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UNITED STATES – USE OF ZEROING IN ANTI-DUMPING MEASURES INVOLVING PRODUCTS FROM KOREA

Report of the Panel

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EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, 10127
US – Anti-Dumping Measures on PET Bags	Panel Report, *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R, adopted 18 February 2010
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, 425
US – Shrimp (Thailand)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VII, 2539
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3

I. INTRODUCTION

1.1 On 24 November 2009, the Republic of Korea ("Korea") requested consultations pursuant to Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"), concerning the United States' alleged application of the practice known as "zeroing" of negative dumping margins in calculating final margins of dumping in its investigations of three products, namely stainless steel plate in coils ("SSPC") from Korea; stainless steel sheet and strip in coils ("SSSS") from Korea; and diamond sawblades and parts thereof ("diamond sawblades") from Korea.[1] Korea and the United States held consultations on 22 December 2009 and on 2 February 2010, but failed to resolve the dispute.

1.2 On 8 April 2010, Korea requested the establishment of a panel pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 17.4 of the Anti-Dumping Agreement.[2] The Dispute Settlement Body ("DSB") established a panel at its meeting on 18 May 2010.

1.3 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Korea in document WT/DS402/3, the matter referred to the DSB by Korea in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the ruling provided for in those agreements."

1.4 On 8 July 2010, the parties agreed to the following composition of the Panel:

Chairman: Mr Alberto Juan Dumont

Members: Ms Enie Neri de Ross
Mr Ernesto Fernández Monge

1.5 China, the European Union, Japan, Mexico, Thailand and Viet Nam reserved their rights to participate in the panel proceedings as third parties.

1.6 The Panel met with the parties and third parties on 5 October 2010. After consulting with the parties, the Panel decided not to hold a second substantive meeting with the parties.

1.7 The Panel issued its interim report to the parties on 29 November 2010 and issued its final report to the parties on 21 December 2010.

II. FACTUAL ASPECTS

2.1 At issue in this dispute is the alleged use by the United States Department of Commerce ("USDOC") of the methodology commonly referred to as "zeroing" in the calculation of certain anti-dumping margins in its investigations of three products from Korea, namely SSPC, SSSS and diamond sawblades. The measures at issue, as identified by Korea, are the final determinations, amended final determinations, anti-dumping duty orders and amended anti-dumping duty orders imposed by the United States in relation to imports of the three products.[3]

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[1] WT/DS402/1.
[2] WT/DS402/3.
[3] WT/DS402/3 and Korea's first written submission, para. 3.

2.2 The United States published a notice of initiation of an anti-dumping investigation of SSPC from Korea on 27 April 1998. On 31 March 1999, the USDOC published the final determination of dumping in this investigation. Following a final determination of injury by the United States International Trade Commission, the United States issued an anti-dumping duty order on imports of SSPC from Korea on 21 May 1999.[4] An amended final determination of dumping was published by the USDOC on 28 August 2001, in order to implement the recommendations of a WTO dispute settlement panel on issues unrelated to the alleged use of the zeroing methodology.[5] Further, amended anti-dumping duty orders were published in 2003 in response to an appeal against the injury determination of the United States International Trade Commission.[6]

2.3 Korea contends that the USDOC's use of the "zeroing" methodology affected the determination of the margin of dumping for the responding company, Korean exporter Pohang Iron & Steel Co., Ltd., and that this affected the determination of the "all others" rate.[7]

2.4 In relation to the second product, SSSS from Korea, the United States published a notice of initiation of an anti-dumping investigation on 13 July 1998. The final determination was published on 8 June 1999. An anti-dumping duty order on imports of SSSS from Korea was issued on 27 July 1999, following a final determination of injury by the United States International Trade Commission.[8] An amended final determination of dumping was published by the USDOC on 28 August 2001, in order to implement the recommendations of a WTO dispute settlement panel on issues unrelated to the alleged use of the zeroing methodology.[9]

2.5 Korea contends that the USDOC applied its "zeroing" methodology in determining the margin of dumping for the responding Korean exporter, Pohang Iron & Steel Co., Ltd., and that this affected the determination of the "all others" rate.[10]

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[4] *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from the Republic of Korea,* 64 Fed. Reg. 15444, Exhibit Kor-1-A; and *Antidumping Duty Orders*; *Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa and Taiwan*, 64 Fed. Reg. 27756, Exhibit Kor-1-B.

[5] *Notice of Amendment of Final Determinations of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From the Republic of Korea*; *and Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 66 Fed. Reg. 45279, Exhibit Kor-1-C.

[6] *Notice of Amended Antidumping Duty Orders*; *Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 68 Fed. Reg. 11520, Exhibit Kor-1-D; *Notice of Amended Antidumping Duty Orders*; *Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 68 Fed. Reg. 16117, Exhibit Kor-1-E; and *Notice of Correction to the Amended Antidumping Duty Orders*; *Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 68 Fed. Reg. 20114, Exhibit Kor-1-F. See Korea's first written submission, footnote 5.

[7] Korea's first written submission, para. 8. Korea explains that in the case of the SSPC investigation, the "all others" rate was equal to the rate established for Pohang Iron & Steel Co., Ltd. It was then assigned to the Korean exporters that were not separately investigated.

[8] *Notice of Final Determination of Sales at Less Than Fair Value*: *Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 64 Fed. Reg. 30664, Exhibit Kor-2-A; and *Notice of Antidumping Duty Order*; *Stainless Steel Sheet and Strip in Coils From United Kingdom, Taiwan and South Korea*, 64 Fed. Reg. 40555, Exhibit Kor-2-B.

[9] *Notice of Amendment of Final Determinations of Sales at Less Than Fair Value*: *Stainless Steel Plate in Coils From the Republic of Korea; and Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 66 Fed. Reg. 45279, Exhibit Kor-2-C.

