

*United States – Final Anti-Dumping Measures on Stainless Steel
from Mexico*

(DS344)

Third Party Submission by the European Communities

Geneva
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TABLE OF WTO CASES CITED

Short Title	Full Case Title and Citation
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R (4 October 1996), adopted 1 November 1996
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R (9 September 1997), adopted 25 September 1997
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001
<i>Guatemala –Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R (2 November 1988), adopted 25 November 1988
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R (15 December 2003), adopted 9 January 2004
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, 13 July 1998, adopted 23 July 1998
<i>EC – Hormones (Canada)</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/Appellate Body/R, WT/DS48/Appellate Body/R (16 January 1998, adopted 13 February 1998
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1988</i> , WT/DS176/Appellate Body/R (2 January 2002), adopted 2 January 2002
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R (22 December 1999), adopted 27 January 2000
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, (22 October 2001) adopted 21 November 2001

Short Title	Full Case Title and Citation
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R (11 August 2004), adopted 31 August 2004
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW (15 August 2006), adopted 1 September 2006
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R (29 November 2004), adopted 17 December 2004
<i>US – Zeroing (EC I)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/AB/R (18 April 2006), adopted 9 May 2006
<i>US – Zeroing (EC I)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/R (31 October 2005), adopted 9 May 2006 as modified by Appellate Body Report
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, (9 January 2007) adopted 23 January 2007
<i>US – Zeroing (Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R (20 September 2006) adopted 23 January 2007 as modified by Appellate Body Report

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I. INTRODUCTION

1. This dispute brought by Mexico against the United States is the latest in a long series of complaints regarding "zeroing" practices and methodology in anti-dumping cases. There are, once again, important substantive issues raised by Mexico's first written submission, in relation to Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI thereof (hereinafter. "the Anti-Dumping Agreement").
2. Due to other scheduling commitments and the short period of time between the deadline set for the United States' first written submission and the deadline for the Third Parties' written submissions, the European Communities will not be in a position to comment on the United States' first written submission by the deadline of 11 April 2007 set by the Panel, but will do so at the oral hearing.
3. Further, the European Communities notes Mexico's assertion that none of the issues which are raised in this panel proceeding are new and that its claims are supported by a consistent body of WTO panel and Appellate Body reports. Assuming that Mexico is correct in these assertions, an important systemic question that the European Communities submits, may need to be addressed is the extent to which this Panel needs to follow previous decisions rendered on identical questions, in particular those contained in adopted Appellate Body reports. The European Communities notes that some panels have in the past chosen to disregard the Appellate Body case law on the issue of zeroing.
4. The European Communities will summarise Mexico's claims below under heading II. Next, the European Communities will summarise previous findings of the Appellate Body under heading III, recalling in particular the instances in which the Appellate Body has referred to findings it has made in earlier cases. It trusts that this summary will demonstrate that Mexico's claims (summarised under heading II) relate to issues that have already been decided by the Appellate Body, and that this summary will thus be of assistance to the Panel and the third parties when assessing the role of precedent in this case. The systemic question of whether this

Panel needs to pay heed to these Appellate Body findings and if so, whether there is any scope for this Panel to disagree with these findings will be addressed under heading IV, by reference both to provisions of the DSU, as well as to practice in other dispute settlement systems. The European Communities will conclude this written submission under heading V.

5. In the light of the analysis of the Appellate Body's reasoning and findings (as they relate to Mexico's claims summarised under heading II), and of the role that – contrary to conventional wisdom - precedent has in WTO dispute settlement proceedings, the European Communities at this stage finds it difficult to imagine that the United States will be able to present arguments that refute Mexico's claims. Nevertheless, the European Communities reserves its right to comment further in its oral statement, taking into account the first written submission by the United States.

II. SUMMARY OF MEXICO'S CASE

6. The European Communities refers to the submissions made by Mexico under headings I (Introduction), II (Summary of Claims) and heading III (Facts and Summary of Evidentiary Support) of its first written submission.
7. Mexico's claims in this dispute all refer to "Zeroing Procedures" used by the United States, which allow the latter to artificially inflate the margin of dumping in all procedural contexts.¹ Mexico submits firstly, that these procedures can be challenged as an 'As Such' violation of the GATT 1994 and the Anti-Dumping Agreement.² Secondly, Mexico refers to concepts of "Dumping" and "Margins of Dumping" and invokes certain core legal principles contained in the text of the relevant agreements that it believes are of critical importance to this proceeding.³ Thirdly, Mexico explains that it challenges the United States' zeroing procedures not only "As Such" but also "As Applied" in original investigations as inconsistent

¹ Mexico's first written submission, 28 February 2007, para. 2.

² *Ibid.*, para. 12.

³ *Ibid.*, paras. 13-14.

with the GATT 1994 and the Anti-Dumping Agreement.⁴ Fourthly, Mexico also challenges the United States zeroing procedures “As Such” and “As Applied” in Periodic Reviews.⁵

8. In the introduction to its first written submission Mexico refers to a ‘long line’ of consistent Appellate Body jurisprudence cases, submitting that the Appellate Body has broadly, and comprehensively, ruled the US’ zeroing procedures to be inconsistent with the WTO agreements “as such” in “original investigations” under Article 5 of the Anti-Dumping Agreement, “periodic reviews” under Article 9, “sunset reviews,” and “changed circumstances” reviews under Article 11.⁶ Further, according to Mexico, the Appellate Body has conclusively found the zeroing procedures, in all procedural contexts to be inconsistent with the US’ international obligations under the GATT 1994 and the Anti-Dumping Agreement.⁷

III. OVERVIEW OF RELEVANT APPELLATE BODY FINDINGS IN PREVIOUS ZEROING CASES

A. Introduction

9. The European Communities agrees with Mexico that zeroing has been contested several times in WTO dispute settlement proceedings, and addressed in a series of adopted panel and Appellate Body reports.
10. On March 1, 2001 the Appellate Body ruled on certain applications of such methodology by the European Communities, finding them inconsistent with GATT 1994 and the Anti-Dumping Agreement.⁸ On August 11, 2004 the Appellate Body confirmed the inconsistency with WTO law of certain zeroing practices of the U.S in a complaint brought by Canada relating to anti-dumping

⁴ *Ibid.*, paras. 15-20.

⁵ *Ibid.*, paras 21-26.

⁶ *Ibid.*, para. 3.

⁷ *Ibid.*, para. 4.

⁸ Appellate Body Report, *EC – Bed Linen*, adopted 12 March 2001.

duties levied on Softwood Lumber.⁹ On April 18, 2006, the Appellate Body released its decision on the “zeroing” antidumping case which the European Communities brought against the United States. It confirmed, again, the inconsistency with WTO law of certain zeroing practices of the United States.¹⁰ On August 15, 2006 the Appellate Body issued its report on the appeal in the compliance proceeding brought by Canada in relation to the Softwood Lumber V case.¹¹ On 9 January 2007 the Appellate Body released its most recent “zeroing” decision regarding, in a proceeding brought by Japan against the United States.¹²

11. The European Communities proposes to review the salient reasoning and findings of the Appellate Body in each of these reports.

B. European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (DS141)

1. Introduction

12. This dispute concerned anti-dumping duties imposed by the European Communities on imports of cotton-type bed linen from India. India argued before the Panel that the imposition of anti-dumping duties as a result of the original investigation by the European Communities was inconsistent with several provisions of the Anti-Dumping Agreement.
13. In determining the dumping margin in its original investigation, the European Communities had used a particular **methodology**. First, it had divided the product under investigation into specific “**models**” or “**types**”. Then, for each model, the weighted average normal value was compared with the weighted average export price. Where the normal value was *higher* than the export price, a *positive* dumping margin was found. For these models, the European Communities used that figure in its later calculation of a dumping margin for the product as a whole.

⁹ Appellate Body Report, *U.S. – Softwood Lumber V*, adopted 31 August 2004.

¹⁰ Appellate Body Report, *U.S. – Zeroing (EC1)*, adopted 9 May 2006.

¹¹ Appellate Body Report, *U.S. – Softwood Lumber V (Article 21.5 – Canada)*, adopted 15 August 2006.

¹² Appellate Body Report, *U.S. – Zeroing (Japan)*, adopted 9 January 2007.

On the other hand, where the normal value was *lower* than the export price for a particular model, a *negative* margin was found. For these models, when calculating the dumping margin for the product as a whole, the European Communities **restated the negative number as zero**. In its calculation of the final dumping margin for the product as a whole, the European Communities added up all of the positive margins and the zeroes, and divided this figure by the total quantity to arrive at a weighted average dumping margin for the product as a whole.

14. The Panel found that the European Communities acted inconsistently with Articles 2.4.2, 3.4 and 15 of the Anti-Dumping Agreement. The European Communities appealed this finding.¹³

2. Relevant Appellate Body Findings

15. The Appellate Body upheld the Panel's finding¹⁴ for three reasons. Firstly, it held that Article 2.1 read in the light of Article 2.4.2 of the Anti-Dumping Agreement makes clear that the margins of dumping to which Article 2.4.2 refers are the margins of dumping for the **product as a whole**.¹⁵ Secondly, it held that in determining a dumping margin for a *product*, Article 2.4.2 refers to a comparison of "**all**" **comparable transactions**. By "zeroing" the models with negative dumping margins, the Appellate Body considered that the European Communities effectively failed to fully take into account the prices of *some* transactions when calculating the overall dumping margin for the product as a whole. Instead, the European Communities discounted these prices, thereby inflating the dumping margin. As a result, the Appellate Body found that the European Communities did not establish the existence of margins of dumping for the product under investigation, cotton-type bed linen, on the basis of comparison of "*all*" transactions, as required by Article 2.4.2. Thirdly, a comparison between export prices and normal value that does not take into account all transactions does not

¹³ Appellate Body Report *EC – Bed Linen*, paras. 47-48.

¹⁴ *Ibid.*, para. 66.

¹⁵ *Ibid.*, paras. 50-53.

constitute a "**fair comparison**" between export price and normal value, as required by Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.¹⁶

16. In the present case, Mexico's first written submission includes the same arguments in support the same claims that the use of "model zeroing" in original investigations is inconsistent with Articles 2.1, 2.4.2 and 2.4 of the Anti-Dumping Agreement.¹⁷

C. *United States- Final Dumping Determination on Softwood Lumber from Canada (DS264)*

1. Introduction

17. Before the Panel Canada challenged an anti-dumping duty order issued by the United States in respect of Canadian softwood lumber. The Panel found a violation of Article 2.4.2 of the Anti-Dumping Agreement based on the U.S. Department of Commerce's ("DOC") use of "zeroing" in its calculation of the dumping margins. The United States appealed this finding.

2. Relevant Appellate Body findings

18. The Panel had concluded that by not taking into account *all* comparable export transactions, in its zeroing practice in the original anti-dumping investigation at issue, the United States violated Article 2.4.2 of the Anti-Dumping Agreement.¹⁸
19. On appeal, the Appellate Body addressed the question of "**margins of dumping**" in Article 2.4.2 of the Anti-Dumping Agreement. The Appellate Body referred to the text of Article VI:1 and Article 2.1, as well as Articles 9.2 and Article 6.10, to confirm its view that that dumping can be found to exist only "for the **product**

¹⁶ *Ibid.*, para. 55.

¹⁷ See the summary of Mexico's claims and arguments under heading II of this submission.

¹⁸ Appellate Body Report, *U.S. – Softwood Lumber V*, paras. 67-74.

under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product."¹⁹

20. Next, the Appellate Body examined the term "**margin of dumping**" in **GATT Article VI:2, second sentence**. Referring to its findings in *EC – Bed Linen*, it concluded that "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 this regard, it said that the results of multiple comparisons at the sub-group level through "multiple averaging" are not "margins of dumping" within the meaning of Article 2.4.2. Rather, that 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, the Appellate Body concluded that 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.²⁰
21. The Appellate Body emphasized that in its view, '**dumping**' and '**margins of dumping**' can only be established for **the product under investigation as a whole**, in consonance with the need for **consistent treatment of a product** in an anti-dumping investigation.²¹
22. The Appellate Body then turned to the implications of zeroing as applied in this case. According to the Appellate Body, 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 they actually are. Therefore, zeroing 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. The Appellate Body concluded that **zeroing therefore inflates the margin of dumping for the product as a whole.**²²

¹⁹ *Ibid.*, paras. 92-94.

