 - India) paras 65 and 141 (the United States submits that Article 2.1 Anti-Dumping Agreement “defines” dumping ...). According to the SAA, (page 138) which provides authoritative interpretation of United States law:

words: “A determination of injury for the purposes of Article VI of GATT 1994 shall be …”, and footnote 9 defines the term “injury”. Article 4 is entitled “definition of domestic industry” and begins with the words: “For the purposes of this Agreement, the term “domestic industry” shall be interpreted as …”. Both principles and definitions are abstract text destined to be used when interpreting or applying other text.

191. These definitions are used throughout the text of the Anti-Dumping Agreement. By way of illustration only, a simple automatic computer search of the text of the Anti-Dumping Agreement yields the following results: dumping (110), dumped (37), injury (50), domestic industry (27), total (224). Clearly, these basic concepts permeate the entire agreement.

192. The European Communities does not consider that a cross-reference is essential before one provision becomes relevant for the purposes of interpreting another – and in any event a definition goes beyond a cross-reference215. It is instructive, however, to trace the web of express cross-references: Article 11 refers to Articles 9 (twice), 6 and 8; Article 9 to Articles 2 (twice) and 6 (thrice); Article 6 to Article 5; Article 5 to Article 3 (and vice versa). Article 1 refers to Article 5; Article 4 to Articles 8 and 3; Article 7 to Articles 5 and 9; Article 10 Articles 7 and 9. This list incorporates, more than once, all the Articles from 1 to 11, and they are all connected to each other by these cross-references. The text of all these articles is thus meshed together as part of a single web or matrix. What was agreed to by all the Members of the WTO was the whole text, not Article 11 in isolation.

193. Turning to Article 11.2 of the Anti-Dumping Agreement, the essentially temporal nature of the exercise is confirmed by the text of Article 11.2, which requires that “…a reasonable period of time has elapsed …”. It is also confirmed by the text in Article 11.2 “continued imposition of the duty”. The word “continued” used in the text of Article 11.2 requires a consideration of three elements: before, (the same

thing) after, and the point of delineation. That is what “continue” means. The point of delineation for the purposes of the present discussion is the end of the review investigation period (a date which is also destined to be the beginning of the following period). Before is the preceding investigation period. After is the following period. Thus, what the text of Article 11.2 must refer to is a thing or concept that is present both before and after the relevant date - the same thing. This use of the word “continued” in the text, and the element of continuity it necessarily requires in the calculation from one review investigation period to the next is highly significant for the purposes of the present discussion. The use of the word “continued” in the text of Article 11.2 thus makes it clear that there is an important requirement of continuity in the way in which successive margins of dumping have been calculated, and estimated anti-dumping duties imposed.

194. The text of Article 11.2 refers to “the” duty, not “a” duty. The use of the definite article is consistent with the use of the word “continued” in the text, and also significant. If Article 11.2 provided for the imposition of a duty qualitatively different from the duty previously calculated on the basis of the original period of investigation, then the text would reflect that by using the indefinite article. But the text uses the definite article. That confirms that the duty with which the Article 11.2 is concerned is the same type of duty calculated in respect of the original investigation period – that is, one consistent with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.

195. Further guidance as to the temporal character of the provision may be derived from the word “immediately” in Article 11.2 of the Anti-Dumping Agreement, emphasising that the dumping duty must be terminated immediately when the authorities determine that it is no longer warranted.

196. Additional contextual support is provided by Article 11.1 of the Anti-Dumping Agreement, which states a general and overarching principle in the light of which

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216 Panel Report, US-Corrosion Resistant Steel Sunset Review, para 7.179: “We derive this from the reference to “recurrence”, which we understand to refer to the recommencement of a phenomenon that has ceased.”

Article 11.2 must be interpreted\(^\text{218}\). Article 11.1 of the *Anti-Dumping Agreement* is particularly concerned with *temporal* matters. This appears from the title of Article 11, which contains the word “duration”. It is confirmed by the use of the word “remain” in Article 11.1. The provision is not concerned with whether or not a measure should be imposed, but whether or not it should remain. The words “only as long as” in Article 11.1 of the *Anti-Dumping Agreement* are significant. The text of the provision does not read “An anti-dumping duty shall remain in force if necessary to counteract dumping …”. Rather, the words “only as long as” indicate a *temporal* requirement that is more than the mere conditional “if”. This analysis is further confirmed by the use of the words “is causing” (the present tense) in Article 11.1 of *Anti-Dumping Agreement*. The dumping in question cannot be dumping that “caused” or “was causing” or “had caused” – it must be dumping that “is causing”. The present is now. Articles VI:1 and VI:2 of GATT 1994 are similarly drafted in the present tense.