[10] Korea's first written submission, para. 11. Korea explains that in the SSSS investigation, the "all others" rate was equal to the rate established for Pohang Iron & Steel Co., Ltd. Although there were two other companies investigated, one was assigned a dumping margin based on adverse facts available and the other was assigned a zero margin because it was found not to have made sales at less than fair value. The "all others" rate was assigned to Korean exporters that were not separately investigated.

2.6 The United States published a notice of initiation of an anti-dumping investigation of diamond sawblades from Korea on 21 June 2005. The final determination by the USDOC was published on 22 May 2006. An anti-dumping duty order on imports of diamond sawblades was issued on 4 November 2009. Further, an amended final determination correcting certain ministerial errors in the dumping calculation was published by the USDOC on 24 March 2010.[11]

2.7 Korea alleges that the USDOC applied its "zeroing" methodology in determining the dumping margins for the three investigated Korean exporters, namely Ehwa Diamond Industrial Co., Ltd., Hyosung Diamond Industrial Co. and Shinhan Diamond Industrial Co., Ltd., and that this affected the determination of the "all others" rate.[12]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. Korea

3.1 Korea requests that the Panel find that the United States acted inconsistently with the requirements of the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. Korea contends that the United States applied the methodology known as "zeroing" in calculating margins of dumping in three specific anti-dumping duty investigations involving Korean products. Korea argues that the zeroing methodology used by USDOC is virtually identical to the methodology that the Appellate Body, in *EC – Bed Linen* and also in *US – Softwood Lumber V*, found to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.[13] Consequently, Korea claims that the final determinations, amended final determinations, anti-dumping duty orders and amended anti-dumping duty orders issued by the United States in the three investigations at issue are inconsistent with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement.[14]

B. The United States

3.2 The United States does not contest the accuracy of Korea's description of the zeroing methodology as it relates to the investigations at issue in this dispute, nor does it contest that the evidence relied upon by Korea to substantiate its factual claims was generated by the Department of Commerce.[15] The United States recognizes that in *US – Softwood Lumber V* the Appellate Body found that the use of zeroing with respect to the average-to-average comparison methodology in investigations was inconsistent with the first sentence of Article 2.4.2 when it interpreted the terms "margins of dumping" and "all comparable export transactions", as used in the first sentence of Article 2.4.2, in an integrated manner. Finally, the United States acknowledges that this reasoning is equally applicable to the margins at issue in this dispute.[16]

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[11] *Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310, Exhibit Kor-3-B; *Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57145, Exhibit Kor-3-D; and *Amended Final Determination of Sales at Less Than Fair Value: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 75 Fed. Reg. 14126, Exhibit Kor-3-E.

[12] Korea's first written submission, para. 14. Korea explains that in relation to the Diamond Sawblades investigation, the "all others" rate was calculated as the weighted average of the responding companies' dumping margins. This was then assigned to the Korean exporters that were not separately investigated.

[13] Korea's first written submission, para. 18.

[14] Korea's first written submission, para. 2.

[15] United States' first written submission, paras. 5 and 9.

[16] United States' first written submission, para. 10.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties, as set out in their written submissions provided to the Panel, are attached to this Report in Annexes A, C and E (See List of Annexes, at pages ii and iii of this Report).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, as set out in their submissions provided to the Panel, are attached to this Report in Annexes B and D (See List of Annexes, at pages ii and iii of this Report).

VI. INTERIM REVIEW

6.1 On 29 November 2010, the Panel issued its Interim Report to the parties. On 10 December 2010, both parties submitted written requests for review of precise aspects of the Interim Report. Neither party submitted comments on the other party's request for review or requested that the Panel hold an interim review meeting. In accordance with Article 15.3 of the DSU, this section of the Report discusses the arguments made by the parties at the interim review stage.

A. REQUEST FOR REVIEW SUBMITTED BY KOREA

6.2 Korea requests a number of minor drafting changes to paragraph 7.6 of the Interim Report, so that the paragraph more accurately reflects its arguments. The Panel has made the changes requested by Korea.

6.3 Korea requests a number of changes to correct inaccuracies in the Panel's citations to Korea's exhibits. Korea also requests a change to correct a typographical error in an Annex. The Panel has made the changes requested by Korea.

B. REQUEST FOR REVIEW SUBMITTED BY THE UNITED STATES

6.4 The United States requests a drafting change to the final sentence of paragraph 7.2 of the Interim Report in order to ensure that the sentence is not taken out of context and read as prejudging the Panel's ruling. The Panel acknowledges that the sentence could be viewed as prejudging its ruling and has made the proposed change.

6.5 The United States requests a number of modifications to the Interim Report so that it more accurately reflects its submissions. In particular, the United States requests an amendment to footnote 52 and to the first sentence of paragraph 7.8, the final sentence of paragraph 7.16 and the second sentence of paragraph 7.30. The Panel is satisfied that the changes requested to footnote 52 and paragraphs 7.16 and 7.30 are consistent with the United States' submissions and the Panel has amended them. The United States requests that the Panel amend the first sentence of paragraph 7.8 as follows: "the United States submits that prior panel and Appellate Body reports are not binding on panels or the Appellate Body in other disputes". However, in its written and oral submissions, the United States does not refer to whether Appellate Body reports are binding on the Appellate Body in other disputes. Therefore, the Panel has amended the first sentence of paragraph 7.8 to the extent it remains consistent with the United States' submissions in this dispute.

6.6 In four paragraphs of the Interim Report in which the Panel refers variously to the inconsistency of the "zeroing" methodology with Article 2.4.2 of the Anti-Dumping Agreement, the United States requests that the Panel refer to the first sentence of Article 2.4.2, rather than Article 2.4.2 in general. The Panel notes that the change suggested by the United States is consistent with the arguments and the findings in this dispute. Therefore, the Panel has made the requested modification.

