1. As a preliminary remark, the European Communities observes that it responds to the questions posed to the European Communities, and has not, as a rule, commented on the questions posed to the United States. However, the European Communities agrees with the United States\(^1\) that the role of the Panel is not to make the case for either party, and that the Panel may pose questions only in order to clarify and distil the legal argument.\(^2\) With regard to certain questions (for example, questions 1, 2, 5, 13, 16, 22 and 26) posed to the United States, it is not always precisely clear to the European Communities what United States argument the Panel is seeking to clarify or distil, and in relation to these matters the European Communities fully reserves its legal position.

A. GENERAL

1. US: Does the US have any specific observations on the factual accuracy of the EC’s description of US anti-dumping laws and regulations and of the cases at issue in this dispute (paragraphs 15-61 of the First Submission of the EC)?

2. EC: Could the EC indicate precisely how the "without zeroing" percentages in Table 32 and EC- Exhibits EC-1.6.1 and EC- 16.4.1 were calculated?

2. The European Communities has explained precisely in its first written submission how the calculations in the Standard AD Margin Program work,\(^3\) and how it is possible to match, line by line, the original calculation and the re-calculation (without zeroing).\(^4\) The European Communities has thus explained that the re-calculation has been done using exactly the identical data used by USODC, but without zeroing. It would be possible to write down in words the same explanation for every single line of the computer program log. But in each case, the written explanation would be identical, the only thing that would change being the numbers. Such explanations could be presented in the format of a table. And in the interests of avoiding unnecessary and useless repetition, the repeated identical words could be deleted, leaving only the numbers. That

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\(^1\) United States first written submission, para 100.
\(^3\) European Communities first written submission, paras 21 to 23 and 36 to 38 and Exhibit EC-42.
\(^4\) European Communities first written submission, paras 51 to 52 and 58 to 59.
would leave, in effect, exactly what the Panel already has: the original computer print out and the recalculaton in tabular format. Naturally, if the Panel has specific questions about the matching exercise explained in detail in the first written submission of the European Communities, then the European Communities would be happy to answer any such questions.

3. With regard to its claims under Articles 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement*, the European Communities would observe that it is not essential for it to demonstrate precisely what the true margins of dumping would be in the absence of zeroing. It is enough for the European Communities to present evidence sufficient to make out a *prima facie* case that the United States used a method inconsistent with the *Anti-Dumping Agreement* (model zeroing in the original investigations, and the weighted-average-to-transaction method and simple zeroing in the retrospective assessments). The European Communities believes that it has amply discharged its burden of proof and established a *prima facie* case, that these facts have not been contested by the United States, and that the United States has adduced no evidence capable of rebutting the *prima facie* case established by the European Communities.

4. Finally, the European Communities would note that the United States has also not contested any of the recalculated margins as a matter of fact. Nor has the United States submitted any evidence capable of rebutting the *prima facie* case presented by the European Communities. In this respect, the Panel should take into account the fact that the United States is uniquely placed, and could today confirm the results of these calculations without zeroing as summarised in Exhibit EC-32. The Panel may take due note of the fact that the United States declines to assist the Panel in this matter. In these circumstances, the Panel may proceed on the basis of the facts as set out in the first written submission of the European Communities, including the facts concerning the recalculated margins, without zeroing.

3. **EC:** Paragraphs 36-37 and 47 of the First Submission of the EC: could the EC explain whether "average-to-transaction method" means the same thing as "simple zeroing"?

5. No – the phrase “average-to-transaction method” and the phrase “simple zeroing” do not mean the same thing. In general, the issue of what comparison method is used and the issue of whether or not zeroing is effected are distinct, although the two issues may
overlap to some extent. For example, if the weighted-average-to-weighted-average method is used (correctly), zeroing will be mathematically impossible.5

6. The “average-to-transaction method” refers to a method by which a weighted average or average “normal value” is compared with individual “export” transactions. This method does not necessarily require that zeroing is effected, although if this method is selected then methods such as zeroing may become possible.

7. “Zeroing” occurs when, during the calculation, an allowance or adjustment is effectively made to the “export price” or otherwise, in order to effectively reduce the level of the “export price” to the level of the “normal value”.

8. The term “simple zeroing” is a term used by the European Communities in its first written submission as a convenient means of distinguishing “model zeroing” from the type of zeroing effected by the United States in retrospective assessments, as described in detail in the first written submission of the European Communities,6 and not contested by the United States. It is possible to distinguish “model zeroing” and “simple zeroing”, although the two methods have many characteristics in common, and ultimately both are equally inconsistent with the Anti-Dumping Agreement, for similar or identical reasons.

9. Zeroing may also arise in the context of other types of averaging groups, and importer specific calculations.

10. The claims of the European Communities relate to:

- model zeroing in the “as applied” sample and other original investigation cases;7
- model zeroing “as such” in original investigations as the normal or standard method;8
- the average-to-transaction method in the “as applied” sample and other retrospective assessment cases;9
- simple zeroing in the “as applied” sample and other retrospective assessment cases;10
- the average-to-transaction method “as such” in retrospective assessment cases as the normal or standard method;11

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5 Panel Report, US-Softwood Lumber V, para 7.200: “Where only a single weighted average-to-weighted average comparison is performed, it seems to us that the issue of zeroing per se could not arise …”
6 European Communities first written submission, paras 37 to 38.
7 European Communities first written submission, particularly paras 64 to 89 and para 102.
8 European Communities first written submission, particularly paras 104 to 145.
9 European Communities first written submission, particularly paras 149 to 163 and para 211.
10 European Communities first written submission, particularly paras 149 to 160, paras 164 to 170, and para 211.
11 European Communities first written submission, particularly paras 212 to 223.
• simple zeroing “as such” in retrospective assessment cases as the normal or standard method;\(^{12}\)
• zeroing “as such” in cases involving other types of averaging groups;\(^{13}\)
• zeroing “as such” between importers in cases involving importer specific assessment rates;\(^{14}\)
• the average-to-transaction method “as such” in new shipper reviews as the normal or standard method;\(^{15}\)
• model or simple zeroing “as such” in new shipper reviews as the normal or standard method;\(^{16}\)
• other types of zeroing “as such” in new shipper reviews;\(^{17}\)
• the average-to-transaction method “as such” in changed circumstances reviews as the normal or standard method;\(^{18}\)
• model or simple zeroing “as such” in changed circumstances reviews as the normal or standard method;\(^{19}\)
• other types of zeroing “as such” in changed circumstances reviews;\(^{20}\)
• the average-to-transaction method “as such” in sunset reviews as the normal or standard method;\(^{21}\)
• model or simple zeroing “as such” in sunset reviews as the normal or standard method;\(^{22}\)
• other types of zeroing “as such” in sunset reviews.\(^{23}\)

B. SCOPE OF APPLICATION OF ARTICLE 2.4.2

4. EC: What is the response of the EC to the arguments of the US that the text of the Anti-Dumping Agreement ("ADA") and prior panel and Appellate Body reports make it clear that investigations and assessment proceedings constitute distinct phases of an anti-dumping proceeding and have different purposes?

11. The European Communities agrees that original investigations and assessment proceedings are different and have different purposes, and does not seek to blur the distinctions between them in any way at all. The same is true with respect to new shipper reviews, changed circumstances reviews and sunset reviews.

12. The European Communities does not agree that the word investigation (given its ordinary meaning rather than the limited or defined meaning argued for by the United States) necessarily excludes assessment proceedings, or for that matter the other types of proceeding indicated in the preceding paragraph – specifically in Article 2.4.2 of the

\(^{12}\) European Communities first written submission, particularly paras 212 to 223.
\(^{13}\) European Communities first written submission, particularly paras 146 to 147.
\(^{14}\) European Communities first written submission, particularly para 224.
\(^{15}\) European Communities first written submission, particularly para 225.
\(^{16}\) European Communities first written submission, particularly para 225.
\(^{17}\) European Communities first written submission, particularly para 225.
\(^{18}\) European Communities first written submission, particularly para 225.
\(^{19}\) European Communities first written submission, particularly para 225.
\(^{20}\) European Communities first written submission, particularly para 225.
\(^{21}\) European Communities first written submission, particularly para 225.
\(^{22}\) European Communities first written submission, particularly para 225.
13. With regard to the text of the Anti-Dumping Agreement, the European Communities attaches as Exhibit EC-45 an analysis of the word “investigation(s)” in the Anti-Dumping Agreement, as requested by the Panel during the first meeting. To summarise: Article VI of the GATT 1994 and the Anti-Dumping Agreement establish 8 definitions (“dumping”; “margin of dumping”; “initiated”; “like product”; “injury”; “domestic industry”; “levy”; and “interested party”) – but do not define “investigation”. Essentially, throughout the Anti-Dumping Agreement, including in Article 2.4.2, having regard to text, context and object and purpose, the word “investigation(s)” indicates a systematic examination or inquiry or a careful study of a particular subject. Having regard to text, context, object and purpose, the word “investigation(s)” in Articles 3.3, 5, 7, 9.5 and 10 of the Anti-Dumping Agreement has a more limited meaning, namely “an investigation to determine the existence, degree and effect of any alleged dumping” – that is, an original investigation.

14. With regard to previous panel and Appellate Body Reports referred to by the United States in its first written submission, the European Communities has the following comments.

15. The United States first refers to the Appellate Body Report in Brazil-Dessicated Coconut. The United States does not provide any quotation. Footnote 18 of the United States first written submission refers to “p. 9”, which appears to mean “page 9”. However, page 9 of the Appellate Body Report in that case contains no statement by the Appellate Body, but merely summarises arguments by Brazil and the European Communities. It is possible that the United States means to refer to the following quotation (we can only guess):

With respect to the measure at issue in this appeal, we see a decision to impose a definitive countervailing duty as the culminating act of a domestic legal process which starts with the filing of an application by the domestic industry, includes the

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23 European Communities first written submission, particularly para 225.
24 United States first written submission, para 37 and footnote 18.
initiation and conduct of an investigation by an investigating authority, and normally leads to a preliminary determination and a final determination.\textsuperscript{26}

16. The European Communities does not agree that this statement lends any support to the position of the United States in the present Panel proceedings. First, the Appellate Body was not concerned in that case with considering the meaning of the word “investigation” in general terms. Rather, the case is about the transitional provisions of the \textit{SCM Agreement} and its relationship with the GATT 1994. The European Communities would not therefore agree with the United States assertion that the Appellate Body was, in that case, “analyzing [the] … distinction in Article 32.3” of the \textit{SCM Agreement} between “investigations” and “reviews”.\textsuperscript{27} That is simply not an accurate description of the case. Second, the European Communities would point out that there are important differences between the \textit{Anti-Dumping Agreement} and the \textit{SCM Agreement}, notably with regard to the provisions of the \textit{Anti-Dumping Agreement} that are at the centre of the present dispute, such as Articles 2.4 and 9.3, which have no equivalents in the \textit{SCM Agreement}. Furthermore, the \textit{SCM Agreement} contains no equivalent to Article 18.3.1 of the \textit{Anti-Dumping Agreement}. The European Communities would not therefore agree with the United States assertion that, on this point, the two agreements are “identical”.\textsuperscript{28} Third, contrary to what the United States suggests, the Appellate Body makes no reference to an investigation “phase”.\textsuperscript{29} Fourth, nothing in the statement of the Appellate Body contradicts or is inconsistent with the submissions of the European Communities in the present case. Fifth, the European Communities does not agree that, in making the above statement, the Appellate Body aimed to rule that the basic principles set out in Article VI of the GATT 1994 governing the application of anti-dumping duties should be ditched in a retrospective assessment. Sixth, the European Communities would draw the close attention of this Panel to the extreme weakness of citations such as these, and the less than entirely transparent manner in which they are presented to the Panel by the United States – matters which, in the opinion of the European Communities, speak volumes about the solidity of the position of the United States in these Panel proceedings.

17. The United States next refers to the Appellate Body Report in \textit{US-Hot-Rolled Steel}, paras 53 and 61, asserting that these paras distinguish between “Article 21.2 reviews”

\textsuperscript{26} Appellate Body Report, \textit{Brazil-Desiccated Coconut}, page 11, Section IV.A, second para.
\textsuperscript{27} United States first written submission, para 37.
\textsuperscript{28} United States first written submission, para 37.
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(this appears to be a reference to the SCM Agreement) and “original” investigations. However, those paras relate to standard of review under the Anti-Dumping Agreement, so the reference appears to be incorrect, and the European Communities is not able to ascertain to what the United States is attempting to refer. The European Communities would merely note that the United States itself again uses the term “original” – if the United States were correct in its assertions in the present case the word “original” would be redundant. Its repeated use by the United States, even if unintentionally, merely confirms the position of the European Communities in these proceedings.

18. The third reference by the United States is to the Appellate Body Report in US-OCTG from Argentina, paras 294 and 301. This reference does not, however, support the United States in the present Panel proceedings. The European Communities has explained that it agrees with the United States that Article 3.3 of the Anti-Dumping Agreement, which contains an express cross reference to Article 5.8 and thus Article 5.1, is limited to investigations “to determine the existence, degree and effect of any alleged dumping” – that is, to original investigations. That has no bearing on the meaning of the word “investigation” in Article 2.4.2 of the Anti-Dumping Agreement. In fact, the case supports the position of the European Communities. First, the Appellate Body systematically uses the words “original investigations” – the word “original” would be redundant if the United States were correct in the present panel proceedings. Second, the Appellate Body states:

Given the rationale for cumulation – a rationale that we consider applies to original investigations as well as to sunset reviews – we are of the view that it would be anomalous for Members to have limited authorization for cumulation in the Anti-Dumping Agreement to original investigations.

19. As the European Communities has explained, the rationale for retrospective assessment proceedings is simply to up-date the temporal frame of reference, so that data for normal

29 United States first written submission, para 37.
30 United States first written submission, para 37 and footnote 18.
31 United States first written submission, footnote 18, para 38 line 7, para 38 line 8, para 42, para 44, para 108.
32 United States first written submission, para 38 and footnote 19.
33 Exhibit EC-45.
34 Appellate Body Report, US-OCTG from Argentina, paras 294, 296 (3 times), 297 (3 times), 298 (twice), 299, 300 and 301.
value, export price and imports are taken from the same period.\textsuperscript{36} This is expressly stated in the Manual\textsuperscript{37} – which the United States has admitted is a “measure” for the purposes of the Anti-Dumping Agreement and dispute settlement.\textsuperscript{38} It was again confirmed by the United States in its first closing oral statement.\textsuperscript{39} Viewed in this light, the statements at para 39 of the United States first written submission, to the effect that the purpose of an original investigation is to determine whether or not a remedy should be provided, whilst the purpose of an assessment is to determine the precise amount of that remedy, is no explanation at all. Why should behaviour which would normally never lead to the imposition of any anti-dumping measure at all, nevertheless give rise to a liability to pay anti-dumping duties just because a measure happens to be in place? There is nothing in the Anti-Dumping Agreement to suggest that this might be the object and purposes of the relevant provisions, nor why that should be so.

