

**In the World Trade Organisation
Before the Appellate Body
AB-2008-1**

**DS344 United States – Final Anti-Dumping Measures on Stainless Steel
from Mexico**

**Third participant notification and written submission by the
European Communities**

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TABLE OF CONTENTS

I. EXECUTIVE SUMMARY 1

II. INTRODUCTION 1

III. OVERVIEW OF THE PROBLEM 3

IV. PRECEDENT 7

V. THE DUTY AMOUNT MUST NOT EXCEED THE MARGIN OF DUMPING FOR THE PRODUCT AS A WHOLE 13

VI. FAIR COMPARISON, ARTICLE 2.4, FIRST SENTENCE 16

A. OVERARCHING AND INDEPENDENT OBLIGATION 16

B. FAIR COMPARISON OBLIGATION NOT LIMITED TO ARTICLE 2.4 17

C. US SIMPLE ZEROING UNFAIR 17

1. *Margin of dumping for the product as a whole*..... 17

2. *Unjustified imbalance* 17

3. *Internal inconsistency* 18

4. *Inherent bias* 20

5. *Unjustified discrimination*..... 22

D. EXISTING CASE LAW CONFIRMS US SIMPLE ZEROING UNFAIR 22

E. CONCLUSION 24

VII. ARTICLE 2.4.2 25

A. BASIC ERRORS BY THE US 25

1. *Failure to properly consider ordinary meaning – undue reliance on remote context*..... 25

2. *Failure to properly consider the meaning of the Phrase “as a whole”* 26

3. *The “no synonyms” argument* 26

4. *The “uniqueness” argument* 27

5. *The “must be given meaning” argument* 27

6. *The alleged intent of the Members* 28

B. ORDINARY MEANING OF THE PHRASE 28

1. *Dictionary meanings*..... 29

2. *Grammatical meaning*..... 29

3. *“margins of dumping”* 31

4. *“investigation”* 31

5. *“existence”* 33

6. *“during ... phase”* 33

7. *“the”* 34

8. *The Phrase “as a whole”* 34

C. CONTEXT OF THE PHRASE 35

1. *Article VI:2 of the GATT 1994*..... 36

2. *Article 2*..... 37

3. *Articles 9.3 and 9.3.3* 38

4. *Article 5*..... 39

5. *Article 6*..... 41

6. *The ADA “as a whole”* 42

(a) *Different types of anti-dumping proceeding and the word “phase”* 42

(b) *The word “investigation” in the ADA* 43

(c) *Distinction between different types of anti-dumping proceeding* 45

D. OBJECT AND PURPOSE : MANIFESTLY ABSURD OR UNREASONABLE 46

E. ARTICLE 31(4) OF THE VIENNA CONVENTION : US FAILED TO PROVE MEMBERS INTENDED SPECIAL MEANING 47

F. PREPARATORY WORK 48

VIII. PROSPECTIVE NORMAL VALUES AND MATHEMATICAL EQUIVALENCE 51

A. PROSPECTIVE NORMAL VALUES 51

B. MATHEMATICAL EQUIVALENCE 52

C. ALLEGED "COMPETITIVE DISINCENTIVE" AND "ADMINISTRATIVE INCONVENIENCE" 53

IX. CONCLUSION 53

I. EXECUTIVE SUMMARY

1. The Appellate Body has already decided the precise legal issue before the Panel and on appeal. The Panel should have followed the past findings of the Appellate Body; and the Appellate Body should confirm its previous findings.
2. The use of zeroing in assessment proceedings is inconsistent with Article VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *ADA* because it does not result in the calculation of a margin of dumping for the product as a whole. Only exporters can engage in dumping, *i.e.* international price discrimination. Importers cannot "dump". Zeroing in assessment proceedings results in the collection of an amount of anti-dumping duty that exceeds the *exporter's* margin of dumping, in contravention of Articles 9.3 and 2 of the *ADA*.
3. It is also inconsistent with Article 2.4 of the *ADA* because it does not constitute a fair comparison between normal value and export price.
4. The disciplines of Article 2.4.2 of the *ADA* are not excluded from assessment proceedings by the phrase "the existence of margins of dumping during the investigation phase".
5. The imposition of a variable duty in a prospective normal value system is not final, but subject always to final assessment or refund under Article 9.3 of the *ADA*.
6. Alleged mathematical equivalence is irrelevant. The question before the Panel and before the Appellate Body does not relate to whether or not zeroing is permissible in cases where targeted dumping has been demonstrated.

II. INTRODUCTION

7. The EC agrees with Mexico that the panel has failed to interpret the relevant WTO provisions correctly and has disregarded, in a somewhat cavalier fashion, the consistent findings of the Appellate Body on this issue. First, we give an overview of the problem (Section III). Then we summarise our views regarding the issue of "*precedent*" in WTO proceedings (Section IV). We then set out our views that the US measures are inconsistent with the rule that the duty amount must not exceed the margin of dumping for the *product as a whole* (Section V); and do not respect the *fair comparison* obligation in the first sentence of Article 2.4 (Section VI). Next, the EC notes that, although Mexico did not, with respect to assessment proceedings, make a claim based on *Article 2.4.2* of the *ADA*, the US nevertheless sought to defend itself by arguing that Article 2.4.2 only applies to original investigations¹. We further note that the Panel Report appears to base its

¹ For example, US first written submission, para 15 : "This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation phase when using the average-to-average comparison methodology in Article 2.4.2."

reasoning, at least in part, on an acceptance of the US proposition². We do not know to what extent the US may rely on this argument in its appellee submission of the same date. Accordingly, the EC also provides an exhaustive analysis of Article 2.4.2 (Section VII), and we respectfully request the Appellate Body to find that the Panel Report is also legally erroneous in this respect. Finally, we specifically address the Panel's reasoning regarding *prospective normal value* systems and *mathematical equivalence* (Section VIII).

8. This is a remarkable – one may say astonishing – Panel Report. For the first time³ a panel simply refuses to follow prior Appellate Body Reports that have specifically clarified the meaning of the ADA on the precise legal question before the Panel – *and this with respect to the same "as such" measure* (if Japan would have brought the present case the matter would be *res judicata*, and the Panel would not even have had jurisdiction)⁴. The Panel announces that it is not "*strictly speaking*" bound by prior Appellate Body reports; that it has "*no option*" but to "*respectfully disagree*" with the Appellate Body; that it declines to engage in an "*unthinking repetition*" of past cases; that it is "*troubled*" by the previous Appellate Body Reports, which it does not find "*convincing*" and which it considers will result in "*administrative inconvenience*"; and that it prefers instead an "*objective assessment*" based on a "*solid textual basis*" and a "*good faith*" interpretation⁵.
9. The Panel then goes on to base itself on two lines of reasoning not only already expressly rejected by the Appellate Body, but in any event so manifestly erroneous as to threaten to bring the dispute settlement system into disrepute. In the prospective system payments at the time of import are obviously not and could never lawfully be "definitive"⁶ – they must always be subject to the possibility of refund. And "mathematical equivalence"⁷, even if present, is irrelevant, because whether or not zeroing is fair absent targeted dumping has nothing to do with whether or not it might or might not be fair if targeted dumping would be demonstrated. In fact, this "nullity" argument is perfectly ironic and absurd – given that it is precisely the US approach that nullifies the targeted dumping provisions.
10. It is with very considerable regret that the EC is compelled to express the view that this lamentable panel report falls well below the standards required by the DSU.

² For example, Panel Report, para 7.57 : "We note that the text of Article 2.4.2 provides that in investigations where the normal value and the export price are compared on a WA-WA basis, the weighted average normal value is to be compared with "a weighted average of prices of all comparable export transactions"." This statement obviously re-phrases the actual text of Article 2.4.2 in a manner that obviously alters its meaning. It constitutes a manifest legal error, and a failure to make an objective assessment. Given the extent to which this matter has already been litigated, this manifest legal error and absence of objective assessment would appear to be intentional.

³ The Panels in *US-Softwood Lumber V* and *US-Zeroing (EC)* were considering particular matters for the first time and the Panel in *US-Zeroing (Japan)* was based on an attempt (albeit erroneous) to interpret or distinguish prior Appellate Body Reports.

⁴ Appellate Body Report, *Mexico – HFSC (Article 21.5 – US)*, paras 78 and 79; Appellate Body Report, *US-Shrimp (Article 21.5 – Malaysia)*, para 97; Appellate Body Report, *EC-Bed Linen (Article 21.5 – India)*, paras 92 and 93.

⁵ Panel Report, paras 7.102, 7.106, 7.115, 7.117, 7.118, 7.119, 7.121, 7.124, 7.133 and 7.146.

⁶ Panel Report, para 7.125.

⁷ Panel Report, paras 7.134 to 7.143.

The issue now extends beyond zeroing, and indeed beyond trade remedies, touching upon the dispute settlement system as a whole – the "jewel in the crown" of the WTO - and the EC thus earnestly hopes in the strongest terms that the Appellate Body will respond appropriately.

III. OVERVIEW OF THE PROBLEM

11. The term "zeroing" – which does not appear in the *ADA*, may be considered something of a misnomer, because it describes only part of the problem : that is, the downward adjustment of the relatively high export transactions; or, in other words, the setting to zero of the negative amounts. The *heart* of the matter, however, is the *selection* of the relatively low priced export transactions *per se*, as a sub-category, as the only or preponderant basis for the dumping margin calculation. This has nothing to do with "offsets" or "credits".
12. This is not a new problem. It is discussed at length in Jacob Viner's Memorandum,⁸ and was specifically addressed in the Uruguay Round negotiations, during which the Members were fully informed of the issue and knew exactly what they were talking about. After more than three years of public negotiations, the problem was nicely summarised by the WTO secretariat⁹ : it was generally considered that the practice of comparing a weighted average normal value with individual export transactions was obviously *unfair* to exporters – particularly from *developing* countries - and required amendment of the Tokyo Round AD Code; the US explained that such a method was necessary to reveal *targeted dumping* – that is, successive attacks on different parts of an importing market; the consensus was that the Membership should try to find *a solution to accommodate the legitimate concerns of both sides*. That *compromise* was the text of Article 2.4.2 of the *ADA*, as it stands today.
13. Looking at the overall design and architecture of Article 2.4.2, and reading its provisions intelligently, in the light of the underlying *economic* realities that the legal rules are intended to address and respond to – that is, the *real world*, it is clear that *there are only three sub-categories of clustered low priced export transactions that it is permissible to respond to* : those clustered by purchaser, region or time.¹⁰ These categories broadly correspond to typical market definition parameters : they make *economic* sense.
14. Thus, it is not *permissible*, and it is not *fair*, to pick up low priced export transactions clustered by model. The US has acknowledged as much. This is clear from the term "all" in the first sentence of Article 2.4.2, and the definition of dumping in Article 2.1 of the *ADA* and Article VI:1 of the GATT 1994 in terms of

⁸ Jacob Viner, *Memorandum on Dumping*, written for the World Economic Conference of the League of Nations, 1926, Reprinted 1966, discussing dumping in terms of international price discrimination between different markets, and distinguishing between systematic or permanent dumping and sporadic, abnormal or temporary dumping (for example, at paragraphs 2, 5, 6, 9, 11, 12 and 13).

⁹ MTN.GNG/NG8/15, page 13.

¹⁰ *ADA*, Article 18.1 : "No specific action against dumping ... can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

the product; *read together with the absence in the targeted dumping provisions of any reference to a sub-category by model*. Thus, the relevant provisions, and particularly the normal rule and the exception, are read *harmoniously*, so as to give meaning – both *legal* and *economic* – to all the treaty terms.

15. In exactly the same way, it is not possible to pick up low priced export transactions *per se* as a sub-category. ***There is no reference to any such sub-category in the provisions on targeted dumping.*** To accept such a proposition would be to render the targeted dumping provisions useless; and to negate the compromise, negotiated and agreed by all the WTO Members (in return for other concessions), to which we have just referred. The proof of this is that for some 13 years the US has simply ignored the targeted dumping requirements, content to continue doing exactly what it was doing before, based on its own unilateral interpretation of Article 2.4.2. The further proof of this is that, by its own assertion, the US sought the insertion of the phrase "the existence of margins of dumping during the investigation phase" (the "Phrase") precisely with the intention of *side-stepping* the compromise and the obligations that we have just outlined. This is a highly significant point that bears repetition: the entire US position is premised on the implied admission that the overall design and architecture of Article 2.4.2 is to be interpreted in the manner advocated by the EC.
16. We turn, therefore, to the Phrase "the existence of margins of dumping during the investigation phase", added – *behind closed doors* - after some three and a half years of public negotiations. According to the US, this means that the obligations in Article 2.4.2 do not apply to the re-calculation of dumping margins in assessment proceedings. Rather, the US is completely free to choose the methodology to be used for calculating a contemporaneous dumping margin and finally collecting duties. Since the results of the first retrospective assessment proceeding are applied with effect from the date on which duties were first imposed, this would negate *entirely* the compromise enshrined in Article 2.4.2.
17. In the view of the EC, assuming Members negotiate in full knowledge of the 1969 Vienna Convention on the Law of the Treaties (the "Vienna Convention"), it may reasonably be assumed that they negotiate in good faith, just as they agree that the terms of the ADA are to be interpreted in good faith. In such negotiations, the EC would neither expect nor accept that what is clearly given, after lengthy debate, with one hand (that is, agreement not to use asymmetry absent targeted dumping) would be surreptitiously entirely taken away with the other hand. The US position reflects what might be termed the "last minute" "spanner in the works" theory of international negotiation – a tactic that, in the view of the EC, is hardly suited to a multilateral organisation with 151 Members, including many *developing* countries.
18. However, assuming for the sake of argument, that such negotiation tactics are permissible, ***the EC would like to draw the Appellate Body's very close attention to what a Member forfeits when it adopts such an approach.*** First, most obviously, the Member chooses to leave no trace of its intended unilateral interpretation in the *preparatory work*. Second, and in similar vein, the Member chooses not to offer any explanation to its negotiating partners – many of whom are *developing* countries - as to what the ***object and purpose*** of such a provision

might be. This is particularly problematic when the subsequent unilateral interpretation flies in the face of the overall design and architecture of the ADA. Especially when there is no object and purpose capable of explaining why, on the basis of identical data, the mere act of collection should inflate the dumping margin many times over – a proposition that is "manifestly absurd or unreasonable" within the meaning of the Vienna Convention – both in legal terms and in *economic* terms. Third, and in similar vein, the Member chooses to forego any attempt to reconcile conflicting *context* with its intended unilateral interpretation. The Appellate Body may thus note that of the various elements of the interpretive rule in the Vienna Convention, *by the US' own choice*, there is only one that stands between the US and failure : the supposed *ordinary meaning* of the Phrase.

19. We believe we have previously amply demonstrated that the ordinary meaning of the Phrase is not that advocated by the US.
20. We believe that, for the US, the term "investigation" was key in its intended unilateral interpretation. In fact, we have an express admission of this in the US Statement of Administrative Action (SAA), which accompanied the adoption of the US Uruguay Round Agreements Act, and which contains the words ("not reviews").¹¹ Obviously, the drafter of the SAA well appreciated that these words are not contained in Article 2.4.2 of the ADA, and do not result from a proper interpretation of that provision, which is precisely why they were inserted in the SAA *in an attempt at ex post rationalisation* – an attempt doomed to fail, as subsequent WTO litigation has demonstrated.
21. The ordinary meaning of the term "investigation" is simply a systematic examination or careful study of a particular subject.¹² When the US asserts that Article 2.4.2 refers to "an investigation to determine the existence, degree and effect of any alleged dumping", within the meaning of Article 5.1 of the ADA, it is the US – not the EC - that is asking the panel to read words into the text of Article 2.4.2 that are not there, and in a manner that is squarely disrespectful of the existing text. Under the ADA there are five types of proceeding (original, newcomer, changed circumstances, sunset and assessment), each of which involves an investigation into something. This is exactly how the term is used in US municipal law.¹³ It is also exactly how it has generally been understood in the WTO.¹⁴

¹¹ US Statement of Administrative Action accompanying the adoption of the Uruguay Round Agreements Act (URAA), and providing authoritative guidance for its interpretation (Appellate Body Report, *US-OCTG from Argentina*, paragraph 207). The SAA also confirms that : "the reluctance to use an average-to-average methodology has been based on a concern that such methodology could conceal "targeted dumping"".

¹² This view is supported by the dictionary meanings set out in *The Shorter Oxford English Dictionary, fifth edition (2002)*.