6.7 The United States proposes a change to the third sentence of paragraph 7.30, which is a sentence summarizing one of Korea's submissions. In particular, the United States objects to the statement that "Members" expect panels to follow Appellate Body conclusions. The United States argues that neither Korea's submission nor the underlying quote from *US – Oil Country Tubular Goods Sunset Reviews* states who it is that expects panels to follow Appellate Body conclusions. The Panel accepts that the third sentence of paragraph 7.30 may slightly misrepresent Korea's submission and therefore the Panel has amended it.

6.8 The United States requests a change to the second sentence of paragraph 7.31 to reflect the fact that Korea's submission does not focus on adopted Appellate Body reports as creating legitimate expectations, to the exclusion of panel reports. The United States also notes that the Panel in this dispute relies upon a number of panel reports to support its reasoning. Similarly, the United States requests that the first sentence of paragraph 7.34 of the Interim Report be amended to reflect the fact that the Panel has considered panel as well as Appellate Body reports in reaching its findings. The Panel has amended the second sentence of paragraph 7.31 in the manner suggested by the United States in recognition of the fact that both panel and Appellate Body reports may create legitimate expectations among Members. The Panel has also modified paragraph 7.34.

6.9 The United States requests that the final sentence of paragraph 7.34 be amended as follows: "This is because the USDOC ~~did not calculate the dumping margins on the basis of the "product as a whole" and~~ did not take into account all comparable export transactions when calculating the dumping margins at issue". The United States argues that the phrase "product as a whole" is not found in the text of the covered agreement, but was derived from the Appellate Body's integrated interpretation of "margins of dumping" and "all comparable export transactions". Therefore, the phrase "product as a whole" has the same textual basis as "all comparable export transactions" and is redundant. The Panel has rephrased the sentence as requested by the United States so that it reflects the terminology used in Article 2.4.2 of the Anti-Dumping Agreement.

6.10 Finally, the United States proposes a number of typographical changes and a change to the manner in which three of Korea's exhibits are cited. The Panel has made the changes requested by the United States.

VII. FINDINGS

A. ARGUMENTS OF THE PARTIES

1. Korea

7.1 Korea claims that the USDOC's final determinations, amended final determinations, anti-dumping duty orders and amended anti-dumping duty orders relating to the three anti-dumping investigations at issue are inconsistent with the United States' obligations under the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. This is due to the USDOC's use of the "zeroing" methodology in the calculation of certain dumping margins in those investigations.[17]

7.2 Specifically, with respect to the SSPC and SSSS investigations, Korea argues that the USDOC applied its zeroing methodology in calculating margins for Pohang Iron & Steel Co., Ltd. With respect to the investigation of diamond sawblades, Korea contends that the USDOC used its zeroing methodology in calculating margins for the three investigated Korean exporters, namely Ehwa Diamond Industrial Co., Ltd. ("Ehwa"), Hyosung Diamond Industrial Co. ("Hyosung"), and Shinhan Diamond Industrial Co., Ltd. ("Shinhan").[18] Korea does not claim that the "all others" rates are

[17] Korea's first written submission, para. 2.
[18] Korea's first written submission, paras. 8, 11 and 14.

inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. Rather, Korea's only claim in this dispute is "that the methodology used by the USDOC in the three investigations was not consistent with Article 2.4.2 of the Anti-Dumping Agreement".[19] Whether a correction of that methodology would also require modification of the "all others" rate is an issue to be addressed by the USDOC in its implementation of any adverse ruling by the Panel.[20]

7.3 Korea argues that, in calculating the dumping margins for the relevant respondents, the USDOC:

(i) identified different "models" (i.e., types of products based on the most relevant product characteristics);

(ii) calculated weighted average prices for sales in the United States and weighted average normal values for sales in the comparison market on a model-specific basis, for the entire period of investigation;

(iii) compared the weighted average normal value of each model to the weighted average United States price for that same model;

(iv) calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated United States price for all models; and in doing so

(v) set to zero all negative margins on individual models prior to summing the total amount of dumping for all models.

7.4 Korea submits that by applying this methodology, the USDOC calculated margins of dumping in amounts that exceeded the actual extent of dumping (if any) by the investigated companies and, consequently, that the United States collected anti-dumping duties in excess of those that would have been due had the zeroing methodology not been applied.[21]

7.5 Korea argues that the zeroing methodology used by the USDOC is virtually identical to the methodology that the Appellate Body, in *EC – Bed Linen* and also in *US – Softwood Lumber V*, found to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.[22] In particular, Korea refers to the Appellate Body's finding in *US – Softwood Lumber V* that "'margins of dumping' can be found only for the product under investigation as a whole". While investigating authorities may be permitted to compare normal values and export prices for sub-groups of a product, the results of those comparisons reflect only intermediate calculations in the context of establishing margins of dumping, and "[i]t is only on the basis of aggregating *all* such intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole". Consequently, Korea argues that investigating authorities are not permitted to disregard some of the intermediate results of model-specific comparisons, or to treat some of those intermediate results as being greater or less than they actually are, and that the practice of zeroing, as employed by the USDOC, does not comport with this requirement.[23]

[19] Korea's second written submission, para. 3.
[20] Korea's second written submission, para. 3.
[21] Korea's first written submission, paras. 4 and 17.
[22] Korea's first written submission, para. 18.
[23] Korea's first written submission, paras. 19-22. As well as referring to the Appellate Body's decision in *US – Softwood Lumber V*, Korea also notes that the same (or a similar) result was reached by panels in *US – Shrimp (Ecuador)*; *US – Shrimp (Thailand)*; and *US – Anti-Dumping Measures on PET Bags*, and by the Appellate Body in *US – Zeroing (EC)*; *US – Stainless Steel (Mexico)*; and *US – Zeroing (Japan)*.