20. Thus, following the reasoning of the Appellate Body in \textit{US-OCTG from Argentina}, given the rationale for the rules in Article 2.4.2 of the Anti-Dumping Agreement – a rationale that the European Communities considers applies to original investigations as well as to retrospective assessment proceedings – the European Communities is of the view that it would be anomalous for Members to have limited those rules to original investigations. In fact, it would be more than merely anomalous: to jettison the basic principles and rules as defined in the GATT 1994 and implemented, notably, in Article 2 of the Anti-Dumping Agreement, just at the critical moment of final assessment, on the basis of some obscure \textit{a contrario} reasoning, and absent any definition of the word “investigation”, would be manifestly absurd and unreasonable. Not one of the 11 third parties ever imagined that Article 2.4.2 could possibly be interpreted in such a way, when they negotiated or signed up to the Anti-Dumping Agreement.\textsuperscript{40} In conclusion, the Appellate Body Report in \textit{US-OCTG from Argentina} supports the European Communities, not the United States.

\textsuperscript{36} European Communities first written submission, para 35, final line.
\textsuperscript{37} Manual, Chapter 18, page 3: “The basic purpose of an annual [administrative review] is to determine the actual amount of AD duties that Customs will assess on imports of the subject merchandise during the period of review ....”.
\textsuperscript{38} United States first written submission, para 84, line 1.
\textsuperscript{39} At para 18: “This system is designed so that the total dollar amount assessed from any importer is the same as if, at the time of entry, the contemporaneous normal value had been used as the prospective normal value.”
21. The United States next refers to the Panel Report in *US-DRAMs*, para 6.87, footnote 519, the full quotation of which reads:

   In this regard, we note that Korea has not argued before us that an Article 9.3 duty assessment procedure should be included within the notion of “investigation” for the purpose of Article 5.8. In the context of Article 5 of the AD Agreement, it is clear to us that the term “investigation” means the investigative phase leading up to the final determination of the investigating authority.

22. In the first place the European Communities takes note that the United States does not quote the full text of footnote 519, nor even the full text of the second sentence of that footnote. Rather, it chooses to omit the important opening words “In the context of Article 5 of the AD Agreement …”. This probably reflects an awareness on the part of the United States that the meaning of the word “investigation” in Article 2.4.2 is an entirely different legal matter from the meaning of that word in various provisions of Article 5 of the *Anti-Dumping Agreement*. Furthermore, the existence of those opening words also indicate that an important and significant degree of care was being exercised by the drafter of the panel report in *US-DRAMs*. The drafter took care to limit the observation to the context of Article 5 – saying nothing about Article 2.4.2 – and with good reason.

23. Second, the European Communities would observe that the *US-DRAMs* case also relates to Article 5.8 of the *Anti-Dumping Agreement*, and that the outcome is correct, as outlined in the comments set out below on the *US-Corrosion-Resistant Steel* case. In these circumstances, the case also provides no support for the position of the United States in these proceedings.

24. The United States also refers to the Panel Report in *US-Corrosion-Resistant Steel*, para 7.70. In this respect, the European Communities would have the following comments.

25. First, the European Communities agrees that the outcome in that panel on this point is correct. *Article 5.8 of the Anti-Dumping Agreement refers expressly to “An application under paragraph 1 …”* and paragraph 1 of Article 5 refers expressly to “an investigation
to determine the existence, degree and effect of any alleged dumping” – that is, to an
original investigation. Second, the European Communities would point out that in that
case the panel was enquiring into whether or not certain obligations contained in Article
5 apply only to original investigation, or also in other types of investigation or
proceeding. The panel was not enquiring into the meaning of the word “investigation” in
Article 2.4.2 of the Anti-Dumping Agreement, which is an entirely different legal matter.
There was no argument and no findings in that case on the meaning of the word
“investigation” in Article 2.4.2 of the Anti-Dumping Agreement. In these circumstances,
the case provides no support for the position of the United States in these proceedings.

26. The next panel report to which the United States refers is that in EC-Bed Linen (Article
21.5 - India), at para 6.114.43 As outlined in its analysis of the Anti-Dumping Agreement
at Exhibit EC-45, the European Communities agrees that Article 5.7 of the Anti-
Dumping Agreement applies only to original investigations, so this panel report also
does not support the position of the United States in these proceedings. In fact, if
anything, the section of the panel report to which the United States refers supports the
position of the European Communities. That is because, when reaching its final
conclusion on this matter the panel again referred to “original investigations”.44 This is
therefore just one further example of cases in which WTO jurisprudence has referred
expressly to “original investigations”, using the word “original” to qualify the word
“investigation”, thus confirming that the word “original” is not redundant in this context –
and thus that there may be other types of investigations under the Anti-Dumping
Agreement, other than original investigations under Article 5.

27. The final panel report to which the United States refers is Argentina-Poultry, at para
7.357,45 and the following statement by the panel (the part quoted by the United States is
indicated in italics):

Thus, the fact that Article 2.4.2, uniquely among the provisions of Article 2, relates to
the establishment of the margin of dumping “during the investigation phase” is not
determinative of the issue before us …

43 United States first written submission, footnote 23.
44 At para 6.115, final sentence, of the panel report.
45 United States first written submission, para 43.
28. First, one has to observe that the partial quotation by the United States significantly changes the meaning of the statement.

29. Second, in order to understand, this statement, it is necessary to recall the context. In that case, Argentina had imposed a variable duty. Argentina assessed the duty as the difference between a minimum export price calculated for each exporter found to have dumped and the invoiced f.o.b. price at the time of import. The resultant duty sometimes exceeded the margin of dumping calculated for that exporter during the original investigation.Brazil claimed that this was inconsistent with Article 9.3 and 2.4.2, particularly because of the reference in Article 2.4.2 to the words “during the investigation phase”. In responding, Argentina pointed out that no refund had been requested by Brazilian exporters, so Brazil was not challenging a final assessment involving a re-calculation of margins of dumping. The panel rightly rejected Brazil’s claim. Variable duties are foreseen in Article 9.4. They do not exclude the possibility of refund under Article 9.3.2, where the full disciplines of Article 2.4.2 will apply.

30. Third, what the panel was actually saying was that, even if the particular phrasing of Article 2.4.2 was in some respects different compared to the phrasing of other provisions of Article 2, Brazil was wrong to assert that this determined the matter in Brazil’s favour. Thus, the panel’s observation, far from supporting the position of the United States in these proceedings, when properly quoted and placed in context, actually supports the position of the European Communities.

31. To conclude. Contrary to what the United States asserts, the European Communities does not seek to blur the distinctions between original investigations and other types of proceedings. The European Communities simply requests the Panel to interpret the word “investigation” in Article 2.4.2 in a manner consistent with customary rules of interpretation of international law. This is also entirely consistent with the text, context and object and purpose of the various provisions of the Anti-Dumping Agreement, as analysed in Exhibit EC-45, and with the panel and Appellate Body reports referred to by the United States in its first written submission.

46 Panel Report, para 7.346.
47 Panel Report, para 7.347.
49 Panel Report, para 7.347.
5. **US:** If, in the view of the US, the rules on the establishment of dumping margins in Article 2.4.2 do not apply to phases of an anti-dumping proceeding other than the investigation phase, what rules do apply? What is the relevance of Article 9.3 and its reference to "the margin of dumping established under Article 2"? What is the relevance of the fact that identical language to that in Article 9.3 appeared in Article 8.3 of the Tokyo Round Anti-Dumping Code, which had no provision comparable to current Article 2.4.2?

6. **EC:** Please comment on the assertion made by Argentina in its oral statement that when interpreting the term "investigation phase" in Article 2.4.2, there is a difference between original investigations and assessment proceedings.

32. The European Communities understands that the question refers to paras 35 to 42 of the oral statement of Argentina. The European Communities believes that it is clear from its submissions in this case that it does not agree with the assertions of the United States on this point, and thus not with those of Argentina insofar as they are vitiated by the same errors. Specifically, the European Communities does not agree with Argentina’s presentation of the prospective and retrospective systems of assessment, which appears to be vitiated by the same errors committed by the United States when it seeks to rely on a possible intermediate stage of a prospective system described in Article 9.4(ii) of the Anti-Dumping Agreement to justify the final result of its retrospective system. The European Communities does not agree with Argentina’s reading of the panel report in Argentina-Poultry. The European Communities does not agree with the conclusions that Argentina draws from Article 3.3 – which refers expressly to Article 5.8 and hence Article 5.1 – when it comes to interpreting Article 2.4.2. And the European Communities does not agree that its position implies that the word “investigation” in the Anti-Dumping Agreement has no meaning.

33. The European Communities recalls that Argentina, together with each of the other 10 third parties, expressly stated that, when it negotiated the Anti-Dumping Agreement, it never imagined that it could possibly be interpreted so as to liberate investigating authorities from the basic principles of Article 2.

7. **US:** Article 18.3 of the ADA reads in part: "subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures,

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50 Argentina oral statement, para 38.
51 Argentina oral statement, para 39.
52 Argentina oral statement, para 41.
53 Argentina oral statement, para 42.
54 Question by the European Communities to the third parties during the first meeting, and the 11 negative responses of the third parties – see European Communities closing oral statement at the first meeting, para 21.
initiated pursuant to applications ... ". There are two terms used here: "investigations" and "reviews". Subparagraph 3.1 specifically addresses the subject matter of Articles 9.3, i.e., refunds. Might this not imply that "refunds" are covered by either the term "investigations" or "reviews"? What implications, if any, would this have for the meaning of the word "investigation" as it appears in Article 2.4.2?

34. Article VI of the GATT 1994 and the Anti-Dumping Agreement define 8 terms, but not the terms “investigation” or “review” or “refund”. Just as it would constitute a legal error to read Article 5.1 as if it contained a definition – even the United States expressly declined to take such a position during the first oral hearing – so it would be a legal error to read Article 18.3, which is merely a transitional provision, in such a way. Even if the specific juxtaposition of the words “investigations” and “reviews” in Article 18.3 were taken as context for the view that the word “investigations” in that provision means “original investigations” – that tells us nothing about the meaning of the word “investigation” in Article 2.4.2, which contains no such juxtaposition.

35. In any event, if anything, Article 18.3 supports the position of the European Communities. Following the logic of the question, if “refunds” or “assessments” are either “investigations” or “reviews”, and given that Article 9.5 clearly indicates that duty assessments are not reviews, the only logical conclusion would be that retrospective assessments do involve investigations, giving that word its ordinary meaning. The word “investigation” in Article 2.4.2 is thus no bar to the application of that provision when dumping margins are re-calculated during a retrospective assessment. Further support for the difference between “retrospective” assessment and “review” is provided by the ordinary meaning of those words: “retrospective” indicates simply an up-date, looking back, with full historical data now available; whilst review indicates looking again, or a reconsideration of the umbrella measure itself.

36. The European Communities also recalls its submission that United States retrospective assessments with an up-dating of the cash deposit rate must also be consistent with Article 11 of the Anti-Dumping Agreement, and thus Article 6.

37. Finally, the European Communities would observe that if the transitional provisions of Article 18.3 are to be considered relevant context, then they must be considered in full.

55 “... Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member ...”
56 European Communities first written submission, footnotes 207 and 208.
In this respect Article 18.3.1 of the *Anti-Dumping Agreement* may be taken as lending considerable support to the position of the European Communities, insofar as it confirms the basic logic that the rules used in a retrospective assessment when re-calculating margins of dumping should be the same as those used in the most recent determination. That would mean, of course, that when an original investigation determines a margin of dumping without zeroing, the first assessment should proceed on the same basis – as would all subsequent assessments.

8. **US**: Does the US consider that duty assessment proceedings are neither investigations nor reviews? If so, does this mean that Article 6 of the ADA, which applies to investigations under Article 5 and reviews under Article 11, does not apply to refund and assessment proceedings pursuant to Article 9?

9. **Both parties**: How does the word "during" in Article 2.4.2 inform the meaning of Article 2.4.2?

38. It indicates a temporal frame of reference – something that begins and ends at specific moments in time. The European Communities refers, in this respect, to its discussion of the possible meanings of the phrase “during the investigation phase” below in response to questions 15 and 21, which are entirely consistent with this view.

10. **US**: Does the US contend that an "investigation", within the meaning of Article 2.4.2, means an investigation as provided for in Article 5, which is terminated completely within the timeframe described in 5.10, and that an "investigation" cannot take place anywhere else in the ADA including under Article 9?

11. **Both parties**: Is there any cogent basis for distinguishing between investigations and other proceedings, in the light of the object and purpose of the ADA?

39. Clearly, the specific object and purpose of each type of investigation or proceeding are different. But they are all subject to Article VI of the GATT 1994, and must be consistent with the overall object and purpose of anti-dumping measures.

40. Thus original investigations and other types of proceedings under the *Anti-Dumping Agreement* should be distinguished, not only textually and contextually, but also in the light of their object and purpose.

41. The object and purpose of an original investigation is “to determine the existence, degree and effect of any alleged dumping” (Article 5.1 of the *Anti-Dumping Agreement*).

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57 European Communities first written submission, paras 187 to 199.
42. The object and purpose of a new shipper review is to determine “individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation …” (Article 9.5 of the Anti-Dumping Agreement).

43. The object and purpose of a changed circumstances review is “to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.” (Article 11.2 of the Anti-Dumping Agreement).

44. The object and purpose of a sunset review is to determine “whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury” (Article 11.3 of the Anti-Dumping Agreement).

45. The object and purpose of a retrospective assessment is to determine “the final liability for payment of anti-dumping duties” (Article 9.3.1 of the Anti-Dumping Agreement).