²⁰ *Ibid.*, paras. 95-98.

²¹ *Ibid.*, para. 99.

²² *Ibid.*, para. 101.

23. The Appellate Body considered four additional arguments made by the United States in this regard. First, it referred to the other dumping margin methodologies provided for in Article 2.4.2, e.g., the transaction-to-transaction comparison, which according to the United States provides "important context" for the permissibility of "zeroing" under the average-to-average methodology at issue in the dispute. The Appellate Body rejected this contention, stating that the issue in this case was confined to the **average-to-average** methodology.²³
24. Second, the Appellate Body referred to a U.S. argument based on the historical background of Article 2.4.2. In this regard, the Appellate Body stated that "[t]he material to which the United States refers does not, in our view, resolve the issue of whether the negotiators of the Anti-Dumping Agreement intended to prohibit zeroing" noting that the United States acknowledged that the materials do not constitute "travaux préparatoire." In any event, the Appellate Body stressed that it had concluded, based on the ordinary meaning of Article 2.4.2 read in its context, that zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology.²⁴
25. Third, the Appellate Body considered the "relevance" to this appeal of its report in *EC – Bed Linen*, which dealt with the application of "zeroing" in a specific original anti-dumping investigation by the European Communities. The Appellate Body stated that it had "taken into account the reasoning and findings" in *Bed Linen*, as appropriate.²⁵ The European Communities will discuss this issue further below under IV D (4).
26. Fourth, the Appellate Body rejected the U.S. argument that, in finding that "zeroing" is prohibited under Article 2.4.2, the Panel failed to apply the **standard of review set out in Article 17.6(ii) of the Anti-Dumping Agreement**.²⁶
27. On the basis of the above reasoning, the Appellate Body upheld the Panel's finding that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping

²³ *Ibid.*, paras 104-105.

²⁴ *Ibid.*, paras. 107-108.

²⁵ *Ibid.*, paras. 109-112.

²⁶ *Ibid.*, paras. 113-116.

Agreement in determining the existence of **margins of dumping on the basis of a methodology incorporating the practice of "zeroing."**²⁷

28. In the present case, Mexico's first written submission includes the same arguments in support the same claims that the use of "model zeroing" in original investigations is inconsistent with Article VI of the GATT 1994 and Articles 2.1 and 2.4.2 of the Anti-Dumping Agreement.²⁸

D. United States –Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (DS 294)

1. Introduction

29. This panel concerned the application by the United States of the "zeroing" methodology in anti-dumping proceedings, including original investigations, and assessment or review proceedings.
30. The Panel described the different types of zeroing as follows. First, when calculating the magnitude of dumping margins in order to determine whether the imposition of anti-dumping measures is justified as part of an original investigation, the United States uses a methodology that the European Communities referred to as "**model zeroing.**" With this method, the investigating authority will, in applying the **weighted-average-to-weighted-average comparison method**, identify the sales of sub-products that are considered "comparable" and include such sales in an "averaging group." The weighted-average-to-weighted-average comparison between normal value and export price is then made within each averaging group. The amount by which normal value exceeds export price is considered to be a "dumping margin" or dumped amount. If export price exceeds normal value for a particular averaging group (i.e., the margin is negative), the "dumping margin" for that group is considered to be zero, rather than the negative number. The dumping margin for the product as a whole is

²⁷ Appellate Body Report, *U.S. – Softwood Lumber V*, para.117.

²⁸ See the summary of Mexico's claims and arguments under heading II of this submission.

- calculated by combining the averaging group results. The total of the dumped amounts is expressed as a percentage of the total export prices.
31. Second, when calculating the magnitude of dumping margins for the purpose of assessing an importer's final liability for paying anti-dumping duties and any future cash-deposit rate (i.e., in a U.S. "administrative review"), the United States normally uses the **average-to-transaction method**, and, in doing so, applies what the European Communities referred to as "**simple zeroing**." Through this method, when comparing a weighted-average normal value with an individual export transaction, the amount by which normal value exceeds export price is considered to be the "dumping margin" or dumped amount for that export transaction. If export price exceeds normal value (i.e., the margin is negative), the "dumping margin" for that export transaction is considered to be zero, rather than the negative number. The overall margin of dumping is calculated by combining the results of each comparison. The total dumping amount is expressed as a percentage of the total export price.
32. Before the Panel, the European Communities challenged U.S. legal instruments, procedures, methodologies and practice related to these types of "zeroing," on both an "as such" and "as applied" basis.²⁹

2. Relevant Appellate Body Findings

(a) "Simple Zeroing" "As Applied" in Administrative Reviews

33. **In its decision, the Appellate Body upheld the Panel's finding that the United States zeroing methodology employed in original antidumping investigations was inconsistent Article 2.4.2 of the Anti-Dumping Agreement.** In addition, the Appellate Body, reversing the Panel's original finding, held that certain applications of the same methodology in the **administrative review process** were inconsistent with Article 9.3 of the Antidumping Agreement.

²⁹ Panel Report, *United States – Zeroing (EC1)*, paras. 2.1-12; Appellate Body Report, *United States – Zeroing (EC1)*, paras. 2, 109-110.

34. The Panel had found that "simple zeroing" was permitted in administrative reviews.³⁰ The European Communities appealed this finding.
35. In considering the appeal on this issue, the Appellate Body first examined the meaning of the term "**margin of dumping**" in Article 9.3 and Article VI:2. In this regard, it drew attention to the wording of Article 9.3 and Article 2.1.³¹ The Appellate Body then referred explicitly to its prior rulings on this issues in *EC - Bed Linen and U.S. – Softwood Lumber V*. The Appellate Body noted that although **the latter case** related to "the determination of a margin of dumping in an original investigation when using the weighted-average-to-weighted-average methodology provided for in the first sentence of Article 2.4.2," the **Appellate Body had stated unambiguously** in that case that "**the terms 'dumping' and 'margins of dumping' in Article VI and the Anti-Dumping Agreement**" apply to the **product under investigation as a whole**," and that this finding "was based not only on Article 2.4.2, first sentence, but also on the context found in Article 2.1 of the Anti-Dumping Agreement."³²
36. Applying this reasoning to Article 9.3, the Appellate Body stated that pursuant to Article 9.3 and Article VI:2, investigating authorities are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter. In other words, according to the Appellate Body **the margin of dumping established for an exporter or foreign producer operates as "a ceiling"** for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding.³³
37. Applying the above analysis to the zeroing methodology challenged in this dispute the Appellate Body found **that the zeroing methodology, as applied by the**

³⁰ *Ibid.*, para. 114.

³¹ *Ibid.*, para. 124.

³² *Ibid.*, para. 126.

³³ *Ibid.*, paras. 126-130.

- United States DOC in the administrative reviews at issue, is inconsistent** with Article 9.3 of the Anti-Dumping Agreement and GATT Article VI:2.³⁴
38. Finally, the Appellate Body addressed again the issues of the standard of review set out in Anti-Dumping Agreement Article 17.6(ii). It said that Article 9.3 and Article VI:2 **when interpreted in accordance with customary rules of interpretation of public international law, as required by Article 17.6(ii), do not, in its view, allow the use of the methodology applied by the United States in the administrative reviews at issue.**³⁵
39. In the present case, Mexico's first written submission includes the same arguments in support the same claims that the use of "simple zeroing" in duty assessment proceedings is inconsistent with Article VI of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement.³⁶

(b) Zeroing Methodology : Whether A Measure "As Such"

40. The Panel had concluded that the zeroing methodology manifested in the 'Standard Zeroing Procedures' represents a "well established and well-defined norm" followed by the United States DOC, and that it was possible, based on this evidence, to identify with precision the specific content of that norm and the future conduct that it will entail. It concluded that the United States' zeroing methodology, as it relates to original investigations, was a "norm" that is inconsistent, as such, with Article 2.4.2.³⁷ This finding was appealed by the United States.
41. The Appellate Body began its analysis by examining the concept of '**measure.**' It noted that DSU Article 3.3 provides that the dispute settlement system exists to deal with "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member." The Appellate Body recalled its previous

³⁴ *Ibid.*, paras. 132-133.

³⁵ *Ibid.*, para. 134.

³⁶ See the summary of Mexico's claims and arguments under heading II of this submission.

³⁷ *Ibid.*, para. 180.

statement in paragraph 81 of *U.S. - Corrosion-Resistant Steel Sunset Review*³⁸ that "[t]his phrase identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member.'"³⁹ In addition, the Appellate Body noted that in previous cases it had already addressed, in the context of the Anti-Dumping Agreement, the scope of "measures" that may, as such, be the subject of WTO dispute settlement. It confirmed that, in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings; and that this covers not only acts applying a law in a specific situation, but also "acts setting forth rules or norms that are intended to have general and prospective application." The Appellate Body specified that instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance.⁴⁰

42. Turning next to the question of the zeroing methodology, the Appellate Body began its analysis with Article 17.3 of the Anti-Dumping Agreement, which, it noted contains **no threshold requirement** that the measure in question be of a certain type. As for Article 18.4, the Appellate Body held that the phrase "laws, regulations and administrative procedures" encompasses the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. The Appellate Body emphasised that the determination of the scope of "laws, regulations and administrative procedures" must be based on the "content and substance" of the alleged measure, and not merely on its form. Accordingly, it observed, that the mere fact that a 'rule or norm' is not expressed in the form of a written instrument, is not, determinative of the issue of whether it can be challenged, as such, in dispute settlement proceedings.⁴¹
43. The Appellate Body then **set out the following standard** for these kinds of challenges. When bringing a challenge against such a "rule or norm" that

³⁸ Appellate Body Report, *U.S. - Corrosion-Resistant Steel Sunset Review*, para. 81.

³⁹ Appellate Body Report, *United States – Zeroing (EC1)*, para 188.

⁴⁰ *Ibid.*, paras. 185-188.

⁴¹ *Ibid.*, paras. 191-193.

constitutes a measure of general and prospective application, a complaining party must:

"clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such.

"This evidence may include proof of the systematic application of the challenged "rule or norm". Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is not expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such." ⁴²

44. Applying this reasoning to the case before it, the Appellate Body reviewed the evidence before the Panel.⁴³ It concluded that this evidence was sufficient for the Panel to identify the precise content of the zeroing methodology, that the zeroing methodology is attributable to the United States, and that it does have general and prospective application. It added that this evidence consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract.
45. On this basis,⁴⁴ the Appellate Body concluded that **"the zeroing methodology, as it relates to original investigations, in which the weighted-average-to-weighted-average comparison method is used to calculate margins of dumping, can be challenged, as such, in WTO dispute settlement"**.⁴⁵

⁴² *Ibid.*, paras. 187-198.

⁴³ *Ibid.*, paras. 201-202.

⁴⁴ *Ibid.*, paras 190-205.

⁴⁵ *Ibid.*, para. 205.

46. In the present case, Mexico's first written submission includes the same arguments in support the same claims that the zeroing methodology is "as such" inconsistent with the Anti-Dumping Agreement.⁴⁶

E. United States- Final Dumping Determination on Softwood Lumber from Canada –Recourse to Article 21. 5 of the DSU by Canada (DS 264)

1. Introduction

47. The use of "zeroing" at issue in the original *U.S. – Softwood Lumber V* proceeding had involved a comparison of "a weighted average normal value with a weighted average of prices of all comparable export transactions" (**weighted average-to-weighted average** or "**W-W**" comparison). This was found to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. As a result of this finding, the United States was required to bring the Determination into conformity with the *Anti-Dumping Agreement*. To implement the DSB's recommendations and rulings, the DOC issued a revised anti-dumping duty determination pursuant to Section 129 of the US' Uruguay Round Agreements Act (the "Section 129 Determination"). In this determination, the DOC calculated new rates for the exporters subject to the anti-dumping duty order. Instead of the W-W comparison, the DOC based the duty rates on a comparison of normal value and export prices on a transaction-to-transaction basis (**transaction-to-transaction** or "**T-T**" comparison). In this process the DOC again adopted the zeroing methodology.⁴⁷
48. Canada brought a complaint under DSU Article 21.5 against the new methodology used in the Section 129 Determination. The compliance Panel found however, that the methodology used in the Section 129 Determination was not inconsistent with Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement*. Canada appealed.