7.6 Korea understands that while "there is a consistent line of Appellate Body Reports" finding that zeroing in the context of the weighted average-to-weighted average methodology in original investigations is inconsistent with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement, it is also clear that the Panel is not bound by the reasoning in prior Appellate Body and panel reports. However, adopted reports create legitimate expectations among WTO Members, and "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[24] Korea argues that the apparent disagreement between the United States and the European Union regarding the extent to which Appellate Body reports are binding on panels is not relevant to the present dispute. This is because, in any event, the text, context, object and purpose of Article 2.4.2 confirm that the practice of zeroing, as employed by the USDOC in the three investigations the subject of this dispute, is inconsistent with the requirements of that provision.[25]

2. United States

7.7 The United States does not contest the accuracy of Korea's description of the zeroing methodology as it relates to the investigations at issue in this dispute. Further, the United States does not contest that the documentation submitted by Korea, including the computer programmes used to calculate the dumping margins, was generated by the USDOC during the conduct of the investigations at issue. Finally, the United States recognizes that in *US – Softwood Lumber V*, the Appellate Body found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with the first sentence of Article 2.4.2, by interpreting the terms "margins of dumping" and "all comparable export transactions" as used in the first sentence of Article 2.4.2 in an integrated manner. The United States acknowledges that this reasoning is equally applicable to the margins at issue in this dispute.[26]

7.8 However, and to the extent Korea or the European Union suggest that the Panel should simply base its findings upon a "consistent line of Appellate Body Reports", the United States submits that prior panel and Appellate Body reports are not binding on panels in other disputes. The rights and obligations of Members flow from the text of the covered agreements.[27] Therefore, the Panel is not bound to follow the reasoning of any prior report.[28] According to the United States, the Panel is charged with making its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the covered agreements as required by Article 11 of the DSU.[29]

B. ARGUMENTS OF THE THIRD PARTIES

1. China

7.9 According to China, it is well-settled by the Appellate Body and by panels that the practice of zeroing as employed by the USDOC is not consistent with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. China requests that the United States provide a "package solution" to the

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[24] Korea's first written submission, para. 24 (citing Panel Report, *US – Anti-Dumping Measures on PET Bags*, para. 7.24; Appellate Body Reports, *Japan – Alcoholic Beverages II*, page 13; *US – Shrimp (Article 21.5 – Malaysia)*, paras. 108-109; *US – Softwood Lumber V*, paras. 109-112; and *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 188).

[25] Korea's oral statement at the substantive meeting of the Panel, paras. 15-17.

[26] United States' first written submission, paras. 5 and 9-10 (citing Appellate Body Report, *US – Softwood Lumber V*, paras. 62-117).

[27] United States' first written submission, para. 11.

[28] United States' first written submission, para. 11 (citing Appellate Body Report, *US – Softwood Lumber V*, para. 111).

[29] United States' first written submission, para. 11.

zeroing issue. In particular, China requests that the United States re-conduct all investigations in which the zeroing methodology has been used.[30]

2. European Union

7.10 The European Union considers that there is no dispute between the parties and that under these circumstances the report of the Panel could be limited to making a finding that the parties agree that there is no dispute. Furthermore, noting that the United States acknowledges that its measures are inconsistent with the Anti-Dumping Agreement, the Panel could suggest that the United States bring the measures at issue into conformity "immediately". The European Union considers that in order to ensure a prompt settlement of the dispute, as well as to make "the procedures more efficient" in accordance with Article 12.8 of the DSU, the Panel could adapt its working procedures and stop its proceedings upon receiving the views of the third parties.[31] Finally, the European Union addresses the United States' position that the rights and obligations of WTO Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. The European Union relies on the Appellate Body report in *US – Stainless Steel (Mexico)* to argue that panels should follow the rulings of the Appellate Body where it has previously interpreted the same legal questions. Thus, the European Union considers that to the extent the Panel wants to make an independent finding about the interpretation of the relevant law and its application to the facts of this case, it should follow Appellate Body reports on the same legal issue and find that the USDOC's use of zeroing is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.[32]

3. Japan

7.11 Japan supports Korea's claim. It recognizes that the Appellate Body found in *US – Softwood Lumber V* that the use of "zeroing" in the context of the weighted average-to-weighted average methodology in original investigations is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. Furthermore, Japan recalls that in *US – Shrimp (Ecuador)* and *US – Anti-Dumping Measures on PET Bags*, where the United States also acknowledged that the reasoning of the Appellate Body in *US – Softwood Lumber V* was applicable to the disputes, the respective panels concluded that the United States had acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement.[33]

C. ANALYSIS BY THE PANEL

7.12 Korea claims that the United States acted inconsistently with Article 2.4.2, first sentence, of the Anti-Dumping Agreement by using "zeroing" in calculating certain dumping margins in three specific anti-dumping duty investigations involving Korean products. According to Korea, the final determinations, amended final determinations, anti-dumping duty orders and amended anti-dumping duty orders at issue are inconsistent with Article 2.4.2.[34] The United States does not contest Korea's claims. In particular, the United States does not contest the factual assertions made by Korea regarding the United States' actions, nor the legal relevance of the Appellate Body reports cited by

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[30] China's oral statement at the substantive meeting of the Panel.

[31] European Union's third party submission, paras. 2-5.

[32] European Union's third party submission, paras. 6-9 (citing Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 157-162).

[33] Japan's third party submission, paras. 2-4 (citing Appellate Body Report, *US – Softwood Lumber V*, paras. 62-117).

[34] Korea's first written submission, para. 2. Korea confirms that its challenge relates only to the application of the zeroing methodology in the anti-dumping investigations for the three products at issue, and not to the calculation of margins of dumping in any administrative reviews (Korea's response to question 1, para. 2).

Korea as applicable to those facts.[35] Further, while the United States argues that the Panel need not follow past Appellate Body reports, it does not advance any legal arguments to contest the Appellate Body's interpretation of Article 2.4.2 in those reports.[36] Consequently, the first step of our analysis is to determine the role of the panel in circumstances where the claim is uncontested.