¹³ The US Rules of Practice and Procedure of the International Trade Commission effective 6 July 1998 (63 FR 30599) contain the following provision :

Investigation to review outstanding determination

(a) Request for review. Any person may file with the Commission a request for the institution of a review investigation under Section 751(b) of the Act. The person making the request shall also promptly serve copies on the request on the parties to the original proceeding upon which the

22. Thus, the US is arguing for the term "investigation" in Article 2.4.2 to have a limited or *special meaning*. Under the terms of the Vienna Convention, that is only possible if the US establishes that *all* the *Members* of the WTO so intended.¹⁵ And that is where the US stumbles, precisely because, in pursuing its "last minute" theory of negotiation, the US itself chose to forego any attempt to get its intended special meaning agreed by the other WTO Members – who have since confirmed that they intended no such thing.¹⁶
23. Although the cause is lost, the US struggles on. It turns first to the term "existence" as somehow unique to original investigations – but this term simply relates to any dumping margin calculation.¹⁷ Next, the US turns to the term "during ... phase" – but this simply indicates "a distinct period" in the passage of time¹⁸ – as the EC submits, an investigation period – and the US is simply wrong to assert that there is only one type of "proceeding" with five phases, when there are in fact five types of proceeding, each of which may involve an investigation into something.
24. The discussion could stop here. But there are a *multitude* of other interpretative points against the US. First, the grammatical structure of the Phrase, in which the term "during ... phase" is grammatically linked to a period of time in which margins exist (an investigation period) as opposed to one in which they are established (as the US would have it). This both confirms the EC interpretation and *precludes* the US interpretation. Second, the defined term "margin of dumping" has the same meaning throughout the *ADA*, and must inform the meaning of the Phrase – there being no support in the text for the view that the definition should change at the moment of final collection. Third, the overall design and architecture of Article 2.4.2, as outlined above. It is particularly significant in this respect that the EC position reads the normal rule referring to the *investigation period* in counterpoint to the exceptional rule permitting a response to *time* based targeted dumping. Thus, once again, the EC advances a *harmonious* reading of all the treaty terms, which makes legal and *economic* sense of all of them. Fourth, the numerous references in Article 2 to "investigations", which are

review is to be based. All request shall set forth a description of changed circumstances sufficient to warrant the institution of a review investigation by the Commission.

A review under Section 751(b) of the Tariff Act is a changed circumstances review, as provided for in Article 11.2 of the *ADA*.

The US International Trade Commission systematically refers to "Changed Circumstances Investigations" and to "Five-Year Review (Sunset) Investigations".

¹⁴ *World Trade Organization, A Handbook on Anti-Dumping Investigations, Judith Czako, Johann Human and Jorge Miranda, Cambridge University Press, 2003, page 93, with respect to retrospective assessment proceedings* : "The margin would be recalculated by means of an investigation much like the original investigation, addressing normal value, export price, and comparing the two, using the data for the POR. This investigation could take up to 12 months." (emphasis added).

¹⁵ Vienna Convention, Article 31(4) : "A special meaning shall be given to a term if it is established that the parties so intended."

¹⁶ A review of all notifications by WTO Members of their anti-dumping laws implementing the *ADA* reveals that none has adopted the US interpretation. Furthermore, when questioned on this issue, other WTO Members have confirmed that they did not intend Article 2.4.2 to have the meaning advocated by the US (Appellate Body Report, *US-Zeroing*, paragraph 22).

¹⁷ See particularly the title to Article 2 in the French language version of the *ADA*.

¹⁸ This view is supported by the dictionary meanings set out in *The Shorter Oxford English Dictionary, fifth edition (2002)*. It was advanced by the US itself in DS294.

- considered, even in US municipal law, to refer to all types of investigations, including assessment proceedings. Fifth, the rule in Article 9.3 that the amount assessed cannot exceed the dumping margin – with an express cross-reference to *all* of Article 2. Sixth, the absence of any object and purpose argument capable of supporting the US position. Seventh, the preparatory work, as outlined above ... And the list goes on.
25. Finally, the US turns to some other general arguments, equally without merit. First, the so-called "mathematical equivalence" argument, which is obviously vitiated by a simple intellectual error : something can perfectly well be fair as a response to targeted dumping, but unfair absent targeted dumping. Second, the argument derived from Article 9(4)(ii) and the so-called "variable duty" or prospective normal value. This provision concerns sampling, and insofar as it implies the possibility that one of the measures that could be imposed pursuant to Article 9.2 *ADA* could be a variable duty, it equally implies that any such duty is ultimately subject to final assessment or refund under Article 9.3, with dumping margins re-calculated in accordance with all of the provisions of Article 2. This is completely logical. It plugs the gap that would otherwise arise in the *refund* system under Article 9.3.2, in which final liability cannot, by definition, increase. The only option for Members operating such systems who are fearful of targeted dumping is a variable duty, with refund in the event that the feared targeted dumping does not materialise. The proposition that Article 9(4)(ii) in any way contradicts any of the interpretative points that we have already outlined is thus without merit. Third, the proposition that because, in the US, assessment proceedings are importer driven, this should change the analysis. This practical assertion is without merit. The *ADA* responds to international price discrimination by *exporters*; and it is a matter of *elementary accounting* to calculate final liabilities for importers, whilst respecting the ceiling fixed by the amount of dumping practiced by an exporter.
26. If *all* of the interpretative elements in the Vienna Convention support the position of the EC, and disprove the position of the US, the US interpretation cannot be said to be "permissible" within the meaning of Article 17.6 of the *ADA*.
27. Some people say that zeroing poses a "constitutional" challenge for the WTO. Certainly, these appellate proceedings have implications beyond zeroing and trade remedies. It is also true that, human nature being what it is, it is not always easy for people to acknowledge their own error. The EC is confident, however, that ultimately the quiet voice of legal reason will prevail. What determines the matter is the rules based systematic and objective application of the agreed rules of interpretation of public international law in the Vienna Convention. Not *ex post* thinly veiled power-oriented expressions of personal will.

IV. PRECEDENT

28. In its third party submissions before the Panel the EC has set out at length its views on the role and value of precedent for the WTO dispute settlement system. These submissions will not be reiterated here, but they are incorporated by

- reference as the position which the EC maintains on the relevance of precedent in this dispute.
29. For the reasons set out below, the EC submits that the Panel's views on the role of the Appellate Body and the value of precedent are thoroughly misconceived and legally erroneous. Thus, the Panel has presented the Appellate Body with important systemic questions relating to the role of the Appellate Body in the WTO dispute settlement system. The answers to these questions are of fundamental importance for the proper functioning of this system.
30. The single most important issue in relation to the subject-matter of precedent that arises from the Panel's report is the question of the extent to which panels are obliged to follow rulings of the Appellate Body on questions of law and legal interpretations. This question, which is sometimes referred to as the question of 'vertical precedent', was treated by the EC at length in its submissions before the Panel¹⁹.
31. The answer that the Panel gives to this question is clear and unambiguous: in the Panel's view, there is no rule obliging it to follow previous Appellate Body decisions that have addressed the legal issues before the Panel²⁰. According to the Panel, previous Appellate Body rulings on particular issues have no particular or additional legal significance. For the Panel, they have the same value as panel reports: Appellate Body reports may have persuasive value, but not more than that; a panel is at liberty to take a different view when it finds the Appellate Body's ruling on a particular legal issue "unpersuasive".
32. Applying this formulation to the case at hand, the Panel has, in order to answer the legal questions it was confronted with, duly looked at panel and Appellate Body reports that have dealt with similar questions. In relation to some if not most of the contentious questions, the Panel has chosen to follow answers given by other panel reports, *even if these reports were subsequently overturned on appeal by the Appellate Body*.
33. It should be noted that the Panel's attention had been explicitly drawn to the unambiguous opinion of the Appellate Body itself on this very question. It was pointed out that in *US-Oil Country Tubular Goods Sunset Reviews*, the Appellate Body clearly stated that panels are '**expected**' to follow the Appellate Body's conclusions in earlier disputes '**especially where the issues are the same**'²¹.
34. It would seem though that the Panel was not convinced by this statement. It implicitly found this particular statement of the Appellate Body to be unpersuasive; acknowledging only that the Appellate Body '*de facto*' expects panels to follow adopted Appellate Body reports to the extent that the legal issues addressed are similar²².

¹⁹ EC third party written submission, parts IV C and D.

²⁰ Panel Report, paras 7.101 to 7.106.

²¹ Appellate Body Report, *US-Oil Country Tubular Goods Sunset Reviews*, para 188, cited in Panel Report in para 7.104.

²² Panel Report, para 7.105.

35. In the EC' view, the Panel's analysis of the value of Appellate Body rulings on questions of law and legal interpretations is seriously flawed. WTO panels are '*de jure*' obliged to correctly apply the law and this means that they must follow rulings of the Appellate Body where the Appellate Body has correctly interpreted legal questions. This is also the true meaning of the Appellate Body's opinion on this question in *US–Oil Country Tubular Goods Sunset Reviews*.
36. The EC has in its submissions before the Panel demonstrated why and to what extent it believes it is important and proper to require that panels follow Appellate Body rulings on 'issues of law' and 'legal interpretations'²³. Reference was made to the need for providing security and predictability to the multilateral trading system²⁴ and the prompt settlement of disputes²⁵. These arguments will not be repeated in full here.
37. The central questions that now lie before the Appellate Body are: whether it can be said that there is in the DSU a hierarchy between the Appellate Body and panels and whether panels are obliged to follow Appellate Body rulings on questions of law.
38. The EC submits that the DSU clearly demonstrates that there is such a hierarchy. In the DSU panels and the Appellate Body are entrusted with different tasks. According to Article 11 of the DSU, the function of a panel is primarily to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.
39. The role of the Appellate Body is set out in Article 17 DSU. It is a standing body that hears 'appeals from panel cases'²⁶, on 'issues of law' covered in the panel report and 'legal interpretations' developed by the panel²⁷. To fulfil this task the Appellate Body is comprised of persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally²⁸. It follows that in the DSU, for issues of law and legal interpretations developed by a panel, the Appellate Body is to be regarded as the hierarchically superior body. The Appellate Body is the body that has the "final say" on legal questions in each dispute, subject to the parties' exercise of their right of appeal.
40. As the EC demonstrated in its submissions before the Panel, the rule that decisions of international courts and tribunals are only binding on the parties to the dispute does not settle questions relating to horizontal or vertical precedential value of decisions of these adjudicatory bodies²⁹. To be more precise, the rule that panel and Appellate Body reports are only binding *qua reports* on the parties to a particular dispute says nothing on the pivotal question at issue here, which is

²³ EC third party written submission, part IV D.

²⁴ DSU, Article 3.2.

²⁵ DSU, Article 3.3.

²⁶ DSU, Article 17.1.

²⁷ DSU, Article 17.6.

²⁸ DSU, Article 17.3.

²⁹ EC third party written submission, paragraphs 103, 104 and 122 to 125.

- whether panels are obliged to follow Appellate Body rulings on ‘issues of law’ and ‘legal interpretations’.
41. The Panel is correct when it states that there is no explicit written rule to this effect in the DSU. However, as demonstrated by the EC in its submissions before the Panel, the absence of such an explicit legal rule is not unusual, but rather the norm in international adjudicatory systems³⁰.
 42. Let us assume, for the sake of argument, that the Panel’s views on the lack of binding force of Appellate Body rulings on legal issues would be accepted. That would mean that every single time a panel is confronted with a legal question it would be entitled to examine this issue afresh. In cases where a panel would not be convinced by the reasoning of the Appellate Body, it would hence be free to settle the same legal question differently. It should be noted that in this proceeding the Panel did not feel the need to re-examine the settled jurisprudence of the Appellate Body on such questions such as the standard of review³¹, rules of treaty interpretation³² and the burden of proof³³. However, in accordance with the Panel’s stance on the lack of binding force of Appellate Body rulings, the Panel might as well have taken a different view also on these fundamental legal questions, in the absence of an express written rule on the binding force of Appellate Body decisions on legal issues.
 43. The EC has no doubt that if this Panel’s views would be accepted, the WTO dispute settlement system would be seriously impaired, and perhaps even eventually more or less grind to a halt for all practical purposes. The Panel’s position amounts to an open invitation to parties to re-litigate every single legal issue arising in a particular dispute. The US appears to believe that Panels would be forced to examine the Appellate Body’s jurisprudence on every possible legal question afresh and would, moreover, be obliged to justify their decision (i.e., whether to follow or not) in each case in relation to each legal issue.
 44. In addition, the Panel’s view that the Appellate Body’s rulings on particular legal questions have no binding force must be regarded as defeating the object and purpose of having an appeals mechanism in the DSU. If the Panel were correct, and if the opinions of the Appellate Body would have no binding force beyond the concrete dispute in relation to which they were rendered, parties could in each and every case be obliged to bring their case to the Appellate Body in order to have their rights upheld. However, a party should not have to have recourse to the Appellate Body for that purpose; already the panel should uphold the parties’ rights. The US position is thus open to the criticism that there would be very little or even no real added systemic or practical value of having a standing body to decide on legal questions.
 45. When reviewing ‘issues of law’ and ‘legal interpretations’ developed by panels the Appellate Body is performing a task of treaty interpretation of the covered agreements. The Appellate Body has repeatedly held that the purpose of treaty

³⁰ EC third party written submission, paragraphs 126 to 144.

³¹ Panel Report, paras 7.1 to 7.2.

³² Panel Report, paras 7.3 to 7.5.

³³ Panel Report, paras 7.6 to 7.9.

interpretation under Article 31 of the Vienna Convention is to ascertain the *common* intention of all the (contracting) parties to these agreements.³⁴ Furthermore, in *EC-Chicken Cuts* the Appellate Body explicitly endorsed the view that

"one Member's unilateral object and purpose for the conclusion of a tariff commitment cannot form the basis" for an interpretation of that commitment, because interpretation in the light of Articles 31 and 32 of the Vienna Convention must focus on ascertaining the common intentions of the parties."³⁵ (footnote references omitted)

46. In other words, in exercising its functions under the DSU and reviewing legal interpretations and issues of law in relation to the covered agreements, the Appellate Body seeks to ascertain the correct legal position dictated by the common intention of all the contracting parties in relation to the agreements. The Appellate Body's conclusions on the correct legal position in relation to one of the covered agreements necessarily transcends the particular facts of one case, and is not confined to the Members who are parties to a particular dispute. The contrary view would obviate the needs for treaty interpretation and undermine the credibility of the DSU.
47. Equally fundamentally, the Panel's position on the lack of binding force of the Appellate Body's decisions on legal issues, means that the resolution of a particular dispute ultimately depends on the **personal convictions held by the panellists** at a particular point in time, and therefore also on the particular composition of a panel.
48. Furthermore, if the Panel were correct the rationale for the system of third party intervention in the DSU would be undercut. Article 10.2 allows any Member that has a substantial interest and has notified its interest to the DSB an opportunity to participate in the panel proceedings. This provision does not require a showing of a trade interest. As a rule, the reasons why Members other than parties to the dispute intervene are of a purely systemic nature: to ensure the correct interpretation and application of the covered agreements. However, if every single legal issue can be re-litigated at every occasion, there is no longer any rationale for third parties to intervene in a particular dispute, as there would be no systemic interest for such intervention. Once again, the Panel's opinion, if accepted, would lead to a chaotic situation which is at odds with the prime function of the DSU: providing security and predictability to the multilateral trading system and the prompt settlement of disputes.
49. A legitimate question that arises in this regard is to what extent, if Panel's would be expected or even obliged to follow previous Appellate Body Reports, which the EC advocates as the correct legal position, this could be seen as inhibiting healthy legal debate, as preventing the international trade system from developing and as ultimately leading to rigidity, inflexibility and paralysis. The EC submitted before

³⁴ Appellate Body Report, *US-Gambling*, para. 159; Appellate Body Report, *EC-Computer Equipment*, paras 84, 93, 109; Appellate Body Report, *EC-Chicken Cuts*, para. 239.

³⁵ Appellate Body Report, *EC-Chicken Cuts*, para. 239.

- the Panel that this fear is unfounded. It has been addressed and dispelled by the Appellate Body in *Japan –Alcoholic Beverages*³⁶.
50. A further question that arises in relation to this particular Panel proceeding is on what grounds a panel may express its disagreement with a particular ruling of the Appellate Body on a legal question. As explained by the EC in its submissions before the Panel, a rule whereby panels follow the Appellate Body on legal questions does not prevent an adjudicatory system from developing its case law and departing from earlier decisions in cases where there are cogent reasons for doing so³⁷.
51. However, the need for such departures must be thoroughly justified. Departures cannot be founded on a mere doubt about the correctness of a previous decision. Nor could they be justified on the sole basis of a disagreement by the hierarchically lower body with the reasoning of the hierarchically higher body.
52. In the present case the Panel has not demonstrated any cogent reasons for departing from the Appellate Body's settled jurisprudence in relation to the legal issues and legal interpretations relating to the practice of zeroing. On the contrary, all the Panel has done is re-iterated the reasoning which the Appellate Body has examined and rejected, in many cases.
53. The Panel has not even engaged in an exercise of trying to 'distinguish' this case from earlier rulings of the Appellate Body. The EC acknowledges though that this would have been a futile exercise because there is no doubt that the legal questions that this Panel had to deal with are the same as those before the Appellate Body in other zeroing cases.
54. In addition, if the Panel's views were to be accepted, the Appellate Body itself would have to reverse its earlier rulings on the legal issues and legal interpretations relating to the zeroing practice at issue in this case. The personal opinions held by particular panellists do not amount to cogent reasons for the Appellate Body to reverse the existing jurisprudence.
55. The EC is well aware that one WTO Member and some panellists may still not be able to personally agree with the rulings of the Appellate Body on legal issues relating to the practice of zeroing. There have been three previous panel reports that have reached different conclusions to those of the Appellate Body, each of which has been overturned on appeal. However, the Appellate Body's role is precisely to definitively settle such disagreements over points of law.
56. The Appellate Body has more than once confirmed what the correct legal position is in relation to the covered agreement, *in casu* the *ADA*, with respect to the legal questions the Panel had to deal with. The time has now come for the Appellate Body to unambiguously re-confirm that all panels are **expected and therefore also obliged**, to follow its rulings on these issues.

³⁶ Appellate Body Report, *Japan - Alcoholic Beverages II*, para 31, cited by the European Communities in its third party written submission before the Panel, at para 168.

³⁷ EC third party written submission, paras 141 to 144.