⁴⁶ See the summary of Mexico's claims and arguments under heading II of this submission.

⁴⁷ Appellate Body Report, *U.S. – Softwood Lumber V (Article 21.5 –Canada)*, paras. 2-7.

2. Relevant Appellate Body Findings

49. The issue before the Appellate Body was whether it is consistent with Article 2.4.2 of the Anti-Dumping Agreement for an investigating authority to disregard the results of those transaction specific comparisons in which export prices exceeded normal value, when aggregating the results of those comparisons for purposes of establishing the margins of dumping for each respondent foreign producer or exporter, under the transaction-to-transaction comparison methodology.⁴⁸
50. In its decision, the Appellate Body disagreed with the Panel's finding that the DOC determination in the Section 129 proceeding is not inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement.

(a) Article 2.4.2

51. The Appellate Body first analysed Article 2.4.2, first sentence. It concluded that "zeroing in the transaction-to transaction methodology does not conform to the requirement of Article 2.4.2, in that it results in the real values of certain export transactions being altered or disregarded."⁴⁹ It noted explicitly that this interpretation was **consistent with its previous rulings on "zeroing"** related to the **weighted average-to-weighted average comparison methodology** under this provision.⁵⁰ In sum, the Appellate Body concluded that the results of the transaction-specific comparisons cannot be considered "margins of dumping" within the meaning of Article 2.4.2, and that the "margins of dumping" established under the transaction-to-transaction comparison methodology provided in Article 2.4.2 result from the aggregation of the transaction-specific comparisons.⁵¹
52. The Appellate Body then considered Article 2.4.2, second sentence. According to the Appellate Body, the Panel's reasoning on this provision assumed that a finding that zeroing is prohibited under the transaction-to-transaction comparison methodology would imply a prohibition of zeroing under the weighted average-to-

⁴⁸ *Ibid*, para. 84.

⁴⁹ *Ibid*, para. 87-88.

⁵⁰ *Ibid*, para. 89.

transaction methodology, and that this would undermine the effective interpretation of the entire provision.⁵² The Appellate Body took exception to the Panel's analysis of the "mathematical equivalence" argument, for a number of reasons, considering *inter alia*, the concerns of the Panel and the United States over the weighted average-to-transaction methodology to be overstated.⁵³

(b) Context

53. The Appellate Body then considered a number of provisions that had been raised as relevant in the context. First, it rejected the view that a reference in Article 2.2 of the Anti-Dumping Agreement to "**margins of dumping**" would, under Canada's argument, mean that constructed normal value would have to be used for the product as a whole whenever this methodology was employed.⁵⁴ Second, the Appellate Body stated that its interpretation of "margins of dumping" fits well into the context of other provisions of the Anti-Dumping Agreement, including Articles 5.8, 6.10 and 9.3.⁵⁵ Third, the Appellate Body found that the operation of **prospective normal-value systems has no bearing** on the permissibility of zeroing under the transaction-to-transaction comparison methodology in Article 2.4.2.⁵⁶ The Appellate Body rejected also two arguments in relation to GATT Article VI,⁵⁷ and GATT Article II.⁵⁸

(c) Historical Background

54. Before the Appellate Body the United States once again pointed to various GATT historical materials, some of which were relied on by the Panel. The Appellate

⁵¹ *Ibid*, paras. 89 -94.

⁵² *Ibid*, paras. 96.

⁵³ *Ibid*, paras. 97-100.

⁵⁴ *Ibid*, paras. 102-104.

⁵⁵ *Ibid*, paras. 105-109.

⁵⁶ *Ibid*, paras. 110-112.

⁵⁷ *Ibid*, paras. 113-114.

⁵⁸ *Ibid*, paras. 115.

Body again rejected the relevance of these materials, noting that they are of limited relevance and do not provide any additional guidance on the issue.⁵⁹

(d) Standard of review

55. The Appellate Body concluded that Article 2.4.2 does not admit an interpretation that would allow the use of zeroing under the transaction-to-transaction comparison methodology.⁶⁰ It confirmed again its earlier decision that the contrary view is not a permissible interpretation of Article 2.4.2 within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement."⁶¹

(e) Fair Comparison - in "T-T" comparisons

56. Canada argued on appeal that the Panel **improperly** interpreted Article 2.4 as permitting **"zeroing" under the transaction-to-transaction comparison methodology**. In particular, Canada asserted that this methodology inflates margins of dumping and creates an inherent bias, in violation of the 'fair comparison' requirement.⁶²
57. The Appellate Body held that the application of the comparison methodologies set out in Article 2.4.2, **including the transaction-to-transaction methodology applied in the investigation underlying this dispute, is expressly made subject to the 'fair comparison' requirement set out in Article 2.4**. It also recalled **Appellate Body findings in earlier cases** that Article 2.4 sets forth a "general obligation" to make a "fair comparison," which applies generally to all of Article 2, but in particular to Article 2.4.2, and also that the "fair comparison" language "creates an independent obligation."⁶³ The Appellate Body rejected the Panel's conclusions on this issue, holding that the introductory clause to Article 2.4.2

⁵⁹ *Ibid.*, paras. 119-121.

⁶⁰ *Ibid.*, para. 122.

⁶¹ *Ibid.*, para. 123.

⁶² *Ibid.*, paras. 126-7.

⁶³ *Ibid.*, paras. 132-133.

expressly makes that provision subject to the provisions governing 'fair comparison' in Article 2.4.⁶⁴

58. Next, the Appellate Body turned to the question of whether the use of zeroing in the 'Section 129 Determination', in addition to being contrary to Article 2.4.2, is inconsistent with the '**fair comparison**' requirement in Article 2.4. In this regard, the Appellate Body explained that the term 'fair' is generally understood to 'connote impartiality, even-handedness, or lack of bias.' The Appellate Body gave several grounds for its conclusion that **the use of zeroing under the transaction-to-transaction comparison methodology** is "difficult to reconcile" with these principles.⁶⁵
59. In the present case, Mexico's first written submission includes the same arguments in support the same claims that the use of zeroing in original investigations is inconsistent with the Anti-Dumping Agreement.⁶⁶

F. United States – Measures Relating to Zeroing and Sunset Reviews (DS322)

1. Introduction

(a) Japan's claims

60. The dispute concerned again the calculation of dumping margins by the U.S. DOC based on a methodology that disregards the amounts by which export prices for certain transactions are above the normal value in the process of establishing an overall margin of dumping, *i.e.*, it treats these amounts as zero. Japan referred to this aspect of the DOC methodology as the "zeroing procedures" and as the "standard zeroing line" of the computer code in the DOC's dumping margin calculation program.

⁶⁴ *Ibid.*, paras. 134-136.

⁶⁵ *Ibid.*, paras. 142-145.

⁶⁶ See the summary of Mexico's claims and arguments under heading II of this submission.

61. Japan identified two types of zeroing: "model zeroing" and "simple zeroing." By "**model zeroing**," Japan meant the method through which the DOC "makes **average-to-average** comparisons of export price and normal value within individual 'averaging groups' established on the basis of physical characteristics ('models') and disregards any amounts by which average export prices for particular models exceed normal value in aggregating the results of these multiple comparisons to calculate a weighted average margin of dumping." By "**simple zeroing**," Japan meant the method through which the DOC "determines a weighted average margin of dumping based on **average-to-transaction** or **transaction-to-transaction** comparisons between export price and normal value and disregards any amounts by which export prices of individual transactions exceed normal value in aggregating the results of these multiple comparisons."
62. Japan asserted that the DOC routinely uses model zeroing in **original investigations**, although it also noted that the DOC had also applied simple zeroing when it calculated a dumping margin in an original investigation using the transaction-to-transaction method. Japan claimed also that for **periodic reviews** and **new shipper reviews**, the DOC routinely uses **average-to-transaction** comparisons, including **simple zeroing**. Japan further submitted that in **changed circumstances reviews and sunset reviews**, the United States DOC generally does not calculate a new margin of dumping but relies on margins of dumping calculated in original investigations on the basis of model zeroing or on margins of dumping calculated in periodic reviews on the basis of simple zeroing.⁶⁷
63. **Japan argued before the panel that these zeroing procedures could be challenged "as such" as a "measure,"** pursuant to the Anti-Dumping Agreement and the DSU. Japan also challenged the application of these procedures in a number of anti-dumping proceedings with respect to products from Japan, specifically, in one original investigation, various periodic reviews, and two sunset reviews. Before the Panel, Japan alleged that these measures result in violations of various provisions of the Anti-Dumping Agreement.

⁶⁷ Appellate Body Report, *U.S. – Zeroing (Japan)*, paras. 7-16.

(b) Panel decision

64. The Panel concluded that the "zeroing procedures" are a measure that can be challenged "as such" and found that, in maintaining model zeroing procedures in the context of original investigations, the United States DOC acts inconsistently with Article 2.4.2 of the Anti-Dumping Agreement.
65. However, the Panel then took the view that in maintaining **simple zeroing procedures in the context of original investigations**, the United States DOC does not act inconsistently with Anti-Dumping Agreement. Similarly, the Panel found that in **maintaining simple zeroing procedures in the context of periodic reviews and new shipper reviews**, the DOC does not act inconsistently with the Anti-Dumping Agreement. It also found that the DOC did not act inconsistently with the Anti-Dumping Agreement by applying simple zeroing in 11 **periodic reviews**. Finally, the Panel found that **Japan failed to prove that by maintaining zeroing procedures in the context of changed circumstances and sunset reviews the DOC acts inconsistently** with Articles 2 and 11 of the Anti-Dumping Agreement. In addition, the Panel concluded that the International Trade Commission and the DOC did not act inconsistently with Articles 2 and 11 of the Anti-Dumping Agreement in relying, in two sunset reviews, on "zeroed" margins calculated in previous proceedings.

2. Relevant Appellate Body findings

66. The Appellate Body confirmed firstly, its earlier findings that the "zeroing procedures" at issue constitute **a measure which can be challenged as such**. It reversed the Panel's finding that the United States does not **violate Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement by maintaining the zeroing procedures when calculating dumping margins on the basis of transaction-to-transaction comparisons in original investigations**. It also reversed the finding that the United States does not violate Articles 9.3 and 9.5 of the Anti-Dumping Agreement and GATT Article VI:2 by maintaining the **zeroing procedures in periodic reviews and new shipper reviews**. Further, the Appellate Body reversed the Panel's finding that **zeroing in the context of periodic reviews and new**

shipper reviews is not, **as such, inconsistent with** Article 2.4. It also reversed the Panel's finding that **zeroing as applied** by the United States in the 11 **periodic reviews** at issue in this appeal is not **inconsistent with** Articles 2.1, 2.4, 9.1, and 9.3 of the **Anti-Dumping Agreement** and GATT Articles VI:1 and VI:2. Finally, the Appellate Body reversed the Panel's finding that the United States acted consistently with Articles 2 and 11 of the Anti-Dumping Agreement when, in the **sunset reviews** at issue, it relied on margins of dumping that had been calculated using zeroing in previous anti-dumping proceedings. It found instead that the United States violates Article 11.3.

67. In the present case, Mexico's first written submission includes the same arguments in support the same claims that the use of zeroing in anti-dumping proceedings is "as applied" and "as such" inconsistent with Article VI of the GATT 1994 and the Anti-Dumping Agreement.⁶⁸

(a) Zeroing Methodology - Whether a Measure "As Such"

68. The United States filed a Notice of Other Appeal in which it alleged that the Panel erred in finding that the "zeroing procedures" are a measure that can be challenged in WTO dispute settlement. After examining the parties' arguments in relation to this question, as well as the Panel's findings, the Appellate Body stated explicitly that it

"agreed with the Panel's understanding of the Appellate Body's previous jurisprudence and the manner in which the Panel framed the question before it."