46. In the opinion of the European Communities, having regard to the defined terms, and having regard to the object and purpose of the Anti-Dumping Agreement, whenever dumping and a margin of dumping are calculated the disciplines of Article 2 should apply in full. Like the Appellate Body, we see no other provisions in the Anti-Dumping Agreement according to which Members may calculate dumping margins. In particular, given that the object and purpose of a retrospective assessment is merely to up-date the temporal frame of reference for the investigation, so that the data relating to normal value, export price and imports are drawn from the same period, we see no reason why the basic rules governing the calculation should change.

12. **EC:** If as argued by the EC, the term "investigation" is applicable to proceedings under Articles 9 and 11, is there any aspect of an anti-dumping proceeding that is not covered by the term "investigation"?

47. The European Communities does not argue that the term “investigation” is “applicable” to proceedings under Articles 9 and 11 – as if the Anti-Dumping Agreement defined the term “investigation” and then applied that term or all provisions using that term to those types of proceeding. The European Communities argues only that the obligations in

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Article 2.4.2 must be respected when a margin of dumping is re-calculated during a retrospective assessment under Article 9.3.1. It is in response to that claim that the United States asserts that the word “investigation” in Article 2.4.2 has a “limited” or defined meaning – an assertion that the European Communities disagrees with. The European Communities believes that the word “investigation” in Article 2.4.2 should be given its ordinary meaning, referring to a dictionary, indicating a systematic examination or inquiry or a careful study of a particular subject. The European Communities believes that this meaning of the word “investigation” in Article 2.4.2 is strongly confirmed by the context, particularly, of Articles 2 and 6 of the Anti-Dumping Agreement, and by the object and purpose of retrospective assessment proceedings.

48. The European Communities also considers that new shipper reviews, changed circumstances reviews and sunset reviews involve a systematic examination or inquiry or a careful study of a particular subject, and we do not therefore see the word “investigation” in Article 2.4.2 as a bar to the application of the obligations in Article 2.4.2 also to those other types of proceeding, where appropriate.

49. The European Communities would not rule out the possibility of pre or post investigation “phases” within a proceeding – and this for any type of investigation or proceeding – but this is in no way essential in order for the Panel to accept the claims of the European Communities. For example, there is an important period from the receipt of an application under Article 5.1 until initiation, which might be described as a pre-(original) investigation phase. There may be a similar lapse of time (between request and initiation) in a changed circumstances review, a sunset review, a new shipper review and a retrospective assessment. In this respect, the European Communities also refers to its response to question 21.

13. US: Article 1 of the ADA reads in part: "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.” What does the US consider to be the ordinary reading of the words "pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.”?

- How does the footnote to Article 1, which refers to Article 5, affect the US’ view of the scope of the word "investigations" as used in Article 1?

Footnote 1 of the ADA reads "The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5."
• Does the US consider that Article 1 only refers to investigations initiated and conducted, and that by defining the term "initiate", Article 1 essentially limits its scope of operation to original investigations?

• Does the US consider that the imposition and collection of anti-dumping duties properly effected under Article 9 would be part of an "anti-dumping measure" described in Article 1?

• Does the US consider that a breach of the provisions of Article 9.3 regarding the collection of anti-dumping duties would not be a breach of the first sentence of Article 1?

• Does the US contend that a different meaning should be given to "action ... taken under anti-dumping legislation or regulations" in the second sentence of Article 1 compared with an "anti-dumping measure" in the first sentence of Article 1?

50. The European Communities refers the Panel to its analysis of Article 1 and footnote 1 in Exhibit EC-45. The defined term in footnote 1 is “initiated” and this defined term is also used elsewhere in the Anti-Dumping Agreement.

14. Both parties: Please provide your interpretation of the term "investigation(s)" at each of the places it is used or subject to a reference in the ADA. Please indicate how your interpretations inform the meaning of "during the investigation phase" as it appears in Article 2.4.2.

51. The European Communities refers to Exhibit EC-45.

15. EC: Does the EC consider the term "period of investigation" as used in Articles 2.2.1, 2.2.1.1, 2.4.1 and footnote 6 to have the same meaning as the term "during the investigation phase" set out in Article 2.4.2? If so, why does the EC consider that the drafters of the Agreement used different language to mean the same concept?

52. The United States asserts that the European Communities position is that the words “during the investigation phase” in Article 2.4.2 of the Anti-Dumping Agreement have no meaning.60 That assertion is false. That is not the position of the European Communities.

53. As a preliminary remark, the European Communities would observe that it is the United States, not the European Communities, that would have this Panel render words in the Anti-Dumping Agreement redundant and without meaning. In particular, the United States assertion is that the words “to determine the existence, degree and effect of any alleged dumping “ in Article 5.1 are superfluous, adding no meaning to the word “investigation” in Article 5.1.

60 United States first written submission, para 40.
54. Furthermore, before entering into a discussion of what the meaning of the words “during the investigation phase” in Article 2.4.2 of the Anti-Dumping Agreement might be, the European Communities would like to stress that it has no particularly strong views on this matter in these proceedings, and that the outcome of these proceedings does not depend in any way whatsoever on the meaning that might eventually be attributed to those words. On the contrary, since it is the United States that has repeatedly asserted that the word “investigation” in Article 2.4.2 has a special and limited or defined meaning, namely “an investigation to determine the existence, degree and effect of any alleged dumping” within the meaning of Article 5.1 of the Anti-Dumping Agreement, it is for the United States to substantiate that assertion. Insofar as the United States has failed to substantiate that assertion – and the European Communities believes that to be incontrovertibly what has happened in these proceedings – that is an end of the matter. The European Communities claim under Article 9.3 and 2.4.2 must prevail. The meaning of the phrase “during the investigation phase” does not need to be decided by this Panel.

55. That said, aside from the possibility that the phrase is merely descriptive, in the sense that the United States considers the words “to determine the existence, degree and effect of any alleged dumping” in Article 5.1 to be merely descriptive, the European Communities has suggested three possibilities (see also the response to question 21, with respect to the pre-investigation phase), which are alternatives, but not necessarily mutually exclusive. The first of these was “during the investigation period.”

56. If the word “phase” is taken to indicate a distinct period in a process of change or development, and if the word “during” is taken to indicate a temporal connotation, then an investigation phase is something that spans a period of time, such as the “investigation period”. In fact, the word “phase” and the word “period” have very similar meanings, especially when the word “phase” is associated with the word “during”, giving it a temporal connotation. The two words may therefore be considered

\[61\] Phase: “A distinct period or stage in a process of change or development; any one aspect of a thing of varying aspects ...” (The New Shorter Oxford English Dictionary).

\[62\] During: “Throughout the duration of; in the course of, in the time of.” (The New Shorter Oxford English Dictionary).

\[63\] Period: “A course or extent of time ... A stage in the progress of a thing ...” (The New Shorter Oxford English Dictionary).
synonymous in the context of Article 2 of the *Anti-Dumping Agreement*, referring to a “stage” in the passage of time.

57. In this respect, the European Communities recalls the structure of Article 2.4.2 of the *Anti-Dumping Agreement*. It appears to the European Communities that the most natural reading of that provision, and the reading that is grammatically correct, is that the words “during the investigation phase” are associated with the word “existence” rather than with the word “established”. In other words, the provision does not refer to something that has to happen (the “establishment” of the margins of dumping) during the period of time in which an investigating authority must normally make its determination (generally 12 to 18 months – see further below). Rather, it refers to something that has to be established (whether or not there is dumping, and if so, what the margin of dumping is) by reference to a certain period of time: the investigation period. If the drafters had intended to associate the phrase “during the investigation phase” with the word “established”, the provision could have been drafted differently. For example, it could have read “… the existence of margins of dumping shall normally be established during the investigation phase …”.

58. Contextual support for such an approach may be found in various other provisions of Article 2 of the *Anti-Dumping Agreement*. Article 2 of the *Anti-Dumping Agreement* may provide valuable and persuasive context, because Article 2.4.2 is part of Article 2, and because Article 2 implements the definitions of dumping and margin of dumping set out in Article VI of the GATT 1994. It is generally more persuasive context than, for example, Article 5 of the *Anti-Dumping Agreement*.

59. For example, Article 2.2.1 provides, *inter alia*, that:

> If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

60. This provision imposes obligations on investigating authorities concerning the circumstances in which sales of the like product in the domestic market “may be disregarded” as below cost. As such, it is of double interest as context, given that the practice of zeroing with which these proceedings are concerned also involves the investigating authority disregarding or adjusting, at least in part, certain export sales or
other data. The Appellate Body has itself noted the particular relevance of this provision in the context of zeroing.64

61. The provision obliges an investigating authority to consider whether or not domestic sales are below cost by reference to weighted average per unit costs arising during the investigation period. Thus, an investigating authority is not entitled to impute to domestic sales costs that do not arise during the investigation period. For example, an investigating authority cannot impute to domestic sales made during the investigation period the costs of a substantial investment made well after the investigation period.

62. The object and purpose of this rule is clear. By requiring an investigating authority to consistently use data arising during the investigation period, the Anti-Dumping Agreement is imposing basic obligations of consistency, objectivity and fairness.

63. Precisely the same is true of Article 2.4.2 of the Anti-Dumping Agreement. If the data used to establish normal value arose during the investigation period, but, in the final step of comparison, the existence of margins of dumping were permitted to be established by reference to another period, there would clearly be a rupture in the basic structure and continuity of the method for establishing whether or not there is dumping, and if so what the margin of dumping is, in conformity with the definitions set out in Article VI of the GATT 1994, as implemented in Article 2 of the Anti-Dumping Agreement. It is thus entirely consistent with the object and purpose of Article 2.4.2 of the Anti-Dumping Agreement that it should continue to require at the comparison stage, just as at the normal value stage, that the margins of dumping must be established by reference to data arising during the investigation period (or phase).

64. In this respect, the European Communities would draw the very particular attention of the Panel to the fact that other references in Article 2 to the investigation period are references to the methodology for establishing normal value. The provision that primarily relates to export price – Article 2.3 of the Anti-Dumping Agreement – contains no reference to data arising during the investigation period. Thus, aside from Article 2.4.2 of the Anti-Dumping Agreement, there is no other express textual provision that would oblige an investigating authority to use export price data arising during the

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64 Appellate Body Report, US-Softwood Lumber V, para 100; European Communities first written submission, paras 88 and 170.
The phrase “at as nearly as possible the same time” in Article 2.4 is qualified, and in any event does not necessarily relate to the exclusion of transactions outside the chosen period. Thus, absent the words “during the investigation phase” in Article 2.4.2, an investigating authority might, for one reason or another, seek to draw on export price data arising outside the investigation period. Viewed in this light, the phrase during the investigation phase (or period) in Article 2.4.2 of the Anti-Dumping Agreement has an important – even vital – role to play.

65. Precisely the same observations may be made with respect to the references to the investigation period in Article 2.2.1.1, final sentence; footnote 6, second phrase; and Article 2.4.1, final phrase of the Anti-Dumping Agreement.

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

67. The European Communities would like to recall that, if the phrase refers to the “investigation period”, then the position of the European Communities is that the word “investigation” does not have a special or limited meaning, as asserted by the United States. Rather, it should be given its ordinary meaning. Thus, it refers to whatever period has been fixed as the investigation period for the purposes of the particular type of investigation underway, be it, for example, a new shipper review, a changed circumstances review, or a retrospective assessment.
68. The European Communities would like to inform the Panel that this is how the phrase has been implemented by the European Communities.65

69. The European Communities does not consider it remarkable that, in some instances, different language is used to refer to concepts that are the same, such as a stage in the passage of time (that is, in this case, “period” and “phase”). Where the drafters sought a particularly high level of consistency, they defined the relevant terms (there are 8 such definitions in the GATT 1994 and the Anti-Dumping Agreement).

70. There are many other examples in the Anti-Dumping Agreement of different words or phrases being used to refer to the same thing. For example, the Anti-Dumping Agreement generally refers to the “the exporting country”,66 but in one specific provision refers instead to “the country of export”67, and in another specific provision to “the supplying country”,68 in certain other specific provisions to the “country of origin”,69 and in yet other provisions to “the exporting Member”70: different language used to describe the same concept, without there being any legal consequences. Similarly, the Anti-Dumping Agreement generally refers to the “importing Member”,71 but in one specific provision refers instead to “the importing country”72: once again, different language used to describe the same concept, without there being any legal consequences. Other examples include: “duty assessment … proceedings”73 and “refund procedures”;74 “suppliers”75 and “producers or exporters”;76 “assurances”77 and “undertakings”;78 “a like product of the importing Member”79 and “the like domestic

65 Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (Official Journal of the European Communities No 56/1 of 06.03.1996), Article 2(11) : “Subject to the relevant provisions governing fair comparison, the existence of margins of dumping during the investigation period shall normally be established …”
66 Articles 2.1, 2.2, 2.2.1, 2.2.1.1, 9.5, 12.1.1, and footnote 2 of the Anti-Dumping Agreement.
67 Article 2.5 of the Anti-Dumping Agreement.
68 Article 9.2 of the Anti-Dumping Agreement.
69 Article 2.2.2 of the Anti-Dumping Agreement – the European Communities confines its observation on this point to this specific provision.
70 Articles 5.5, 6.1.3, 6.11(ii), Annex 1 paras 1, 2, 3, 4, 5, 8, and footnotes 15 and 16 of the Anti-Dumping Agreement.
71 Articles 2.5, 3.2, 3.7(ii), 4.2, 5.2(iii), 5.8, 6.11(iii), 8.2, 8.5, 8.6, 9.1, 9.5, 17.4, 17.5(ii), Annex 1 point 6, and footnote 2 of the Anti-Dumping Agreement.
72 Article 14 of the Anti-Dumping Agreement.
73 Article 9.5 of the Anti-Dumping Agreement.
74 Article 18.3.1 of the Anti-Dumping Agreement.
75 Article 9.2 of the Anti-Dumping Agreement.
76 Article 9.4 of the Anti-Dumping Agreement.
77 Article 4.2 of the Anti-Dumping Agreement.
78 Article 8 of the Anti-Dumping Agreement.
product”80; “firms”81 and “companies”;82 “on-the-spot investigation” and “visit”;83 “allowance”84 and “adjustment”85. All of these terms fall to be interpreted according to the Vienna Convention, being given their ordinary meaning and having regard to context and object and purpose. There is nothing in the Vienna Convention that excludes the possibility that such different terms in fact have the same meaning. In such circumstances, the mere fact that the terms are different is of no further legal consequence.