V. THE DUTY AMOUNT MUST NOT EXCEED THE MARGIN OF DUMPING FOR THE PRODUCT AS A WHOLE³⁸

57. The parties and the Panel agree, and it is not controversial, that the “as applied” measures at issue include final retrospective assessments as provided for in Article 9.3.1, and must be consistent with, *inter alia*, the relevant obligations set out in Article 9.3. Article 9.3 provides that the *amount* of the anti-dumping duty shall not exceed the *margin of dumping* as established under Article 2. In the view of the EC, in the relevant measures at issue, the US did not correctly establish the anti-dumping duty amount or the margin of dumping, consistent with the obligations set out in Articles 9.3 and 2, and Article VI of the GATT 1994. This is so because the US determination did not reflect the margin of dumping for *the product as a whole*. Rather, the US used, without justification, an asymmetrical method of comparison between normal value and export price; and the US made, without justification, a zeroing adjustment that effectively reduced the price at which certain exports were made. The US did not therefore comply with its obligation to ensure that the amount of the anti-dumping duty collected must not exceed the margin of dumping.
58. The disagreement between the parties flows, in essence, from their respective interpretations of the terms “dumping” and “margin of dumping” in the ADA, and whether these terms apply at the level of the product as a whole, or at the level of a comparison between a weighted average normal value and an individual export transaction. We therefore turn to an analysis of these terms as used in Articles 2 and 9. The US position and the Panel Report rest on the proposition that “margins of dumping” can be established, and “dumping” can be found, at the level of a comparison between a weighted average normal value and an individual export transaction. In addressing this argument, we turn first to Article VI:1 of the GATT 1994 and Article 2.1 of the ADA, which define “dumping”.
59. Specifically, Article VI:1 defines “dumping” as occurring where “*products* of one country are introduced into the commerce of another country at less than the normal value of the *products*” (emphasis added). This definition is reiterated in Article 2.1 (“... a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if...”). It is clear from the texts of these provisions that dumping is defined in relation to a product as a whole as defined by the investigating authority. Moreover, we note that it results, *inter alia*, from the opening phrase of Article 2.1 (“For the purpose of this Agreement”) that the definition of dumping as re-iterated in Article 2.1 applies to the entire ADA. “Dumping”, within the meaning of the ADA, can therefore be found only for the product under investigation as a whole, ***and cannot be found to exist only for a type, model or category of that product, including a “category” of one or more relatively low priced export transactions.***
60. Other provisions of the ADA confirm this view. For example, Article 9.2 (as well as Article VI:2 of the GATT 1994) stipulate that an anti-dumping duty is to be

³⁸ Appellate Body Report, *EC-Bed Linen*, para 53; Appellate Body Report, *US-Hot-Rolled Steel*, para 118; Appellate Body Report, *US-Softwood Lumber V*, paras 91 to 103; Appellate Body Report, *US-Zeroing (EC)*, paras 123 to 135; Appellate Body Report, *US-Zeroing (Japan)*, paras 108 to 116.

imposed in respect of the *product* under investigation. In addition, Article 6.10 provides that the investigating authorities “shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned *of the product under investigation*” (emphasis added).

61. Having examined the definition of “dumping”, we now turn to examine the term “margin of dumping” as defined in Article VI:2 of the GATT 1994, second sentence, and implemented in Article 2 of the *ADA*, to which Article 9.3 cross-refers. The EC submits that, whatever the method used to calculate a margin of dumping, that margin must be, and can only be, established for the *product* under investigation as a whole, subject to the targeted dumping provisions. While “dumping” refers to the introduction of a product into the commerce of another country at less than its normal value, the term “margin of dumping” refers to the magnitude of dumping. As with dumping, “margins of dumping” can, in principle, be found only for the product under investigation a whole, and cannot be found for a product type, model or category of that product, including a “category” of one or more relatively low priced export transactions.
62. It is clear that an investigating authority may undertake multiple intermediate comparisons between a weighted average “normal value” and individual export transactions. However, the results of any such multiple comparisons are not “margins of dumping”. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating all these “intermediate values” that an investigating authority can establish margins of dumping for the product under investigation as a whole.
63. The EC fails to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating all of the “results” of the multiple comparisons. Aside from the exception provided for by the targeted dumping provisions, there is no textual basis in the *ADA* that would justify taking into account the “results” of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other “results”. Thus, the obligations in Articles 2 and 9 must apply to the aggregation of the results of such multiple comparisons.
64. The Panel's reasoning constitutes an outright repudiation of the findings of the Appellate Body in the five previous cases cited above. Furthermore, the Appellate Body has made it clear that these principles are based most fundamentally on Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *ADA* and are confirmed by Articles 9.2 and 6.10 of the *ADA* and Articles VI:1 and VI:2 of the GATT 1994. The Appellate Body has thus explicitly rejected the notion that these principles apply only in original proceedings.
65. This view that “dumping” and “margins of dumping” can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping proceeding. Thus, having defined the product under investigation, the investigating authority must treat that *product* as a whole for, *inter alia*, the following purposes : determination of the volume of dumped imports, injury determination, causal link between dumped

imports and injury to domestic industry, and calculation of the margin dumping. ***Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the ADA, an anti-dumping duty can be levied only on a dumped product.*** For all these purposes, the product under investigation is treated as a whole, and so-called non-dumped export transactions are not excluded. We see no basis under the ADA for treating the very same export as “non-dumped” for one purpose and “dumped” for other purposes. In this respect, the EC particularly agrees with the Appellate Body's conclusion, quoted by Mexico in paragraph 87 of its appellant submission, that dumped imports must be treated in the same manner for the purposes of both dumping and injury :

If as a consequence of zeroing, the results of certain comparisons are disregarded only for purposes of calculating margins of dumping, but taken into consideration for determining injury, this would mean that the same transactions are treated as “non-dumped” for one purpose, and as “dumped” for another purpose. This is not in consonance with the need for consistent treatment of a product in an anti-dumping investigation.³⁹

66. The EC further refers to Article 2.2.1, which provides for particular circumstances in which investigating authorities may *disregard* certain matters; and Article 2.7, according to which all the rules in Article 2 are without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to the GATT 1994. That supplementary note recognises that, in certain cases, special difficulties may exist in determining price comparability for the purposes of Article VI:1 of the GATT 1994, and that *only in such cases* a strict comparison with domestic prices may not be appropriate. We also refer to Article 9.4, which permits investigating authorities, in certain specific circumstances, to disregard zero, *de minimis* and “facts available” margins; and Annex II, which permits investigating authorities, in certain circumstances, to disregard certain information. The EC considers that this context supports the view that, where the Members sought to allow investigating authorities to disregard certain matters, they did so by way of express reservation.⁴⁰
67. It is clear from the preceding observations that the obligations and methodologies that apply when a margin of dumping is investigated or relied upon are the same for the entire ADA, including “administrative review” proceedings, and that the use of zeroing by the US in the measures at issue is thus inconsistent with the ADA in both the calculation of a revised margin of dumping for cash deposit purposes and in the calculation of the amount of duty retrospectively assessed. It is not contested that, all other things being equal, the use of zeroing in the computation of either the margin of dumping for cash deposit purposes or the amount of duty finally assessed systematically and inevitably inflates the dumping margin and amount of duty, compared to a computation without zeroing. Accordingly, the use of zeroing in the measures at issue clearly constitutes a direct violation of Article 9.3.
68. In this respect, the EC recalls that the US calculation of a revised margin for cash deposit purposes is identical in all relevant respects to the margin calculation

³⁹ Appellate Body Report, *US – Zeroing (Japan)*, para. 128, citing the Appellate Body Report, *US – Softwood Lumber V*, para. 99.

⁴⁰ Appellate Body Report, *US-Softwood Lumber V*, para 100.

performed in the original proceeding. There is therefore simply no basis on which the US can plausibly argue that zeroing, which is prohibited in original proceedings, somehow become permitted in the same calculation done in an “administrative review”; or that if zeroing is not permitted in the calculation of a margin for cash deposit purposes, it is somehow permitted in the final duty assessment, which would mean that the US could reach a different (and higher) amount in one calculation than in another, in the same proceeding and on the basis of the same data. Such a proposition is manifestly absurd or unreasonable and underscores the error of the US argument and of the Panel's reasoning.

69. The preceding observations are fully consistent with all other interpretative considerations, as set out in this submission. For all of these reasons, the EC requests the Appellate Body to reverse the Panel's findings that the US did not act inconsistently with Articles 9.3 and 2 of the *ADA*, and Articles VI:1 and VI:2 of the GATT 1994 and the conclusions and recommendations based on those findings. The Panel has not correctly assessed this issue of law; and it has developed a legal interpretation of these provisions that is incorrect.

VI. FAIR COMPARISON, ARTICLE 2.4, FIRST SENTENCE

70. The EC considers that the zeroing method used by the US in the relevant measures at issue results in the calculation of a margin of dumping, whether expressed as an amount or a percentage rate, that does not relate to the product as a whole, and is unbalanced, internally inconsistent, inherently biased, discriminatory, unjustified and unfair. It is thus inconsistent with Article 2.4, first sentence, of the *ADA*. The Panel dismissed Mexico's claim in this respect as consequential to Mexico's other claims.⁴¹

A. Overarching and independent obligation

71. Article 2.4 of the *ADA* provides that “[a] fair comparison shall be made between the export price and the normal value.” Article 2.4 thus establishes an overarching and independent obligation to make a fair comparison between normal value and export price. US municipal law implementing Article 2.4 also contains an independent and separate rule to that effect.⁴²
72. The text of the Uruguay Round *ADA* contains an important and significant innovation by comparison with the text of the previous Tokyo Round *Anti-Dumping Code*. Under the Tokyo Round *Anti-Dumping Code*, the equivalent or similar provisions to the first and second sentences of Article 2.4 of the Uruguay Round *ADA* were contained in the same sentence.⁴³ In the Uruguay Round *ADA*, however, the words “fair comparison ... between the export price and the normal

⁴¹ Panel Report, paras 7.144 to 7.145.

⁴² US Tariff Act (“Tariff Act”), Section 773(a); US Statement of Administrative Action (“SAA”) at page 809; US Regulations on Antidumping and Countervailing Duty Proceedings (“Regulations”), at 62 FR 27350, middle column, at “Other Comments Concerning Section 351.401”.

⁴³ Tokyo Round *Anti-Dumping Code*, Article 2.6, first sentence : “In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1 (b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.”

value” were lifted up and placed on their own in a new first sentence of Article 2.4. This change confirms that Article 2.4 contains an overarching and independent obligation to make a fair comparison⁴⁴.

B. Fair comparison obligation not limited to Article 2.4

73. The fair comparison obligation is not limited to paragraph 4 of Article 2. Articles 2.4, second to sixth sentences, 2.4.1 and 2.4.2 contain more detailed rules, which are an expression of the fair comparison requirement, although they do not exhaust it⁴⁵. The fair comparison requirement is thus also applicable to proceedings governed by Article 9.3 of the ADA⁴⁶.

C. US simple zeroing unfair

1. Margin of dumping for the product as a whole

74. The EC submits that, absent targeted dumping, a comparison between normal value and export price that does not fully take into account all export transactions does not result in the calculation of a margin of dumping for the product as a whole, and is therefore not a fair comparison within the meaning of Article 2.4, first sentence⁴⁷.

2. Unjustified imbalance

75. The obligation imposed by Article 2.4 to conduct a fair comparison precludes the zeroing method used by the US in the measures at issue. Given the ordinary meaning of the word “fair”,⁴⁸ the obligation to make a fair or equivalent comparison must necessarily involve a fairly balanced comparison, being one that, subject to the targeted dumping exception, takes equivalent account of all the data relating to normal value and export price, in calculating a “margin of dumping” for each exporter. The US in fact used a zeroing method without any justification, and for that reason acted in a manner inconsistent with its obligation to make a fair comparison, pursuant to Article 2.4.
76. The Panel and Appellate Body reached a similar conclusion in *US Hot-Rolled Steel*, regarding the “arm’s length” and “aberrationally high” price tests for determining whether or not domestic sales are made in the ordinary course of trade. The panel observed that the mere fact that a domestic sale is at a relatively low price does not necessarily mean that it can no longer be considered to have been made in the ordinary course of trade. Similarly, in the present case, the mere fact that an export sale is at a relatively high price does not mean that it ceases, for that reason alone, to be comparable. The panel further observed that the US methodology excluded lower priced domestic sales, skewing the normal value

⁴⁴ Appellate Body Report, *US-Zeroing (EC)*, para 146.

⁴⁵ Appellate Body Report, *US-Zeroing (EC)*, para 146.

⁴⁶ Appellate Body Report, *US-Zeroing (EC)*, para 146, final sentence.

⁴⁷ See section V of this submission.

⁴⁸ A comparison that is “just, unbiased, equitable, impartial”, “offering an equal chance of success”, conducted “honestly, impartially” and “evenly, on a level” (*The New Shorter Oxford English Dictionary*).

upward, thereby inflating the margin of dumping. Similarly, in the present case, the US methodology partially excludes higher priced export sales, skewing the export price downward, thereby inflating the margin of dumping. The Appellate Body agreed with the panel that the US was systematically exercising discretion in a manner that was not even-handed and that was unfair, automatically resulting in the distortion and inflation of the margin of dumping, to the disadvantage of exporters.⁴⁹

3. Internal inconsistency

77. Just as an anti-dumping proceeding concerns “a product” (the subject product), so it also concerns a margin of dumping based on a comparison of sales made during the investigation period (whatever type of anti-dumping proceeding is being conducted). Just as the *ADA* contains no express rule governing the definition of the “subject product”, so it contains no express rule governing the definition of the investigation period. The investigation period might be a shorter period or a longer period (such as a year), provided that it is a sustained period, in relation to which market fluctuations or other vagaries do not distort a proper evaluation.⁵⁰ Just like product characteristics, time is typically a parameter by reference to which markets – that is, categories of goods or services with a certain competitive relationship or degree of comparability - are defined. Just as the US defined the “subject product”, so the US defined the investigation period in the measures at issue. Just as the EC does not take issue, in this case, with the definition of the subject product, so the EC does not take issue, in this case, with the definition of the investigation period. Just as in the case of model zeroing, having defined the investigation period, the US was obliged to ensure that the margin of dumping for that period was fairly calculated in conformity with Article 2.4. The US had become bound by its own logic.⁵¹
78. The US having fixed the investigation period, it had effectively decided that, in principle, and due account being taken of all necessary adjustments, any transaction during the investigation period, at whatever time it was made, was potentially comparable with any other transaction during the investigation period, at whatever time *it* was made. In short, the reasoning of the Appellate Body in past cases in relation to model zeroing also applies whenever an investigating authority decides to fix the parameters of its investigation, whether in relation to subject product, region, time or any other parameter. The investigating authority thereby becomes bound by its own logic, and must complete its analysis on the basis of the same logic.⁵²
79. The EC finds contextual support for the preceding analysis in Article 2.4.2, which refers to certain other parameters of the determination, including “time periods”. This indicates that, having fixed the temporal parameters of its investigation, the US had become bound by its own logic, unless the exceptional targeted dumping

⁴⁹ Panel Report, *US-Hot-Rolled Steel*, paras 7.110 to 7.112; Appellate Body Report, *US-Hot-Rolled Steel*, paras 144, 145, 148, 154 and 158.

⁵⁰ Appellate Body Report, *EC-Tube or Pipe Fittings*, para 80.

⁵¹ Appellate Body Report, *EC-Bed Linen*, paras 57, 58, 60 and 62; Appellate Body Report, *US-Softwood Lumber V*, paras 93 and 99.

⁵² Panel Report, *US-Stainless Steel*, paras 6.121 to 6.123.

situation described in the second sentence of Article 2.4.2 was present (which it was not). The same is true in respect of any other parameters of the investigation fixed by the investigating authority, notably the purchasers and regions concerned, these also being matters referred to in the second sentence of Article 2.4.2. ***The simple zeroing method used by the US is offensive to any one of these parameters, because it is performed at the most disaggregated level, that is, at the level of individual transactions.*** In other words, instead of treating all the relevant export transactions as a whole, the US methodology is based on treating each export transaction individually in the same manner as model zeroing is based on treating each model separately.

80. Further contextual support may be found in other provisions of the *ADA* which indicate that temporal considerations are relevant to the calculation of a margin of dumping. For example, below cost domestic sales may only be disregarded if they are made within an extended period of time. That period should normally be one year (the typical length of an investigation) but in no case less than six months. Cost allocations must be adjusted appropriately for non-recurring items of cost which benefit future production (so that such cost items are not entirely allocated to the investigation period, inflating the normal value, thus artificially generating a finding of “dumping”). Exporters must be allowed at least 60 days to have adjusted prices to reflect sustained movements in exchange rates. In the ordinary course of trade costs and prices typically vary in the very short term, even if in the medium term things average out. Dumping only occurs when a situation in which export prices are below normal value becomes the norm, or “the ordinary course of trade”⁵³. Similar contextual support may be found in the *ADA* in relation to both purchasers and regions.
81. The EC does not enter into a discussion of the several mooted economic rationales for the anti-dumping rules, much discussed in the literature and well known. The fact remains, however – and this much is uncontroversial – that they are all economic. Articles VI:1 and VI:2 of the GATT 1994 repeatedly use words such as “commerce”, “trade”, “price”, “sale”, “cost” and “profit”. In this respect, it is highly significant that Ad Article VI, paragraph 1, second sub-paragraph and Article 2.7 of the *ADA* disapply certain rules with respect to Members in which there is no market *economy*. The preamble to the GATT 1994 refers to “trade and economic endeavour”, “expanding the production and exchange of goods” and “international commerce”. Similarly, the preamble to the WTO Agreement refers to “trade and economic endeavour” and “expanding the production of and trade in goods” and “international trade relations” and the objective “to develop an integrated, more viable and durable multilateral trading system”.
82. The application of the discipline of economics requires a minimum of consistency. Investigating authorities cannot, from one day to the next, and in a random or capricious manner, or even within the same proceeding, chop and change the basic legal economic concepts used in the *ADA* – such as, for example, the concept of sales not “in the ordinary course of trade” or the concept of what is an “exporter or producer” or related company, and so on. On certain matters, Members may have a

⁵³ Articles 2.1, 2.2.1, 2.2.1.1, 2.4.1 and footnote 4 of the *ADA*.

certain latitude in deciding what rule they will apply. But once they have made their choice, they must apply the rule in an even-handed way.