69. The Appellate Body also considered that the Panel had sufficient evidence before it to conclude that **the "zeroing procedures" under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a "single rule or norm"**, and that the Panel examined ample evidence regarding the precise content of this rule or norm, its nature as **"a**

⁶⁸ See the summary of Mexico's claims and arguments under heading II of this submission.

measure of general and prospective application, and its attribution to the United States." ⁶⁹

70. In sum, the Appellate Body confirmed its previous decisions. It upheld the Panel's finding that the zeroing procedures constitute a measure which can be challenged as such. ⁷⁰

(b) Zeroing "As Such" - Original Investigations, Periodic Reviews, New Shipper Reviews

71. The Panel had rejected Japan's claims relating to "simple zeroing" procedures in T-T comparisons in original investigations, taking the view that it is "permissible" to interpret Articles 2.1 and 2.4.2 of the Anti-Dumping Agreement, as well as GATT Article VI, to mean that "there is no general requirement to determine dumping and margins of dumping for the product as a whole." ⁷¹ The Panel also concluded that there was no violation of the "fair comparison" requirement of Article 2.4 and it applied the same line of reasoning to Japan's claims relating to periodic and new shipper reviews. ⁷²

72. On appeal, Japan contended that the Panel erred in its findings related to the use of **simple zeroing in original investigations and in periodic, new shipper and sunset reviews.** ⁷³

73. In addressing this issue, the **Appellate Body structured its analysis as follows.** First, it discussed the fundamental disciplines that apply under the Anti-Dumping Agreement and GATT to all anti-dumping proceedings. Next, it examined Japan's claim that zeroing in T-T comparisons in original investigations is, as such, inconsistent with the Articles 2.1, 2.4, and 2.4.2 of the Anti-Dumping Agreement and GATT Articles VI:1 and VI:2. Finally, it examined Japan's claim that zeroing in periodic reviews and new shipper reviews is, as such, inconsistent with the

⁶⁹ *Ibid.*, para. 88.

⁷⁰ *Ibid.*, para. 96.

⁷¹ Panel Report, paras. 98-100.

⁷² *Ibid.*, paras. 102-104.

⁷³ Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 105.

Articles 2.1, 2.4, 9.1-9.3 of the Anti-Dumping Agreement, and 9.5 and GATT Articles VI:1 and VI:2.⁷⁴

i) *Fundamental Principles*

74. In discussing the concepts of "dumping" and "margins of dumping," the Appellate Body recalled at the outset the definition of "dumping" in GATT Article VI:1 and Article 2.1 of the Anti-Dumping Agreement, and that of "margin of dumping" in GATT Article VI:2, both of which refer to a "product." It then noted that the Anti-Dumping Agreement "prescribes that dumping determinations be made in respect of each exporter or foreign producer examined." Finally, it observed that the Anti-Dumping Agreement and the GATT are concerned only with dumping that causes or threatens to cause material injury.

75. After setting out these views, the Appellate Body then held as follows:

" (...) it is evident from the design and architecture of the Anti-Dumping Agreement that: (a) the concepts of 'dumping' and 'margins of dumping' pertain to a 'product' and to an exporter or foreign producer; (b) 'dumping' and 'dumping margins' must be determined in respect of each known exporter or foreign producer examined; (c) anti-dumping duties can be levied only if dumped imports cause or threaten to cause material injury to the domestic industry producing like products; and (d) anti-dumping duties can be levied only in an amount not exceeding the margin of dumping established for each exporter or foreign producer."

76. The Appellate Body added that all these concepts "interlinked."⁷⁵

77. Finally, the Appellate Body also confirmed again, that "dumping" and "margins of dumping" can be found to exist **only in relation to that product as defined by [the investigating] authority**. The Appellate Body repeated that "dumping" and "margins of dumping" **cannot be found to exist** for only a **type, model, or category of that product**, nor, under [any comparison methodology,] can "dumping" and "margins of dumping" be found to exist "at the **level of an individual transaction**."

⁷⁴ *Ibid.*, para. 107.

⁷⁵ *Ibid.*, paras. 108-114.

78. On this basis the Appellate Body confirmed its earlier jurisprudence. It concluded that when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, **the results of such intermediate comparisons are not, in themselves, margins of dumping**, but rather are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer."⁷⁶

ii) *Zeroing "As Such" - Dumping Margin Determination Based on Transaction-to-Transaction Comparisons in Original Investigations*

79. In considering the Panel's findings relating to the "zeroing procedures" "as such" in T-T comparisons in original investigations, the Appellate Body addressed three sets of provisions of the Anti-Dumping Agreement separately: Article 2.4.2; Article 2.1 and GATT Articles VI:1 and VI:2; and Article 2.4.

80. Turning first to Article 2.4.2, the Appellate Body analyzed separately the Panel's consideration of the first sentence of that provision and the contextual arguments relating to the second sentence of the provision. The Appellate Body noted that "[u]nder **the T-T comparison methodology** at issue in this appeal, the margin of **dumping is established by a comparison between the normal value and the export price in individual transactions.**" The issue, it said, is whether the zeroing procedures are, as such, inconsistent with the first sentence of Article 2.4.2 in the context of T-T comparisons in original investigations.⁷⁷

81. On this issue, the Appellate Body first recalled its earlier finding in *U.S - Softwood Lumber V (Article 21.5 – Canada)*⁷⁸ where it **concluded that zeroing, as applied in the original investigation determination based on the T-T comparison methodology at issue there, was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.** The Appellate Body said it saw "no reason to depart from"

⁷⁶ *Ibid.*, para. 115.

⁷⁷ *Ibid.*, para. 119.

⁷⁸ Appellate Body Report, *U.S. – Softwood Lumber V (Article 21.5 – Canada)*, paras. 87 -93, 122.

its reasoning in that case, which, it said, is in consonance with the Appellate Body's approach in the earlier case of *U.S. - Softwood Lumber V* and is "consistent with the fundamental disciplines that apply under the Anti-Dumping Agreement and GATT Articles VI:1 and VI:2."⁷⁹ As further support, the Appellate Body held that **having prohibited "zeroing" in the context of W-W comparisons, there is no reason to allow "zeroing" in the context of T-T comparisons. It rejected the argument that** the absence of the phrase "all comparable export transactions" from the T-T comparison language would mean that "zeroing" is permissible in that context. It held that because the WW and T-T comparison methodologies fulfil the same function, it would be "illogical to interpret the [T-T] comparison methodology in a manner that would lead to results that are systematically different from those obtained under the [W-W] methodology."⁸⁰

82. The Appellate Body disagreed with the Panel that "dumping may be determined at the level of individual transactions, and that multiple comparison results are margins of dumping in themselves." It also disagreed that the terms "product" and "products" "can apply to individual transactions and do not require an examination of export transactions at an aggregate level," and that "a Member may treat transactions in which export prices are less than normal value as being more relevant than transactions in which export prices exceed normal value."⁸¹ Therefore, the Appellate Body disagreed with the Panel's finding that, "in the context of the [T-T] methodology in the first sentence of Article 2.4.2, the term 'margins of dumping' can be understood to mean the total amount by which transaction-specific export prices are less than transaction-specific normal values."⁸²

83. Turning then to the contextual arguments related to the second sentence of Article 2.4.2, the Appellate Body noted that this provision provides for an "asymmetrical comparison methodology" that addresses a "pattern" of "targeted" dumping. This methodology, it held, constitutes an "exception" to the normal methodologies. The Appellate Body explained that the Panel wrongly assumed that a general

⁷⁹ Appellate Body Report, *U.S. - Zeroing (Japan)*, paras. 120-121.

⁸⁰ *Ibid.*, paras. 123-125.

⁸¹ *Ibid.*, paras. 119-125.

prohibition of "zeroing" could not be reconciled with Article 2.4.2, second sentence, on the basis that the results under the first sentence and second sentence would be "mathematically equivalent" if "zeroing" were not used.⁸³ The Appellate Body rejected the Panel's view, referring again explicitly to its reasoning in *U.S – Softwood Lumber V (Recourse to Article 21.5)*⁸⁴ and also explaining that the "universe of export transactions" would be more limited under the second sentence.⁸⁵

84. **On this basis, the Appellate Body concluded that, "in establishing 'margins of dumping' under the T-T comparison methodology, an investigating authority must aggregate the results of all the transaction-specific comparisons and cannot disregard the results of comparisons in which export prices are above normal value." Accordingly, the Appellate Body reversed the Panel's finding that the United States does not act inconsistently with Article 2.4.2 by maintaining zeroing procedures when calculating margins of dumping on the basis of T-T comparisons in original investigations.**⁸⁶

85. The Appellate Body next considered Article 2.1 of the Anti-Dumping Agreement and GATT Articles VI:1 and VI:2. In this regard, noting that "these findings are simply based on the Panel's findings and reasoning relating to Article 2.4.2 of the Anti-Dumping Agreement, which we have reversed," the Appellate Body reversed the panel's findings that "simple zeroing" in original investigations is not inconsistent with Article 2.1 and Articles VI:1 and VI:2.⁸⁷

86. Finally, turning to Article 2.4 of the Anti-Dumping Agreement, the Appellate Body considered whether the "zeroing procedures" are inconsistent with the "**fair comparison**" requirement in that provision. In this regard, the Panel had stated that the "somewhat indeterminate standard of fairness underlying the 'fair comparison' requirement may not be interpreted in a manner that renders more

⁸² *Ibid.*, para. 129.

⁸³ *Ibid.*, paras. 131-132.

⁸⁴ Appellate Body Report, *U.S. – Softwood Lumber V (Article 21.5 –Canada)*, paras. 79, 100, 122.

⁸⁵ Appellate Body Report, *U.S. – Zeroing (Japan)*, paras. 133-136.

⁸⁶ *Ibid.*, paras. 137-138.

⁸⁷ *Ibid.*, paras. 139.

specific provisions of the [Anti-Dumping] Agreement completely inoperative." The Appellate Body held that the Panel's reasoning implies that the "fair comparison" requirement in Article 2.4 is dependent on Article 2.4.2, and it said that this is not a correct representation of the relationship between the provisions.⁸⁸ With regard to the substance of the issue, the Appellate Body recalled that it had previously held in *U.S –Softwood Lumber V (Recourse to Article 21.5)*⁸⁹ that the use of zeroing under the T-T comparison methodology "distorts the prices of certain export transactions because the 'prices of [certain] export transactions [made] are artificially reduced,'" which "artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely." It noted its statement in paragraph 142 of that same case that "[t]his way of calculating cannot be described as impartial, even-handed, or unbiased."

87. **The Appellate Body therefore considered that zeroing in T-T comparisons in original investigations is inconsistent with the fair comparison requirement in Article 2.4.** It reversed the Panel's finding that the United States does not act inconsistently with Article 2.4 of the Anti-Dumping Agreement, by maintaining zeroing procedures when calculating margins of dumping on the basis of T-T comparisons in original investigations.⁹⁰

iii) Zeroing "As Such" in Periodic Reviews and New Shipper Reviews

88. The Appellate Body next considered Japan's claims relating to zeroing, as such, in periodic and new shipper reviews, under the following provisions: Articles 9.3 and 9.5 of the Anti-Dumping Agreement and GATT Article VI:2; the "fair comparison" requirement of Article 2.4 of the Anti-Dumping Agreement; and Articles 2.1, 9.1 and 9.2 of the Anti-Dumping Agreement, along with GATT Article VI:1.⁹¹

⁸⁸ *Ibid.*, paras. 141-143.

⁸⁹ Appellate Body Report, *U.S. – Softwood Lumber V (Article 21.5 –Canada)*, para 139.

⁹⁰ Appellate Body Report, *U.S. – Zeroing (Japan)*, paras. 146-147.

⁹¹ *Ibid.*, para. 148.