(a) The role of the Panel

7.13 Although the United States does not contest Korea's claim, the United States submits that, under Article 11 of the DSU, the Panel is required to make its own objective assessment of the matter before it, including its own objective assessment of the facts, and the applicability of and conformity with the relevant covered agreements.[37] In its third party submission, the European Union suggests that the Panel could limit its finding to a conclusion that the parties agree there is no dispute, accompanied by a recommendation that the measures be brought into conformity.[38]

7.14 While the United States does not contest Korea's claim, in our view the parties do not "agree that there is no dispute", as suggested by the European Union, nor have the parties characterized their shared views as a "mutually agreed solution". Therefore, although when a mutually agreed solution is reached, Article 12.7 of the DSU provides that a panel's report shall be "confined to a brief description of the case and to reporting that a solution has been reached", in the Panel's view this does not apply in the circumstances of this dispute.

7.15 Rather, Article 11 of the DSU, which governs the "functions of panels", sets out our responsibilities. In particular, Article 11 provides:

> "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, *a panel should 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*, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."[39]

7.16 Therefore, notwithstanding that the United States did not contest Korea's claims, we consider that we are still required to reach our own conclusion on the matter before us, in accordance with Article 11 of the DSU. In particular, we are required to "make an objective assessment of the matter before [us] including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".

7.17 We note that the situation before us is very similar to that before the panels in *US – Shrimp (Ecuador), US – Shrimp (Thailand)* and *US – Anti-Dumping Measures on PET Bags*, in that the complainant alleges inconsistency with Article 2.4.2 of the Anti-Dumping Agreement due to the use of zeroing in the application of the "weighted average-to-weighted average methodology" in calculating margins of dumping in original investigations and the respondent, the United States, does not contest the claim. We agree with the approach adopted by those panels and are guided by it.

[35] United States' first written submission, paras. 5, 9 and 10.
[36] United States' first written submission, para. 11.
[37] United States' first written submission, para. 11.
[38] European Union's third party submission, para. 3.
[39] Emphasis added. We note that Article 17.6 of the Anti-Dumping Agreement – setting forth the special standard of review applicable to disputes under the Anti-Dumping Agreement – also applies to this dispute. Given that the United States does not contest Korea's claims, it is not necessary for us give detailed consideration to the application of this provision.

7.18 In particular, having determined the role of the panel as part (a) of our analysis, to reach a conclusion in this dispute we consider it necessary to (b) determine the burden of proof to be discharged by the complainant; (c) evaluate whether the complainant has established that the United States used "zeroing" in the measures at issue; (d) consider whether the complainant has established that the "zeroing" methodology used by the United States is the same as the methodology reviewed in a "consistent line of Appellate Body Reports", including *US – Softwood Lumber V*; and (e) find whether or not the complainant has established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement.

(b) Burden of Proof

7.19 We note that in *US – Shrimp (Ecuador),* the panel made the following findings regarding burden of proof and that this reasoning was adopted by the panels in *US – Shrimp (Thailand)* and *US – Anti-Dumping Measures on PET Bags:*

> "Because of its singularity, this dispute raises in a particularly acute fashion the issue of the burden of proof.
>
> The burden of proof lies, in WTO dispute settlement proceedings, with the party that asserts the affirmative of a particular claim or defence. Ecuador, as the complaining party, must therefore make a *prima facie* case of violation of the relevant provisions of the relevant WTO agreements. The burden would then shift to the responding party (here the United States), to adduce evidence to rebut the presumption that Ecuador's assertions are true. In this context, we recall that 'a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case'.
>
> In our view, the issue of the burden of proof is of particular importance in this case. This is because Ecuador has made factual and legal claims before the Panel which the United States does not contest. Yet, the fact that the United States does not contest Ecuador's claims is not a sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case. We take note in this regard that the Appellate Body has cautioned panels against ruling on a claim before the party bearing the burden of proof has made a *prima facie* case. In *EC – Hormones*, the Appellate Body ruled that the Panel erred in law when it absolved the complaining parties from the necessity of establishing a *prima facie* case and shifted the burden of proof to the responding party:
>
>> 'In accordance with our ruling in *United States – Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each Article of the *SPS Agreement* addressed by the Panel .... Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim.'

More recently, in *US – Gambling*, the Appellate Body indicated that "[a] panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case", and noted that:

> 'A *prima facie* case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.
>
> In the context of the sufficiency of panel requests under Article 6.2 of the DSU, the Appellate Body has found that a panel request:
>
> > ... must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits.
>
> Given that such a requirement applies to panel requests at the outset of a panel proceeding, we are of the view that a *prima facie* case – made in the course of submissions to the panel – demands no less of the complaining party. The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.'

Thus, notwithstanding the fact that the United States is not seeking to refute Ecuador's claims, we must satisfy ourselves that Ecuador has established a *prima facie* case of violation, and notably that it has presented 'evidence and argument ... sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision'."[40] (footnotes omitted)

7.20 We agree with the reasoning of the panel in *US – Shrimp (Ecuador)* and adopt it as our own. Consequently, although the United States does not refute any elements of Korea's claims, we must be satisfied that Korea has established a *prima facie* case of violation of Article 2.4.2 of the Anti-Dumping Agreement if we are to make the findings that Korea seeks.

(c) Has Korea established that the USDOC "zeroed" in the measures at issue?

7.21 In support of its assertion that the USDOC "zeroed" in relation to each of the measures at issue, Korea provides copies of the computer programmes used by the USDOC for its amended final determination in the SSPC investigation, the amended final determination in the SSSS investigation and for the final and amended final determinations in the Diamond Sawblades investigation.[41]

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[40] Panel Report, *US – Shrimp (Ecuador),* paras. 7.7-7.11. See also, Panel Reports, *US – Shrimp (Thailand),* paras. 7.20-7.21 and *US – Anti-Dumping Measures on PET Bags*, paras. 7.6-7.7.