83. Thus, it is not by chance that the ADA uses the words “market” or “competition” or “compete” 28 times,⁵⁴ these being the indispensable and basic building blocks of consistent economic analysis. It is particularly significant that Article 2.2 refers repeatedly to a “market of the exporting country”. And it is not by chance that the basic parameters by which markets are defined : product (or physical characteristics),⁵⁵ geography⁵⁶ and time⁵⁷ play a central role in the ADA. Nor is it by chance that these are also the basic parameters essentially referred to in the second sentence of Article 2.4.2. Finally, it must come as no surprise that part of the reasoning of the Appellate Body in the model zeroing cases is essentially about consistency with respect to one of these parameters : product definition. The Appellate Body has recently confirmed that a market is “a place with a demand for a commodity or service ... a geographical area of demand for commodities or services ... the area of economic activity in which buyers and sellers come together and the *forces of supply and demand affect prices*.”⁵⁸

84. Viewed in this light, *it is impossible to measure international price discrimination in two different markets (the domestic market and the export market), if the fundamental methodology for defining and measuring price in each of the markets is different*. Absent good reason (targeted dumping – that is, distinct markets), such an approach is actually *incapable* of measuring alleged international price discrimination. And in this sense it is unfair, because it is internally inconsistent. As Jacob Viner has observed :

... sufficient justification is to be found in the usage of the most authoritative writers and in the considerations of economy and precision of terminology for confining the term dumping to *price-discrimination between national markets*.
This definition, I venture to assert, will meet all reasonable requirements.

... The one essential characteristic of dumping, I contend, is price-discrimination between purchasers in different national markets.⁵⁹

4. Inherent bias

85. Zeroing is also unfair and in violation of Article 2.4 of the ADA because it is inherently biased. Specifically, the method of zeroing which the US employs is biased because when an exporter makes some sales above normal value and some sales below normal value, the use of zeroing will inevitably result in a margin higher than would otherwise be calculated, including in the original proceeding. This increase in the margin is not attributable to any change in the pricing behaviour of the exporter (such as, for example, deciding to make sales further

⁵⁴ ADA, Articles 2.2 (thrice), 2.2.1, 2.2.2(i), 2.2.2(ii), 2.2.2(iii), 2.4.1, 3.1, 3.3 (twice), 3.4, 3.5, 3.7(i), 3.7(ii) (twice), 4.1(ii) (seven times), 4.2, 4.3, 5.2(iii), 5.2(iv), footnote 2.

⁵⁵ See particularly Article 2.6 of the ADA.

⁵⁶ See particularly Article 4 of the ADA.

⁵⁷ See the repeated references to the investigation “period” in the ADA.

⁵⁸ Appellate Report, *US-Upland Cotton*, para 404.

⁵⁹ Jacob Viner, *Dumping, A Problem in International Trade*, First Edition 1923, Reprinted 1991, Chapter I, *The Definition of Dumping*, pages 3 and 4 (original italics, footnote omitted).

- below normal value or deciding to engage in targeted dumping). Rather, this increase is the direct result of the US decision to limit the numerator of its dumping calculation to those transactions with positive intermediate comparison results. A methodological choice that systematically and inevitably results in a higher margin when there has been no change in pricing behaviour is inherently biased and unfair, and inconsistent with the ADA.
86. The inherently biased zeroing method used by the US can have a dramatic effect on the outcome of the calculation, an effect that may be far more significant than the effects associated with the due adjustments referred to in Article 2.4 of the ADA. The effect of the zeroing method used by the US in “administrative review” proceedings is that, even if an exporter’s selling prices and quantities are identical to those examined in the original proceeding, USDOC will find a higher margin of dumping, simply because it has switched from model zeroing to simple zeroing. If model zeroing in an original proceeding does not involve a “fair comparison” as required by Article 2.4, it cannot be that, absent good reason, simple zeroing such as that used by the US, which leads to an even higher margin of dumping, constitutes a fair comparison within the meaning of that provision.
87. These conclusions are confirmed if one considers the situation from the exporter’s point of view. Having been made subject to an anti-dumping duty following the original proceeding, an exporter will most likely wish to remedy this situation by increasing its prices so as to eliminate the margin of dumping as established during the original proceeding. This basic principle is enshrined, for example, in Article 8.1, which provides for the suspension or termination of proceedings without the imposition of duties, if an exporter undertakes to increase prices so as to eliminate the margin of dumping. However, the removal of the original margin of dumping will not prevent the exporter from being subject to the further imposition of a duty following a US “administrative review” proceeding, unless the exporter actually increases its prices by *more than* the margin of dumping. Thus, even if the exporter raises its prices so as to eliminate the margin of dumping found by USDOC in the original proceeding, USDOC will very likely still calculate a margin of dumping. This cannot be consistent with the general principle that comparisons between normal value and export price be fair, nor with the express rule in Article 9.3 that the amount of the duty must not exceed the margin of dumping as established under Article 2.
88. Another aspect of the inherent bias of the zeroing methodology used by the US in “administrative review” proceedings is that, in the logic of the US, liability for anti-dumping duties may depend entirely on the frequency and size of sales in the US. For example, two exporters, A and B, may both sell 1000 units of an identical product to the same customer in the US at an average price of \$100 per unit, normal value also being \$100. However, exporter A may choose to sell at the same time in one large transaction, whilst exporter B may choose to sell at five different times in five separate transactions, at a range of prices. USDOC will calculate a dumping margin of zero for exporter A, but a positive dumping margin for exporter B, despite the fact that the pricing policy of both is the same to the same customer, and the return on their export sales is identical. This is an absurd result. In effect, the US appears to be making its assessment on the basis that exporter B is engaged in some kind of targeted dumping simply because its shipments are

carried out as five transactions instead of one. There is nothing in Articles 2.4 or 2.4.2 that would permit this, as there is nothing in those provisions that would permit a targeted analysis on the basis of the model zeroing condemned in past cases. In truth, the proposition that exporter B is engaged in “dumping” in such circumstances is an illusion – nothing more than that.

5. Unjustified discrimination

89. Article 9.2 obliges Members to collect any anti-dumping duty on a non-discriminatory basis on imports of such products from all sources found to be dumped and causing injury. The US methods result in imposition and collection on the basis of unjustified and unfair discrimination.
90. This is illustrated by the final example in the preceding section.
91. Similarly, in relation to the same period, some firms may be assessed and have to pay anti-dumping duties at the rate resulting from the original proceeding and the methodology used therein (model zeroing). Other firms, exporting the same product from the same country during the same period, may be assessed at a revised rate, in “administrative review” proceedings, calculated on the basis of a different methodology (simple zeroing).
92. Similarly, some firms may be subject to a measure imposed on the basis of model zeroing in the original proceeding; whilst other firms subject, for example, to a new shipper proceeding may be subject to a measure imposed on the basis of simple zeroing. In such a case, it would appear that, in the logic of the US, a firm could be penalised simply for having begun exports to the US after the end of the original period of investigation.
93. Internal inconsistencies and discrimination of this type further indicates that the methods employed by the US are discriminatory and unfair.

D. Existing case law confirms US simple zeroing unfair

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

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

Furthermore, we are also of the view that a comparison between export price and normal value that does *not* fully take into account the prices of *all* comparable export transactions – such as the practice of “zeroing” at issue in this dispute – is *not* a “fair comparison” between export price and normal value, as required by Article 2.4 and by Article 2.4.2.⁶⁰

95. They are further confirmed by the findings of the Appellate Body in *US-Corrosion Resistant-Steel Sunset Review* :

⁶⁰ Appellate Body Report, *EC-Bed Linen*, paras 55 and 59.

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

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

As explained above, if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too. Thus, the consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of USDOC's likelihood determination in the CRS sunset review. In the CRS sunset review, USDOC based its determination that "dumping is likely to continue if the [CRS] order were revoked" on the "existence of dumping margins" calculated in the administrative reviews. If these margins were indeed calculated using a methodology that is inconsistent with Article 2.4 – an issue that we examine below – then USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3.⁶¹

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

When investigating authorities use a zeroing methodology such as that examined in *EC-Bed Linen* to calculate a dumping margin, whether in an original proceeding or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing ... may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing." Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.⁶² (emphasis added)

97. The word "otherwise" makes it particularly clear that the findings of the Appellate Body in that case are just as valid whenever a margin of dumping is investigated or relied on, and not just in original proceedings.

⁶¹ Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review*, paras 127, 128 and 130.

⁶² Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review*, para 135.

98. These conclusions were again essentially confirmed by the Panel Report in *US-Softwood Lumber V*, the issue before the panel being whether US model zeroing was “consistent with the obligations imposed by Article 2.4.2 and the “fair comparison” requirement in Article 2.4”⁶³. The Appellate Body in that case again found that :

Dumping”, within the meaning of the *ADA*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product. ...

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

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

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

Our view that “dumping” and “margins of dumping” can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping investigation.⁶⁴

99. This reasoning was further confirmed in *US-Zeroing (EC)*⁶⁵ and *US-Zeroing (Japan)*.⁶⁶

E. Conclusion

100. The EC submits that, in the relevant measures at issue, the simple zeroing methodology used by the US failed to ensure that the amount of anti-dumping duty did not exceed the margin of dumping, because it failed to calculate margins of dumping for the product as a whole. The US method involved an inherent bias that had the effect of inflating (or super-inflating) the margin of dumping, and even of turning a negative margin into a positive one. The US failed to duly reflect the actual prices of the export transactions that took place during the period of review, as it should have done once the US had fixed the parameters of its investigation, for example in terms of subject product, or time, thus becoming bound by its own logic - that is, bound to apply the provisions of the *ADA* consistently to the subject

⁶³ Panel Report, *US-Softwood Lumber V*, paras 7.196.

⁶⁴ Appellate Body Report, *US-Softwood Lumber V*, paras 93, 96, 97, 99 and 101.

⁶⁵ Appellate Body Report, *US-Zeroing (EC)*, paras 136 to 147.

⁶⁶ Appellate Body Report, *US-Zeroing (Japan)*, paras 167 to 169.

product. The US method is thus unbalanced, internally inconsistent, inherently biased, discriminatory, unjustified and *unfair*, within the meaning of the first sentence of Article 2.4.

101. The preceding observations are fully consistent with all other interpretative considerations set out in this submission. For all of these reasons, the EC requests the Appellate Body to reverse the Panel's findings that the US did not act inconsistently with the first sentence of Article 2.4, and the conclusions and recommendations based on that finding. The Panel has not correctly assessed this issue of law; and it has developed a legal interpretation of the first sentence of Article 2.4 that is incorrect. The EC further requests the Appellate Body to complete the analysis and to find that, in the measures at issue, the US acted inconsistently with the obligation in the first sentence of Article 2.4 to make a fair comparison.

VII. ARTICLE 2.4.2

102. In "administrative reviews", when determining a margin of dumping for each exporter, USDOC makes intermediate comparisons between monthly "normal values" established on a weighted average basis and prices of individual export transactions. In effect, the US bases the dumping calculation preponderantly on the relatively low priced transactions, even though they are not clustered by purchaser, region or time. USDOC uses this method, even though it does not find a pattern of export prices that differ significantly among different purchasers, regions or time periods, and even though it does not provide an explanation as to why such differences could not be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.
103. The EC considers that the US methodology is inconsistent with the second sentence of Article 2.4.2 because the US makes an asymmetrical comparison, and makes the low priced exports the only or preponderant basis of the dumping margin calculation, even though the conditions for the application of that provision are not fulfilled. The US does not contest this, but defends itself by arguing that because of the phrase "the existence of margins of dumping during the investigation phase" in the first sentence of Article 2.4.2, there is no inconsistency.

A. *Basic errors by the US*

1. **Failure to properly consider ordinary meaning – undue reliance on remote context**

104. The legal analysis must be conducted by reference to customary rules of interpretation of public international law, as codified, at least partially, in the Vienna Convention. With respect to this issue, the US has, in the past, reasoned with particular reference to the supposed "context" of the term "the investigation phase", as opposed to the ordinary meaning of the provision as a whole.
105. The EC does not suggest that each of the four factors referred to in Article 31(1) of the Vienna Convention can only be considered in isolation. On the contrary, each factor can affect the interpretation; and all factors need eventually to be

synthesised. However, a Member cannot simply state, by way of some sort of short-cut, that a dispute about the interpretation of a provision of the *ADA* is to be resolved “in the light of Article 31(1) of the Vienna Convention”, directly collapsing the distinct interpretative rules into one. Rather, it is first necessary to carry out an objective assessment of each of the relevant factors, before reaching its final conclusion. Only then is it possible to understand the relevant line of reasoning; and particularly, in the event of conflicting factors, which has prevailed, and why. This approach has been consistently adopted by the Appellate Body and panels in the past.

106. Nor does the EC suggest that one factor must always carry special weight. The correct interpretation will need to be worked out on a case-by-case basis. However, it is fair to say that in the past the Appellate Body and panels have given careful consideration to the ordinary meaning. Thus, the starting point of interpretation should be the elucidation of the ordinary meaning of the text. Certainly, the ordinary meaning is not to be lightly displaced by one of the other factors.

2. Failure to properly consider the meaning of the Phrase “as a whole”

107. The EC requests interpretation of the terms in the Phrase separately, and the Phrase as a whole,⁶⁷ providing a legal and economic overview that is simple, coherent, logical and fair. The EC insists on a grammatically correct reading of the Phrase as a whole, within the first sentence of Article 2.4.2, within Article 2.4.2 itself as a whole, and indeed within the *ADA* and the GATT as a whole. The US has systematically refused to follow such an approach, asserting instead that only the allegedly special meaning of certain terms in the Phrase (notably the term “investigation” and the term “phase”) should determine the matter in favour of the US.

3. The “no synonyms” argument

108. There is no rule of interpretation of public international law that *rigidly* and *mechanistically*⁶⁸ precludes synonyms. The Appellate Body has held that the terms “contingent”, “conditional”, “tied to” and “tie” are synonymous in the context of Articles 3.1(a) and footnote 4 of the *SCM Agreement*.⁶⁹ Similarly, the Appellate Body has held that the terms “nature of competition” and “quality of competition” may be considered synonymous;⁷⁰ as may the terms “like” and “similar”;⁷¹ and the terms “jural society”, “state” and “organized political community”.⁷² The Appellate Body has also effectively agreed with the US that the term “except” in

⁶⁷ Appellate Body Report, *US-Softwood Lumber V*, para 85.

⁶⁸ Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review*, paras 93 and 178; Appellate Body Report, *US-Oil Country Tubular Goods Sunset Reviews*, paras 208, 213 and 214.

⁶⁹ Appellate Body Report, *Canada – Autos*, para 107.

⁷⁰ Appellate Body Report, *Korea – Alcoholic Beverages*, paras 133 to 134.

⁷¹ Appellate Body Report, *EC-Asbestos*, para 91.

⁷² Appellate Body Report, *Canada – Dairy*, para 97 and footnote 73. See also Panel Report, *EC-Hormones (US)*, para 8.60 : “good veterinary practice” synonymous with “good animal husbandry practice” synonymous with “Good Practice in the Use of Veterinary Drugs”.

Article 2.4 of the *Agreement on Textiles and Clothing* is synonymous with the terms “only”, “provided that” and “unless”.⁷³ The EC lists nine examples of synonyms in the *ADA*.⁷⁴ Remarkably, the US accepts this point, arguing that the terms “investigation” and “investigation to determine the existence, degree and effect of any alleged dumping” are also synonymous. Thus, as the US has previously agreed, particularly having regard to the word “during”, which indicates a temporal meaning, the ordinary meanings of the terms “during ... period” and “during ... phase” coincide, indicating “a distinct period”. The conclusion that the meaning of the terms “during ... period” and “during ... phase” coincide is a far more reasonable and balanced conclusion, consistent with all other considerations of context and object and purpose; than the conclusion that all the Members intended the terms “investigation” and “investigation to determine the existence, degree and effect of any alleged dumping” to be synonymous.

4. The “uniqueness” argument

109. The US has previously relied on the supposed “uniqueness” of the term “phase”. First, the Vienna Convention does not indicate that “uniqueness”, in itself, is relevant to treaty interpretation.⁷⁵ Second, there are numerous “unique” terms in the *ADA*, which do not have special meaning.⁷⁶ Third, the “uniqueness” of the term “phase” is no basis on which to ascribe a special meaning to the term “investigation”, when that proposition directly conflicts with all other interpretative considerations, and is precluded by the grammatical structure of the Phrase.