89. Turning first to Articles 9.3 and 9.5 of the Anti-Dumping Agreement and GATT Article VI:2, the Appellate Body held that the Panel's reasoning assumed that the terms "dumping" and "margins of dumping" "refer to results of transaction-specific comparisons." The Appellate Body disagreed with the Panel's view, affirming again that "dumping" and "margins of dumping" can exist only at the level of a **product**.⁹² In addition, the Appellate Body rejected the Panel's consideration of Article 9, recalling its previous holding in *U.S. - Zeroing (EC1)*⁹³ – that the margin of dumping acts as a ceiling for the total amount of anti-dumping duties.⁹⁴
90. Next, the Appellate Body considered issues related to the operation of "prospective" normal value systems. In this regard, the Panel had taken the view **that such systems allow for the transaction-specific consideration of export transactions that are below normal value, and thus indicate that duties may be assessed in the same way in the U.S. retrospective system.** The Appellate Body disagreed with this analysis, and found instead that "[u]nder any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter." Thus, as with the U.S. retrospective system, "[t]o the extent that duties are paid by an importer, it is open to that importer to claim a refund if such a ceiling is exceeded." Finally, noting that the Panel gave no separate interpretive consideration to new shipper reviews, the Appellate Body also decided that "zeroing" applied to **new shippers** is inconsistent with Article 9.5 of the Anti-Dumping Agreement.⁹⁵
91. On this basis, the Appellate Body reversed the Panel's finding that the United States does not act inconsistently with Articles 9.3 and 9.5 of the Anti-Dumping Agreement and GATT Article VI:2 by maintaining zeroing procedures in **periodic reviews and new shipper reviews.**⁹⁶

⁹² *Ibid.*, paras. 149-151.

⁹³ Appellate Body Report, *United States – Zeroing (EC1)*, para. 130.

⁹⁴ Appellate Body Report, *U.S. – Zeroing (Japan)*, paras. 152-156.

⁹⁵ *Ibid.*, paras. 162-165.

⁹⁶ *Ibid.*, para. 166.

92. The Appellate Body then examined the issue of zeroing in periodic and new shipper reviews under the "**fair comparison**" requirement of Article 2.4. In this regard, the Appellate Body stated that the use of zeroing means that anti-dumping duties are collected in excess of the margin of dumping, a methodology which does not involve a "fair comparison."⁹⁷ Finally, as a consequence, the Appellate Body reversed the Panel's findings that zeroing is not, as such, inconsistent with Articles 2.1, 9.1, and 9.2 of the Anti-Dumping Agreement and GATT Article VI:1.⁹⁸

(c) Zeroing As Applied in Periodic Reviews

93. The Panel had found that zeroing, as applied by the United States in the **periodic reviews** at issue, is not inconsistent with Articles 1, 2.1, 2.4, 2.4.2, and 9.1-9.3 of the Anti-Dumping Agreement and GATT Articles VI:1 and VI:2.⁹⁹

94. In assessing Japan's arguments on appeal in relation to this issue, the Appellate Body recalled, inter alia, its earlier finding in this case to the effect that zeroing in periodic reviews as such violates Articles 2.4 and 9.3 of the Anti-Dumping Agreement and GATT Article VI:2. In the periodic reviews at issue here, the Appellate Body noted, the United States DOC assessed the anti-dumping duties "**according to a W-T comparison methodology in which, for each individual importer, comparisons were carried out between the export price of each individual transaction made by the importer and a contemporaneous average normal value.**" If, for a given individual transaction, "the export price exceeded the contemporaneous average normal value," the DOC, "at the aggregation stage, disregarded the result of this individual comparison." **Since the results of such comparisons were "systematically disregarded," the Appellate Body held that "the amount of anti-dumping duties collected in the periodic reviews at issue exceeded the exporters' proper margins of dumping."**¹⁰⁰

⁹⁷ *Ibid.*, paras. 167-169.

⁹⁸ *Ibid.*, paras. 170-171.

⁹⁹ *Ibid.*, paras. 172-173.

¹⁰⁰ *Ibid.*, paras. 174-175.

95. On this basis, the Appellate Body reversed the Panel's finding that zeroing, as applied by the United States in the 11 periodic reviews at issue in the appeal, is not inconsistent with Articles 2.1, 2.4, 9.1, and 9.3 of the Anti-Dumping Agreement and GATT Articles VI:1 and VI:2.¹⁰¹

(d) Zeroing As Applied in Sunset Reviews

96. With regard to the specific sunset review determinations at issue, the Panel had found that the margins relied on by the DOC in these sunset reviews were from previous periodic reviews, for which it had already found that the Anti-Dumping Agreement does not prohibit zeroing. Thus, the Panel had concluded that the DOC did not violate Articles 2 and 11 of the Anti-Dumping Agreement when it made its sunset determinations based on previous periodic review margins that used zeroing.¹⁰²

97. In addressing this issue, the Appellate Body recalled its previous case law according to which the terms "determine" and "review" in Article 11.3 require reasoned conclusion "based on" positive evidence and a "sufficient factual basis." It noted in particular that it has previously decided that when **investigating authorities rely on past dumping margins in making their likelihood determination in a sunset review, these margins must be consistent with Article 2.4.**¹⁰³ Here, the Appellate Body noted, the Panel had found that the DOC relied on past margins that were calculated during periodic reviews on the basis of "simple zeroing." Having previously concluded that zeroing in periodic reviews is inconsistent with Articles 2.4 and 9.3, the Appellate Body found that the determinations **in the sunset reviews at issue are inconsistent with Article 11.3.**¹⁰⁴

¹⁰¹ *Ibid.*, para. 176-177.

¹⁰² *Ibid.*, paras. 178-180.

¹⁰³ *Ibid.*, paras. 182-183; referring to: Appellate Body Reports in the following cases: *US – Oil Country Tubular Goods Sunset Reviews*, para. 283; *US – Corrosion-Resistant Steel Sunset Review*, paras. 7:2, 71, 111, 113, 127, 180, 130.

¹⁰⁴ Appellate Body Report, *U.S. – Zeroing (Japan)*, paras. 184-185.

98. On this basis, the Appellate Body reversed the Panel's finding that the United States acted consistently with Articles 2 and 11 of the Anti-Dumping Agreement when, in the sunset reviews at issue in this case, it relied on margins of dumping calculated in previous periodic review proceedings. It found instead that the United States acted inconsistently with Article 11.3.¹⁰⁵

IV. PRECEDENTIAL VALUE OF THESE APPELLATE BODY FINDINGS

A. Introduction

99. The European Communities notes that in their submissions before WTO panels and the Appellate Body parties often cite Appellate Body reports in support of their arguments. In its first written submission in this case Mexico makes abundant reference to previous panel and Appellate Body reports regarding zeroing. In addition, it must be noted that the Appellate Body itself regularly cites its own previous decisions in support of its findings and conclusions. The reports discussed under heading III are no exception: in its findings on the issues raised, the Appellate Body frequently invokes earlier decisions.¹⁰⁶
100. This may seem slightly perplexing as the conventional wisdom is that there is no *stare decisis* in the WTO dispute settlement system,¹⁰⁷ and that panel and Appellate Body reports are considered binding only on the parties to the dispute in question.

¹⁰⁵ *Ibid.*, paras. 186-187.

¹⁰⁶ In similar vein, the European Communities note that in their reports, panels established under the dispute settlement provision of the North American Free Trade Agreement (NAFTA), can be seen to cross refer to other panel decisions. For example, in *Certain Corrosion-Resistant Steel Sheet Products Originating in or Exported from the United States of America* (CDA-94-1904-03, June 23 1995, at 43-44) the panel stated that "three of these panel decisions are particularly relevant to our decision" and went on to discuss the previous decisions at length. The European Communities notes in this regard that in 2005 a NAFTA Chapter 19 panel (NAFTA Softwood Lumber) also condemned the zeroing practice, invoking the celebrated "*Charming Betsy*" doctrine, and expressing the view that the United States should follow the Appellate Body decision against it in *US-Softwood Lumber V (EC-1)*.

¹⁰⁷ Guohua et al., *WTO Dispute Settlement Understanding. A Detailed Interpretation*, (2005), xii (EC-17); See too: statement by Canada recorded in the Appellate Body Report in *US – Softwood Lumber V*, para. 110, cited below.

101. The principle of *stare decisis*, or binding judicial precedent, by which courts are bound by their previous decisions, is traditionally recognised in common law jurisdictions. It is often regarded as one of the most distinctive aspect of Anglo-American common law systems, setting them apart from other legal systems.¹⁰⁸
102. Insofar as the WTO dispute settlement system does not formally recognise *stare decisis* it does not appear to occupy a unique place among international courts and tribunals.¹⁰⁹ In international law generally, this doctrine is not formally accepted. This can be illustrated with the Statute of International Court of Justice ('ICJ'), the highest judicial body of the United Nations, competent to deal with international law disputes between sovereign States that have accepted its jurisdiction. Article 38(1) of the ICJ's Statute sets out the law that this Court must apply. Although these provisions are expressed in terms of the function of the ICJ, they reflect the previous **practice of arbitral tribunals** and are generally regarded as the most complete statement of the sources of international law.¹¹⁰ According to Article 38(1)(d), judicial decisions are (only) "subsidiary means for the determination of [international] law". Further, Article 59 of the ICJ Statute emphasizes that:
- The decision of the Court has no binding force except as between the parties and in respect of that particular case.¹¹¹
103. Article 59 of the Statute reflects the idea on the part of the founders that the ICJ should 'apply' the law and not 'make' it; that it is intended to settle the disputes as they come to it, rather than shape the law.¹¹² Insofar as they reject the doctrine of binding judicial precedent, international courts and tribunals are said to closely resemble the civil law tradition. In the latter, lawmaking is considered a function of the legislature; contrary to a common law judge, a civil law judge's task is considered to be passive; he or she must implement legal rules contained mainly in various codes, laws, and statutes.¹¹³

¹⁰⁸ Zweigert and Kötz, *An Introduction to Comparative Law* (3rd ed.1988), p. 259 (EC-25).

¹⁰⁹ WTO, *A Handbook on the WTO Settlement System* (2007), p.91: "as in other areas of international law, there is no rule of *stare decisis* in WTO dispute settlement" (EC-26).

¹¹⁰ Brownlie, *Principles of Public International Law*, (5th ed. 1988), p. 3 (EC-16).

¹¹¹ ICJ Statute (EC-8).

¹¹² Brownlie *op.cit.*, p. 20 (EC-16).

¹¹³ Arnall, *The European Union and its Court of Justice* (2006), p. 623 (EC-15).

104. However, there are two important considerations that qualify the principles outlined above. Firstly, all legal systems have in common a serious interest in the continuity of their jurisprudence. Whether as a matter of doctrine or practice, a high value is placed on consistency, certainty and predictability of the jurisprudence, particularly as regards decisions rendered by the highest courts. Secondly, decisions rendered by the hierarchical superior court or tribunal are, in all legal systems, followed by subsidiary courts or tribunals. The European Communities will elaborate on these two considerations separately.

B. The Principle of Consistency and Predictability of Jurisprudence

1. National courts and tribunals

105. The need for consistency and predictability of the case law is one of the most important considerations underpinning the doctrine of *stare decisis* in common law systems. According to a simple dictionary definition, *stare decisis* is the:

"doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same."¹¹⁴

106. It is generally acknowledged that there are limits to this doctrine. In common law systems, the highest courts treat previous decisions as "normally binding", but they reserve the right to depart from them in certain, narrowly defined, exceptional circumstances. Appellate courts in common law systems follow their own prior decisions unless they specifically decide to change direction, and this must be done by the entire court sitting *en banc*.