197. Thus, it being *temporal* considerations that are at the heart of this provision\(^\text{219}\), recourse to Article 11.2 of the *Anti-Dumping Agreement* does not provide an opportunity for a Member to switch to making a comparison between normal value and export price that is “unfair” within the meaning of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, insofar as it involves unlawful zeroing. To accept that would be to accept a fundamental rupture in continuity that would set at naught the word “continued” in the text of Article 11.2. On that view, the word might as well be “future”, which is not what the text says. This is all the more so when the first review period stretches back to the date on which provisional measures were first imposed, thus eclipsing entirely the results of the original investigation.

198. In this specific case, as a result of the unlawful zeroing method described in this submission, the margin of dumping determined by the United States was not calculated in conformity with Article 2 of the *Anti-Dumping Agreement*, and particularly Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*. Consequently, the United States acted in this case in a manner inconsistent with its obligations


\(^{219}\) United States First Written Submission, para 25.

under Article 11.2 of the *Anti-Dumping Agreement*. It failed to consider whether or not the imposition of the duty was necessary to offset “dumping” as defined in Article 2 of the *Anti-Dumping Agreement*. Rather, the United States sought to justify the continued imposition of the duty as necessary to offset something that did not constitute dumping within the meaning of Article 2 of the *Anti-Dumping Agreement*.

199. Concomitant with this infringement of Article 11.2 *Anti-Dumping Agreement*, the United States acted inconsistently with the obligations imposed on it by Article 11.1 of the *Anti-Dumping Agreement*, which constitutes a general overarching principle, insofar as the United States determined that the anti-dumping duty should remain in force, even when it was clear that it was no longer necessary to counteract dumping, within the meaning of Article 2 of the *Anti-Dumping Agreement*.

(e) Other inconsistencies

i) Article 9.3 of the *Anti-Dumping Agreement*

200. The European Communities considers that, as a consequence of the unlawful zeroing method described in this submission, the United States acted in this case in a manner inconsistent with obligations imposed on it by Article 9.3 of the *Anti-Dumping Agreement*.

201. Article 9.3 of the *Anti-Dumping Agreement* provides, *inter alia*:

The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

202. In this case, the United States established a margin of dumping of 1.42 % having unlawfully used the zeroing method described in this submission. Had the United States not employed the unlawful zeroing method described in this submission the margin of dumping would have been negative. It would in fact have been negative % (deleted for confidentiality reasons).

203. The United States retrospectively assessed anti-dumping duties on the basis of its unlawful margin of dumping, the super-inflated dumping margin being used to generate a similarly super-inflated assessment rate. Consequently, the amount of
anti-dumping duty exceeded the real margin of dumping. The real margin of dumping being de minimis or zero or negative, the amount of anti-dumping duty imposed and assessed should necessarily also have been zero.

ii) Article 1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of GATT 1994

204. The European Communities considers that the United States acted in this case in a manner inconsistent with obligations imposed on it by Article 1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of GATT 1994.

205. As a result of the unlawful zeroing method described in this submission, the United States applied an anti-dumping measure other than under the circumstances provided for in Article VI of GATT 1994 and other than pursuant to investigations initiated and conducted in accordance with the provisions of the Anti-Dumping Agreement, as set out above. In taking action under its domestic anti-dumping legislation, the United States failed to respect the provisions of the Anti-Dumping Agreement, as set out above, which provisions govern such action, and which provisions the United States should have respected. Accordingly, the United States acted in a manner inconsistent with the obligations imposed on it by Article 1 of the Anti-Dumping Agreement.