71. A more pertinent question is the following: if the drafters had intended to take a step of such great importance as jettisoning, in retrospective assessments, the basic principles governing the determination of dumping margins, as defined in Article VI of the GATT 1994 and elaborated in Article 2 and particularly Article 2.4.2, thus rendering the results of original investigations worthless, would they have chosen to a) rely on a over subtle distinction between the words “during … period” and the words “during … phase”, neither the word “period” nor “phase” being defined, and those phrases bearing the same ordinary meaning, if reference is made to a dictionary b) in circumstances where the use of one word or the other logically had no incidence whatsoever on the meaning of the word “investigation” in Article 2.4.2 – investigation itself not being a defined term c) by associating the phrase with the word “existence” as opposed to “established”, in a manner that is grammatically incorrect given their alleged objective and d) whilst at the same time including the directly contradictory cross-reference in Article 9.3 to the whole of Article 2? Or, given the importance of the step the drafters were allegedly taking, would they not rather have simply expressly stated that the rules in Article 2.4.2 could be disregarded in retrospective assessments? Just as they did in Article 2.2.1 with regard to sales not in the ordinary course of trade86? Just as they did in Article 9.4 with regard to zero, de minimis and facts available margins87? Just as they did in Article 2.7 with

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79 Article 3.2 of the Anti-Dumping Agreement.
80 Article 3.3 of the Anti-Dumping Agreement.
81 Annex 1 of the Anti-Dumping Agreement.
82 Article 6.13 of the Anti-Dumping Agreement.
83 Annex 1 of the Anti-Dumping Agreement.
84 Article 2.4, third sentence of the Anti-Dumping Agreement.
85 Footnote 7 of the Anti-Dumping Agreement.
regard to non-market economies? That, at least, is what the third parties in this case seem to think.88

72. A second possible meaning of the phrase “during the investigation phase” that has been suggested by the European Communities is that it refers to the (generally) 12 to 18 month investigation phase. The United States appears to take the view that Article 2.4.2 does not refer to an investigation period. The United States, it appears, attempts to associate the phrase “during the investigation phase” with the word “established” rather than with the word “existence”. Even if this would be correct, it would still appear that the word “phase” indicates a period or stage of a larger process, and that the word “during” indicates a temporal connotation. It is thus still a question of looking for something that spans a period of time. In this case, it would presumably be the period of time beginning with the initiation of the investigation, and ending with the procedural action by which a Member formally terminates or concludes such investigation. In this respect, footnote 1 of the Anti-Dumping Agreement, which relates to initiation, may provide helpful context for understanding when an investigation is terminated or concluded.

73. Viewed in this light, one possible meaning of the words “during the investigation phase” in Article 2.4.2 is that, quite apart from the fact that an investigating authority must make its determination about the existence of margins of dumping based on data from the investigation period, the investigating authority must also make that determination within the 12 to 18 month period during which investigations must generally be concluded.

74. For example, in the context of an original investigation, Article 5.10 of the Anti-Dumping Agreement contains the procedural rule that: “Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.”.

75. Article 2.4.2 takes this procedural rule one step further, and makes it a substantive rule, clearly of application to investigations of all types. It provides that the “margins of

88 Question by the European Communities to the third parties during the first meeting, and the 11 negative responses of the third parties – see European Communities closing oral statement at the first meeting, para 21.
dumping” must be established during the 12 to 18 month original investigation phase. Thus, if a margin of dumping resulting from an original investigation were determined 2 years after the initiation of the original investigation, the Member responsible would act inconsistently with the *Anti-Dumping Agreement*. The same would be true if a Member purported to alter the margin of dumping determined during the original investigation, after the end of the 18 month period, *without conducting a new investigation*. It should not be forgotten that, with a new investigation, there comes, in principle, a new investigation period (or review period) – that is, fresh data (see further below) – and a new obligation to make any necessary margin of dumping determinations required by Article 2 within the new investigation phase.

76. The reasons for this rule are self-evident.

77. First, it would be Kafkaesque if a producer or exporter were to find itself forever “under investigation” without ever being subject to a measure (or having the investigation terminated). That would be inconsistent with the basic requirements of certainty and predictability in international trade, which the Appellate Body has so clearly stated lie at the heart of the WTO Agreements.89

78. Second, although the *Anti-Dumping Agreement* contains no rule concerning the establishment of periods of investigation, it is well established that an investigating authority is not entirely unfettered in this matter. In principle, the period of investigation must end as close as reasonably possible to the date on which the investigation is initiated.90 There are very good reasons for this. Anti-dumping measures can only reasonably be imposed on the basis of sufficiently fresh data. Absent some special justification, it would not be reasonable or acceptable under the *Anti-Dumping Agreement* for an investigating authority to impose anti-dumping measures today, based on data from 10 years ago. Requiring the dumping margin determination to be made within the investigation phase is an essential part of this “fresh data” rule: there would be no point in requiring the investigation to be initiated shortly after the end of the

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89 For example, Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review*, para 82: “… 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.”

90 Recommendation of 6 May 2000 of the WTO Committee on Anti-dumping Practices; Panel Report, *EC-Tube or Pipe Fittings*, para 7.100 and Appellate Body Report, footnote 73; Appellate Body Report,
investigation period, if the dumping margin determination could be delayed until several years later.

79. Third, given the importance of this rule, it is entirely appropriate that it should be expressed not only in the essentially procedural terms of Article 5.10 of the Anti-Dumping Agreement, which relates to original investigations, but that it should also be recalled, or expressed in more substantive terms, in the context of Article 2.4.2 of the Anti-Dumping Agreement, and in relation to all types of investigation. This makes it clear that failure to respect the rule would result not merely in a procedural inconsistency with the Anti-Dumping Agreement, but would vitiate the very core of the determination – the establishment of the margin of dumping. And it makes it clear that the rule applies in all types of investigation.

80. In the context of changed circumstances reviews, Article 11.4 of the Anti-Dumping Agreement provides that the review should be carried out expeditiously and normally concluded within 12 months of the date of initiation. The reasoning is analogous. If the review involves reliance on or determination of a new “margin of dumping”, that determination must comply with the requirements of Article 2 of the Anti-Dumping Agreement, and must be made during the 12 month review investigation phase. The same reasoning applies, mutatis mutandis, to sunset reviews under Article 11.3. Similarly, Article 9.5 of the Anti-Dumping Agreement provides that new shipper reviews must be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings.

81. In the same vein, both Articles 9.3.1 and 9.3.2 of the Anti-Dumping Agreement expressly provide for an investigation phase of normally 12 months and in no case less than 18 months. Thus, this is the period or phase during which the investigating authority must make any “margin of dumping” calculations required by Article 2 of the Anti-Dumping Agreement. That is what the words “during the investigation phase” in Article 2.4.2 of the Anti-Dumping Agreement mean.

82. Another way of saying essentially the same thing is that there is a post-investigation phase – but for each type of investigation foreseen by the Anti-Dumping Agreement.

Argentina-Footwear, footnote 130 on page 47 (with respect to safeguard measures) “the relevant investigation period should not only end in the very recent past, the investigation period should be the recent past”.

Thus, the mere fact that there is a post investigation phase with respect to an original investigation does not mean that there is never any subsequent investigation – there might be a new investigation (and a new investigation phase) if there is a new shipper review, a changed circumstances review, a sunset review or an assessment. And a particular and special example of a post investigation phase is what follows the final assessment under Article 9. In fact, Articles 9.3.1 and 9.3.2 refer expressly to this post investigation phase – it is the 90 days period in which any refund payment should normally be made, once the 12 to 18 month assessment investigation phase is terminated.

16. Both parties: The EC has suggested that the term "investigation phase" could mean "period of investigation". Is there any relevance to the fact that the term "period of investigation" was used in various drafts of Article 2.4.2 itself alongside the term "investigation phase"? See e.g., Ramsauer I dated 26/11/1991.91

83. The European Communities is uncertain what argument of the United States the Panel may be seeking to clarify or distil, given that the United States has submitted no arguments based on the negotiating history, and fully reserves its legal position in this respect.

84. Without prejudice to that observation, the European Communities recalls that, under Article 32 of the Vienna Convention, recourse may be had to preparatory work in order to confirm the meaning resulting from Article 31 of the Vienna Convention, or to determine the meaning if it remains ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. The meaning of the word “investigation” in Article 2.4.2 resulting from Article 31 of the Vienna Convention is clear: a systematic examination or inquiry or a careful study of a particular subject. This is not ambiguous or obscure. And it does not lead to a result which is manifestly absurd or unreasonable (on the contrary, the result advocated for by the United States is manifestly absurd and

91 The text of Article 2.4.2 in Ramsauer I provided: "Subject to the provisions governing fair comparison in paragraph 2.4, in cases where prices vary in both the exporting and importing country, the normal value and the export price shall normally be compared on a weighted average to weighted average or transaction to transaction basis when establishing the existence of dumping margins during the investigation phase. A weighted average normal value may be compared to individual export transactions when the pattern of export transactions to particular customers reveals a distinct pattern of targeted dumping during the period of investigation, provided that the authorities ensure that no margins of dumping are found when there are similar movements in levels of prices at the same time in the two markets, and provided that the authorities give an explanation of the reasons for using such a comparison." [Underline added.]
unreasonable). In these circumstances, the negotiating history could only ever be invoked in order to confirm the position of the European Communities.

85. Without prejudice to either of the above observations, the European Communities does not attach any particular significance to the text referred to in the question. There were several texts that changed considerably over time, and what matters is the final text. One simply cannot substitute speculation about what some individuals acting for some Members might or might not have thought at some intermediate stage of negotiations, based on an erroneous construction of legal reasoning, for the actual text of what was finally agreed.

17. Both parties: It could be argued that the use of the term "investigation phase" implies that there are other distinct phases(s). Please comment on the meaning of the word "phase" and its relevance to this dispute.

86. The European Communities refers to its response to questions 15 and 21. Either the word “phase” means “period”. Or it suggests the possibility of different phases, such as an original investigation phase, or other phases in which there are different types of investigation, such as new shipper, changed circumstances, sunset or retrospective assessments. It could also indicate the existence of a pre-investigation or post-investigation phase.

87. There are other words that only appear once in the Anti-Dumping Agreement, and this does not in itself indicate that they have any special or limited meaning, beyond their ordinary meaning. For example “accelerated” in Article 9.5; “fragmented” in footnote 13; “zero” in Article 9.4; “offset” in Article 11.2. In the context of the present dispute, what matters is the ordinary meaning of the word “investigation”. The ordinary meaning of the word phase is of much less significance – and in any event merely confirms the position of the European Communities.

18. EC: What does the EC consider the words "during the investigation phase" actually add to Article 2.4.2?

88. The European Communities would refer to its responses to questions 15 and 21. The words could just be “descriptive”, in the sense that the United States considers the words “to determine the existence, degree and effect of any alleged dumping” in Article 5.1 to be “descriptive”.
89. If the phrase means “during the investigation period”, the value added would be to require an authority to use only data arising during the investigation period, particularly as regards export price. The words “at as nearly as possible the same time” in Article 2.4 do not achieve the same result.

90. If the phrase means during the period provided for the conclusion of the particular type of investigation, then the value added would be the preservation of the “fresh data” rule.

91. If the phrase means not during the pre-investigation phase, it would release an authority from the unreasonable burden of applying the technical rules in Article 2.4.2 before it has received the completed questionnaire responses (see the response to question 21).

19. US: Please comment on the four possible meanings of the term "during the investigation phase" posited by the EC in its closing marks at the meeting with the Panel.

20. EC: In the first meeting of the parties with the Panel, the EC expressed the view that one possible interpretation of the words "during the investigation phase" is that they confine Members, when establishing margins of dumping under Article 2.4.2, to data taken from the "period of investigation".

(a) Does the EC consider that in the absence of the phrase "during the investigation phase", there is nothing in the Agreement that would preclude an authority from establishing a margin of dumping on the basis of data collected from outside of the "period of investigation"? Is this issue dealt with in the requirement found in Article 2.4 of comparing sales made at "nearly as possible the same time"?

(b) What does the EC consider to be the significance of the absence of a reference to "during the investigation phase" in the second sentence of Article 2.4.2? Does this absence mean, for example, that the obligation to establish a margin of dumping on the basis of data collected from outside of the "period of investigation" does not apply in the case of targeted dumping?

92. (a) Article 2.4 is qualified by the words “as nearly as possible”, so would not achieve the same result. Furthermore, it relates to the comparison within the period of investigation (for example, between a domestic transaction in January and an export transaction in December) rather than to the issue of taking data from outside the investigation period.

(b) If the Panel considers that the phrase “during the investigation phase” in Article 2.4.2 is limited to the first sentence of that provision, and does not apply to the second sentence of that provision, then it would automatically follow that the United States would, in retrospective assessments, be acting inconsistently with the second sentence of Article 2.4.2, since it systematically applies an asymmetrical method without any of the
conditions being met. In such circumstances, it would be unnecessary to further consider, in these panel proceedings, this part of the Panel’s question. Having regard to these considerations, this is an argument that the European Communities expressly makes, in the alternative.

21. **EC:** The EC has expressed the view that one of the possible interpretations of the words "during the investigation phase" contained in Article 2.4.2 is that it refers to all proceedings but for the "pre-initiation" phase. Does the EC not consider that the inquiry called for in the pre-initiation phase is already largely dealt with Article 5.2(iii)?

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

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

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

97. In the opinion of the European Communities, Article 5.2(iii) of the Anti-Dumping Agreement, viewed in isolation, would not achieve this result. It simply requires information about prices in the domestic and export markets. That is not in itself enough. Article 5.2 requires that the application must contain sufficient evidence of “dumping” and Article 5.3 requires an authority to determine whether or not there is sufficient evidence to justify initiation. Quite apart from Article 5.2(iii), the authority will therefore have to make some kind of rudimentary comparison. And that is the point at which the rule in Article 2.4.2, on the basis of this interpretation, would have value added, because it would release the authority from the unreasonable burden of applying the rules set out in Article 2.4.2, which essentially pre-suppose that the questionnaire responses, with all the detailed data on domestic and export prices, have already been filed.
C. SCOPE OF ARTICLE 2.4

22. US: Does the US contest the claim of the EC that the application of "model zeroing" in the original investigations identified in the Exhibits to the First Submission of the EC was inconsistent with Article 2.4 of the ADA?