107. Change of precedent by the highest courts in common law systems is something done relatively rarely and with great aforethought and discussion. According to the United Kingdom House of Lords, a mere doubt about the correctness of a previous

¹¹⁴ *Black's Law Dictionary, West Publishing, 1987: 1577.*

decision does not justify departure.¹¹⁵ Australia's highest court has ruled that departure can be justified only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances.¹¹⁶ The United States Supreme Court no longer views the doctrine of *stare decisis* as an "inexorable command". Departure can be justified if it can be shown that the previous decision was clearly in error.¹¹⁷

108. In general, civil law jurisdictions do not recognise the principle of *stare decisis* or binding precedent. However, the highest courts will as a matter of judicial policy and practice, follow their previous decisions. This is illustrated by the French¹¹⁸ and the Italian¹¹⁹ legal systems.
109. The European Court of Justice (ECJ), which is a hybrid court – part constitutional court, part general national court of last instance - also pays particular attention to its earlier case law.¹²⁰ The general position is that the ECJ is not bound by its previous decisions, but that it, in practice, does not often depart from them.¹²¹ As one commentator notes:

"The overriding objective of the uniform application of EU law and the principle of legal certainty are thought to require a great deal of consistency over time."¹²²

¹¹⁵ *Fitzleet Estates Ltd. v. Cherry (Inspector of Taxes)*, [1977] 3 All ER 996, 999, discussed in para. para. 92 of ICTY Appeals Chamber Judgement *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement 24 March 2000 (EC-4).

¹¹⁶ *Queensland v. Commonwealth* (1977) 16 ALR 487 at 497, discussed in para. para. 92 of ICTY Appeals Chamber Judgement *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement 24 March 2000 (EC-4).

¹¹⁷ *Planned Parenthood of Southeastern Pennsylvania et al. v. Casey*, 505 U.S. 833, 854 (1992) discussed in para. para. 92 of ICTY Appeals Chamber Judgement *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement 24 March 2000 (EC-4).

¹¹⁸ David and De Vries, *The French Legal System* (1985), p. 113 ff. discussed by Zweigert and Kötz, *op.cit.*, pp. 262-3 (EC-25).

¹¹⁹ Cappelletti et al., *The Italian Legal System: An Introduction* (1967), at p. 271 discussed by Zweigert and Kötz, *op. cit.*, p. 263 (EC-25).

¹²⁰ The EU judicial system is of a *sui generis* character. It consists of several instances, beginning with the European Court of Justice (ECJ), established in 1952. The ECJ was supplemented in 1988 with the Court of First Instance (CFI) which has jurisdiction over cases brought by private parties against decisions of EU institutions as well as over cases brought by member states against decisions of the European Commission: Rosas, "The European Court of Justice: sources of law and methods of interpretation" in *The WTO at Ten* (2006), p. 482 at 483 (EC-22).

¹²¹ *Id.*

¹²² Arnall, *The European Union and its Court of Justice* (2006), p. 627-8 (EC-15).

2. International courts and tribunals

(a) ICJ

110. As outlined above, the ICJ Statute makes clear that decisions rendered by the ICJ in a particular case between states cannot be binding on other states in disputes before the Court. However, even if, strictly speaking, the ICJ does not observe a doctrine of precedent (except however, in matters of procedure), there is no doubt that it strives to maintain consistency in its jurisprudence.¹²³ As Judge *Shahabuddeen* observed:

"The desiderata of **consistency, stability and predictability**, which underlie **a responsible legal system**, suggest that the Court would not exercise its power to depart from a previous decision except with circumspection... **The Court accordingly pursues a judicial policy of not unnecessarily impairing the authority of its decisions.**"¹²⁴ (emphasis added)

111. In the *Peace Treaties* case Judge *Zoricic* adequately explained the value which the ICJ may attach to decisions of other international tribunals, including of the ICJ itself:

" (...) it is quite true that no international court is bound by precedents. But there is something, which this Court is bound to take into account, namely the principles of international law. If a precedent is firmly based on such a principle, the Court cannot decide an analogous case in a contrary sense, so long, as the principle retains its value."¹²⁵

112. Seen in this light it is not surprising to note that the ICJ, like other (international) tribunals, frequently invokes previous decisions in order to support a decision in a particular case. This is not because previous decisions are regarded as precedents that would bind the Court as a matter of *stare decisis*. Previous decisions are

¹²³ Brownlie, *op.cit.*, pp. 21-22 (EC-16).

¹²⁴ Shahabuddeen, *Precedent in the World Court* (1996), p. 239 (EC-23).

¹²⁵ *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, ICJ Rep 1950, p. 65 at p. 104, Judge *Zoricic*, Dissenting Opinion, quoted in Shahabuddeen, *op.cit.*, p. 237 (EC-23).

invoked because they are a statement of what the Court regarded as “the correct legal position”.¹²⁶

(b) ITLOS

113. The International Tribunal for the Law of the Sea (ITLOS) is called on mainly to settle disputes relating to the interpretation and application of the 1982 United Nations Convention on the Law of the Sea. States, international organisations, non-self-governing territories and, in certain cases, private parties, have access to this Tribunal.
114. The ITLOS often quotes its own judicial decisions, in an effort to develop consistent jurisprudence. The Tribunal also frequently quotes case law of other international tribunals, particularly of Permanent Court of International Justice (PCIJ) and the ICJ, in support of general rules of international law.¹²⁷

(c) ECHR

115. The European Court of Human Rights (ECHR) was established by the Council of Europe in 1959 to enforce the European Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention').¹²⁸ Cases can be brought by a States (Contracting Parties) against another State (Contracting Parties), and by individuals and organisations against States (Contracting Parties).¹²⁹ There is an explicit provision whereby Contracting Parties accept to abide by final judgements of the Court rendered in a case to which they are parties.¹³⁰

¹²⁶ Shabuddeen, *op.cit.*, p. 63 (EC-23) .

¹²⁷ Treves, “The International Tribunal for the Law of the Sea”, in *The WTO at 10* (1996), p. 490 at 493 (EC-24).

¹²⁸ The Convention was signed on 4 November 1950 and entered into force in September 1953; 213 UN.T.S. 221, 1950 (EC-7).

¹²⁹ Articles 33 and 34 of the European Convention (EC-7).

¹³⁰ Article 45 of the European Convention (EC-7).

116. In line with other international tribunals, the doctrine of binding precedent does not operate formally in the European Court of Human Rights.¹³¹ However in the *Cossey Case*, the Court noted that, although not strictly bound, it would normally follow its previous decisions and would only depart from them if there were "cogent reasons" for doing so.¹³²
117. It should be noted too that Protocol XI, amending the European Convention¹³³, has also introduced an explicit mechanism to ensure consistency in the Court's jurisprudence. This provision will be discussed below.

(d) International Criminal Tribunals

118. The European Communities proposes to briefly refer to the policy and practice of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as the International Criminal Court (ICC). The first two are ad-hoc international tribunals established to prosecute individuals for international crimes (war crimes, crimes against humanity, genocide); the last one is a permanent court.
119. In the absence of any express statutory provision on this matter, the ICTY Appeals Chamber has seen the need to address in its own case law, the question of the extent to which it is bound to follow its previous decisions. In examining this issue, the Appeals Chamber found that "in the interests of certainty and predictability", it should follow its previous decisions, but should be free to depart from them "for cogent reasons in the interests of justice". Elaborating on this principle, the Chamber held that instances of situations where "cogent reasons" in the interests of justice require a departure from a previous decision include cases

¹³¹ Reid, *A Practitioner's Guide to the European Convention on Human Rights* (2nd ed. 2004), p. 51 (EC-21).

¹³² European Court of Human Rights, *Cossey* Judgement of 27 September 1990, Series A, vol. 184, para. 35 (EC-6).

¹³³ Protocol XI, opened for signature on 11 May 1994, entered into force on 1 November 1998, ETS No. 155 (EC-7).

where the previous decision has been “wrongly decided, usually because the judge or judges were ill-informed about the applicable law.”¹³⁴

120. The Appeals Chamber of the 'sister' tribunal of the ICTY, the ICTR, has concurred with the opinions expressed by the ICTY Appeals Chamber. It held that the ICTR Appeals Chamber should follow its previous decisions, but should be free to depart from them for "cogent reasons in the interests of justice".¹³⁵
121. The trend observed in the jurisprudence of the ICJ and the *ad hoc* international criminal tribunals referred to above has undoubtedly influenced the drafters of the ICC Statute. According to paragraph 2 of Article 21 of its statute, regarding applicable law, the Court is explicitly allowed to take previous decisions into account.¹³⁶

3. Conclusions

122. Formal rejection of the doctrine of *stare decisis* should not be confused with the interest that all legal systems have in maintaining continuity in jurisprudence.
123. Whether as a matter of doctrine or practice, all legal systems place a high value on consistency, certainty and predictability of the jurisprudence, particularly as regards decisions rendered by the highest courts. Departures from previous decisions are carefully considered and require the identification of cogent reasons for doing so.
124. In cases where courts, in particular those dealing with international law, are not formally bound by their previous decisions, they will nevertheless consider themselves bound by the (international) law as authoritatively expressed in a decision.

¹³⁴ ICTY, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement 24 March 2000, paras. 107-108 (EC-4).

¹³⁵ ICTR, *Laurent Semanza vs. Prosecutor*, Case No. ICTR-97-20-A, 31 May 2000, para. 92 (EC-5).

¹³⁶ Article 21(2) states as follows: "[T]he Court may apply principles and rules of law as interpreted in its previous decisions": Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12

125. A rule such as that expressed by Article 59 of the ICJ's Statute, quoted above, is concerned only with the notion that the decision, *qua* decision, binds only the parties to a particular case. However, it does not prevent the decision from being treated in a later case by the same court or tribunal as the correct legal position.

C. *To what extent are subsidiary courts bound by decisions of higher courts ?*

126. The European Communities submits that there is a further element to the question of precedential value of previous decisions that is eminently pertinent for this Panel. To what extent should this Panel follow decisions rendered by the Appellate Body? The European Communities proposes to again address this question by first surveying the practice and principles observed in other dispute settlement systems.

1. National courts and tribunals

127. In common law jurisdictions the primary function of an appellate court is to give predictability and stability to the field of law it judges. This is done in large part by *stare decisis*: subsidiary tribunals follow the rulings of higher courts in their jurisdiction. The United States Supreme Court expressed the rationale for this principle as follows:

"[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."¹³⁷

128. The principle that decisions of a higher court are binding on lower courts is part and parcel of the doctrine of *stare decisis*. The rule that lower courts should abide by controlling precedent, sometimes called "vertical precedent," can safely be called settled law in common law jurisdictions.¹³⁸

July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002 (EC-11).

¹³⁷ *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam) (EC-2).

¹³⁸ Kmiec, "The Origin and Current Meanings of "Judicial Activism" ", Comment, *California Law Review*, October 2004, 1466-1467 (EC-18).

129. In spite of the fact that there is no doctrine of binding precedent in civil law jurisdictions, as a matter of practice, lower courts tend to follow decisions of higher courts, even if there is rarely an explicit legal rule compelling a judge to follow the decisions of a higher court:

"In practice a judgement of the Court of Cassation or of the Bundesgerichtshof in Germany today can count on being followed by lower courts as much as a judgement of an appeal court in England or in the United States. This is true not only when the judgement of the superior court follows a line of similar decisions; in practice even an isolated decision of the Bundesgerichtshof in Germany enjoys the greatest respect, and it is very rare and not at all typical for a judge to openly deviate from such a decision? In France the situation is much the same (...) Accordingly, it is hardly an exaggeration to say that the doctrine of *stare decisis* in Common Law and the practice of Continental courts generally lead to the same results".¹³⁹

130. In the EU judicial system, the Court of First Instance (CFI) will normally uphold ECJ case-law.¹⁴⁰ The CFI will follow the precedents set by the ECJ for two reasons. Firstly, as in the court systems of the EC Member States, the lower court in the hierarchy accepts, as a general rule, the authority of precedents set by the higher court; Secondly, the decision establishing the CFI was accompanied by a provision allowing appeal of CFI judgements to the ECJ on the grounds of "infringement of Community law".¹⁴¹ The precedents set by the Court are, of course, part of Community law, so that where these are clear and consistent the lower court would regard itself as bound to follow them at risk of its decision being set aside on appeal.¹⁴²

2. International courts and tribunals

131. International courts and tribunals with a hierarchical two- or multi-tier structure are rare. However, where there is an appellate structure, the general rule seems to

¹³⁹ Zweigert and Kötz, *op. cit.*, pp. 262-3 (EC-25).