[41] *Model Match Programme*, SSPC investigation, Exhibit Kor-1-G; *Margin Calculation Programme*, SSPC investigation, Exhibit Kor-1-H; *Margin Calculation Programme Log*, at lines 16083-16087, SSPC investigation, Exhibit Kor-1-I; *Model Match Programme*, SSSS investigation, Exhibit Kor-2-D; *Margin Calculation Programme*, SSSS investigation, Exhibit Kor-2-E; *Margin Calculation Programme Log*, at lines

Further, in relation to the latter investigation, Korea submits the USDOC's Issues and Decision Memorandum for the final determination.[42] Each of the computer programmes includes the line "WHERE EMARGIN GT 0", indicating that the calculation of the total amount of dumping includes only those sales where the dumping margin ("EMARGIN") is greater than zero ("GT 0"). Further, the computer programmes provided for the Diamond Sawblades investigation include the line "IF EMARGIN LE 0 THEN EMARGIN = 0", indicating that margins on models less than zero should be set to zero. Finally the Issues and Decision Memorandum in relation to the Diamond Sawblades investigation provides that "the Department will continue in this investigation to deny offsets to dumping based on export transactions that exceed [normal value]".[43]

7.22 On the basis of this evidence, and in the light of the fact that the United States does not contest that the USDOC used the "zeroing" methodology in the manner described by Korea, in the Panel's view Korea has established that the USDOC "zeroed" in the measures at issue.

(d) Has Korea established that the methodology used by the USDOC is the same in all legally relevant respects as the methodology reviewed by the Appellate Body in *US – Softwood Lumber V?*

7.23 Korea contends that the "zeroing" methodology at issue in this dispute is "virtually identical" to the methodology that was held to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in *US – Softwood Lumber V*. It is necessary for us to consider whether this is indeed the case and if so, to consider the implications of the identity between the methodologies.

7.24 In *US – Softwood Lumber V*, Canada's challenge was limited to an "as applied" challenge to the consistency of "zeroing" when used in calculating margins of dumping on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions (the "weighted average-to-weighted average" methodology) in the context of an original investigation under Article 2.4.2 of the Anti-Dumping Agreement.[44]

7.25 The Appellate Body in *US – Softwood Lumber V*, described "zeroing" as applied by the USDOC in that investigation as follows:

> "First, USDOC divided the product under investigation (that is, softwood lumber from Canada) into sub-groups of identical, or broadly similar, product types. Within each sub-group, USDOC made certain adjustments to ensure price comparability of the transactions and, thereafter, calculated a weighted average normal value and a weighted average export price per unit of the product type. When the weighted

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13847-13851, SSSS investigation, Exhibit Kor-2-F; *Ehwa Margin Calculation Programme Log*, at line 2611 *et seq.*, Exhibit Kor-3-G; *Hyosung Margin Calculation Programme Log*, at line 5119 *et seq.*, Exhibit Kor-3-I; *Shinhan Margin Calculation Programme Log*, at line 2619 *et seq.*, Exhibit Kor-3-K.

[42] USDOC's unpublished *Issues and Decision Memorandum for the Final Determination, Antidumping Duty Investigation of Diamond Sawblades and Parts Thereof from the Republic of Korea*, 15 May 2006, Exhibit Kor-3-C.

[43] USDOC's unpublished *Issues and Decision Memorandum for the Final Determination, Antidumping Duty Investigation of Diamond Sawblades and Parts Thereof from the Republic of Korea*, 15 May 2006, Exhibit Kor-3-C, p. 42. For completeness, we note that modification to the United States' methodology of calculating the weighted average dumping margin in investigations using the average-to-average comparison methodology, which took effect on 22 February 2007, did not affect the anti-dumping duty order or the amended final determination in the Diamond Sawblades investigation. The modified methodology applies only to future investigations and investigations pending before the USDOC as of 22 February 2007. In the case of the Diamond Sawblades investigation, the final determination was completed in 2006 and the amended final determination, published on 24 March 2010, was limited to correcting ministerial errors (United States' response to question 2, para. 1 and Korea's response to question 2, para. 3).

[44] Appellate Body Report, *US – Softwood Lumber V*, para. 63.

average normal value per unit exceeded the weighted average export price per unit for a sub-group, the difference was regarded as the "dumping margin" for that comparison. When the weighted average normal value per unit was equal to or less than the weighted average export price per unit for a sub-group, USDOC took the view that there was no "dumping margin" for that comparison. USDOC aggregated the results of those sub-group comparisons in which the weighted average normal value exceeded the weighted average export price – those where the USDOC considered there was a "dumping margin" – after multiplying the difference per unit by the volume of export transactions in that sub-group. The results for the sub-groups in which the weighted average normal value was equal to or less than the weighted average export price were treated as zero for purposes of this aggregation, because there was, according to USDOC, no "dumping margin" for those sub-groups. Finally, USDOC divided the result of this aggregation by the value of all export transactions of the product under investigation (*including the value of export transactions in the sub-groups that were not included in the aggregation*). In this way, USDOC obtained an "overall margin of dumping", for each exporter or producer, for the product under investigation (that is, softwood lumber from Canada).[45]

...

Thus, as we understand it, by zeroing, the investigating authority treats as zero the difference between the weighted average normal value and the weighted average export price in the case of those sub-groups where the weighted average normal value is less than the weighted average export price. Zeroing occurs only at the stage of aggregation of the results of the sub-groups in order to establish an overall margin of dumping for the product under investigation as a whole."[46]

7.26 In Attachment 1 to its first written submission, Korea provides references to its exhibits to demonstrate that for each investigation USDOC (i) identified different "models" (i.e., types of products based on the most relevant product characteristics)[47]; (ii) calculated weighted average prices for sales in the United States and weighted average normal values for sales in the comparison market on a model-specific basis, for the entire period of investigation[48]; (iii) compared the weighted average

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[45] Appellate Body Report, *US – Softwood Lumber V*, para. 64 (emphasis original; footnote omitted).