23. EC: The EC states in paragraphs 66 and 149 of its First Submission that Article 2.4 contains an "overarching and independent" obligation to make a fair comparison. How does the EC define the precise scope of application of the fair comparison requirement as an "overarching" and "independent" obligation?

98. It is “overarching” in the sense that it informs the rest of Article 2.4. It is independent in the sense that the rest of Article 2.4 does not exhaust the obligation to make a fair comparison.

24. EC: Could the EC discuss how the Panel and Appellate Body Reports cited in footnotes 99 and 175 of the First Submission of the EC support the EC's argument that the fair comparison requirement is "overarching" and "independent"?

99. Appellate Body Report, EC-Bed Linen, para 59:

Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This is a general obligation that, in our view, informs all of Article 2 …

100. Panel Report, Guatemala-Cement I, para 7.65:

In our view, this provision [Article 2.4] establishes an obligation for investigating authorities to make a fair comparison.


… The chapeau of Article 2.4 states that "[a] fair comparison shall be made between the export price and the normal value." Whatever the relationship of the fair comparison language of the chapeau to the specific requirements of Article 2.4 – an issue of dispute between the parties – it is evident to us that the provisions of Article 2.4.2 must be read against the background of this basic principle. In fact, the provisions of Article 2.4.2 itself are "subject to the provisions governing fair comparison in paragraph 4." An interpretation of Article 2.4.2 that required a Member to compare transactions that were not comparable would run counter to this basic principle.

115 Korea considers that the chapeau to Article 2.4 creates a fair comparison requirement that is independent of the other requirements of Article 2.4. The United States contends that, while the first sentence of Article 2.4 establishes a requirement to make a "fair comparison", the remainder of Article 2.4 defines how such a comparison is made.

102. Appellate Body Report, US-Hot-Rolled Steel, paras 167 to 168 and 174 to 179:

… Article 2.4 requires that a "fair comparison" be made between export price and normal value … (para 167) … Article 2.4 expressly requires that "allowances" be made for "any other differences which are also demonstrated to affect price comparability." (emphasis
There are, therefore, no differences "affect[ing] price comparability" which are precluded, as such, from being the object of an "allowance".

103. The significance of this statement is that it confirms that the specific provisions of Article 2.4 do not exhaust the "fair comparison" requirement.

104. Panel Report, Argentina-Ceramic Tiles, para 6.113, final sentence:

... We believe that the requirement to make due allowance for such differences, in each case on its merits, means at a minimum that the authority has to evaluate identified differences in physical characteristics to see whether an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price under Article 2.4 of the AD Agreement, and to adjust where necessary.

105. Panel Report, Egypt-Steel Rebar, paras 7.333 to 7.335:

7.333 Article 2.4, on its face, refers to the comparison of export price and normal value, i.e., the calculation of the dumping margin, and in particular, requires that such a comparison shall be "fair". A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions)\(^{250}\), but with the nature of the comparison of export price and normal value. First, the emphasis in the first sentence is on the fairness of the comparison. The next sentence, which starts with the words "[t]his comparison", clearly refers back to the "fair comparison" that is the subject of the first sentence. The second sentence elaborates on considerations pertaining to the "comparison", namely level of trade and timing of sales on both the normal value and export price sides of the dumping margin equation. The third sentence has to do with allowances for "differences which affect price comparability", and provides an illustrative list of possible such differences. The next two sentences have to do with ensuring "price comparability" in the particular case where a constructed export price has been used. The final sentence, where the reference to burden of proof at issue appears, also has to do with "ensur[ing] a fair comparison". In particular, the sentence provides that when collecting from the parties the particular information necessary to ensure a fair comparison, the authorities shall not impose an unreasonable burden of proof on the parties.

7.334 The immediate context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to the comparison of export price and normal value, that is, the calculation of the dumping margin. Article 2.4.1 contains the relevant provisions for the situation where "the comparison under paragraph 4 requires a conversion of currencies" (emphasis added). Article 2.4.2 specifically refers to Article 2.4 as "the provisions governing fair comparison", and then goes on to establish certain rules for the method by which that comparison is made (i.e., the calculation of dumping margins on a weighted-average to weighted-average or other basis).

7.335 In short, Article 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value. ...

\(^{250}\)In this regard, we note that earlier provisions in Article 2, namely Article 2.2 including all of its sub-paragraphs, and Article 2.3, have to do exclusively and in some detail with the
establishment of normal value and export price, and in addition that Article 2.1 has to do in part with the establishment of the export price.

106. Appellate Body Report, *US-Carbon Steel*, para 70:

Turning to the immediate context of Article 21.3, we observe the title to Article 21 of the *SCM Agreement* reads "Duration and Review of Countervailing Duties and Undertakings". The first paragraph of Article 21 stipulates that a countervailing duty "shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury". We see this as a general rule that, after the imposition of a countervailing duty, the continued application of that duty is subject to certain disciplines. These disciplines relate to the *duration* of the countervailing duty ("only as long as … necessary"), its *magnitude* ("only … to the extent necessary"), and its *purpose* ("to counteract subsidization which is causing injury"). Thus, the general rule of Article 21.1 underlines the requirement for periodic review of countervailing duties and highlights the factors that must inform such reviews. …

107. Panel Report, *EC-Tube and Pipe Fittings*, para. 7.113:

… [Article 11.1] furnishes the basis for the review procedures contained in Article 11.2 (and 11.3) by stating a general and overarching principle, the modalities of which are set forth in paragraph 2 (and 3) of that Article. …

108. Appellate Body Report *Thailand-H-Beams*, para 106:

… Article 3.1 is an overarching provision that sets forth a Member’s fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs.

109. Panel Report, *Egypt-Steel Rebar*, para 7.102:

… It is clear that Article 3.1 provides overarching general guidance as to the nature of the injury investigation and analysis that must be conducted by an investigating authority. …


In our Report in *Thailand – Steel*, we said that "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination. We also said that this general obligation "informs the more detailed obligations" in the remainder of Article 3. The thrust of the investigating authorities' obligation, in Article 3.1, lies in the requirement that they base their determination on "positive evidence" and conduct an "objective examination". The term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.

111. Taken together, the European Communities believes that these various statements by panels and the Appellate Body support the view that the Article 2.4 obligation to make a fair comparison is an overarching and independent obligation.
25. EC: Apart from the Appellate Body Report in EC – Bed Linen, could the EC cite other Panel and Appellate Body Reports that support the interpretation of the fair comparison requirement as going beyond the obligation to make adjustments within the meaning of Article 2.4?

112. The European Communities refers to its response to question 24. In the opinion of the European Communities, taken together, these various statements by panels and the Appellate Body support the view that the Article 2.4 obligation to make a fair comparison is not exhausted by the second to final sentences of Article 2.4. The European Communities also refers to its response to question 27, and question 38, where we explain that an adjustment to export price, normal value or otherwise for differences that do not affect price comparability is inconsistent with Article 2.4.

26. US: Apart from the Panel Report in Egypt - Rebar, could the US cite other Panel and Appellate Body Reports that support its interpretation of the scope of the fair comparison language in Article 2.4?

113. As indicated in our response to question 24, the European Communities does not consider that the panel report in Egypt-Steel Rebar supports the position of the United States. On the contrary, it supports the position of the European Communities.

27. EC: What is the basis for the argument in paragraphs 68 and 151 of the EC First Submission that it follows from the ordinary meaning of the word "fair" that a fair comparison must be "symmetrical"?

114. The ordinary meaning of the word “fair” indicates a comparison that is “just, unbiased, equitable, impartial”; “offering an equal chance of success”; conducted “honestly, impartially”; and “evenly, on a level”.92

115. Fairness, in the context of a comparison between domestic sales and export sales, requires that, under normal circumstances, the same treatment be applied to both domestic and export sales, i.e. that such sales be treated in a symmetrical way. That means, in particular, that the same methodology must be adopted to establish the value of the sales that will be used for the calculations. Because “zeroing”, which consists in an arbitrary and artificial reduction of the price, is only applied to the export sales, there is no symmetrical treatment.

116. The European Communities believes that this view is supported by the context and the object and purpose of the Anti-Dumping Agreement. The European Communities does
not enter into a discussion of the several possible economic rationales for the anti-dumping rules, much discussed in the literature and well known. The fact remains, however – and this much is uncontroversial – that they are all economic. Articles VI:1 and VI:2 of the GATT 1994 repeatedly use words such as “commerce”, “trade”, “price”, “sale”, “cost” and “profit”. In this respect, it is highly significant that Ad Article VI, paragraph 1, second sub-paragraph and Article 2.7 of the Anti-Dumping Agreement disapply certain rules with respect to Members in which there is no market economy. The preamble to the GATT 1994 refers to “trade and economic endeavour”, “expanding the production and exchange of goods” and “international commerce”. Similarly, the preamble to the WTO Agreement refers to “trade and economic endeavour” and “expanding the production of and trade in goods” and “international trade relations” and the objective “to develop an integrated, more viable and durable multilateral trading system”.

117. In the opinion of the European Communities, the application of the discipline of economics requires a minimum of consistency. Investigating authorities cannot, from one day to the next, and in a random or capricious manner, or even within the same investigation or proceeding, chop and change the basic legal economic concepts used in the Anti-Dumping Agreement – such as, for example, the concept of sales not “in the ordinary course of trade” or the concept of what is an “exporter or producer” or related company, and so on. On certain matters, Members may have a certain latitude in deciding what rule they will apply. But once they have made their choice, they must apply the rule in an even-handed way.

118. Thus, it is not by chance that the Anti-Dumping Agreement uses the words “market” or “competition” or “compete” 28 times, these being the indispensable and basic building blocks of consistent economic analysis. And it is not by chance that the basic parameters by which markets are generally defined: product (or physical characteristics), geography and time play a central role in the Anti-Dumping Agreement. Nor is it chance that these are also the basic parameters essentially referred to in the second sentence of Article 2.4.2. Finally, it must come as no surprise that the reasoning of the

93 See particularly Article 2.6 of the Anti-Dumping Agreement.
94 See particularly Article 4 of the Anti-Dumping Agreement.
95 See the repeated references to the investigation “period” in the Anti-Dumping Agreement.
Appellate Body in the model zeroing cases is essentially about consistency with respect to one of these parameters: product definition.

119. Viewed in this light, how could it be possible to measure international price discrimination in two different markets (the domestic market of the exporting country and the domestic market of the importing Member), if the fundamental methodology for defining and measuring each of the markets would be different? Absent good reason (targeted dumping), such an approach is actually incapable of measuring alleged international price discrimination. And in this sense it must be unfair, because it is internally inconsistent.

28. EC: Please explain further the arguments in paragraphs 68 and 151 of the EC First Submission that a "symmetrical" comparison necessarily excludes model zeroing and simple zeroing. In this connection, please explain the meaning of the word "symmetrical" as used in the EC Submission and how the concept of "symmetry" relates to the concept of "zeroing". In the same context, could the EC please comment on the distinction that the US makes in paragraphs 1-4 of its first Submission between "zeroing" and "symmetry"?

120. The European Communities refers to its response to question 3 concerning the relationship between the symmetry issue and zeroing.

121. The European Communities agrees with the United States that there is a distinction between these two issues. However, the two issues to some extent overlap – a fact not acknowledged by the United States in paras 1 to 4 of its first written submission.

122. More generally, the European Communities disagrees in the strongest terms with paras 1 to 4 of the United States first written submission, which contain a grotesque caricature and misrepresentation of the claims and arguments presented by the European Communities, and which uses vocabulary entirely alien to the Anti-Dumping Agreement. The European Communities is not asking the United States to “grant” an “offset” or “credit” for “negative dumping” in transactions where “export price” exceeds “normal value”. Rather, the European Communities is simply asking the United States to stop effectively adjusting the export price or normal value or certain intermediate values, or to stop making an allowance or adjustment for something which does not “affect price comparability”, during the comparison of normal value and export price required by Article 2.4 of the Anti-Dumping Agreement.
123. As indicated in response to question 3, in the context of a weighted-average-to-weighted-average comparison, the question of model or simple zeroing should not arise, as a matter of mathematics. That is because, in calculating a weighted average normal value and a weighted average export price, the full value of all transactions will already have been accounted for. In the context of United States retrospective assessments, the use of the asymmetrical method is already inconsistent with Article 2.4 and the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

29. US: The US asserts in paragraph 65 that a methodology cannot "be designated as 'fair' or 'unfair' within the meaning of Article 2.4 solely on the basis of whether it makes dumping margins go up or down". In this respect, what are the comments of the US on the observations of the Appellate Body in EC–Bed Linen and in US - Corrosion-Resistant Steel Sunset Review that a zeroing methodology is "inherently biased towards inflating the margin of dumping"?

30. US: What is the view of the US on the interpretation of the fair comparison requirement set out in paragraphs 33-39 of the Third Party Submission of Japan?

31. EC: What are the comments of the EC on the argument of the US in paragraphs 66-67 of the US First Submission that a transaction-to-transaction comparison can yield a higher margin of dumping than an average-to-transaction comparison? If a permissible dumping margin calculation methodology pursuant to Article 2.4.2 produces higher dumping margins than zeroing, can zeroing be said to be "inherently unfair"?

124. The United States example is highly theoretical and self-serving. First, it is interesting to note that, although the two domestic sales are considered to be comparable, the United States arbitrarily selects the highest domestic price as being the “most” comparable one. Apart from the fact that the distinction between comparable and “most comparable” is not reflected in the Anti-Dumping Agreement (either a sale is comparable or is not comparable), it is clear that the United States selects the highest priced sale as the most comparable simply because that suits the pre-determined result the United States is aiming for. Second, the validity of the example relies on the assumption that the selection process of the comparable domestic sale was fair, a matter in respect of which no further (theoretical) information is provided. The United States example is therefore of little value or relevance to the present case.

125. A more relevant question is what will generally happen when a particular method is used. In this respect, the outcome of a transaction-to-transaction method might always depend to some extent on the particular distribution of transactions in the exporting and importing markets. In any event, regardless of the position with regard to the transaction-to-transaction method, the United States submissions are simply irrelevant to
the point that zeroing is unfair when it is applied outside the circumstances of targeted
dumping governed by Article 2.4.2. What matters is the method itself, not just the end
result. A method that consists of making allowance or adjustments to export price,
normal value or otherwise, which in effect systematically adjusts the export price
downwards, is in itself unfair, because it deprives the exporter of the actual full value of
its export sales. The United States position is reminiscent of the argument advanced by
the European Communities in the *Bed Linen* case, to the effect that it could simply have
defined different subject products in order to achieve the same result. The Appellate
Body rejected that argument, considering that it was incapable of rendering model
zeroing lawful. The same reasoning applies here. Whether or not the transaction-to-
transaction method could lead to a higher result in some other case cannot render
inconsistent measures consistent with the *Anti-Dumping Agreement*. In short, what is
abundantly clear is that the use of the asymmetrical method with zeroing will
systematically and generally inflate the dumping margin, and that is one of the reasons
why it is inherently unfair.