5. The “must be given meaning” argument

110. The US has previously invoked the argument that the terms of a treaty must be given meaning and effect in two senses : the alleged “meaning and effect” it considers must be derived from the word “phase”; and the alleged lack of meaning or effect given to that word by the EC. In both respects the US reasoning is erroneous.
111. With regard to the first point, the EC does not consider that the general proposition should be rigidly or mechanistically applied, since, like other general propositions, it has its limits. For example, the EC would not rule out the possibility that a treaty might contain provisions that overlap; or more than one provision addressing the same point; or terms that do not in themselves create or determine the scope of obligations.

⁷³ Appellate Body Report, *US-Wool Shirts and Blouses*, page 9, second para; and page 16, final para.

⁷⁴ 1) the exporting country/the country of export/the supplying country/country of origin/the exporting Member 2) importing Member/the importing country 3) duty assessment proceedings/refund procedures 4) suppliers/producers or exporters 5) assurances/undertakings 6) a like product of the importing Member/the like domestic product 7) firms/companies 8) on-the-spot investigation/visit 9) allowance/adjustment.

⁷⁵ Panel Report, *EC-Chicken Cuts*, para 7.172; Appellate Body Report, *EC-Chicken Cuts*, para 218 (rejecting argument about the significance of the uniqueness of a treaty term).

⁷⁶ For example : “accelerated” in Article 9.5; “fragmented” in footnote 13; “zero” in Article 9.4; “offset” in Article 11.2.

112. In any event, there is a fundamental distinction between the proposition that all terms of a treaty must be given meaning and effect; and the different proposition that all aspects of *contextual argument* must be given meaning and effect. Contextual arguments may sometimes conflict. In such a situation, the treaty interpreter must balance the weight of such conflicting contextual arguments, and, applying the rules of the Vienna Convention, settle the dispute. That means that one contextual argument will not prevail; it will not be given meaning or effect.
113. The US reasoning with respect to this matter is *contextual*. The US considers that, viewed in the *context* of the ADA “as a whole”, the word “phase” *must* be given a meaning that is different from the word “period”; and that the term “the investigation phase” *must* mean the “original” investigation phase. Thus, the US proposition is not that a term of the ADA must be given meaning and effect, but rather that a particular *contextual argument* must be given meaning and effect. That is to pre-judge the very question in dispute. If the starting point of a Member’s reasoning is that a particular argument must be given meaning and effect, then it is a foregone conclusion that that Member will prevail.
114. The EC further notes that, perversely, the principle of effectiveness is invoked by the US in this case in order to permit the US to avoid the clear obligations on targeted dumping, clearly entered into. Thus, under the guise of the principle of effectiveness, the US, in truth, argues for the application of the antithesis of that principle : the doctrine of restrictive interpretation.
115. Turning to the second point, if the application of the Vienna Convention leads to a particular conclusion (in this case, that the US argument must fail), whilst at the same time preserving a meaning and effect for all the relevant treaty terms, that is an end of the matter, or at least it should be. The result reflects the package of rights and obligations *carefully negotiated* by the parties, in the light of the interpretative rules of the Vienna Convention.
116. Finally, the EC would like to recall that the special meaning of the Phrase argued for by the US in fact has no meaning or effect, because the proposition that, if behaviour remains unchanged, final liability should increase may times over because of the mere act of collection, is manifestly absurd or unreasonable.

6. The alleged intent of the Members

117. The US has previously invoked the alleged intent of the Members. Since this issue relates to Article 31(4) of the Vienna Convention, it is analysed below⁷⁷, consistent with the systematic scheme of interpretation that must be followed in order to comply with the requirement to make an objective assessment.

B. Ordinary meaning of the Phrase

118. We first consider ordinary meaning. The sequence of analysis should not affect the conclusion, provided all terms are objectively assessed. After some general observations regarding dictionary meanings, we begin with the ordinary

⁷⁷ See section VII.E of this submission.

grammatical meaning, because grammatical rules are an important part of the ordinary meaning.⁷⁸ We then consider the term “margins of dumping” because it has a special meaning. Next, we consider the word “investigation”, which the US has previously indicated to be an important term in the zeroing dispute. Next, we consider the word “existence” and the words “during” and “phase”, in the order in which they appear in the Phrase; and the word “the”. Finally, we consider parts of the Phrase or the Phrase as a whole.

1. Dictionary meanings

119. The EC does not argue that ordinary meaning is to be strictly equated with dictionary meanings; nor that dictionary meanings are definitions or dispositive. Only that, in considering ordinary meaning, it is appropriate to have regard to dictionaries as one part of the analysis. The EC has previously adduced other evidence regarding the ordinary meaning of the word “investigation”. This is not a case in which the dictionary meanings are controversial. All dictionaries point towards the same conclusion; and the relevant meanings are not rare or specialized, but common and universal, and have previously been agreed by the US.

2. Grammatical meaning

120. The EC considers that the ordinary grammatical meaning of the Phrase as a whole is that the term “during the investigation phase” refers to the term “existence” and not to the term “established”. Thus, the Phrase refers to a distinct period in which margins of dumping *exist*, i.e. an investigation period; and not, as the US would have it, a period of time in which margins of dumping are *established*. The US has previously sought to rely on the word “existence”, a position that, logically, could only mean that the words “during the investigation phase” should be associated with the word “existence”, rather than the word “established”.
121. The grammatical units of English are : word, phrase, clause and sentence. In English grammar, there are nine word classes : verb; noun; adjective; adverb; preposition; determiner; pronoun; conjunction; and interjection. There are five kinds of phrase : verb phrase; noun phrase; adjective phrase; adverb phrase and prepositional phrase. These are the elements of an English sentence or clause : subject; verb; object; complement; adverbial. The subject precedes the verb. The relevant clause contains one verb phrase, “shall ... be established”, in the passive : the verb “be” and the passive participle “established”, it being understood that it is the investigating authority that will do the “establishing”. The use of the modal auxiliary verb “shall” and the future tense of the verb “be” indicates a formal or binding rule, of prospective application.⁷⁹

⁷⁸ Appellate Body Report, *Chile-Price Band System*, para 206 and footnote 182; Panel Report, *US-Upland Cotton*, para 7.471 : “An interpretation which excluded any of these categories of support from the assessment of implementation period support, would be inconsistent with the wording and **grammar** of the sentence ...”.

⁷⁹ *Oxford Guide to English Grammar*, John Eastwood, Oxford University Press (1994), pages 1, 2, 3, 4, 7, 96, 97, 130 and 135.

122. The word “during” is a preposition of time. The term “during the investigation phase” is a temporal modifier of the term “the existence of margins of dumping”. The indivisible subject of the clause is the entire Phrase “the existence of margins of dumping during the investigation phase”.
123. Thus, applying basic rules of English grammar, the term “during the investigation phase” cannot be construed as a modifier either of the object of the clause, which is, by implication, the investigating authorities; or of the verb phrase (“shall ... be established”). It can only be construed as a temporal modifier of the term “the existence of margins of dumping”; and as an integral part of the subject of the clause. In this respect, the rules of English grammar are clear; and there is no basis for reaching any other conclusion. Any other conclusion would directly and manifestly contradict the basic rules of English grammar.
124. In order for the term “during the investigation phase” to modify the verb, the clause would have to be drafted differently, for example :
- “during the investigation phase, the existence of margins of dumping shall normally be established on the basis of ...”; or
- “the existence of margins of dumping shall normally be established, during the investigation phase, on the basis of ...”; or
- “the existence of margins of dumping shall, during the investigation phase, normally be established on the basis of ...”.
125. The Members had these and many other alternatives open to them – all of which they rejected, opting instead for the specific grammatical structure of the text as it now stands.
126. The word “normally” is an adverb that modifies the verb phrase “shall ... be established”. It shows that the Members were perfectly aware of the possibility of modifying the verb phrase with an adverbial; and that they chose to do that with the word “normally”, but not with the term “during the investigation phase”.
127. The same conclusion results from a consideration of the grammatical structure of the French and Spanish texts of the ADA.
128. This is confirmed by the preparatory work. In each of the New Zealand I, II and III texts the phrase “during the investigation phase” appears at the end of the first sentence, in such a way that it could refer to “when establishing” or to “the existence of dumping margins”. In the final Dunkel Draft text the Members decided to eliminate this ambiguity, moving the phrase “during the investigation phase” to a new position in the grammatical structure of the first sentence, so that it unambiguously refers to “the existence of margins of dumping” and does not refer to “shall ... be established”. This change in the final Dunkel Draft text marked a significant difference. This *carefully negotiated* language, which reflects an equally carefully drawn balance of rights and obligations of Members, must be

respected.⁸⁰ The Phrase cannot be re-formulated to read : “the *establishment* of margins of dumping during the investigation phase”, thus completing an *ex post* re-writing of this *carefully negotiated* provision; the reversal and elimination of the meaning achieved through negotiation, and counterbalanced by other concessions; and the re-instatement of precisely the structure discarded by the Members during the negotiations.

3. “margins of dumping”

129. The term “margins of dumping” has a special meaning, as defined in Article VI:2 of the GATT 1994, such definition being implemented in Article 2 of the ADA. The meaning of the phrase “margins of dumping” fully supports the EC. It is further considered below⁸¹.

4. “investigation”

130. It is clear from the US Statement of Administrative Action, itself an exercise in *ex post* rationalisation, and from other US statements, that the US considered the word “investigation” to be determinative, arguing that it has a particular meaning, namely “an investigation to determine the existence, degree and effect of any alleged dumping”, such as is provided for in Article 5.1. However, the US has since been driven to accept that this is not the case. The EC considers that the ordinary meaning of the word “investigation” indicates a systematic examination or inquiry or a careful study of or research into a particular subject. In the case of Article 2.4.2, that particular subject is “margins of dumping”.
131. Dictionary meanings are relevant to, although not determinative of, ordinary meaning. The EC refers to the following dictionary meaning of investigation : “The action or process of investigating; systematic examination; careful research ... An instance of this; a systematic inquiry; a careful study of a particular subject” (*The New Shorter Oxford English Dictionary*). This is not a rare or specialised meaning, but a common or universal meaning. In fact, no dictionary indicates that the word “investigation” has the special meaning argued for by the US. The EC has previously referred to other evidence regarding the ordinary meaning of the word “investigation”.
132. First, the US Rules of Practice and Procedure of the International Trade Commission contain the following provision :

Investigation to review outstanding determination

(a) Request for review. Any person may file with the Commission a request for the institution of a review investigation under Section 751(b) of the Act. The person making the request shall also promptly serve copies on the request on the parties to the original proceeding upon which the review is to be based. All request shall set forth a description of changed circumstances sufficient to warrant the institution of a review investigation by the Commission.

⁸⁰ Appellate Body Report, *US-Wool Shirts and Blouses*, page 16, penultimate para; Appellate Body Report, *US-Underwear*, page 15.

⁸¹ See section VII.C.1 of this submission.

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133. A review under Section 751(b) of the Tariff Act is a changed circumstances review, as provided for in Article 11.2 of the ADA.
134. Second, there are numerous specific determinations adopted by the International Trade Commission containing the same language.
135. Third, according to extracts from the web site of the US International Trade Commission⁸², that investigating authority is conducting “investigations”, giving that word its ordinary meaning, since it refers expressly and repeatedly, for example, to “changed circumstances investigations” and “Five-Year Review (Sunset) Investigations”.
136. Fourth, the EC has previously adduced other documents in which USDOC has itself used the word “investigation” other than with respect to “an investigation to determine the existence, degree and effect of any alleged dumping” such as is provided for in Article 5.1.
137. Fifth, there are numerous panel and Appellate Body reports that consistently use the term “*original investigations*”⁸³ to refer to Article 5.1 investigations. If the US were correct, in all of these cases, the word “original” would be redundant. The word “original” is used in these cases to qualify, and limit, the ordinary meaning of the word “investigation”, just as the words “to determine the existence, degree and effect of any alleged dumping” qualify and limit the meaning of the word investigation in Article 5.1. The word “original”, as it is used in these cases, is simply a shorthand way of referring to the words “to determine the existence, degree and effect of any alleged dumping”.
138. Sixth, the Panel Report in *US-DRAMS*, at para 2.3, states that (the same statement is made in para 2.4 of the same Panel Report) :
- “The DOC initiated the first annual review of DRAMs from Korea on 15 June 1994 and investigated whether the Korean companies made sales of DRAMs less than normal value, (i.e. dumped) during the period of review.”
139. Seventh, the Panel Report on *US-Countervailing Duties on certain EC Products*, at footnote 295 and para 7.114, states that :
- “We consider that in a sunset review investigation the importing Member is obliged ...”⁸⁴
140. This is also consistent with the way in which the ADA has been implemented by the EC.⁸⁵

⁸² http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/active/index.htm

⁸³ For example, Appellate Body Report *US-Oil Country Tubular Goods Sunset Reviews* (54 instances).

⁸⁴ See also, Appellate Body Report, *EC-Bed Linen (Article 21.5-India)*, paras 6.99, 6.100 and 6.248; and *World Trade Organization, A Handbook on Anti-Dumping Investigations*, Judith Czako, Johann Human and Jorge Miranda, Cambridge University Press, 2003, page 93, with respect to retrospective assessment proceedings : “The margin would be recalculated by means of an investigation much like the original investigation, addressing normal value, export price, and comparing the two, using the data for the POR. This investigation could take up to 12 months.” (emphasis added).

⁸⁵ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, *Official Journal of the European Communities*, L 56, 6.3.1996, p.1, as amended, Article 2.11 (“existence of margins of dumping during

141. In the light of these matters, and recalling that the burden of proof and persuasion that the word “investigation” has the special meaning advocated by the US falls on the US, the correct conclusion is that the ordinary meaning of the word “investigation” in Article 2.4.2 is that advanced by the EC; and that it does not support the US.

5. “existence”

142. With regard to the *ordinary* meaning of the word “existence”, the EC agrees with previous statements by the US that it is appropriate to refer to dictionary meanings, which are relevant, but not determinative; including the *The New Shorter Oxford English Dictionary*. However, the EC points out that the US has previously selected a meaning not of the *word* “existence”, but rather the *term* “existence problem” or “existence theorem”. Furthermore, this meaning is a rare or specialized meaning in mathematics or philosophy; and not a common or universal meaning. More simply, referring to the same dictionary, something exists if it has “objective reality or being”. Thus, if on the basis of a given data set, it is demonstrated that an exporter is not dumping (or has a dumping margin of zero or less), then it is possible to state, in ordinary language, that in relation to that exporter, no dumping “exists”, and this is so regardless of the type of investigation or proceeding in which such determination is made. In the light of the foregoing, the correct conclusion is that the ordinary meaning of the word “existence” lends no support to the US.

6. “during ... phase”

143. The US has previously argued that the ordinary meaning of the word “during” is relevant to the dispute and supports its case; and refers to *The New Shorter Oxford English Dictionary*, from which it cites the following meaning : “throughout the duration of; in the course of, in the time of”. The EC agrees with the dictionary and ordinary meanings of the word “during” advanced by the US, but considers that they do not support the US defence.
144. The US has previously argued that the ordinary meaning of the term “phase” is relevant to the dispute, and that in order to determine the ordinary meaning of the word “phase”, considered in isolation, it is appropriate to have regard to *The New Shorter Oxford English Dictionary* : “a distinct period or stage in a process of change or development; any one aspect of a thing of varying aspects.” The US has also previously confirmed that the ordinary meaning of the term “during ... phase” has a temporal aspect to it : according to the US, the investigation phase starts *when* the investigation is initiated; and the investigation phase ends *when* the relevant determination is issued. The EC agrees with the US that the ordinary meaning of the term “during... phase” considered “as a whole” has a temporal aspect to it, and coincides with “a distinct period”.
145. Thus, the correct conclusion with regard to ordinary meaning is that the term “during ... phase” indicates a determinate *temporal* stage in the passage of time, or

the investigation period”) and 11.2, third sub-para, 11.3, third sub-para, 11.5, third sub-para, 11.9 and 11.10 (references to new shipper, changed circumstances, sunset, and refund investigations).

“a distinct period”; and that this is of no assistance to the US. There is nothing in such an observation to support the view that the “distinct period” referred to is the period of time in which the “margins of dumping” must be established, as the US would have it, as opposed to the period of time in which the “margins of dumping” must have existed, as results from the only grammatically correct reading of the Phrase.

146. In truth, as is apparent from our observations on the preparatory work, it is clear that the use of the term “during ... phase” in Article 2.4.2, as opposed to its synonym “during ... period”, is nothing more than a *relic* or *artefact* of what might be termed “*negotiating dynamics*”.⁸⁶ By selectively and subjectively beginning with this word, and mechanistically elevating it to a position of such paramount and overwhelming importance in its analysis, the US posits an intention on the part of all the Members that is implausible in the extreme. The word “phase” reaches out, *like a dead hand from the grave, with supernatural power*, miraculously resurrecting the use of asymmetry and simple zeroing outside the context of targeted dumping, and rendering the *carefully negotiated* terms of the ADA and the existing Appellate Body case law on zeroing effectively *worthless*.

7. “the”

147. The US has previously argued that the ordinary meaning of the word “the” is relevant, and refers to *The New Shorter Oxford English Dictionary* : “designating one or more persons or things already mentioned or known, particularized by context, or circumstances, inherently unique, familiar or otherwise sufficiently identified.”. According to the US, given the interpretation of the Phrase put forward by the EC, the use of the word “an” would have been more appropriate – whilst this is not the case with the interpretation put forward by the US. The EC does not agree that it is possible to break the grammatical structure of the Phrase, and read into it the eleven words “to determine the existence, degree and effect of any alleged dumping”, just on the basis of the ordinary meaning of the word “the”. The correct conclusion is that the ordinary meaning of the word “the” does not support the US defence.