[46] Appellate Body Report, *US – Softwood Lumber V*, para. 65.

[47] With respect to the SSPC and the SSSS investigations, Korea refers to the sections of the USDOC computer programmes that indicate that "U.S: Models" and "Home Market Models" were identified (*Model Match Programmes*, SSPC and SSSS investigations, Exhibits Kor-1-G and Kor-2-D). In relation to all three investigations, Korea also refers to the relevant final determination or preliminary determination, which state that USDOC considered all products produced by the respondent(s), covered by the description in the *Scope of the Investigation* section and sold in the home market during the period of investigation, to be foreign like products for the purpose of determining appropriate product comparisons to U.S. sales. Where there were no sales of identical merchandise in the home market to compare to United States sales, USDOC compared United States sales to the next most similar foreign like product on the basis of a defined set of criteria (64 Fed. Reg. 15444-15445, Exhibit Kor-1-A; 64 Fed. Reg. 30664, 30667, Exhibit Kor-2-A; and 70 Fed. Reg. 77135, 77139, Exhibit Kor-3-A).

[48] Korea refers to the final or preliminary determinations for each investigation, which indicate in varying terms that the United States calculated weighted average export prices or constructed export prices for comparison to weighted average normal values (64 Fed. Reg. 15444-15445, Exhibit Kor-1-A; 64 Fed Reg. 30664, 30667, Exhibit Kor-2-A; and 70 Fed. Reg. 77135, 77139, Exhibit Kor-3-A). Korea also provides references to the relevant lines of the computer programmes (Exhibits Kor-1-G at Part 6; Kor-1-H at Part 1; Kor-1-I at lines 15705-15711; Kor-2-D at Part 6; Kor-2-E at Part 2; Kor-2-F at lines 13467-13473; Kor-3-F at Part 8, lines 2415-2421; Kor-3-G at Part 4-I, line 2387 *et seq.*; Kor-3-H at Part 8, lines 2362-2369; Kor-3-I at Part 4-I, line 4895 *et seq.*; Kor-3-J at Part 8, lines 2443-2450; and Kor-3-K at Part 4-I, line 2395 *et seq.*).

normal value of each model to the weighted average United States price for that same model[49]; (iv) calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated United States price for all models[50]; and in doing so (v) set to zero all negative margins on individual models prior to summing the total amount of dumping for all models.[51]

7.27 We have examined the preliminary determinations, final determinations, amended final determinations, computer programmes and Issues and Decision Memorandum cited by Korea in Attachment 1 to its first written submission.[52] On the basis of this evidence, we conclude that Korea has made a *prima facie* case that the methodology used by the USDOC in calculating the margins of dumping in the three anti-dumping investigations at issue, was the same in all legally relevant respects as the methodology found by the Appellate Body in *US – Softwood Lumber V* to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. This conclusion is supported by the fact that the United States acknowledges that the reasoning used by the Appellate Body in *US – Softwood Lumber V* is "equally applicable" to the margins at issue in this dispute.[53]

(e) Has Korea established that the methodology applied by the USDOC is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement?

7.28 We turn now to the legal analysis of Korea's claim, i.e., whether the zeroing methodology it describes, as applied to the measures at issue, is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. Article 2.4.2 provides:

> *"Article 2*
>
> *Determination of Dumping*
>
> ...
>
> 2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison

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[49] Korea cites either the final determination, amended final determination or preliminary determination for each investigation, which indicate in varying terms that weighted average export prices or constructed export prices were compared to weighted average normal values in order to determine whether sales of the product at issue from Korea to the United States were made at less than fair value (64 Fed. Reg.15444-15445, Exhibit Kor-1-A; 66 Fed. Reg. 45279, 45283, Exhibit Kor-1-C; 64 Fed. Reg. 30664, 30667, Exhibit Kor-2-A; 66 Fed. Reg. 45279, 45283, Exhibit Kor-2-C; 70 Fed. Reg. 77135, 77139, Exhibit Kor-3-A). Further, Korea provides references to the relevant lines of the computer programmes (Exhibits Kor-1-H at Part 4; Kor-1-I at line 16001; Kor-2-E at Part 6; Kor-2-F at line 13765; Kor-3-G at Part 5 line 2502 and Part 6 line 2567 *et seq.*; Kor-3-I at Part 5, line 5010 *et seq.* and Part 6, line 5075 *et seq.*; Kor-3-K at Part 5, line 2510 *et seq.* and Part 6, line 2575 *et seq.*).

[50] Korea cites the lines from the relevant Margin Calculation Programmes and Margin Calculation Programme Logs which provide "WTAVGPCT = (TOTPUDD/TOTVAL)*100" (where TOTPUDD refers to total potential duties due, Korea's first written submission, footnote 8). See Exhibits Kor-1-H at Part 4, Kor-1-I at line 16097, Kor-2-E at Part 6, Kor-2-F at line 13861, Kor-3-G at Part 8, line 2611 *et seq.*, Kor-3-I at Part 8, line 5119 *et seq.* and Kor-3-K at Part 8 line 2619 *et seq.*

[51] See paras. 7.21-7.22 of this Report for a description of the evidence provided by Korea to demonstrate that the USDOC set to zero all negative dumping margins on individual models.

[52] Although some of the evidence relating to the Diamond Sawblades investigation pertains to the USDOC's preliminary determination, the United States did not contest Korea's description of the zeroing methodology as it relates to the investigations at issue in this dispute.

[53] United States' first written submission, para. 10.