126. The European Communities is of the view that the transaction-to-transaction method
was essentially intended for circumstances in which there are a few very large
transactions – and this view is also shared by the United States, as expressly provided
for in the Regulations\(^6\) and in the Manual\(^7\) (which the United States admits is a
“measure”).

32. **EC: First Submission of the EC paragraphs 90-93: how does the EC respond to the
argument of the US that the EC’s claims under Article 3 of the ADA are speculative because the
EC cannot presume the results of an alternative methodology permitted by the ADA
(paragraphs 108-110 of the First Submission of the US)**

127. The European Communities does not need to demonstrate, neither for the purposes of its
claims under Articles 2.4 and 2.4.2, nor for the purposes of its claims under Article 3,
what the actual results would be in the “as applied” model zeroing cases without
zeroing. It is sufficient to demonstrate that the “model zeroing” method used by the

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\(^6\) Regulations, Section 351.414(c) : “… The Secretary will use the transaction-to-transaction method
only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise
sold in each market is identical or very similar or is custom made.”; European Communities first written
submission, para 20 and footnote 13.

\(^7\) Manual, Chapter 6, page 7 : “We may also establish dumping margins by comparing NV and EP or
CEP on a transaction-to-transaction basis. This is normally done only for large capital goods made to order, such
as transformers. The difference between these custom-made products render average prices meaningless.”
United States was inconsistent with the Anti-Dumping Agreement. And that is sufficient to demonstrate that the injury determinations must also be considered unsound, and would therefore also have to be reconsidered. Furthermore, when it has been demonstrated that the margins without zeroing in original investigations are *de minimis* or even negative, the Panel should find a violation of Article 3 with respect to the definition of the volume of dumped imports; and of Article 5.8 since, because of the margins being *de minimis*, the case should have been terminated. In this latter situation, the Panel should recommend that the measures be repealed.

33. **EC:** How does the EC respond to the argument of the US in paragraph 69 of the US First Submission that "the EC has not offered any argument as to how an offset to anti-dumping duties assessable on one entry as a result of a distinct entry having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under the rubric of Article 2.4"?

128. It is necessary to distinguish the concept of “transaction-by-transaction” or “entry-specific”, from the concept of “transaction-to-transaction”. The former concept has nothing to do with the method of comparison between normal value and export price, but just refers to the idea of considering each export transaction in isolation.

129. The European Communities has responded to the United States argument based on Article 9.4(ii) in its opening statement at the first meeting. It would be an error of law to invoke one possible *intermediate* step in a prospective system of assessment, in an attempt to justify the *final* result that the United States reaches in its retrospective system of assessment.

130. As the European Communities has explained, it is not asking for an “offset” – it is asking the United States to stop effectively making an adjustment or allowance for something that does *not* affect price comparability during the comparison required by Article 2.4 and to calculate the margin of dumping mentioned in the chapeau of Article 9.3 in compliance with Article 2.

131. In the context of model zeroing, the adjustment would be precluded by the proper use of the weighted-average-to-weighted-average method. In the context of United States retrospective assessments, the unlawfulness of the adjustment results, first, from the

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98 United States first written submission, para 68.
99 European Communities first opening oral statement, paras 38 to 41.
improper use of the asymmetrical comparison, in circumstances where the conditions set out in Article 2.4.2 are not fulfilled; and second from the use of zeroing.

132. The precise way in which the Standard AD Margin Program operates is explained in detail in the first written submission of the European Communities,\(^\text{100}\) and also in the declaration by Valerie Owenby, at para 15.\(^\text{101}\)

133. The Panel in *EC-Bed Linen* took the same view:

6.115 We note also that Article 2.4.2 specifies that the weighted average normal value shall be compared with "a weighted average of prices of all comparable export transactions". In this case, the European Communities' calculation of the final weighted average dumping margin for the product did not, in fact, rest on a comparison with the prices of all comparable export transactions. By counting as zero the results of comparisons showing a "negative" margin, the European Communities, in effect, changed the prices of the export transactions in those comparisons. It is, in our view, impermissible to "zero" such "negative" margins in establishing the existence of dumping for the product under investigation, since this has the effect of changing the results of an otherwise proper comparison. This effect arises because the zeroing effectively counts the weighted average export price to be equal to the weighted average normal value for those models for which "negative" margins were found in the comparison, despite the fact that it was, in reality, higher than the weighted average normal value. This is the equivalent of manipulating the individual export prices counted in calculating the weighted average, in order to arrive at a weighted average equal to the weighted average normal value. As a result, we consider that an overall dumping margin calculated on the basis of zeroing "negative" margins determined for some models is not based on comparisons which fully reflect all comparable export prices, and is therefore calculated inconsistently with the requirements of Article 2.4.2. (underline added)

134. And this view was confirmed by the Appellate Body in the *EC-Bed Linen* appeal:

… As the Panel correctly noted, for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value … despite the fact that it was, in reality, higher than the weighted average normal value."\(^\text{23}\) By "zeroing" the "negative dumping margins", the European Communities, therefore, did not take fully into account the entirety of the prices of some export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did not establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of all comparable export transactions – that is, for all transactions involving all models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is not a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2. (underline added)

\(^\text{100}\) European Communities first written submission, paras 21 to 22 and 37 to 38 and Exhibit EC-42.

\(^\text{101}\) Exhibit EC-44.
34. **US**: How does the US respond to the points made in paragraphs 153-154 of the First Submission of the EC?

35. **EC**: Is the EC claiming that simple zeroing violates Article 2.4 because it involves an asymmetrical comparison or because zeroing is unfair as such, irrespective of whether there has been symmetry in the comparison exercise (average price behaviour)?

135. The European Communities refers to its response to question 3. The European Communities claims that the use of an asymmetrical comparison in circumstances where none of the conditions provided for in Article 2.4.2 are fulfilled, violates Article 2.4.2 and Article 2.4. The European Communities further claims that the use of zeroing in such a case violates Articles 2.4.2 and Article 2.4.

36. **Both parties**: In the *US – Softwood Lumber* case, the Appellate Body did not refer to Article 2.4 in its analysis of Article 2.4.2. Please indicate whether you consider this to be of any significance for the present matters in dispute.

136. No, the European Communities does not consider this to be of significance in this dispute. There is ample other case law on the point. The Appellate Body Report in *US-Softwood Lumber V* simply reflects the fact that Canada did not challenge the judicial economy exercised by the original panel with respect to Article 2.4. The Appellate Body made other statements that are highly significant for the purposes of the present dispute, for example:

> “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.

> As with dumping, “margins of dumping” can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product.

In our view, the results of the multiple comparisons at the sub-group level are, however, not “margins of dumping” within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating all these “intermediate values” that an investigating authority can establish margins of dumping for the product under investigation as a whole.

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103 European Communities first written submission paras 70 to 74 and 155 to 160.
Our 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.\(^{107}\)

We now turn to the implications of zeroing as applied in this case. Zeroing means, in effect, that at least in the case of some export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the entirety of the prices of some export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole.\(^{108}\)

37. **Both parties**: What do the parties consider to be the relevance of the Appellate Body's statements in the **EC – Bed Linen** and **US – Corrosion Resistant Steel Sunset** cases regarding Article 2.4 and its relevance to the calculation of dumping margins? Do the parties consider such statements to be obiter dictum or something more substantive? Please explain and elaborate your answer.

137. The European Communities refers to paras 70 to 74 and 155 to 160 of its first written submission. The European Communities considers that these statements support its position in the present proceedings. Notably, in **US-Corrosion Resistant Steel Sunset Review**, the Panel made findings in relation to Article 2.4, which Japan appealed; and the Appellate Body made findings, confirming its earlier findings in the **EC-Bed Linen** case. These were subsequently adopted by the DSB.

38. **EC**: Could the EC please further elaborate on whether, and if so, how, the third sentence of Article 2.4 is relevant to its claim that zeroing violates Article 2.4?

138. The third to fifth sentences of Article 2.4 provides:

Due allowance shall be made in each case, on its merits, for difference 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.\(^7\) 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.

\(^7\)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.

139. It is not controversial that, if an authority would make an “allowance” or “adjustment” to reflect a difference that did not affect price comparability, it would not be a “due” allowance, and the authority would act inconsistently with Article 2.4, and particularly


the third to fifth sentences of Article 2.4. It is also not controversial that, in doing so, the authority would act inconsistently with the first sentence of Article 2.4.

140. The ordinary meaning of the word “allowance” includes: “A sum or item put to someone’s credit; deduction, discount” and “Addition or deduction in consideration of something”. The ordinary meaning of the word “adjust” includes: “Arrange, compose, harmonize, (differences, discrepancies, accounts); assess (loss or damages)”.109 In these circumstances, the European Communities considers that the words “allowance” and “adjustment” in Article 2.4 may be considered to have the same meaning, at least for the purposes of the present proceedings.

141. The European Communities considers that the allowance or adjustment in question may be made to normal value, or export price, or in some other way during the process of comparison. Nothing in the third to fifth sentences of Article 2.4 limits in this respect the type of allowance or adjustment with which the overall provision is concerned.

142. Referring to its response to question 33, and particularly the declaration by Valerie Owenby and the extracts from the EC-Bed Linen case, the European Communities considers that what the United States does when it zeros is an “allowance” or “adjustment” within the meaning of Article 2.4.

143. In the opinion of the European Communities, the United States makes this allowance or adjustment because of the difference between some intermediate results (they are positive) and other intermediate results (they are negative); or because of the sign (negative) of an intermediate difference between what are considered a “normal value” and an “export price”. In other words, in effect, zeroing changes the value of the export transactions, as the Appellate Body observed in EC-Bed Linen.

144. In the opinion of the European Communities, that difference is not something that affects price comparability. Rather, it is part of the very price comparison that the authority is obliged to carry out.

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145. The European Communities concludes that the United States acts inconsistently with the third to fifth and first sentences of Article 2.4 when it makes such an allowance or adjustment without justification.

39. Both parties: If zeroing would be considered unfair as such and thus prohibited, what would be the practical consequences of such a concept? Would it presuppose aggregation of different transactions into a single margin or would this concept, if applied in all its logic, oblige administrations practising transaction by transaction duty assessment to compensate importers for negative margins underlying certain of these assessment operations?

146. As the European Communities has explained in response to question 3, it has made a number of discreet claims concerning the method of comparison and zeroing, absent targeted dumping. The European Communities is not certain that it can identify all of the effects in practice of the United States current WTO inconsistent behaviour, so it cannot identify all of the practical consequences, assuming that the United States is brought to respect its WTO obligations. Suffice is to say that the European Communities believes that, in future, the WTO consistent margins of dumping calculated by the United States in original investigations and re-calculated in retrospective assessments would generally be significantly reduced, compared to what would otherwise be calculated using the WTO inconsistent methods currently applied by the United States.

147. The various consequences of the claims of the European Communities being accepted are sufficiently apparent from the response to question 3. If all the claims of the European Communities would be accepted, all other things being equal, there would indeed be one normal value, one export price, and one margin of dumping, for each exporter, in all cases of retrospective assessment, due allowance being made for any differences affecting price comparability and targeted dumping.

148. The European Communities would like to clarify its understanding that when the question refers to “transaction by transaction” it is not referring to the “transaction-to-transaction” method of comparison, but rather to the practice of considering each export transaction in isolation. As indicated above, the consequence of accepting all of the European Communities claims would indeed be to confirm that such practice is prohibited at the final stage of assessment (that is, when ensuring that the total amount of duty collected with respect to exports made by one specific exporter during the assessment period does not exceed the relevant margin of dumping of the same exporter), because of the disciplines of Article 2.4, including Article 2.4.2. It is not,
however, a question of “compensating” an importer for a “negative margin” – just a question of making a fair comparison between normal value and export price, without making adjustment for differences that do not affect price comparability, in order to ensure that the total amount of duty collected does not exceed the margin of dumping as established in conformity with Article 2. In this respect, the only relevant margin of dumping is that of the exporter. The European Communities would like to emphasise that the margin of dumping calculated by the United States in assessment proceedings purports to ensure compliance with the chapeau of Article 9.3; but manifestly does not, because the margin calculation is vitiated by the use of “zeroing” In short, Members are not allowed in a retrospective assessment to bypass the disciplines contained in Article VI of GATT 1994 and in the Anti-Dumping Agreement.

149. Finally, the European Communities would again like to stress in the strongest terms that the acceptance of its claims and arguments in this case would merely mean that there would be a “level playing field” between the prospective and retrospective systems of collection. By contrast, the arguments advanced by the United States are an attempt to justify a serious imbalance between the two systems. The European Communities intends to return to this matter in its rebuttal, and to provide the Panel with sample calculations further illustrating this point.

40. US: Is the view of the US that the first sentence of Article 2.4 means something over and above what is set out in the second sentence and what comes thereafter, or does the remainder of Article 2.4 exhaust the meaning of the word "fair" used in the first sentence? If not, why does the first sentence of Article 2.4 exist?

D. RELATIONSHIP BETWEEN ARTICLE 2.4 AND 2.4.2

41. EC: If the fair comparison requirement also applies to the subject matter of Article 2.4.2 - the establishment of margins of dumping- how does the EC define the precise relationship between the fair comparison obligation and the provisions of Article 2.4.2?

150. The rules in Article 2.4.2 are one aspect of the fair comparison requirement, but they do not exhaust it. The fair comparison requirement is an independent and overarching obligation. Article 2.4.2 clarifies what fairness means when establishing the margin of dumping in normal circumstances and in the exceptional circumstances of targeted dumping.

42. Both parties: Could the parties explain the meaning of the phrase "subject to the provisions governing fair comparison in paragraph 4" in Article 2.4.2? In particular, what
exactly is the meaning of "the provisions governing fair comparison in paragraph 4" and of "subject to"?