8. The Phrase “as a whole”

148. We will now consider whether or not combining terms in the Phrase or considering the Phrase as a whole, changes the conclusion concerning the ordinary meaning(s).
149. First, we consider the grammatical issue, because this compels the treaty interpreter to read certain parts of the Phrase together. As outlined above, we consider that the ordinary grammatical meaning of the Phrase as a whole is that it refers to “the *existence* of margins of dumping during the investigation phase”. We fail to see how the US may be permitted to see the relationship between the words or terms in the Phrase in one way for one purpose (dissociating them from the word existence, when arguing they should be associated with the word “established” instead), and in another way for another purpose (associating them

⁸⁶ Panel Report, *US-Zeroing (EC)*, para 7.212.

- with the word existence, when arguing on the basis of an alleged textual similarity between Articles 2.4.2 and 5.1). By arguing for the second meaning, the US has, in effect, excluded the first meaning. We conclude that the term “during the investigation phase” must be considered to qualify the word “existence” and not the word “established”. And we further conclude that the Phrase may not be re-written as “the *establishment* of margins of dumping during the investigation phase”.
150. Second, we consider the term “existence of *margins* of dumping”. The word “margin” in the term “margins of dumping”, as opposed to the word “dumping” on its own, confirms that Article 2.4.2 is concerned with a precise numerical determination, by contrast, for example, with Article 11.3, which is concerned with a prospective determination of “dumping”. Thus, the term “margin” does not refer to a “binary” yes or no answer to the hypothetical question : does *dumping* “exist”, as the US would have it. This confirms the position of the EC.
151. Third, as set out above, assessing the term “during ... phase” as a whole, it is clear that the Phrase is concerned with “a distinct period”.
152. Fourth, we consider the significance of reading the special term “margins of dumping” together with the general term “during ... phase”. Any interpretation of the general term “during ... phase” must take into account the special meaning of the term “margins of dumping” which precedes it, the two terms being inseparable parts of the subject of the relevant clause. As further set out below, this further supports the view that the Phrase cannot be interpreted in the manner advocated by the US.
153. Finally, we consider the ordinary meaning of the whole Phrase. Having carefully considered the ordinary meanings of the terms in the Phrase, we fail to see how combining these terms in itself leads to an ordinary meaning of the Phrase as a whole that supports the US defence. On the contrary, the ordinary meaning of the terms in the Phrase and the Phrase as a whole *precludes* the US interpretation, and unequivocally confirms the EC interpretation. Rather, such other arguments as have been relied on by the US are *contextual*, and it is to these that we now turn.

C. *Context of the Phrase*

154. The context includes the entire *ADA* and Article VI of the GATT 1994. Not all context carries equal weight. Some context may be more persuasive than other context. The weight to be given to a particular contextual argument must be considered on a case-by-case basis. The order in which these contextual arguments are considered should not alter the conclusion of the analysis, provided all are objectively assessed. We will consider first the *immediate* context, moving progressively to more *remote* context. Thus, we begin with provisions to which the Phrase expressly and directly refers; then the provisions of Article 2, of which the Phrase is a part; then other provisions of the *ADA* that cross-reference the Phrase; then other specific provisions of the *ADA* previously referred to by the US; and finally contextual arguments derived from the *ADA* “as a whole”.

1. Article VI:2 of the GATT 1994

155. The Phrase contains one direct link to other treaty terms : the term “margins of dumping” has a special defined meaning, as provided for in Article VI:2 of the GATT 1994.⁸⁷ There are only a handful of defined terms in Article VI of the GATT 1994 and the *ADA*,⁸⁸ and they have a significance that goes beyond a mere cross-reference.⁸⁹ Furthermore, the *ADA* implements the GATT 1994;⁹⁰ and Article 2 of the *ADA* implements the defined term “margin of dumping”.
156. The GATT 1994 and the *ADA* constitute an inseparable package of rights and obligations.⁹¹ The term “margin of dumping” has the same meaning whenever it is used in Article VI of the GATT 1994 or the *ADA*. The purpose of defining a term is that the (generally) shorter term is to be used elsewhere (*not just once*), conveying the special meaning of the (generally) longer definition; and to achieve an especially high degree of consistency.
157. Article VI:1 of the GATT 1994 defines the word “dumping”; whilst Article VI:2 of the GATT 1994 defines the term “margin of dumping”.⁹² Thus, whenever the *ADA* uses the word “dumping” (such as, for example, in Article 11.3), that word has the special meaning given to the defined term “dumping”; and whenever the *ADA* uses the term “margin of dumping” (such as, for example, in Article 2.4.2) that phrase has the special meaning given to the defined term “margin of dumping”. It results from the text of Article 2.1 of the *ADA* (“a product is to be considered as being dumped ...”) that Article 2.1 implements the definition of “dumping”. Similarly, it results from the text of Article 2.2 (“the margin of dumping shall be determined ...”) and the text of Article 2.4 (“margins of dumping”) that Articles 2.1 to 2.4 also implement the definition of “margin of dumping”. There are no other provisions of the *ADA* that concern themselves with how to calculate a margin of dumping.
158. In these circumstance, we fail to see how the US may be permitted to see the defined term “margin of dumping” in Article VI:2 of the GATT 1994 in one way for one anti-dumping proceeding (all of the provisions of Article 2 in the case of an original proceeding), and in other ways for other anti-dumping proceedings (only some of the provisions of Article 2). That would mean that the defined term “margin of dumping” in Article VI:2 of the GATT 1994 would have multiple meanings : one meaning for original proceedings; and different meanings for each of the other four types of anti-dumping proceeding. This would be fundamentally

⁸⁷ Article VI:2 of the GATT 1994, second sentence : “For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.”

⁸⁸ Dumping, margin of dumping, injury, domestic industry, like product, interested parties, authorities, initiated, levy (Articles VI:1 and VI:2 of the GATT 1994; Articles 2.6, 4.1, 6.11 and footnotes 1, 3, 9 and 12 of the *ADA*).

⁸⁹ Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review*, para 126.

⁹⁰ The title of the *ADA* is : “Agreement on *Implementation* of Article VI of the General Agreement on Tariffs and Trade 1994”.

⁹¹ Appellate Body Report, *Brazil-Dessicated Coconut*, page 14; Appellate Body Report, *US-1916 Act*, paras 11 and 56; Appellate Body Report, *Argentina-Footwear (EC)*, paras 77 and 81; Appellate Body Report, *Korea-Dairy*, para 83; Appellate Body Report *US-Lamb*, para 69; Appellate Body Report, *US-Steel Safeguards*, para 275.

⁹² Appellate Body Report, *US-Softwood Lumber V*, paras 91 to 96.

inconsistent with the basic concept of a definition. The purpose of defining a term is to give it one meaning; subsequently to refer to that meaning by referring to the defined term; and to achieve a particularly high degree of consistency. The *implementation* of a definition cannot result in its negation, and certainly not merely on the basis of an interpretation that is grammatically incorrect; ignores the ordinary meaning; relies on remote context; and relies on object and purpose arguments that lead to a result that is manifestly absurd or unreasonable.

159. There is no textual basis for such a proposition in Article VI of the GATT 1994. On the contrary, those provisions set out definitions of “dumping” and “margin of dumping” of general application in all anti-dumping proceedings. This is further confirmed by the reference in Article VI:2 of the GATT 1994 to “levy”, a term defined in the ADA as referring to final assessment under Article 9.⁹³ ***This further confirms that the concept of “margins of dumping” applies to all anti-dumping proceedings, whenever investigating authorities calculate or rely on margins of dumping; or levy an anti-dumping duty.*** Since any interpretation of the general term “during ... phase” must take into account the special meaning of the term “margins of dumping” which precedes it, the two terms being inseparable parts of the subject of the relevant clause, this further supports the view that the Phrase cannot be interpreted in the manner advocated by the US.
160. We conclude that the use of the term “margins of dumping” in the Phrase, together with the defined term “margin of dumping” in Article VI:2 of the GATT 1994, as implemented in Article 2 of the ADA and used in other provisions of the ADA, supports the EC's views; and must be given weight commensurate with the express and direct link between the Phrase and the definition.

2. Article 2

161. The EC considers that the context of Article 2 supports the position of the EC.
162. The first sentence of Article 2.4.2 continues, after the Phrase, with the words “shall normally be established ...”. The use of the word “normally” suggests that these obligations and methodologies apply in most situations. That is at odds with the view expressed by the US that the comparison rules only apply in one situation : an original proceeding; and do not apply to the investigation of or reliance on margins of dumping in any of the other four types of anti-dumping proceeding. That is, according to the US, these obligations would only apply in 1 out of 5 types of proceeding. This ratio increases when it is taken into account that one original proceeding will typically spawn several other types of proceeding, particularly “administrative review” proceedings, so that the final ratio is likely to be 1 in 10 or more. Furthermore, we note that the results of the first 18 month retrospective assessment proceeding will apply from the date on which provisional duties were first imposed. This would make the rules in Article 2.4.2, first sentence, at best, the *exception* as opposed to the norm, and this is inconsistent with the use of the word “normally”. In the structure of Article 2.4.2, the *exception* is contained in the second sentence. The US and the Panel effectively replace the norm in the first

⁹³ ADA, footnote 12 : “As used in this Agreement “levy” shall mean the definitive or final legal assessment or collection of a duty or tax.”

- sentence, with the exception in the second sentence, whilst at the same time abandoning the conditions that circumscribe the exception. These observations further expose the inherent weakness in the interpretative technique used by the US, insofar as it uses the principle that treaty terms must be given meaning and effect to so expand an exception (which should normally be strictly interpreted) so as to render it the general rule. We conclude that the context of this part of the first sentence of Article 2.4.2 does not support the US defence.
163. Article 2.4.2 begins : “[s]ubject to the provisions governing fair comparison in paragraph 4,”. This includes the third to fifth sentences of Article 2.4. The fourth sentence of Article 2.4 contains a further reference to Article 2.3, which concerns constructed export price. There is nothing in these provisions to support the view that they apply only in one type of proceeding under the *ADA*. On the contrary, the drafting of the provisions supports the view that they apply whenever an authority investigates or relies on a “margin of dumping”. We conclude that the context of this part of the first sentence of Article 2.4.2 does not support the US defence.
164. Precisely the same is true of the second sentence of Article 2.4.2, which as we have explained above contains special rules on targeted dumping the effectiveness of which would be entirely negated by the US interpretation.
165. The same comment applies to the other provisions of Article 2.4; and the provisions of Article 2 as a whole, which implements the definitions of “dumping” and “margin of dumping” in Article VI of the GATT 1994. In particular, Article 2.2 contains rules according to which “the margin of dumping shall be determined” and refers eight times to the word “investigation”. In relation to each of these specific provisions US municipal anti-dumping law implements the *ADA* not just for original proceedings, but for all types of proceedings under the *ADA* in which margins of dumping are investigated or relied on. The SAA expressly states that this is “required or appropriate”. Furthermore, the words “in the course of the investigation” in Article 2.2.1.1 and “during the investigation” in footnote 6 refer to the period of time in which the investigation is to be conducted; yet the US accepts that these obligations apply to all types of proceedings under the *ADA*.
166. Finally, the title of Article 2, in the French and Spanish texts, demonstrates that the whole of Article 2 is concerned with the “existence” of dumping, the US assertion that Article 2.4.2 is the only place in the *ADA* besides Article 5.1 where the word “existence” is used in connection with the word “dumping” being manifestly incorrect.
167. In the light of the foregoing, we conclude that the context of Article 2 confirms the ordinary meaning of the word “investigation” in the Phrase as referring to all types of proceeding under the *ADA* in which margins of dumping are investigated or relied on, and does not support the US defence.

3. Articles 9.3 and 9.3.3

168. Consistent with our progressive analysis of the context, we next consider provisions of the *ADA* referring directly to the Phrase or to Article 2 : Articles 9.3 and Article 9.3.3.

169. According to Article 9.3 : “The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.” The reference to “Article 2” must be taken to be a reference to the whole of Article 2. The cross-references in the *ADA* make express provision when they refer only to certain paragraphs or sub-paragraphs of an article, particularly when the cross-reference is between different articles,⁹⁴ or when they are restricted in some way,⁹⁵ or when the provision to which reference is made is to be modified when applied in certain circumstances.⁹⁶ There is no such express provision in Article 9.3. Article 9.3 does not provide, for example, that the amount of the anti-dumping duty is not to exceed the margin of dumping as provided under Article 2, with the exception of Article 2.4.2; or as provided in Article 2, with the exception of the rules for comparing duly adjusted normal value and export price; or *mutatis mutandis*. This confirms that, in the context of Article 9.3, a “margin of dumping” is to be established by reference to the whole of Article 2, consistent with the use of the defined term “margin of dumping”.⁹⁷
170. Similar comments apply with respect to Article 9.3.3. That provision requires investigating authorities to take into account any change in “normal value” – a normal value that must be calculated in a manner consistent with Article 2, and particularly Articles 2.2 and 2.4. It further requires the authorities to take into account “any changes in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices.” In other words, it requires authorities to re-investigate the constructed export price, consistent with Article 2.3. The provision applies whenever an investigating authority is “determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2”. Such reimbursement includes the refund referred to in Article 9.3.1, which is subject to the obligation in Article 9.3, which refers to the whole of Article 2. The EC concludes that this context similarly offers no support to the US.

4. Article 5

171. We next consider Article 5 of the *ADA*, this being a provision to which the US has previously referred in its defence. We recall that the US has previously argued that the word “investigation” has a particular meaning throughout the *ADA*, that being “an investigation to determine the existence, degree and effect of any alleged dumping” such as is referred to in Article 5.1; although it has also subsequently been driven to concede that Article 5 does not contain a definition of the word

⁹⁴ For example : Article 11 (footnote 21) cross-refers to “paragraph 3 of Article 9”; Article 11 (footnote 22) cross-refers to “subparagraph 3.1 of Article 9”; Article 9.3.3 cross-refers to “paragraph 3 of Article 2”; Article 9.4 cross-refers to “paragraph 10 of Article 6”, “paragraph 8 of Article 6” and “subparagraph 10.2 of Article 6”; Article 4.4 cross-refers to “paragraph 6 of Article 3”; Article 10.1 cross-refers to “paragraph 1 of Article 7” and “paragraph 1 of Article 9”.

⁹⁵ For example : Article 11.4 cross-refers to “The provisions of Article 6 *regarding evidence and procedure ...*”; Article 7.5 cross-refers to “*The relevant provisions of Article 9 ...*”.

⁹⁶ For example : Article 11.5 cross-refers to Article 8 “*mutatis mutandis*”; Article 12.3 cross-refers to Articles 11 and 10 “*mutatis mutandis*”.

⁹⁷ Appellate Body Report, *US-Softwood Lumber V*, paras 93 (“... which includes, of course, Article 2.4.2. ...”) and 99 (“... Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *ADA*, an anti-dumping duty can be levied only on a dumped product. *For all these purposes*, the product under investigation is treated as a whole ...”).

- “investigation” for the purposes of the *ADA*; and that the word “investigation” in the *ADA* has different meanings. The US has nevertheless continued to argue that Article 5 is linked to Article 2.4.2, particularly because of the word “existence”.
172. The EC agrees that the provisions of Article 5 are limited to original proceedings, precisely because of the limiting words “to determine the existence, degree and effect of any alleged dumping” that appear in Article 5.1, to which the other provisions of Article 5 refer. The EC considers that the invocation of the word “existence” by the US is an admission about the ordinary grammatical meaning of the Phrase; and that the word “existence” does not support the US.
173. Thus, the US has previously agreed that Article 5.1 refers to “an investigation to determine the existence, degree and effect of any alleged dumping”; that through a series of cross-references the other provisions of Article 5 that refer to investigations equally refer to “an investigation to determine the existence, degree and effect of any alleged dumping”; that Article 5 does not contain a definition of the word “investigation” for the purposes of the *ADA*; and that there are no cross-references between Articles 2 and 5.
174. Titles do not themselves generally contain or create rights or obligations. The title of Article 5 does not define its subject matter. The purpose of a title is to quickly convey to a reader the essential content of an article, part or annex. Consistent with that view, the title of Article 5 does not exhibit any of the characteristics of a “definition” : A means B for the purpose of C. There is no defined thing (A); there is no definitional term (B); there is no operational definitional language (means); and there is no indication of any operational scope (C). The *ADA* and the GATT 1994 contain several definitions, but no definition of the term “investigation”. The Members were aware of definitions, discussing them at length during the preparatory work, and used them when they sought a particularly high degree of consistency. The Members chose, however, not to define the term “investigation” (or for that matter, the terms “proceeding” and “review”), and those choices must be respected. In these circumstances, it would be an error to interpret the *ADA*, under the guise of context or otherwise, as if Article 5 contains a definition of “investigation”, when manifestly it does not.
175. The EC does not agree with what the US has previously asserted to the effect that it is “natural” to read into Article 2.4.2 the 11 words “to determine the existence, degree and effect of any alleged dumping”, an exercise that would significantly contribute to completely changing the ordinary meaning of the Phrase. Nor do we consider that it is “natural” to interpret Article 2 by reference to provisions that the reader has not yet even reached (Article 5), and absent any definition or cross-reference. Nor do we consider that it is “natural” to read the Phrase in a manner that is grammatically erroneous. Nor do we consider that it is “natural” to assume that all the Members intended such a result, given that they chose not to use the various simple means at their disposal to achieve it (different drafting, definitions, cross-references), and when the evidence overwhelmingly supports the view that the Members intended no such thing.
176. On the contrary, we consider that it is “natural” to read Article 2 as containing the consistent *methodologies* for determining “dumping” and “margins of dumping”.