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

207. The European Communities would strongly emphasise the significance of these observations. Article VI of GATT 1994 contains the basic principles governing anti-dumping measures. According to the express terms of its title, the Anti-Dumping Agreement implements Article VI of GATT 1994. To implement
something means to complete or execute, to put into effect\textsuperscript{220}. One would therefore expect to be able to place any provision of the \textit{Anti-Dumping Agreement} under the umbrella of one or more provisions of Article VI of GATT 1994. Certainly, the \textit{Anti-Dumping Agreement} cannot be lawfully interpreted in a manner that contradicts the basic principles set out in Article VI of GATT 1994. There are essentially five basic principles set out in Articles VI:1 and VI:2 of GATT 1994. First, Articles VI:1 and VI:2 of GATT 1994 define “dumping” and “margin of dumping” (the definitions being elaborated in more detail in Article 2 of the \textit{Anti-Dumping Agreement})\textsuperscript{221}. In that context, it also sets out the basic rules governing the determination of normal value (second) and export price\textsuperscript{222} (third) and the comparison between them (fourth). Fifth, as regards assessment, it provides that “in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount that the margin of dumping” (see also Article 9.3 of the \textit{Anti-Dumping Agreement}). The first note to Paragraphs 2 and 3 expressly refers to cash deposits pending final determination (that is, to the United States estimated anti-dumping duty deposit)\textsuperscript{223}. There is \textit{nothing} in these provisions to support the view that, by labelling, in municipal law, a retrospective assessment as a “review”, it is possible for a Member to disapply, if it so wishes, \textit{all or some} of the rules concerning these five basic principles, as implemented, notably, by Article 2 (but also Article 9) of the \textit{Anti-Dumping Agreement}. To suggest that the \textit{Anti-Dumping Agreement} can be interpreted in such a manner is to fly in the face of Articles VI:1 and VI:2 of GATT 1994.

208. This view is confirmed by Article 2.7 of the \textit{Anti-Dumping Agreement}, according to which Article 2 of the \textit{Anti-Dumping Agreement} is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994 (which concerns countries where the State has a complete or substantially complete monopoly of trade). Thus, where the negotiators wished to make provision for the non-application of the rules in Article 2 of the \textit{Anti-Dumping Agreement}...
Agreement in respect of the above matters, they did so by way of express reservation.

   iii) Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement

209. The European Communities considers that, as a consequence of the unlawful zeroing method described in this submission, the United States acted in a manner inconsistent with obligations imposed on it by Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

210. In this case, as a result of the unlawful zeroing method described in this submission, the United States has failed to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Agreement, and has thus acted in a manner inconsistent with obligations imposed on it by Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

2. Other “as applied” cases

211. The same unlawful zeroing method was used by the United States, to similar effect, in each of the cases listed and documented in Exhibits EC-17 to EC-31. Accordingly, for the same reasons, in each of these cases, the United States acted inconsistently with the obligations imposed on it by Articles 2.4, 2.4.2, 11.1, 11.2, 9.3, 1 and 18.4 of the Anti-Dumping Agreement; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement. The effects of zeroing in these cases are summarised in Exhibit EC-32.

3. “As such”

(a) The Standard Zeroing Procedures

212. The observations set out above with respect to original investigations apply mutatis mutandis. The measures at issue include the Standard Zeroing Procedures (and the Manual, to the extent that it refers to the Standard Computer Programs), or the United States practice or methodology of zeroing, which are, at least in part,

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the root of the problem. These measures are not in conformity with the *Anti-Dumping Agreement*.

213. The mathematical character of a computer program makes this “as such” determination inevitable, once it is established that “simple zeroing” is inconsistent with the *Anti-Dumping Agreement*, and that the simple zeroing methodology is incorporated into the Standard Computer Programs, and particularly the Standard Zeroing Procedures, as expressly stated in the Manual.

214. The European Communities submits that the Standard Zeroing Procedures, or the United States practice or methodology of zeroing, which unconditionally effect simple zeroing in “periodic review” investigations, both for the purposes of calculating an assessment rate, as well as for the purposes of calculating an estimated anti-dumping duty deposit, are “as such” not in conformity with the obligations imposed on the United States by Articles 2.4, 2.4.2, 11.1, 11.2, 9.3, 1 and 18.4 of the *Anti-Dumping Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement, for all the reasons set out above, *mutatis mutandis*.\(^{224}\)

(b) *Sections 771(35)(A) and (B) and 731 of the Tariff Act*

215. The European Communities refers to its comments above, including in the context of original investigations, which apply *mutatis mutandis*, with equal force, in the case of a “periodic review” of the amount of duty. Sections 771(35)(A) and (B) and 731 of the Tariff Act are inconsistent with Articles 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Articles 11.1, 11.2, 1 and 18.4 of the *Anti-Dumping Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.

(c) *Section 777A(d) of the Tariff Act*

216. The European Communities refers to its comments above, including in the context of original investigations, which apply *mutatis mutandis*, with equal force, in the case of a “periodic review” of the amount of duty. Section 777A(d) of the Tariff Act

\(^{224}\) The European Communities refers, in particular, but not exclusively, to the observations at para 128 of this submission.
Act is inconsistent with Articles 2.4, 2.4.2 and 9.3 of the Anti-Dumping Agreement and Articles 11.1, 11.2, 1 and 18.4 of the Anti-Dumping Agreement; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.