151. If provision A is “subject to” provision B, it means that, in case of conflict, provision B prevails.

152. The “provisions governing fair comparison in paragraph 4” are the second to final sentences of Article 2.4. The first sentence of Article 2.4 does not “govern” fair comparison – it contains the basic rule requiring a fair comparison to be made.

43. **EC:** Could the EC elaborate on the statement in paragraph 161 of its First Submission that: "...the main purpose of Article 2.4.2 of the ADA 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 ADA"?

153. The first sentence of Article 2.4 requires that there be a fair comparison between normal value and export price. The first sentence of Article 2.4.2 explains how that fair comparison must normally be made. The second sentence of Article 2.4.2 explains the circumstances in which, exceptionally, the fair comparison may be effected asymmetrically, if the conditions provided for in Article 2.4.2 are fulfilled. In other words, the first sentence of 2.4.2 merely recalls the norm contained in Article 2.4 that fairness implies equal and symmetrical treatment in normal circumstances. The second sentence clarifies that in cases of targeted dumping symmetrical treatment may be departed from when certain conditions are met.

44. **US:** How does the US respond to the argument of Hong Kong China in paragraph 24 of its third Party Submission that the phrase "Subject to the provisions governing fair comparison in paragraph 4" supports the view that the fair comparison requirement is an overarching substantive obligation that is independent of substantive obligations in other parts of Article 2.4, including Article 2.4.2?

45. **EC:** Is there a relevant distinction between the concept of fair comparison as it appears in Article 2.4 and the terminology in 2.4.2 which talks about establishment of the existence of margins of dumping? Does the EC consider that what takes place under Article 2.4.2 is equivalent to what is described in the first sentence of Article 2.4 as a "fair comparison"?

154. There is a relevant distinction, because the first sentence of Article 2.4.2 does not exhaust the fair comparison requirement. An investigating authority cannot assume, merely because it has complied with the requirements of Article 2.4.2, that it has necessarily effected a fair comparison within the meaning of the first sentence of Article 2.4. For example, when an authority has made a weighted-average-to-weighted-average
comparison, as required by the first sentence of Article 2.4.2, if it has failed to make due allowance for a difference affecting price comparability – or if it has made an adjustment for a difference that does not affect price comparability – then it will have acted inconsistently with Article 2.4, third to fifth and first sentences. In this respect, the European Communities refers to its response to question 38. However, Article 2.4.2 cannot be entirely separated from “what is described in the first sentence of Article 2.4 as a "fair comparison”, since the establishment of the margin of dumping is the final step of the fair comparison process, which will determine whether dumping exists and in what amount.

46. **Both parties:** Does Article 2.4.2 prohibit zeroing when a Member establishes the existence of margins of dumping on the basis of (a) the second (transaction-to-transaction) methodology set forth in Article 2.4.2; and (b) the third methodology set forth in Article 2.4.2 (weighted average to individual)? If not, does this imply that the term "margins of dumping" as used in Article 2.4.2 has different meanings depending upon which of the three methodologies is used?

47. **Both parties:** Does Article 2.4 (fair comparison) prohibit zeroing when a Member establishes the existence of a margin of dumping on the basis of (a) the second (transaction-to-transaction) methodology set forth in Article 2.4.2; and (b) the third methodology set forth in Article 2.4.2 (weighted average to individual)? Please explain your response.

155. The European Communities answers questions 46 and 47 together, the replies being very similar or identical. In doing so, it refers to its response to questions 3, 27, 31 and 38.

156. (a) The European Communities would generally tend to consider that zeroing is unfair in such a scenario, since it would in effect consist of departing from the requirement to make a symmetrical comparison also in the transaction-to-transaction method – that is, the requirement to treat export price and domestic prices equally or symmetrically. However, this is irrelevant to the “as applied” and “as such” model and simple zeroing claims made in the first written submission of the European Communities.

157. (b) Not if the conditions for a targeted dumping analysis are fulfilled. This does not mean that the term “margins of dumping” has a different meaning in the targeted dumping scenario. It means only that the investigating authority is allowed to structure its investigations and to calculate the margin of dumping in a manner that takes due account of the targeted dumping practice, respecting the rules set out in Article 2, and provided that the required explanation is provided.
48. **Both parties:** Is the use of an asymmetrical comparison methodology, i.e. the comparison of a weighted average normal value to individual export transactions, always inconsistent with Article 2.4 (fair comparison)? Is this true even when the third methodology of Article 2.4.2 is used consistent with Article 2.4.2? If not, please explain.

158. A correctly executed targeted dumping analysis, where all the conditions provided for in Article 2.4.2 are fulfilled, is a fair comparison within the meaning of the first sentence of Article 2.4. The European Communities also refers in this respect to its responses to questions 47 and 48. In effect, the *Anti-Dumping Agreement* here identifies a different situation that justifies different treatment, consistent with the general principle of non-discrimination.

49. **EC:** In the first meeting of the parties with the Panel, the EC asserted that the use of a weighted average to weighted average methodology and the use of a weighted average to individual methodology, both without zeroing, would not necessarily produce the same result. Please elaborate.

159. By the use of the “weighted average to individual methodology”, the European Communities referred to the legitimate use of such method in cases of targeted dumping as defined in the second sentence of Article 2.4.2. The fact that the two methods may lead to different results is provided for in the text of this sentence itself when it says that the “differences [among purchasers, time period or regions] cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.” Evidently, this means that the two methods give different margins as a result of “zeroing” or some other method considered appropriate to address targeting. The European Communities notes however that the United States does not claim that in assessment proceedings it applies the third method of comparison in conformity with the second sentence of Article 2.4.2.

E. **MEASURES**

50. **EC:** Could the EC further explain the reference to the Statement of Administrative Action (SAA) in paragraph 15 of its First Submission? Is the EC challenging the SAA as a measure?

160. When surveying United States municipal anti-dumping law, from the point of view of the claims made in these proceedings, the European Communities cannot help but be reminded of the fairground game “find the lady”, where three playing cards are placed face down on a table, and one is invited to find the queen (or three up-turned cups are presented, and one is invited to locate the pea hidden beneath one of them). One is sure
that the queen (or pea) is on the table. But whenever one looks in one specific place, by some sleight of hand, one is told that it is not there …

161. The European Communities believes that, in order to properly understand the situation in United States municipal anti-dumping law, it is helpful or even necessary to have an overview of the whole structure, and all the various measures. The European Communities believes that it cannot be denied that different elements of the whole structure have, at various times, contributed to the current situation.

162. In order to assist the Panel, the European Communities has focussed, in the first place, on what it believes to be the root of the problem: the Standard AD Margin Program; and Section 351.414(c)(2) of the Regulations. However, in order to ensure that it has “covered all the bases”, the European Communities has also referred to various other measures and practice.

163. The European Communities does not challenge the SAA in isolation. However, it does not believe that the Panel can ignore it entirely. The SAA provides authoritative guidance for interpreting the URAA.\textsuperscript{110} And it is particular instructive to see how, after the negotiation and signing of the \textit{Anti-Dumping Agreement}, the drafters of the SAA felt it necessary to slip in the words “(not reviews)” in the section explaining how to implement Article 2.4.2.\textsuperscript{111} Clearly, whoever drafted the SAA fervently wished that the words “(not reviews)” were in Article 2.4.2 of the \textit{Anti-Dumping Agreement}. The drafter of the SAA also clearly thought that the reader of the SAA necessarily required these two clarifying words in order to understand the meaning that the drafter of the SAA was seeking to convey. That is all the more remarkable given that, in United States municipal anti-dumping law this is supposed to be generally understood – so if the words were necessary in the SAA, so they would be all the more necessary in Article 2.4.2 of the \textit{Anti-Dumping Agreement}. Furthermore, it is exceedingly odd and remarkable that these words were not generally considered necessary elsewhere in the SAA when references were made to “investigations”. It is also very interesting to compare this form of drafting with Article 18.3 of the \textit{Anti-Dumping Agreement}, which is invoked by the United States in these proceedings – although not to any avail. Article 2.4.2 does not contain the word

\textsuperscript{110} European Communities first written submission, footnote 2.
\textsuperscript{111} European Communities first written submission, para 171 and footnote 201, Exhibit EC-34, page 140.
“review” in juxtaposition to the word “investigation”; and neither Article 2.4.2 nor Article 18.3 contain the word “not”, that would be necessary to sustain the *a contrario* line of argument advanced by the United States. Why, one wonders, did the United States not simply put these words forward in the negotiations, rather than slipping them into the SAA? No doubt because the other Members would never have accepted them. In short, despite this *ex post* attempt to rationalise or re-write the negotiations, the simple fact is that the words “(not reviews)” do not appear in Article 2.4.2 (or any other provision) of the *Anti-Dumping Agreement*. As the French say: “qui s’excuse, s’accuse”.

51. **EC: First Submission of the EC, paragraphs 103, 125,129, 212, 214 and 226:** could the EC clarify precisely how "Standard Zeroing Procedures" relates to "the US methodology or practice of zeroing"? Is the EC challenging a "practice" or "methodology" as a measure distinct from the Standard zeroing procedures? If so, what is the view of the EC on the arguments in paragraphs 93-97 of the First Submission of the US?

164. The difference is between the more specific and the more abstract.

165. The practice consists of using the particular type of methodology (asymmetry, model zeroing or simple zeroing) repeatedly in a series of specific determinations, in one specific anti-dumping proceeding after another.

166. The Standard AD Margin Program contains the more abstract expression of precisely the same rule that is being repeatedly applied – *automatically* - in each of the more specific determinations. The Standard AD Margin Program contains the general or standard or normal rule, intended for prospective application. The standard or normal rule is contained in the Standard Zeroing Procedures, and particularly in the line “WHERE EMARGIN > 0”. The Standard AD Margin Program exists in electronic form, but also on paper.

167. In order to assist the Panel, the European Communities has focussed on what it believes to be the root of the problem – and it firmly believes that there is simply no mystery at all about what we are talking about, and how the Standard AD Margin Program works. However, in order to “cover all the bases”, the European Communities has also made a claim with respect to the consistent practice of the United States.

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112 Who excuses himself accuses himself. Or perhaps a better, less literal, translation : sometimes a defence is tantamount to a confession.
168. With regard to paras 93 to 97 of the United States first written submission, the European Communities considers that, whatever may or may not have been said in past cases, the particular factual circumstances of the present case, in which the practice has been lifted up into an abstract document that exists on paper, and applies automatically, are sufficient for the Panel to find in favour of the European Communities, if necessary, with regard to the practice. The European Communities also refers, in this respect, to its first written submission,\textsuperscript{113} and notes that the United States has admitted that the Manual is a measure;\textsuperscript{114} that the Manual states expressly that it “incorporates the current AD methodology” and that “the calculation methodology [is] built into these programs”\textsuperscript{115} and that the relevant line of computer code has never been changed by USDOC.\textsuperscript{116}

52. **EC:** In the absence of the existence of the AD margin computer program, what would be the "measure" the EC would challenge, if the US was zeroing in the same manner set out in the AD margin computer program?

169. “As such”, the European Communities would continue to challenge United States practice or methodology, as well as the other provisions of the Tariff Act and Regulations listed in its first written submission.\textsuperscript{117}

53. **EC:** To what extent is the EC challenging the Anti-Dumping Procedures Manual as a separate measure? Specifically, is the EC challenging any aspect of the Manual other than the reference made to the "Standard Zeroing Procedures"?

170. The European Communities is challenging, first and foremost, the Standard AD Margin Program. The European Communities believes that the dispute could be largely resolved if the Standard AD Margin Program, and eventually the Regulations, were changed. To the extent necessary, however, and in order to “cover all the bases” the European Communities is challenging each part of the Manual referenced in the factual part of its first written submission,\textsuperscript{118} considered both in isolation and together, including the instruction to use the Standard AD Margin Program.

\textsuperscript{113} European Communities first written submission, particularly paras 104 to 125.
\textsuperscript{114} United States first written submission, para 84, first sentence.
\textsuperscript{115} European Communities first written submission, para 16 and footnote 7.
\textsuperscript{116} Declaration of Valerie Owenby, para 10, Exhibit EC-44. The European Communities recalls that, asked this question by the Panel during the first meeting, the United States replied that it was not able to point to any determination where the relevant line of code had been changed and that it was “very doubtful” that the Standard AD Margin Program has ever been so tailored.
\textsuperscript{117} European Communities first written submission, particularly paras 130 to 145 and 215 to 223.
\textsuperscript{118} European Communities first written submission, paras 15 to 61 and footnotes 1 to 88.
54. **EC:** Could the EC explain further the argument in paragraphs 126 and 143 of its First Submission that the standard to apply to an "as such" claim is whether a measure is "in conformity" with the ADA? Specifically, what is the precise content of this standard; how exactly does it differ from the mandatory/discretionary test; and how has this "in conformity" standard been applied in WTO panel and Appellate Body Reports to date?

171. The European Communities does not believe that there is any general principle in WTO law that non-mandatory measures cannot be the subject of dispute settlement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body reviewed the alleged basis for this doctrine and reversed the reliance of the panel on it in that case, stating:

> Hence we see no reason for concluding that, in principle, non-mandatory measures cannot be challenged "as such".119

172. The Appellate Body then proceeded to examine whether the non-mandatory measure in question was of such nature that it could violate provisions of the *Anti-Dumping Agreement* and found that it could.

173. Thus, the scope of WTO obligations, and the possibilities for invoking them against measures maintained by the Members, must be determined on the basis of the ordinary meaning of the text of the relevant WTO provisions, read in light of their context, object and purpose. WTO obligations cannot be restricted or otherwise reduced by arguments that find no basis in the text. Rather, whether legislation is mandatory or discretionary is one question that must be considered along with a multitude of others – including, importantly, an inquiry into the nature and content of the relevant WTO provision, and whether it permits the kind of discretion that is allowed by the legislation at issue – in assessing the compatibility of a measure with a WTO obligation.