We consider that it is “natural” to read the Phrase in the only manner that is grammatically correct. We consider that it is “natural” to understand the term “during ... phase” as synonymous with “during ... period”, given that the ordinary meanings coincide. Furthermore, given the repeated references to the investigation period in Article 2, especially taken together with the grammatical link, and given the inherent logic of and even necessity for such a rule, we consider that it is “natural” to read the Phrase as referring to the investigation period. Finally, we consider that it is “natural” to give the word “investigation” its ordinary meaning; and “natural” to read the words “to determine the existence, degree and effect of any alleged dumping” in Article 5.1 not as redundant, but rather as delimiting the scope of the particular type of investigation with which Article 5 is concerned.

177. We conclude that the context of Article 5 does not support the US defence.

5. Article 6

178. Consistent with our progressive analysis of the context, we turn to the next provision of the ADA : Article 6. The EC considers that the application of the word “investigation” in Article 6 to changed circumstances and sunset proceedings is context supporting its view; as is the fact that Article 6 also applies to a review proceeding leading to a variation of the rate of duty, such as is conducted by the US in administrative reviews. The US has previously argued that Article 6 does not apply to “administrative review” proceedings.
179. We note that Article 11.4, cross-referring to the provisions of Article 6 regarding evidence and procedure, does not contain the words “*mutatis mutandis*”, such as are used in Articles 11.5 and 12.3. Consequently, absent any further express cross-reference, the relevant provisions of Article 6 apply, without any modification, to changed circumstances and sunset proceedings. We note that the relevant provisions of Article 6 refer repeatedly to an “investigation”. We conclude that a plain reading of the text supports the view that an investigating authority engaged in the conduct of a changed circumstances or sunset proceeding is engaged in an “investigation” within the meaning of these provisions. We further note that this is consistent with US municipal anti-dumping law, which refers expressly to “changed circumstances review investigations” and “sunset review investigations”. We conclude that the meaning of the word “investigation” in these provisions is not limited to “an investigation to determine the existence, degree and effect of any alleged dumping”. This supports the view of the EC that the meaning of the word “investigation” in the Phrase is also not limited to the type of investigation conducted in original proceedings.
180. The method by which it is confirmed that the relevant provisions of Article 6 apply to changed circumstances and sunset proceedings does not have any bearing on this analysis. To reason that “but for” the cross-reference in Article 11.4 the relevant provisions of Article 6 would be limited to investigations in *original* proceedings would be to pre-judge the very question into which we are supposed to be enquiring, because such reasoning is based on the (erroneous) premise that the word “investigation” has the special meaning *original* investigation throughout the ADA.

181. Furthermore, we note that in a US administrative review the investigating authority makes two determinations : it not only establishes final liability for payment on a retrospective basis; but at the same time it reviews and changes (that is, varies) the “cash deposit rate”, that is, the anti-dumping duty rate at which the measure will be prospectively applied until the next administrative review. We consider that this second determination varying the duty rate is *also* subject to the obligations set out in Article 11.2, which refers expressly to a proceeding in which the duty is “varied” in this way. We consider that this is confirmed by footnote 21, which states that the determination of final liability for payment *itself* is not a review, indicating that any variation of the duty is; and by footnote 22, which again confirms the distinction between final assessment proceedings and changed circumstances proceedings. We do not express a view on whether or not the US is *required*, when conducting a final assessment proceeding, to also review the duty rate. We consider only that if an investigating authority chooses to rely on or calculate a varied duty rate, it must do so in accordance with the provisions of Article 11.2. We see no other provisions of the *ADA* that deal directly with the variation of the duty rate.
182. Accordingly, we conclude that the provisions of Article 6 also apply, without modification, to the variation of the duty rate. We thus further conclude that the variation of the duty rate also involves an “investigation” within the meaning of Article 6. We note that the calculation of an exporter’s margin of dumping for the purposes of a variation of the rate of duty, and the calculation of an exporter’s margin of dumping for the purpose of retrospective assessment of final liability for payment, are based on identical facts and investigative activity, and are in these respects inseparable. We do not see how the US may be permitted to see these identical and inseparable facts and activities in one way for one purpose (there is an investigation for the purposes of varying the rate of duty) and in another way for another purpose (there is no investigation for the purposes of calculating final liability).
183. We conclude that Article 6 of the *ADA* supports the claims of the EC.

6. The *ADA* “as a whole”

- (a) Different types of anti-dumping proceeding and the word “phase”
184. The US has previously argued that, because of the word “phase” in Article 2.4.2, it necessarily follows that each of the five types of anti-dumping proceeding, that is, Articles 5 (original) 9.5 (new shipper), 11.2 (changed circumstances), 11.3 (sunset) and Article 9.3 (assessment), are to be re-labelled “phases”, and considered as incorporated within one overall “proceeding”, beginning with the filing of an Article 5.1 application and ending an indefinite time later with termination under Article 11.2 or Article 11.3.
185. Such a proposition flatly contradicts the text of the *ADA*. The *ADA* refers to five types of anti-dumping proceedings, not “phases”. Thus, the word “proceedings” is used, for example, in Article 5.9 to include *original* proceedings. Article 9.5 refers to “duty assessment ... proceedings”. Article 9.5 also refers to “review

proceedings”, meaning changed circumstances or sunset proceedings. And by referring to “normal ... review proceedings”, Article 9.5 also indicates that a new shipper review is a proceeding. Finally, footnote 20 refers to “judicial review proceedings.” We conclude that, just like the word “investigation(s)”, the word “proceeding(s)” is not defined. In some provisions the meaning is expressly limited by specific words, failing which, the word must be given its ordinary meaning, referring to a dictionary, and subject to context, object and purpose.

186. The US view collapses in a morass of confusion, because the US is unable to articulate what it is supposed to be referring to : is it a proceeding; or a phase of a proceeding ? Either the US is simply re-writing the *ADA*, asserting that it refers to “phases” when it in fact refers to “proceedings”, which cannot be a lawful basis on which to break the grammatical structure of the Phrase, and anyway flatly contradicts the numerous references elsewhere to retrospective assessment *proceedings*. Or the US is saying that each of the five types of anti-dumping proceeding is to be broken down into a number of phases, one of which is an investigation phase – a proposition that does not lead to the conclusion that the disciplines of Article 2.4.2 are excluded from assessment proceedings.
187. In summary, the US loses its way, because, notably, it fails to look to the ordinary meaning of the Phrase, including its grammatical structure; to the coinciding meanings of “during ... period” and “during ... phase”; and to the preparatory work. And seeks to rely instead on a profoundly flawed notion of "uniqueness", which bears no relevance to the meaning of the treaty terms at the centre of the discussion, and posits an intention on the part of the Members that is implausible in the extreme.

(b) The word “investigation” in the ADA

188. Consistent with our progressive consideration of the context, we turn now to consider the meaning of the word “investigation” throughout the *ADA*. The US has previously argued that the word “investigation” has a particular meaning throughout the *ADA*. The EC has demonstrated that assertion to be erroneous, as the US has previously been driven to concede.
189. For the reasons we have set out above, and elaborated in previous dispute settlement proceedings, the word “investigation(s)” in **Article 1** and **Article 2** is not necessarily limited to “an investigation to determine the existence, degree and effect of any alleged injury”.
190. The word “investigations” in **Article 3.3** does not refer to new shipper or assessment proceedings, since neither concern injury. Nor does it refer to sunset proceedings, insofar as they are prospective. Nor does it refer to sunset or changed circumstances proceedings, or assessment proceedings, given the express cross-reference to Article 5.8, which is expressly limited by its own terms to investigations “to determine the existence, degree and effect of any alleged dumping”, as provided for in Article 5.1.
191. For the reasons we have set out above, the word “investigation” in **Article 5** refers to the type of investigation conducted in original proceedings, because of the

- express limiting language in Article 5.1, to which the other provisions of Article 5 refer.
192. For the reasons we have set out above, the word “investigation” in the relevant provisions of **Article 6** is not necessarily limited to “an investigation to determine the existence, degree and effect of any alleged injury”. Furthermore, **Annexes I and II** of the *ADA* clearly refer to on-the-spot investigations.
 193. The word “investigation” in **Article 7** refers to the type of investigation conducted in original proceedings, because of the express cross-reference to that effect; because as a matter of simple logic provisional measures are only relevant in an original proceeding; and because the relevant provisions refer to injury.
 194. The possibility for accepting undertakings provided for in **Article 8** is not limited to original proceedings. This may be the outcome, for example, of new shipper, changed circumstances or sunset proceedings. Accordingly, the word “investigation” in Article 8.4 is not limited to original proceedings.
 195. The word “investigation” in **Article 9.4** further confirms that proceedings under Article 9 also involve an investigation.
 196. It results from the context and object and purpose of **Article 9.5** that the words “the period of investigation” refer to an original proceeding.
 197. **Article 10.1** cross-refers to Article 7.1, which in turn cross-refers to Article 5. Furthermore, it is clear that **Articles 10.7 and 10.8**, which relate to “retroactive” imposition (which is to be distinguished from retrospective assessment proceedings), that those provisions refer to original proceedings, but not to retrospective assessment proceedings.
 198. On the face of it, **Article 12.1** is limited by its own terms, given the express cross-reference to Article 5, which concerns original proceedings. Articles 12.1.1, 12.2.2, 12.2.3 are nestled within Article 12.1. The point is academic, however, given that Article 12.3 confirms that these provisions are generally applicable.
 199. **Article 16.5** contains an express cross-reference to Article 5, and therefore relates to original proceedings. The point is academic, however, since in practice the same authority or authorities will act.
 200. It is clear that the word “investigation” in **Article 18** is not necessarily limited to “an investigation to determine the existence, degree and effect of any alleged injury”.
 201. That completes our systematic and exhaustive review of all the provisions of the *ADA* that refer to the word “investigation(s)”. We conclude that, contrary to what the US has previously asserted, the word “investigation(s)” does not have a particular meaning throughout the *ADA*. Rather, its meaning differs, and needs to be worked out in each instance by applying customary rules of interpretation of public international law. Those meanings include : original investigations; new shipper investigations; changed circumstances investigations; sunset

- investigations; assessment investigations; refund investigations; injury investigations; country or company specific investigations; on-the-spot investigations; provisional investigations; and so forth. The type of investigation conducted under Article 14 will again have a different scope, extending to injury to the industry in the third country requesting action.
202. Furthermore, we do not find any *consistent* use of the word “investigation” in the *ADA* that would support the US defence, and certainly nothing capable of overriding the ordinary meaning, other contextual arguments, object and purpose and preparatory work. In particular, we do not find that in all cases where the word “investigation” might be taken as referring to an anti-dumping proceeding, it necessarily means only “an investigation to determine the existence, degree and effect of any alleged dumping”, that is, an original proceeding. This is not so, for example, with respect to Articles 1, 2, 6, 8, 9, 12 and 18. Conversely, nor do we find that in all other cases the word “investigation” necessarily has a more general meaning. For example, when Article 9.5 refers to “the period of investigation”, it clearly refers to an original proceeding.
203. On the contrary, our review of these provisions indicates the presence of a number of express cross-references between Article 5.1 and other provisions of the *ADA*, namely : the other provisions of Article 5; Article 3.3 (through Article 5.8); Article 7; and Article 10 (through Article 7). These cross-references suggest that when the meaning of the word “investigation” in the *ADA* is to be interpreted as having the special meaning “an investigation to determine the existence, degree and effect of any alleged dumping” there should normally be a cross-reference that achieves such a result. We recall that there is no such cross-reference between Articles 2 and 5.1 of the *ADA*.
204. We conclude that a consideration of the meaning of the word “investigation” as it appears throughout the *ADA* provides no contextual support for the US defence; on the contrary, it supports the position of the EC.
- (c) Distinction between different types of anti-dumping proceeding
205. The US has previously argued that applying Article 2.4.2 to “administrative review” proceedings would necessarily be based on the premise that there is no distinction between different types of anti-dumping proceedings. The EC disagrees.
206. That the disciplines in Article 2 apply whenever an authority investigates or relies on a “margin of dumping” does not have as a result that there is no longer any meaningful distinction between different types of anti-dumping proceedings. First, if the Phrase is taken to require the use of data during the investigation period, then it is no different from the several references of a similar type that already exist in Article 2. In such a case, the Phrase simply takes its place in the scheme of the *ADA* alongside the other references in Article 2, and such an interpretation has no impact whatsoever on the distinction between different types of anti-dumping proceeding. Second, the rules of interpretation of customary public international law provide a solid basis for determining which obligations are limited to original

proceedings. In these circumstances, we conclude that this argument does not support the US defence.

D. Object and purpose : manifestly absurd or unreasonable

207. The EC points to the absence of any object and purpose considerations supporting the US and explains that the basic purpose of retrospective assessment proceedings is to update the temporal frame of reference, making final assessment on the basis of the *actual* (contemporaneous) normal value, export price and margin of dumping of the exporter. The US has argued that the import or importer specific nature of assessment proceedings support its submissions. In this respect, the EC has the following comments.
208. First, in this regard, the US has often argued that an exporter-based approach to Article 9.3 of the *ADA* is unreasonable because it favours importers who "participate in dumping" over those which import at non-dumped prices. In fact, this argument is based on one very obvious flaw – exporters can dump (i.e. discriminate between normal value and export price); importers cannot. Therefore, only an exporter can have a dumping margin. If an exporter has a dumping margin of zero, for example, it may be that this margin is composed of the aggregation of transactions with two importers, with the first importer having a dumping amount of 5 and the second -5. In this situation, no duty can be collected from the first importer because the exporter has not dumped. This is in no way unfair, because importers, by definition, cannot dump.
209. Second, if the low and high priced export transactions from a given exporter are more or less evenly distributed amongst two or more importers, then the alleged "unfairness" that the US asserts would be experienced by importers importing at relatively high prices will not, by definition, materialise.
210. Third, if, at the other extreme, the low priced export transactions are clustered with one importer (or purchaser), then, of course, the targeted dumping provisions can be used. In this respect, the US is arguing that it does not have to comply with the requirements of the targeted dumping provisions because it might be confronted with targeted dumping – an absurd argument that requires no further comment.
211. Fourth, in any event, even in the intermediate scenarios, where the low and high exports are not distributed evenly, nor clustered with one importer, there is still no difficulty. This may be illustrated with a simple example. Assume one exporter with a dumped amount and margin of 120 and 10 %, based on a WA-WA comparison, with the exports distributed unequally amongst 3 importers. The results of WA-WA comparisons per importer are 50, 150 and minus 80. In all cases the US collects 200, which is inconsistent with Articles 9.3 and 2. Leaving aside the possibility of a targeted dumping analysis, by simply reducing proportionately the amounts calculated for the second and third importers, the US would collect from them 30 and 90, thus respecting the ceiling of 120. All importers would pay a "fair" amount, reflecting their behaviour during the relevant period. Thus, as the EC has previously explained, respecting the rule in Article 9.3 is just a matter of *elementary accounting*.

E. Article 31(4) of the Vienna Convention : US failed to prove Members intended special meaning

212. The US has previously referred to Article 31(4) of the Vienna Convention as a relevant rule of interpretation of customary public international law, and sought to rely on the alleged intent of the Members in arguing that the word “investigation” in Article 2.4.2 must be understood as having the special meaning “an investigation to determine the existence, degree and effect of any alleged dumping”. The EC agrees that Article 31(4) of the Vienna Convention is relevant, but disagrees with the US analysis.
213. According to Article 31(4), a special meaning shall be given to a term if it is established that the parties so intended. This means the Members, not some narrow privileged group, such as “*anti-dumping circles*”. It also means *all* the Members. The burden of proof is on the Member seeking to establish the intent, in this case, the US. The first place to look for evidence of the Members’ intent is the text of the *ADA* and the GATT 1994. In this respect, it is appropriate to bear in mind that if the Members intend to give a term a special meaning, there is a simple means of doing that : define it, or at least use a cross-reference. The *ADA* and the GATT 1994 contain several definitions and many cross-references, but no definition of the word “investigation”, and no cross-reference between Articles 2 and 5.
214. In our view, if the Members had “intended” the Phrase to have the result argued for by the US, they would not have tried to “implement” the definition of “margin of dumping” by fragmenting that definition and introducing internal inconsistencies in the *ADA* and the GATT 1994; they would not have confined the Phrase to the first sentence of Article 2.4.2; they would not have grammatically tied the words “during the investigation phase” to the word “existence” as opposed to the word “established” (in English, French and Spanish); they would not have changed the drafting in the final Dunkel Draft precisely in order to achieve this grammatical link; they would have expressly defined or cross-referenced or referred to “an investigation to determine the existence, degree and effect of any alleged dumping”; they would have made express provision for investigating authorities to disregard the relevant data, as they did in Articles 2.2.1, 2.7, 9.4 and Annex II, paras 5 to 7; they would not have inserted the cross-reference to all of Article 2 in Article 9.3; and they would not have used the word “investigation” in Articles 2, 6 and elsewhere in the *ADA* to refer to different types of anti-dumping proceeding.
215. The Phrase uses the words “during ... phase” rather than the words “during ... period”. However, the ordinary meaning of these two phrases coincides, both terms referring to : “a distinct period”; and this is no more than a relic of “negotiating dynamics”. Furthermore, there are other words that appear only once in the *ADA* without that meaning, mechanistically, that those words have a special meaning⁹⁸. And there is no general mechanistic rule against synonyms. Taking all of these matters fairly into consideration, and considering the range of options open to the Members, it is simply not possible to reasonably conclude that *all* the Members intended, merely by the use of the word “phase”, placed in a

⁹⁸ See footnote 76 of this submission.