217. In addition, Section 777A(d)(2) of the Tariff Act is inconsistent with these provisions, if it means that the investigating authority is precluded, in normal circumstances, from establishing the existence of a margin of dumping for the subject product on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, including throughout the investigation period.

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

218. Section 751(a)(2)(A)(i) and (ii) of the Tariff Act provides as follows:

(2) Determination of antidumping duties.

(A) In general. For the purpose of paragraph (1)(B), the administering authority shall determine

(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and

(ii) the dumping margin for each such entry.

219. The European Communities considers that this provision is not in conformity with Articles 2.4, 2.4.2 and 9.3 of the Anti-Dumping Agreement if it means that the investigating authority is precluded, in normal circumstances, from establishing the existence of a margin of dumping for the subject product on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. Or if it means that an investigating authority is required, in all cases or normally, to make an asymmetrical comparison.

(e) Section 351.414(c)(2) of the Regulations

220. The European Communities submits that Section 351.414(c)(2) of the Regulations is “as such” inconsistent with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.

221. Section 351.414(c)(2) of the Regulations provides:
“In a review, the Secretary will normally use the average-to-transaction method.”

222. For the reasons set out in this submission, the European Communities considers that this provision is “as such” inconsistent with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement, which require that a fair comparison be made. In the light of the Appellate Body Reports cited above, the fair comparison requirement precludes a national measure providing that the average-to-transaction method is the norm.

223. Similarly, for the reasons set out in this submission, the European Communities considers that this provision is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. First, it permits the use of an asymmetrical method without any of the cumulative conditions set out in Article 2.4.2 having been met. Second, it provides that the normal rule is asymmetry, when Article 2.4.2 of the Anti-Dumping Agreement recalls that the normal rule is symmetry. The provision also fails to provide for a fair comparison within the meaning of Article 2.4 of the Anti-Dumping Agreement.

(f) Importer specific assessment rates

224. For the reasons that have already been given, the European Communities considers that, insofar as the United States defines the subject product, and absent any analysis of targeted dumping made in compliance with Article 2.4.2 of the Anti-Dumping Agreement, the United States is not entitled to set at zero the negative margins calculated for certain importers or purchasers, and assess duties on that basis, without any set-off. In this respect, it is highly significant that the Appellate Body has clearly stated that: “‘Dumping’, within the meaning of the Anti-Dumping Agreement, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product.” (emphasis added)225. The use of such a method by the United States is thus inconsistent with obligations imposed on the United States by Articles 2.4, 2.4.2 and 9.3 of the Anti-Dumping Agreement, and with the other relevant WTO provisions set out in this submission.

C. New shipper, changed circumstances and sunset reviews

225. The European Communities submits that the same conclusions should be reached for new shipper, changed circumstances and sunset reviews. To the extent that the Standard Zeroing Procedures are used in order to automatically effect model or averaging group or simple zeroing, they must be considered “as such” inconsistent with Articles 2.4, 2.4.2, 9.5, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement, and Articles 9.3, 1 and 18.4 of the Anti-Dumping Agreement; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement. The same is true with regard to Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the Regulations.

IV. CONCLUSION

226. In the light of the objective assessment of the matter set out above, the European Communities respectfully requests this Panel to make the following findings and recommendation:

- In the cases and measures listed in Exhibits EC-1 to EC-15, by setting at zero negative margins when aggregating the intermediate results of comparisons between averaging groups, for the purposes of calculating the margin of dumping for the subject product, the United States acted inconsistently with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement and Articles 3.1, 3.2, 3.5 and 5.8 and Articles 9.3, 1 and 18.4 of the Anti-Dumping Agreement; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement. The Panel need make no findings with regard to Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement where the corrected margin of dumping for individual exporters is not less than 2%; and Article 5.8 of the Anti-Dumping Agreement in cases where the corrected margin of dumping for the exporting country is not less than 2%.

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

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

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

- The Standard Zeroing Procedures used or relied on by the United States in new-shipper, changed circumstances and sunset reviews are a measure or part of a measure. Such Standard Zeroing Procedures (or the United States practice or methodology of zeroing) and Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the Regulations are “as such” inconsistent with Articles 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement and Articles 1 and 18.4 of the Anti-Dumping Agreement; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.
• It is recommended that the United States takes the steps necessary to bring its measures into conformity with the cited WTO provisions.