174. The panel in *US—Section 301*, specifically noted that legislation that is ostensibly discretionary may also be WTO-inconsistent, stating as follows:

> We believe that resolving the dispute as to which type of legislation, *in abstract*, is capable of violating WTO obligations is not germane to the resolution of the type of claims before us. In our view the appropriate method in cases such as this is to examine with care the nature of the WTO obligation at issue and to evaluate the Measure in question in the light of such examination. The question is then whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited. We do not accept the legal logic that there has to be one fast and hard rule covering all domestic legislation. After all, is it so implausible that the framers of the WTO Agreement, in their wisdom, would have crafted some obligations which would render illegal even discretionary legislation and crafted other obligations prohibiting only mandatory legislation? Whether or

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not Section 304 violates Article 23 depends, thus, first and foremost on the precise obligations contained in Article 23.\(^{120}\)

175. While the mandatory or discretionary nature of a measure may be relevant in assessing the compatibility with certain WTO obligations, the Appellate Body held in *US – Section 211* that an assessment of the compatibility of a measure cannot end with the conclusion that it is discretionary.\(^{121}\) It is necessary to continue the analysis to see whether the provisions have the prohibited effects.

176. One major reason why the mandatory/discretionary doctrine cannot be a mechanistic rule is that state measures are always, by definition, mandatory in some sense and very often leave some element of discretion. There are always some exceptions possible to any mandatory rule. Does that allow a measure to escape having to comply with the WTO rules?

177. WTO law does not impose the direct effect of the *Anti-Dumping Agreement* in municipal jurisdictions.

178. Members’ general rules implementing the *Anti-Dumping Agreement* are “measures” within the meaning of Article 3.3 DSU, and thus subject to “as such” review by a Panel.\(^{122}\)

179. A provision in such a general measure that is not identical to the equivalent provision of the *Anti-Dumping Agreement* generates a common legal problem. It is sometimes difficult to be certain that an abstract provision of municipal law will *always* produce the same result as, or a “stricter” result than, an abstract provision in the *Anti-Dumping Agreement*, when applied to all possible factual circumstances.

180. The degree of uncertainty, and thus the magnitude of any legal problem, depends on how the municipal law is drafted and interpreted. A municipal law may be interpreted by investigating authorities and by municipal courts. Municipal *courts* may be required to interpret municipal law, if possible, so as to render it consistent with international law, which may ultimately resolve some issues. However, at the same time, municipal courts

\(^{120}\) Panel Report, *US – Section 301*, para. 7.53.
\(^{121}\) Appellate Body Report, *US – Section 211*, para. 260.
may also be required to give deference to the interpretation preferred by an investigating authority.

181. A Member is responsible for differences between its municipal law and the Anti-Dumping Agreement, and for how municipal law is interpreted in its jurisdiction. It is therefore responsible for the magnitude of any resulting legal problem. Members are obliged to take all necessary steps, of a general or particular character, to ensure the conformity of such general measures with the provisions of the Anti-Dumping Agreement.123

182. In these circumstances, there are two extreme analytical approaches. The first is that any “implementation” of WTO law in a municipal jurisdiction, other than a verbatim repetition of its provisions and nothing more, is, “as such”, always capable of giving rise to inconsistencies. That would be tantamount to direct effect. The second (essentially the United States line in this Panel) is that as long as municipal law has not yet been interpreted by the highest municipal court in a manner that renders it inconsistent with WTO law, so that some scope for a WTO-consistent interpretation or some “discretion” remains theoretically open, an “as such” finding of inconsistency is impossible. In the meantime, how the municipal law is interpreted (or applied) by the investigating authority is irrelevant to the question of its “as such” consistency with the Anti-Dumping Agreement.

183. Neither approach provides an acceptable model for a Panel tasked to make an “as such” determination. The Panel must look for a more balanced approach, which takes into account the good faith of the WTO Members when concluding the WTO Agreements. The Appellate Body has referred to the concept of determining whether or not it is possible to apprehend the problem at its root124 (in abstract terms). If that is so, an “as such” determination of inconsistency should be possible. In this context, all the relevant factual evidence, including judicial and administrative determinations, must be weighed and assessed by the Panel.

184. To put the matter in slightly more concrete terms:

123 Article 18.4 of the Anti-Dumping Agreement.
If a Member’s Statute contains a provision stating, for example, that an investigating authority will impose a duty double the margin of dumping, that is “as such” inconsistent with the Anti-Dumping Agreement. If the provision is in a measure such as the Manual or the Standard AD Margin Program, it is still “as such” inconsistent.

If a Member’s Statute contains a provision stating that an investigating authority will do one of two things a) impose a duty not exceeding the margin of dumping or b) impose a duty double the margin of dumping, the second provision is “as such” inconsistent with the Anti-Dumping Agreement. That the investigating authority has a “discretion” not to use the offending provision is irrelevant. If the provision is in a measure such as the Manual or the Standard AD Margin Program, it is still “as such” inconsistent.

Fundamentally, the position is no different in circumstances where the option or “discretion” arises because the Statute (or other measure) is open to interpretation; and is in fact consistently interpreted and applied by the investigating authority as permitting the imposition of a duty double the dumping margin.

185. This is an uncontroversial, “black and white”, almost mathematical example. Other cases may be less clear. There is no perfect solution to the “as such” problem. In less clear cases, identifying whether or not the document containing the general rule or norm for prospective application is the root of the problem will require a careful consideration of the facts about municipal law.

186. The specific case before this Panel is not one in which it is required to trace or explore, in abstract terms, the precise dividing line between measures that are “as such” in conformity with the Anti-Dumping Agreement and those that are not. That is because the specific WTO obligation in question (Article 2.4.2 of the Anti-Dumping Agreement) – which should always be the appropriate point of departure - contains a mandatory rule about what the normal rule should be in municipal law; and municipal law in this case contains a standard or normal rule that is incontrovertibly different. The non-conformity is thus self-evident. This is therefore precisely the type of case in which the Appellate Body has cautioned against a mechanistic use of the mandatory/discretionary concept as an analytical tool, and precisely the type of case in which that concept, properly understood and applied, will not avert a finding of non-conformity.

55. US: First Submission of the US, paragraph 72: could the US provide evidence of the consistent application of the mandatory/discretionary test in WTO Panel and Appellate Body Reports? Please comment in this respect on the Panel and Appellate Body Reports cited in Third Party Submissions of Japan (paragraph 50) and China (paragraphs 11-14) as support for their view that the mandatory nature of a measure is not a decisive consideration.

125 Article 9.3 of the Anti-Dumping Agreement: “The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.”
56. **US**: How does the GATT and WTO case law reflect the two rationales of the mandatory/discretionary test described in paragraph 72 of the First Submission of the US?

57. **US**: Could the US comment on the reference made by the EC in paragraph 109 of its Submission to the statement of the Appellate Body that Article 18.4 covers "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings"?

58. **EC**: Is it the position of the EC that the "Standard Zeroing Procedures" and the Anti-Dumping Procedures Manual constitute "administrative procedures" within the meaning of Article 18.4 of the ADA?

187. They are “laws, regulations or administrative procedures” – although this is not essential in order for them to be measures subject to review by this Panel. The European Communities refers, in particular, to paras 111 to 120 of its first written submission.

59. **US**: Does the US agree with the interpretation of the words "procedures" and "administrative" in paragraph 113 of the First Submission of the EC and paragraph 13 of the Third Party Submission of Japan? Does the US agree with Japan that an "administrative procedure" within the meaning of Article 18.4 of the ADA is "a system or method that directs the administering authority's conduct or management of anti-dumping proceedings"?

60. **US**: First Submission of the US, paragraph 91. How does the US respond to the argument in paragraph 22 of Japan's Third Party Submission that if the AD Margin Program "implements rules or norms adopted by a decision-maker in some other instrument", the implication is that the program is covered by Article 18.4 of the ADA?

61. **US**: What is the US response to the argument of the EC in paragraph 123 of its First Submission that "a computer program and the procedures it contains are perhaps the paradigm example of normative rules that apply mechanistically and automatically to a given set of facts, without further human intervention"?

62. **EC**: Is the EC saying, by the statement made in paragraph 123 of its First Submission (referred to in question 61), that the "Standard Zeroing Procedures" computer program is mandatory and for this reason a "measure" or is the EC's fundamental concern with respect to the "methodology" manifested in the application of the computer program, rather than the program itself?

188. One of the measures at issue is the Standard AD Margin Program. The reasons why the Standard AD Margin Program is not in conformity with the *Anti-Dumping Agreement*, in terms of the methodologies incorporated in it, are listed in the response to question 3, and the European Communities seeks “as such” findings from this Panel with regard to each of those reasons. Precisely what would then have to be done to the Standard AD Margin Program in order to bring it into conformity with the *Anti-Dumping Agreement* is a matter for implementation, not for this Panel. The European Communities has attempted, however, to assist the Panel on this point in its response to the question from the United States.
189. The question of whether or not something is a measure does not depend on whether or not it is mandatory. The European Communities is, in this respect, following the reasoning of the Appellate Body in *US-Corrosion-Resistant Steel Sunset Review.*

190. The European Communities agrees that the statements in para 123 of its first written submission could also be relevant, should the Panel refer to the “mandatory” concept when reaching its findings.

63. **US:** Could the US please comment on the statement in paragraph 30 of Japan’s Third Party Submission that

"...in light of (1) the standard AD Margin Calculation Program, (2) the many specific margin calculation programs provided by the EC, (3) the manual, and (4) the testimony of ms. Owenby, model and simple zeroing are norms or rules that are applied by the US on a generalized and prospective basis. In terms of Article 18.4 of the ADA, the norm constitutes an 'administrative procedure.' (footnote omitted) The very purpose of the AD Margin calculation program is to establish standard 'programming procedures' that operate mechanistically to ensure that a particular – 'proper' – calculation methodology is applied universally and predictably. This is the very essence of an administrative norm, rule or procedure because it provides instructions that predetermine or systematize regulatory conduct in a given set of circumstances. These instructions are – and have always been – applied generally and prospectively."

64. **US:** What is the view of the US on the argument advanced by Japan and Norway that the fact that the US could alter AD manual and the AD margins programme is not relevant? (paragraph 51 of the Third Party Submission of Japan; paragraph 46 of the Third Party Submission of Norway).

65. **US:** First Submission of the US, paragraph 92. Please comment on the argument of Japan in paragraph 52 of its Third Party Submission that "there is considerable evidence before the Panel that the US treats the zeroing procedure as a binding, mandatory part of its administrative procedures".

66. **US:** First Submission of the US, paragraphs 77-78. Please indicate which specific provisions of the Tariff Act were at issue in these two judgements of the Court of Appeals.

67. **EC:** First Submission of the EC, paragraphs 130-145: What is the EC's response to the US argument that the provisions cited by the EC cannot be WTO-inconsistent as such because the US Court of Appeals for the Federal Circuit has twice held that the Tariff Act does not require zeroing?

191. The question is not whether they “require” zeroing – the question is simply whether or not they are in conformity with the relevant provisions of the *Anti-Dumping Agreement.* This is a case in which it is particularly clear that a “mechanistic” application of the mandatory/discretionary doctrine would be inappropriate, given that Article 2.4.2

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126 European Communities first written submission, particularly paras 104 to 125.
mandates a certain normal rule – and the Standard AD Margin Program and Regulations contain a normal rule that is clearly different.

68. **EC**: First Submission of the EC, paragraphs 146-147: What exactly are the measures referred to in these paragraphs and how are these measures WTO-inconsistent "as such"?

192. The measure(s) that the European Communities refers to is, in particular, the Standard AD Margin Program. It is inconsistent with Articles 2.4, 2.4.2 and 9.3 of the Anti-Dumping Agreement also because the zeroing methodology is operative under the Standard AD Margin Program whenever averaging groups are established on the basis of parameters other than model type, as provided in Section 351.414(d)(2) of the Regulations, and explained in para 23 of the European Communities first written submission.

69. **EC**: First Submission of the EC, paragraphs 183-199. Could the EC please explain the basis for its claim under Article 11, given that paragraph 183 states that the periodic reviews conducted by the US are covered by Article 9 of the ADA?

193. The position of the European Communities is that the conduct of retrospective assessments in the United States must be consistent both with the provisions of Articles 2.4, 2.4.2 and 9.3, and with the provisions of Article 11 of the Anti-Dumping Agreement. However, its claims under Article 11 are conditional, in the sense that they may be considered withdrawn if the claims of the European Communities under Articles 2.4, 2.4.2 and 9.3 are successful.

70. **EC**: First Submission of the EC, paragraphs 217 and 219: Please comment on the US claim that the statements in these paragraphs do not make a *prima facie* case that the provisions in question are WTO-inconsistent.

194. The European Communities does not agree. It has made a *prima facie* case by presenting the text of the measure, and explaining why it is inconsistent with the Anti-Dumping Agreement. For the avoidance of doubt, the word “if” in line 2 of para 217 of the European Communities first written submission is replaced by the words “given that”.

71. **EC**: First Submission of the EC, paragraph 224: What exactly are the measures that are the subject of the claims in this paragraph?

195. The measure(s) that the European Communities refers to is, in particular, the Standard AD Margin Program. It is inconsistent with Articles 2.4, 2.4.2 and 9.3 of the Anti-Dumping Agreement also because the zeroing methodology is operative under the
Standard AD Margin Program whenever zeroing occurs between importer specific assessment rates, as explained in paras 39 to 45 of the European Communities first written submission.

72. **EC:** In the first meeting of the parties with the Panel, the EC referred to the "Standard Zeroing Procedures" computer program as "the root of the problem". Is the EC aware of the source of the instructions implemented by the "Standard Zeroing Procedures" computer program? Does the Manual, the Tariff Act or the interpretation given to the Tariff Act by the US administration, or do the regulations, prescribe the result of the "Standard Zeroing Procedures" computer program?

196. In the view of the European Communities it is not necessary that the measure "prescribe" a particular course of action – the only question is whether or not it is in conformity with the Anti-Dumping Agreement, which it is not, because Article 2.4.2 mandates one normal rule, whilst the Standard AD Margin Program contains another normal or standard rule.

197. The European Communities would point out that the Manual, which the United States admits is a measure, is published on the internet under the express authority of USDOC. It expressly refers, for example, to the Under Secretary for International Trade. And the Manual states expressly that the computer programs incorporate current anti-dumping methodology, and that the calculation methodology is built into the computer programs. The Standard AD Margin Program is therefore maintained and published under the authority of USDOC, just like the Regulations.

73. **US:** Can the US point to any occasion when the AD margin computer program has been applied without the application of "zeroing"?

74. **EC:** How does the EC distinguish the present situation from that which confronted the panel in the US – India Steel Plate case, where it stated that "we do not consider that merely by repetition, a Member becomes obligated to follow its past practice"?

198. The European Communities respectfully refers the Panel to its response to question 51.

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128 European Communities first written submission, paras 16 and 104 to 125.