- grammatically irrelevant position, to render the disciplines of Article 2 on the calculation of the defined term “margin of dumping” worthless – and this for all practical purposes, that is, for all final payments, given that the results of the first refund procedure are applied from the date on which provisional duties are first imposed.
216. The US did not adduce any evidence in support of the proposition that the Members intended the Phrase to have the special meaning argued for by the US. The EC, on the other hand, refers to several additional pieces of evidence.
217. First, the EC has asked the other interested WTO Members that intervened in *US-Zeroing (EC)* whether or not, when they signed up to the *ADA*, they intended that the result argued for by the US should be considered consistent with that *ADA*. The response was unanimous : these Members had no such intention.
218. Second, the EC refers to the preparatory work. If all the Members had intended to take a step as important as that argued for by the US, one might expect to find some trace of that decision in those documents, which run to several hundred pages, and span seven years. However, as the EC has pointed out, these documents offer no support to the US. On the contrary, they support the EC.
219. Third, the EC refers to the notifications made by 105 WTO Members to the WTO of municipal laws implementing the *ADA*. None of these notifications indicate any Member that has taken the same line as the US. It is not to be expected that the Members would intend one thing when concluding the *ADA*, and systematically do something different on implementation.
220. In the light of the preceding matters, the correct conclusion is that the US has not established that all the WTO Members intended to give the special meaning to the Phrase argued for by the US.

F. *Preparatory work*

221. A correct interpretation of the Phrase according to Article 31 of the Vienna Convention does not leave the meaning ambiguous or obscure and does not lead to a result which is manifestly absurd or unreasonable. It just means that the US defence fails. And this is *confirmed* by the preparatory work. However, the interpretation argued for by the US *does* lead to a result that is manifestly absurd or unreasonable. That interpretation cannot therefore prevail without a proper analysis of the preparatory work. The relevant aspects of the preparatory work may be summarised as follows.
222. First, the Members were acutely sensitive to the issue of definitions. All the documents refer to and discuss several definitions. The Members repeatedly and at length discussed the merits of whether or not to define concepts. There was consensus : it really matters whether or not something is defined; and the fact that some terms are defined (notably, “margin of dumping” in Article VI:2 of the GATT 1994) and others not (notably, the parties agreed that Article 5 does not

- contain a definition of “investigation” for the purposes of the ADA) must be respected.⁹⁹
223. Second, there was general consensus on the need for a balanced, consistent and fair application of anti-dumping measures.¹⁰⁰
224. Third, there was broad consensus that international markets and business had evolved, and that the ADA should be up-dated accordingly.¹⁰¹
225. Fourth, it was never suggested that there should be different treatment for original proceedings and other proceedings on the fundamental question of how to calculate a margin of dumping. This is so notwithstanding the fact that assessment and refund issues were repeatedly discussed in detail and at length, with regard to the “duty as a cost” and “lesser duty” issues.¹⁰²
226. Fifth, *there is a clear and strong indication of consensus that the interests of both parties in the asymmetry and zeroing debate could be accommodated in the targeted dumping provisions that eventually became the second sentence of Article 2.4.2.*
227. Sixth, there is an overwhelming indication of consensus that the presence of the word “investigation”, used repeatedly in what was to become Article 2.2, did not mean that those provisions were to be irrelevant when a margin of dumping was calculated in retrospective assessment proceedings.
228. In particular, towards the end of the discussions the Chairman circulated a paper “which could provide a structured agenda for future work”. The discussion on the price comparison issue is revealing :

⁹⁹ For example : MTN.GNG/NG8/W/3, page 1 point A, page 2 point B, page 3 point H; MTN.GNG/NG8/W/7, page 1 points A3 and A4, page 3 point B10; MTN.GNG/NG8/W/10, page 2 point B first and second paras, page 5 point H; MTN.GNG/NG8/W/11, page 2 point 11.1(2); MTN.GNG/NG8/W/12, page 1 final para; MTN.GNG/NG8/W/15, page 1 point II.1, page 3 first indent; MTN.GNG/NG8/4 (Note by the Secretariat), page 2 point 9; MTN.GNG/NG8/W/7/Rev.1 (Note by the Secretariat), paras 1, 6, 8, 9, 10, 17, 48, 49, 50, 64, and 65 [**24 instances**]; MTN.GNG/NG8/W/26 (Note by the Secretariat), paras I.2, I.3, II.6, III.1, FN 1 (see also Rev.1 and Rev.2); MTN.GNG/NG8/7 (Note by the Secretariat), paras 4, 13 and 14; MTN.GNG/NG8/8, paras 1, 2, 4(1), 4(2) and 5; MTN.GNG/NG8/11 (Note by the Secretariat), paras 12 and 14; MTN.GNG/NG8/13 (Note by the Secretariat), paras 13, 16, 20, 22, 29, 36, 38, 39, 40, 41 and 44 [**12 instances**]. MTN.GNG/NG8/15 (Note by the Secretariat), page 4 para 3, page 8 paras 2, 3 and 4, page 9 para 3, page 11 para 7, page 12 paras 1, 4 and 8, page 14 paras 1 and 6, page 17 para 1, page 18 para 3, 4 and 7, page 19 paras 1, 2, 3 and 4, page 20 paras 1 and 4, page 21 paras 3 and 9, page 22 paras 1, 6 and 7, page 23 para 3, page 28 para 4, page 30 para 3, page 32 para 2, page 33 para 4 [**43 instances**].

¹⁰⁰ See MTN.GNG/NG8/W/46 (Hong Kong); and MTN.GNG/NG8/W/59 and Add.1 (**United States**) : “... anti-dumping rules should be effective, predictable, transparent and fair ...”; “[A] lack of confidence has contributed to pressures for protectionist “solutions” outside the context of the anti-dumping rules.” ... “... such measures sometimes require administering authorities to apply anti-dumping rules in ways that may seem unconventional.”

¹⁰¹ For example, MTN.GNG/NG8/W/46 (Hong Kong).

¹⁰² MTN.GNG/NG8/W/7 Rev.1, page 14; MTN.GNG/NG8/W/11, page 3; MTN.GNG/NG8/W/30, page 4 (duty as a cost). MTN.GNG/NG8/W/51, pages 4 and 5; MTN.GNG/NG8/W/55, page 5; MTN.GNG/NG8/W/76, page 4; MTN.GNG/NG8/14, page 1; MTN.GNG/NG8/15, pages 25, 26 and 27; MTN.GNG/NG8/W/55, page 5 (lesser duty rule).

Some delegations said that it was fair to have the principles of symmetry of price calculation and symmetry of adjustment in normal value and in export price inscribed in Article 2:6. One delegation said that the practice of comparing the average of the normal value with export prices on a transaction-by-transaction basis was duly described and commented upon in Table 1 of MTN.GNG/NG8/W/64, as well as in MTN.GNG/NG8/W/51/Add.1, paragraphs 14-15. This was an obvious area of prejudice against exporters; the Code should be amended to require comparison to be made between the weighted average of the normal value and the weighted average of the export price.

...

One delegation considered that it would be too large a burden upon the investigating authority if it were to investigate possible factors leading to adjustments, without the mentioning of such factors by the exporters. It was normal that even small exporters at least drew attention to the factors that might lead to adjustment, and that they provide evidence, since they alone had it. It did not think that on the basis of Article 2:6 there was a symmetry problem; it required a comparison of prices at the same level of trade and adjustments for factors that affected price comparability. The main reason for the practice of averaging on a transaction-by-transaction basis was to prevent exporters from practising selective dumping. This phenomenon was of great concern and manifested itself by successive attacks of unfair trade practices on different parts of an importing market. Such a strategy should not leave the authorities concerned without the possibility to react. It added, concerning the table in MTN.GNG/NG8/W/64, that it was common to break down the periods in case of significant fluctuations; differences should not be calculated in an artificial manner which for given time periods did not exist. However, it believed current practices took care of this.

One delegation said that the problem remained that the method used against selective dumping was applied to all, by way of which protectionist barriers were raised across the board.

One delegation said that there was a real problem of selective dumping whether on a regional basis or along product-lines within a single "like product" category. However, it also understood the concerns of some other delegations. The Group should try to find solutions to accommodate the legitimate concerns of both sides.¹⁰³

229. In this discussion ones sees the juxtaposition between the two sides and critically, one sees the express statement that, in truth, the reason for the practice of comparing a weighted-average normal value with export prices transaction-by-transaction was to combat targeted dumping. Finally, one sees the launching of the solution "to accommodate the legitimate concerns of both sides" – that being Article 2.4.2 as it stands today.

230. That this is the truth is even confirmed in the SAA itself, which states that :

the reluctance to use an average-to-average methodology has been based on a concern that such a methodology could conceal "targeted dumping".¹⁰⁴

231. Making the reasonable assumption that the Members negotiated in full cognizance of the customary rules of interpretation of public international law, including Articles 31 and 32 of the Vienna Convention, it may reasonably be assumed that

¹⁰³ MTN.GNG/NG8/15 (Note by the Secretariat), page 13, paras 4 to 7.

¹⁰⁴ SAA, page 172.

they negotiated in good faith, just as they agreed that the terms of the *ADA* were to be interpreted in good faith.¹⁰⁵ In such negotiations, one would neither expect nor accept that what is clearly given, after lengthy debate, with one hand (agreement not to use asymmetry, absent targeted dumping), would be *entirely* taken away with the other, on the basis of an obscure, unarticulated, unilateral and erroneous “interpretation” of the relevant provisions. In these circumstances, insofar as the US claims paternity of the Phrase, it cannot be allowed to rely on its own failure either to have the Phrase drafted so as to convey the meaning now argued for by the US, or its failure to explain the supposed object and purpose of the Phrase to its negotiating partners, as an excuse for unilaterally ignoring other clear obligations clearly entered into. That would be inconsistent with basic requirements of legal security and legal stability in international relations, which also inform subsequent negotiations. Members are not entitled to any reservation other than to the extent clearly provided for in the *ADA*.¹⁰⁶

VIII. PROSPECTIVE NORMAL VALUES AND MATHEMATICAL EQUIVALENCE

232. We turn finally to address the three primary arguments relied upon in the Panel Report, none of which has any legal merit.

A. *Prospective normal values*

233. The Panel's reliance on Article 9.4(ii) is erroneous.¹⁰⁷

234. In the first place, Article 9.4(ii) relates to sampling, and thus simply has no relevance to the present dispute, in which sampling is not an issue.

235. Furthermore, even if Article 9.4(ii) of the *ADA* is taken as a confirmation that Members may apply a system of so-called “variable duties”, by which a duty may be imposed pursuant to Article 9.2 if and to the extent by which the price of an export transaction is below a *prospective* normal value, the essential fact remains that Article 9.4(ii) refers to a *prospective* normal value. Thus, the provision does not mean, and cannot be taken to mean, that in a *final* assessment of anti-dumping duties, based on *actual* (contemporaneous) exporter-specific margins of dumping, the basic disciplines governing the calculation of a margin of dumping, contained in Article VI of the GATT 1994 and Article 2 of the *ADA*, no longer apply. The collection of anti-dumping duties on the basis of *prospective* normal values is only an intermediate stage of collection, since it is subject to final assessment under Article 9.3.1 and “a prompt refund, upon request” under Article 9.3.2. Members must ensure that the obligations in Article 9.3 are complied with, particularly whenever the “amount of the anti-dumping duty is assessed on a prospective basis”; and there is nothing in Article 9.4 that releases authorities from the

¹⁰⁵ Panel Report, *Korea-Procurement*, para 7.100 : “Parties have an obligation to negotiate in good faith just as they must implement the treaty in good faith”. See also, Vienna Convention, Article 48.

¹⁰⁶ Article XVI.5 of the WTO Agreement.

¹⁰⁷ Appellate Body Report, *US-Zeroing (EC)*, para 131 and footnote 234; Appellate Body Report, *US-Zeroing (Japan)*, paras 160 to 163.

- obligations in Article 9.3, including Articles 9.3.1 and 9.3.2. In short, the possibility for Members to use a variable duty system such as that referred to in Article 9.4(ii), based on a *prospective* normal value, offers no support for the position of the US or the Panel on the question of *final* assessment.
236. The limitation of the import-specific variable duty provisions in Article 9.4(ii) to the situation of a *prospective* normal value; and their exclusion in final assessment under Articles 9.3.1 or 9.3.2 is entirely logical. The only possibility under Article 9.3.2 is a *refund* (final liability cannot increase), requested by an *importer* (as opposed to any interested party). Thus, the prospective variable duty system gives an investigating authority fearful of targeted dumping the possibility of *initially imposing* a duty that should capture any type of targeted dumping that might occur. To the extent that targeted dumping does not occur, the importer can obtain a *refund* under Article 9.3.2.
237. It is legally erroneous to transpose these *prospective* variable duty provisions to *final* collection under Article 9.3.1, thereby erroneously concluding that the ADA enshrines an advantage for Members operating a collection system under Article 9.3.1¹⁰⁸. Under Article 9.3.1 any interested party, including domestic producers, concerned about targeted dumping, can request an “administrative review”; and in any retrospective assessment proceedings final liability may increase, including on the basis of an eventual targeted dumping analysis.
238. The weakness of the Panel's reasoning is particularly apparent from the phrase “generally considered” in paragraph 7.125 of the Panel Report.¹⁰⁹ It is not clear what the Panel means when it refers to a certain matter being “considered” in a certain way. The Panel would appear to refer to the alleged opinions or beliefs of one or more unspecified persons. Nor is it clear what the Panel means by “generally” – does this mean more than half of the persons who have allegedly expressed an opinion? Furthermore, the use of the term “definitive” is obviously confusing. It is correct that the imposition may be termed “definitive”, in the sense that it is to be distinguished from a “provisional” measure imposed pursuant to Article 7 of the ADA. But this is entirely irrelevant to the point that it is subject to a possible final assessment or refund, as indeed the following sentence in the Panel Report states.

B. Mathematical equivalence

239. The EC again re-iterates what has been said many times, also by the Appellate Body¹¹⁰ – and which is an elementary matter of logic and legal reasoning. Even if there would be mathematical equivalence that does not matter and is of no assistance to the US. Recourse to targeted dumping is an exceptional remedy under the ADA and is of no relevance as regards the fairness or otherwise of

¹⁰⁸ Appellate Body Report, *US-Zeroing (Japan)*, para 163, first sentence.

¹⁰⁹ “In a prospective system, however, the payment of the anti-dumping duty at the time of importation is generally considered to be definitive.”

¹¹⁰ Appellate Body Report, *US-Softwood Lumber V (Article 21.5 – Canada)*, paras 97 to 100; Appellate Body Report, *US-Zeroing (Japan)*, paras 133 to 136.

zeroing in other situations. Something might perfectly well be normally unfair, but fair as a response to the exceptional circumstances of targeted dumping.

240. Furthermore, there are ways of responding to targeting dumping that do not involve zeroing, such as restricting the universe of export transactions to those in the pattern, in which case there would be no mathematical equivalence – as the US has previously acknowledged.

C. Alleged "competitive disincentive" and "administrative inconvenience"

241. According to the Panel, if, while calculating in a periodic review the amount of the duty to be paid by a given importer, the authorities have to take into account the export prices of other importers importing from the same exporter or foreign producer, this would have unfair consequences in the market. The Panel reasons that, in this situation, importers with high margins of dumping would be "favoured" at the expense of importers who do not dump or who dump at a lower margin. In such situations, importers importing at dumped prices would pay less than their "true margin of dumping" because of other importers refraining from importing at dumped prices. The Panel agrees with the United States that "[t]his kind of **competitive disincentive** to engage in fair trade could not have been intended by the drafters of the Antidumping Agreement and should not be accepted ... as consistent with a correct interpretation of Article 9.3".¹¹¹
242. This line of reasoning is wholly without merit. As a matter of law, the *ADA* addresses international price discrimination by exporters. Only exporters have a "normal value" and only exporters can engage in dumping. Importers cannot "dump". The *ADA* does not seek to regulate relationships between importers.
243. In any event, there is no question of an "incentive to dump" being created. Related importers form part of the same economic nexus as exporters, so there is no sense in which one can speak, in economic terms, of one being favoured over another. In any event, as the EC has explained above¹¹², if the export transactions are evenly distributed, no issue arises; if they are clustered, a targeted dumping analysis may be possible; and otherwise a proportionate adjustment that ensures that the exporter's total dumped amount acts as a ceiling for the amount that can be collected from all importers ensures that importers are subject to an amount that reflects their overall behaviour during the relevant period. The Panel's complaint that it allegedly causes "administrative inconvenience" if the data in relation to all importers has to be considered is of no legal relevance or merit.

IX. CONCLUSION

244. For all of these reasons the EC respectfully requests the Appellate Body to reverse the Panel's findings at paragraphs 8.1(c) and (d) of the Panel Report and to complete the analysis with respect to these matters, and the matters referenced at

¹¹¹ Panel Report, para 7.146.

¹¹² See section VII.D of this submission.

paragraphs 8.2(a) and (b) of the Panel Report, with respect to which the Panel exercised judicial economy. The EC requests the Appellate Body to find that, with respect to the "as such" measure as well as the five "as applied" measures the US acted inconsistently with its obligations under Articles VI:1 and V:2 of the GATT 1994; Articles 2.1, 2.4, 2.4.2 and 9.3 of the *ADA*; and Article XVI:4 of the WTO Agreement and Article 18.4 of the *ADA*.