¹⁴⁰ Rosas, *op. cit.*, p. 488, fn. 31 (EC-22).

¹⁴¹ ECJ Statute, para. 58: "An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First instance" (EC-9).

¹⁴² Neville and Kennedy, *The Court of Justice of the European Communities* (2000), pp. 370-377 (EC-19).

be that decisions of the hierarchical higher body are followed by the hierarchical lower body, at least insofar as the *ratio decidendi*, legal principles, or points of law are concerned.

(a) ECHR

132. The original structure of the Court, and mechanism for handling cases, provided for a two-tier system of rights protection, which included the Commission of Human Rights, a non-judicial body, as well as the Court itself. The Commission's task was the screening of applications. As a matter of general practice and practical necessity, the Commission regarded the Court's binding judgments as the final authority on the interpretation of the Convention of the European Convention on Human Rights.¹⁴³
133. On 1 November 1998, Protocol 11 of the European Convention came into force, eliminating the Commission of Human Rights and restructuring the Court. The Court now consists of Committees of 3 Judges, Chambers of 7 judges and a Grand Chamber of 17 judges. The function of the Committees is to dispose of applications that are clearly inadmissible. Chambers determine both admissibility and merits in separate decisions or, where appropriate, together. As mentioned above, Protocol 11 amending the European Convention has also introduced an explicit mechanism to ensure consistency in the Court's jurisprudence. The Convention explicitly provides that Chambers may, at any time, refer a case to the Grand Chamber in case **there is a risk of departure from earlier case law**.¹⁴⁴
134. Judgements of the Grand Chamber are final, which means that the mechanism set out in this provision ensures not only consistency of jurisprudence but also 'vertical precedent', to the extent that the Grand Chamber can be regarded as the hierarchical superior court.¹⁴⁵

¹⁴³ Reid, *A Practitioner's Guide to the European Convention on Human Rights* (1st ed. 1998), p. 43 (EC-20).

¹⁴⁴ Article 30 of the European Convention; See too: Article 43 (EC-7).

¹⁴⁵ Article 44 (1) of the European Convention: 'Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with

(b) ICTY/ICTR

135. The Appeals Chamber of the ICTY hears appeals from judgements of trial chambers on two grounds: (1) an error on a question of law invalidating the decision; or (2) an error of fact which has occasioned a miscarriage of justice.¹⁴⁶
136. The ICTY Appeals Chamber has ruled that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers, for a number of reasons: (i) the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers (...); (ii) the **fundamental mandate** of the Tribunal (...) cannot be achieved if the accused and the Prosecution do not have the assurance of **certainty and predictability** in the application of the applicable law; and (iii) the right of appeal [is] a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike as well as the "**need for coherence**".¹⁴⁷

(c) ICSID

137. The International Centre for Settlement of Investment Disputes (ICSID) was established by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. By the end of 2006, 143 countries ratified the Convention. It provides a system, administered by ICSID, for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. In 2004 the ICSID Secretariat launched a discussion paper on possible improvements of the framework for ICSID arbitration. One of the improvements suggested was the establishment of an 'appeals mechanism'. According to the proposal the appeals mechanism would be composed of 15 persons of 'recognised authority, with demonstrated expertise in

a judgement previously delivered by the Court, the Chamber may, at any time before it has rendered its judgement, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects' (EC-7).

¹⁴⁶ Article 25 of the ICTY Statute (EC-10).

law, international investment and investment treaties', sitting in panels of three. Further, under the proposal an award could be challenged for a 'clear error of law' or any of the five grounds for annulment of an award set out in the ICSID Convention. It was also suggested that the appeals body might 'uphold, modify or reverse' or 'annul' the award concerned. It is significant that the proposal for such an appeals mechanism was made precisely because of the need to "foster coherence and consistency in the case law emerging under investment treaties".

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(d) Horizontal precedent

138. For the sake of completeness, the European Communities also wishes to address briefly the question whether courts or tribunals are bound by decisions rendered by other courts or tribunals that are hierarchically at the same level.
139. The prevailing view seems to be that decisions of bodies with coordinate jurisdiction have no binding force on each other. However, a court or tribunal is free to follow the decision of another court or tribunal if it finds that decision persuasive.¹⁴⁹ Some take the view that decisions of bodies with coordinate jurisdiction should nevertheless be treated with respect, and carefully considered, in order to examine whether departure from those decisions is appropriate.¹⁵⁰
140. In the UK there is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction.¹⁵¹ Where, however, a judge has come to a definite decision on a complex matter, the opinion has been expressed that a second judge in a co-ordinate jurisdiction should follow

¹⁴⁷ ICTY, *Aleksovski Appeal Judgement*, Case No. IT-95-14/1-A, 24 March 2000, para. 113, pp. 47-48 (EC-4).

¹⁴⁸ ICSID Secretariat Discussion Paper, 'Possible Improvements of the Framework for ICSID Arbitration', October 22, 2004; part VI and Annex 'Possible Features of an ICSID Appeals Facility', paras. 5, 7, 9 (EC-12). In a follow-up paper the idea was put on hold because of the many technical and policy issues the establishment of an appeals mechanism would involve: Working Paper of the ICSID Secretariat, 'Suggested Changes to the ICSID Rules and Regulations', May 12, 2005, para. 4 (EC-13).

¹⁴⁹ ICTY, *Aleksovski Appeal Judgement*, Case No. IT-95-14/1-A, 24 March 2000, para. 114.

¹⁵⁰ Declaration of Judge Hunt, ICTY, *Aleksovski Appeal Judgement*, para. 11 (EC-4).

that decision.¹⁵² Furthermore, modern practice is that a judge will, as a matter of judicial comity,¹⁵³ usually follow the decision of another judge of co-ordinate jurisdiction instance unless he is convinced that that judgment was wrong.¹⁵⁴

3. Conclusions

141. The above survey of national and international legal dispute settlement systems shows that decisions of higher courts or tribunals are, either as a matter of legal doctrine or judicial practice, followed by hierarchically lower courts or tribunals.
142. It must be remembered too that in most two-tier dispute settlement systems, lower courts and higher courts have different tasks. At a risk of oversimplification: the tasks of a lower court or tribunal is usually centred around fact-finding and dealing with the merits of the cases, whereas higher bodies have often much narrower tasks, centred around settling issues of law.
143. Further, a statement that a decision of a hierarchically higher body is binding on a lower body, will normally be confined to the legal principles involved, the *ratio decidendi*. Still, the *ratio decidendi* cannot be distinguished merely because the facts to which it is applied are different.
144. This is not to say that in dealing with the merits of a particular dispute or case, there would be no scope whatsoever for lower bodies to develop the jurisprudence. However, in keeping with the universally recognised principles set out above, departures from decisions taken by higher courts on issues of law must be carefully considered. There must be cogent reasons for a lower court or tribunal to depart from the legal positions taken by hierarchically superior courts. If the lower court or tribunal deviates from what the higher court has considered as the correct legal position its decision runs the risk of being struck down. This will be

¹⁵¹ *The Vera Cruz (No 2)* (1884) 9 PD 96 at 98 see *Halsbury's Laws of England* (volume 37) (2001) (EC-3).

¹⁵² *Re Smith, Vincent v Smith* [1930] 1 Ch 88 at 99 see *Halsbury's Laws of England* (volume 37) (2001) (EC-3).

¹⁵³ *Mirehouse v Rennell* (1833) 1 Cl & Fin 527 at 546 see *Halsbury's Laws of England* (volume 37) (2001) (EC-3).

especially the case when the higher court has, through a series of decisions, endeavoured to create a consistent body of jurisprudence on a particular issue. A lower body may express a reasoned disagreement on legal principles with the higher body, but this will ultimately be for the consideration of the higher body.

D. Precedent in the WTO Dispute Settlement System

145. The European Communities recognises that references to the doctrines adopted and the practices observed by other courts and tribunals are not determinative of the question of the authority of previous decisions in the WTO dispute settlement system, in particular those of the Appellate Body. This question must be answered by an examination of the functions of the WTO Dispute Settlement System and the place which the Appellate Body occupies in the WTO dispute settlement system.

1. Characteristics of the WTO Dispute Settlement System

146. Like many other international dispute settlement systems surveyed above, WTO panels and the Appellate Body are called on to settle disputes between WTO Members concerning the interpretation and application of a specific group of conventions governed by international law (in these case the 'covered agreements'), including the agreement pertinent in this case, the Anti-Dumping Agreement.¹⁵⁵

147. There is no doubt that these agreements are 'proper' international agreements governed by international law. The DSU itself directs the panels and the Appellate Body to interpret the covered agreements:

"in accordance with customary rules of interpretation of public international law" (Article 3.2 of the DSU).

148. Bearing in mind its origins, most commentators agree that the WTO settlement system has moved away from the arbitral model. The European Communities sees no reason to disagree with the observation that the WTO has created a system of

¹⁵⁴ *Huddersfield Police Authority v Watson* [1947] KB 842 at 848 see *Halsbury's Laws of England* (volume 37) (2001) (EC-3).

binding dispute settlement based on legal rules and procedures that closely resemble a judicially based court system.¹⁵⁶

2. The need for consistency of WTO Rules and Jurisprudence

149. Regardless of the institutional characteristics of the WTO Dispute Settlement System, there can be little doubt that the ultimate goal of creating and maintaining a uniform body of rules is a paramount function of this system. This is clearly reflected in Article 3(2) of the DSU, according to which:

- the dispute settlement system aims at providing '**security and predictability to the multilateral trading system**';
- this is to be achieved, by means of '**preser[ving] the rights and obligations of Members under the covered agreements**' (without 'adding to', or 'diminishing' these rights and obligations); and this
- through 'clarifying' the provisions of the covered agreements 'in accordance with the **customary rules of interpretation of public international law**'.

150. It follows according to the European Communities, that the most important function of the binding dispute settlement mechanism is to provide security and predictability to Members and the system as a whole by detailing and interpreting the rules and outlining rights and obligations of Members, so that they may act accordingly.

¹⁵⁵ Art. 1.1 DSU; See too: Appellate Body Report, *Guatemala –Cement I*, para. 64.

¹⁵⁶ Guohua *et al.*, *WTO Dispute Settlement Understanding. A Detailed Interpretation*, (2005), xi (EC-17); See too: Abi-Saab, *The Appellate Body and treaty interpretation*, in *The WTO at Ten* (2006), p. 453 at pp. 458-9 (EC-14).

151. The importance of security and predictability as an object and purpose of the WTO dispute settlement system has been recognized in many panel and Appellate Body reports. The European Communities refers, in this regard, to the panel in *US-Section 301* which stressed the concept of 'security and predictability' to the multilateral trading system and through it to the market-place and its different operators, when it stated:

"Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect we are referring not only to preambular language but also to positive law provisions in the DSU itself."¹⁵⁷

3. Role of the Appellate Body

152. The Appellate Body occupies a superior position in the WTO dispute settlement system's hierarchy (Article 17.4 DSU). The task of the Appellate Body is to decide on appeal, issues of law and legal interpretations developed by the panel (Article 17.6 DSU). The Appellate Body may 'uphold, modify or reverse the legal findings and conclusions' of the panel (Article 17.13 of the DSU). In line with what has been set out above for other courts or tribunals with at least a two-tier system, it is not the role of the Appellate Body to engage in fact-finding; this is the role of the panel.¹⁵⁸
153. The Appellate Body is undisputedly inherently entrusted with a purely judicial function.¹⁵⁹ Its primary function is to provide predictability and stability to the multilateral trading system through its decisions on issues of law covered in panel reports and legal interpretations developed by panels.

¹⁵⁷ Panel Report, *US – Section 301 Trade Act*, para. 7.75.

¹⁵⁸ Appellate Body Report, *EC – Bananas III*, paras. 238-239; Appellate Body Report, *EC – Poultry* para. 107; Appellate Body Report, *U S – Section 211 Appropriations Act*, paras. 101-106; Appellate Body Report, *EC – Hormones (Canada)*, para. 132.

¹⁵⁹ *Abi-Saab, op. cit.*, p. 455 (EC-14).

4. Precedent and the Appellate Body

154. It is not disputed that Appellate Body reports do not have precedential effect or automatic applicability, *qua* reports, beyond the immediate parties.¹⁶⁰ However the European Communities submits that it is unquestionable that when interpreting the covered agreements (which broadly represent the most important body of international trade law) the Appellate Body aims at ensuring consistency in its case law, much like the international tribunals referred to above. It has been observed that the Appellate Body rarely departs from prior opinions.¹⁶¹
155. The European Communities notes that the Appellate Body regularly invokes previous decisions in its reports without, however, explicitly addressing the relevance of such previous decisions. The Appellate Body has done so however, in a case which is particularly apposite to the proceedings before this Panel. In *US – Softwood Lumber V*, the United States requested that the Appellate Body not "import wholesale the findings and reasoning" from another case, *EC - Bed Linen*, which also concerned the application of "zeroing" practice in an anti-dumping investigation. The United States stressed that it was not a party to the dispute in *EC – Bed Linen*, that the arguments raised in that case were different, and that the US' practice of zeroing was not at issue in the *EC - Bed Linen* case.¹⁶²

¹⁶⁰ Art.17.14 DSU provides that adopted Appellate Body reports shall be unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the report.

¹⁶¹ Guohua *et al.*, *op. cit.*, xii (EC-17).

¹⁶² Appellate Body Report, *US – Softwood Lumber V*, para. 109.

156. Canada, the complainant in *US – Softwood Lumber V*, stated that the Appellate Body "is not subject to a strict doctrine of *stare decisis*," but said that "the suggestion that each case stands on its own and should be decided without regard to the recommendations and rulings of the Dispute Settlement Body in other WTO cases would deny the major achievement of a coherent body of WTO case-law or jurisprudence."¹⁶³

157. In addressing this issue, the Appellate Body referred to findings it made in *Japan – Alcoholic Beverages II* :

"[a]dopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute."¹⁶⁴

158. The Appellate Body then noted that it had clarified this statement in *US – Shrimp (Article 21.5 – Malaysia)* as follows:

"[t]his reasoning [from *Japan – Alcoholic Beverages II*] applies to adopted Appellate Body Reports as well. Thus, in taking into account the reasoning in an adopted Appellate Body Report — a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it — the Panel did not err. The Panel was correct in using our findings as a tool for its own reasoning."¹⁶⁵

¹⁶³ *Ibid.*, paras 110.

¹⁶⁴ Appellate Body Report, *Japan – Alcoholic Beverages II*, at 108. (footnote omitted)

¹⁶⁵ Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 109.

159. In *US – Softwood Lumber V* the Appellate Body then concluded as follows on the question of the 'relevance' of its previous decisions:

"Bearing these previous findings in mind, and noting Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), which states that "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system," we have given full consideration to the particular facts of this case and to the arguments raised by the United States on appeal, as well as to those raised by Canada and the third participants. In doing so, we have taken into account the reasoning and findings contained in the Appellate Body Report in *EC – Bed Linen*, as appropriate."¹⁶⁶

160. This confirms, in the European Communities' view, that in accordance with Article 3(2) DSU, the need for security and predictability is also thought to require consistency in WTO case law, including in particular the Appellate Body decisions relating to questions of law and legal interpretations of the covered agreements.

5. Whether panels should follow Appellate Body decisions

161. As set out above, in international law the lack of formal status of prior opinions as precedent is no bar to achieve consistency in jurisprudence in a particular dispute settlement system. Even in the absence of *stare decisis*, predictability and stability is achieved through consistent jurisprudence that carefully builds on previous decisions and avoids unconsidered departures from established jurisprudence. The WTO dispute settlement system is no exception.
162. In *US – Shrimp (Article 21.5 – Malaysia)* the Appellate Body held that a panel that takes account of the reasoning in an adopted Appellate Body report commits no "error".¹⁶⁷ The European Communities submits that it would be erroneous to take this statement to mean, *a contrario*, that panels would be free to depart from Appellate Body jurisprudence on issues of law and legal interpretations relating to the covered agreements.

¹⁶⁶ Appellate Body Report, *US- Softwood Lumber V*, para. 112.

¹⁶⁷ Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 109, quoted above.

163. The Appellate Body's rulings must, in the view of the European Communities, be regarded as commanding particular authority for panels. This is despite the fact that there is no formal doctrine of *stare decisis* in the WTO dispute settlement system, and notwithstanding the fact that, according to the Article 17.14 DSU, (adopted) Appellate Body reports only bind parties to the dispute at issue.
164. Firstly, Appellate Body decisions should command appropriate respect with panels and parties to the proceedings as authoritative pronouncements on the law. Secondly, the system of 'negative consensus' for adopting reports necessarily puts a high premium on the Appellate Body decision's correctness in the first place, since the error-correcting mechanisms cannot easily be invoked. Thirdly, because the Appellate Body is the hierarchically superior body, tasked with deciding on issues of law and legal interpretations, panels should follow Appellate Body decisions which constitute an authoritative interpretation of the law to be applied by the panel.
165. It is for those reasons that the European Communities submits that the Appellate Body has stated that, panel reports – and equally adopted Appellate Body reports – "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute".¹⁶⁸
166. Further, the European Communities notes that the Appellate Body has already clearly stated that panels are bound by the legal analysis of the Appellate Body. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body addressed the question of whether the panel in that case had correctly characterised the Sunset Policy Bulletin ('SPB') as a 'measure'. It held that panels are expected to follow Appellate Body decisions where the issues are the same:

¹⁶⁸ Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 97 at paras. 107-108.

"Regarding the arguments presented by the United States relating to Article 11 of the DSU, we disagree with the United States that the Panel did not assess objectively whether the SPB is a measure. In our view, such an assessment is a legal characterization and not just a factual one, and the Panel correctly conducted its analysis. The Panel referred first to the SPB, which formed the factual information needed to conduct the exercise of legal characterization. The Panel had before it exactly the same instrument that had been examined by the Appellate Body in US – Corrosion-Resistant Steel Sunset Review; thus, it was appropriate for the Panel, in determining whether the SPB is a measure, to rely on the Appellate Body's conclusion in that case. **Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.** (...)"¹⁶⁹
(emphasis added)

167. Therefore, the European Communities submits that in assessing the claims and arguments made by Japan and the United States in this panel proceeding, and interpreting the provisions of GATT 1994 and the Anti-Dumping Agreement, this Panel is obliged to bear in mind the need for security and predictability of the multilateral trading system. Consequently, the Panel should pay rigorous attention to the established jurisprudence, in particular to the decisions of the Appellate Body.
168. The foregoing does not mean that there would be no room for this Panel to depart from previous rulings made on the substantive issues raised in this proceeding. Security and predictability of the WTO dispute settlement system should not be equated with rigidity and inflexibility. In *Japan – Alcoholic Beverages* the Appellate Body has stated that:

"WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system."¹⁷⁰

¹⁶⁹ Appellate Body Report *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

¹⁷⁰ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 31.

169. In line with what has been set out above, the European Communities acknowledges that there can be no absolute bar for panels to depart from Appellate Body decisions. However, such departures must be carefully thought through and must be based on cogent reasons. Nonetheless, the need for security and predictability does mean, in the European Communities' submission, that should a panel wish to depart from previous rulings this should be carefully considered and based on (cogent) reasons. This is especially the case when the rulings and recommendations are contained in reports which have been adopted by the DSB.¹⁷¹

V. CONCLUSIONS

170. The thrust of Mexico's case is that by using the zeroing procedures challenged in this proceeding, the United States has failed to comply with its international obligations established in the GATT 1994 and the Anti-Dumping Agreement.

171. The European Communities agrees with Mexico that its claims are supported in law by a consistent body of reasoning and findings, contained in all reports issued by the Appellate Body since the *EC-Bed Linen* case on zeroing in anti-dumping cases. The reasoning and findings of the Appellate Body are, in the view of the European Communities, to be regarded as the correct position in law.

172. The Appellate Body has considered the issues raised in this case frequently before, including in cases involving different variations of zeroing, in different stages of the anti-dumping investigations and administrative reviews, in different factual circumstances and between different parties. The European Communities considers that the Appellate Body came to its decisions on the basis of correct legal principles.

173. In the interest of ensuring security and predictability to the multilateral trading system, this Panel should follow the reasoning and findings contained in these Appellate Body reports.

¹⁷¹ It has been held that even unadopted reports may still be regarded as a useful legal guidance, in spite of the fact that they have no formal legal status: See Appellate Body Report, *Japan –*

174. Should this Panel wish to depart from previous Appellate Body findings, the European Communities submits that this should be carefully considered. The Panel would have to identify cogent reasons for why it proposes to take a different direction.
175. Further, it should also be borne in mind that should this Panel express a reasoned disagreement with the Appellate Body on issues of law or legal interpretations, this will ultimately be a question for the Appellate Body to consider.¹⁷²

Alcoholic Beverages II, 97 at 107-108.

¹⁷² Even if the particular panel report is not appealed it is quite likely that other Members will take issue with panel decisions that diverge from Appellate Body jurisprudence, in other proceedings.

LIST OF EXHIBITS

EC-1.	NAFTA: US-Softwood Lumber V (NAFTA Chapter 19 panel: Softwood Lumber Products from Canada, No. USA-CDA-2002-1904-2, Jun. 9, 2005, at 43-44
EC-2.	Supreme Court of the United States, Hutto, Director, Virginia State Department of Corrections, et al., v. Davis, January 11, 1982
EC-3.	Halsbury's Laws of England (volume 37) (2001)
EC-4.	International Criminal Tribunal for the former Yugoslavia: Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement 24 March 2000, pp. 41-48 and Declaration of Judge David Hunt
EC-5.	International Criminal Tribunal for Rwanda: Laurent Semanza s. Prosecutor, Case No. ICTR-97-20-A, 31 May 2000, para. 92
EC-6.	European Court of Human Rights: Cossey Judgement of 27 September 1990, Series A, vol. 184, para. 35
EC-7.	(European) Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. XI
EC-8.	Statute of the International Court of Justice
EC-9.	Statute of the European Court of Justice
EC-10.	Statute of the International Criminal Tribunal for the former Yugoslavia
EC-11.	Statute of the International Criminal Court
EC-12.	ICSID Secretariat Discussion Paper, 'Possible Improvements of the Framework for ICSID Arbitration', October 22, 2004
EC-13.	ICSID Secretariat Working Paper, 'Suggested Changes to the ICSID Rules and Regulations, May 12, 2005
EC-14.	Abi-Saab, The Appellate Body and treaty interpretation, in The WTO at Ten (2006), pp. 453-464
EC-15.	Arnall, The European Union and its Court of Justice (2006) pp. 622-638

EC-16.	Brownlie, Principles of Public International Law (5th ed. 1988) pp. 3-5, pp. 20-21
EC-17.	Guohua et al., WTO Dispute Settlement Understanding. A Detailed Interpretation (2005), xi-xii
EC-18.	Kmiec, The Origin and Current Meanings of "Judicial Activism", Comment, California Law Review, October 2004, 1422-1477
EC-19.	Neville and Kennedy, The Court of Justice of the European Communities (2000), pp. 370-377
EC-20.	Reid, A Practitioner's Guide to the European Convention on Human Rights (1st ed. 1998), p. 43
EC-21.	Reid, A Practitioner's Guide to the European Convention on Human Rights (2nd ed. 2004), p. 51
EC-22.	Rosas, "The European Court of Justice: sources of law and methods of interpretation", in The WTO at Ten (2006), pp. 482 -489
EC-23.	Shahabuddeen, Precedent in the World Court (1996), pp. 234-241
EC-24.	Treves, "The International Tribunal for the Law of the Sea", in The WTO at 10, (1996), pp. 490-500
EC-25.	Zweigert and Kötz, An Introduction to Comparative Law (3rd ed. 1988), pp. 256-265
EC-26.	WTO, A Handbook on the WTO Settlement System (2007 ed.), pp. 90-91