> of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

7.29 Korea relies upon the Appellate Body report in *US – Softwood Lumber V* to argue that the United States acted inconsistently with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. In particular, Korea relies on the Appellate Body's finding that, under the weighted average-to-weighted average methodology provided for under the first sentence of Article 2.4.2, "dumping ... margins must be, and can only be, established for the product under investigation as a whole".[54] Therefore, model-specific results are only intermediate calculations and "[i]t is only on the basis of aggregating all such intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole". A proper aggregation of the intermediate results of model-specific comparisons must reflect the result of *all* such comparisons.[55]

7.30 In relation to the reliance by Korea on the Appellate Body's report in *US – Softwood Lumber V,* both the United States and Korea agree that the Panel is not bound by the reasoning in prior Appellate Body reports. However, the United States recognizes that prior adopted panel and Appellate Body reports may be taken into account by a panel.[56] According to Korea, adopted reports create legitimate expectations among WTO Members and that, where the issues are the same, following Appellate Body conclusions is what would be expected from panels.[57] In contrast, in its third party submission, the European Union argues that the "Panel should follow the rulings of the Appellate Body". The European Union supports this position by referring to Appellate Body statements in *US – Stainless Steel (Mexico),* including that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[58]

7.31 In our view, there is not a system of precedent within the WTO dispute settlement system and panels are not bound by Appellate Body reasoning. However, we agree with Korea that adopted reports create legitimate expectations among WTO Members[59] and that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[60]

7.32 In this light, we note that the panel in *US – Shrimp (Ecuador)* explained its understanding of the Appellate Body's reasoning in *US – Softwood Lumber V* as follows:

> "The Appellate Body began its analysis with the text of Article 2.4.2 and noted that the question before it was the proper interpretation of the terms 'all comparable export transactions' and 'margins of dumping' in Article 2.4.2. In examining the arguments of the parties with respect to these phrases, the Appellate Body concluded that the parties' disagreement centered on whether a Member could take into account 'all'

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[54] Korea's first written submission, para. 19 (quoting Appellate Body Report, *US – Softwood Lumber V,* para. 96).

[55] Korea's first written submission paras. 20-21 (quoting Appellate Body Report, *US – Softwood Lumber V,* paras. 97-98).

[56] United States' first written submission, para. 11.

[57] Korea's first written submission, para. 24.

[58] European Union's third party submission, paras. 6-9.

[59] See Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 14; *US – Shrimp (Article 21.5 – Malaysia)*, paras. 108-109; and *US – Softwood Lumber V*, paras. 109-112.

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

comparable export transactions only at the sub-group level, or whether such transactions also had to be taken into account when the results of the sub-group comparisons are aggregated. To examine that issue, the Appellate Body noted the definition of dumping in Article 2.1 of the Anti-Dumping Agreement. The Appellate Body found that 'it [was] clear from the texts of [Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement] that dumping is defined in relation to a product as a whole as defined by the investigating authority'. The Appellate Body further considered that the definition of 'dumping' contained in Article 2.1 applies to the entire Agreement, including Article 2.4.2, and that '[d]umping', within the meaning of the Anti-Dumping Agreement, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product.' Next, the Appellate Body relied on its Report in *EC - Bed Linen*, in which it stated that '[w]hatever the method used to calculate the margins of dumping ... these margins must be, and can only be, established for the *product* under investigation as a whole.' Thus, the Appellate Body noted that '[a]s 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.' The Appellate Body therefore rejected the United States' arguments in that case that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons at the sub-group level; for the Appellate Body, while an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation, the results of the multiple comparisons at the sub-group levels are not margins of dumping within the meaning of Article 2.4.2; they merely reflect intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. It is only on the basis of aggregating all such intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole. On this basis, the Appellate Body held that zeroing, as applied by the USDOC in *US – Softwood Lumber V*:

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

The Appellate Body on this basis concluded that the treatment of comparisons for which the weighted average normal value is less than the weighted average export price as 'non-dumped' comparisons was not in accordance with the requirements of Article 2.4.2 of the Anti-Dumping Agreement. As a result, the Appellate Body upheld the Panel's finding that the United States had acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing."[61]

7.33 We note that the Appellate Body's finding in *US – Softwood Lumber V* regarding "zeroing" in the context of the weighted average-to-weighted average methodology in original investigations, is consistent with its finding in *EC – Bed Linen*. In fact, panels considering the issue have found that

[61] Panel Report, *US – Shrimp (Ecuador)*, paras. 7.38-7.39 (footnotes omitted).

"there is now a consistent line of Appellate Body Reports" holding that the use of "zeroing" as described by Korea in this dispute is inconsistent with the first sentence of Article 2.4.2.[62] Further, three successive panels have reached the same conclusions as the Appellate Body on this issue.[63]

7.34 We have carefully considered the Appellate Body's reasoning in *US – Softwood Lumber V* and taken into consideration panel reports and the "consistent line of Appellate Body reports" finding that zeroing in the context of the weighted average-to-weighted average methodology in original investigations is inconsistent with Article 2.4.2, first sentence. We recall our finding that the zeroing methodology at issue in this dispute is identical to that at issue in *US – Softwood Lumber V* and that the legal issues raised in Korea's claim are also identical in all material respects to those addressed by the Appellate Body in *US – Softwood Lumber V*. In the light of this, and the fact that the respondent has failed to advance any legal arguments to contradict the reasoning in the line of cases cited by Korea, we are satisfied that Korea has established a *prima facie* case that the use of zeroing by the USDOC in the calculation of the margins of dumping at issue is inconsistent with the United States' obligations under the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. This is because the USDOC did not take into account all comparable export transactions when calculating the dumping margins at issue.

7.35 Given our finding that Korea has made a *prima facie* case of violation in respect of the measures at issue, and in the absence of arguments of the United States to the contrary, we conclude that the United States has acted inconsistently with its obligations under the first sentence of Article 2.4.2 of the Anti-Dumping Agreement by using the zeroing methodology in the manner described above.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In the light of the above findings, we conclude that the United States acted inconsistently with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement by using the zeroing methodology in calculating certain margins of dumping in the three investigations involving Korean products. Consequently, the final determinations, amended final determinations, anti-dumping duty orders and amended anti-dumping duty orders at issue are inconsistent with Article 2.4.2, first sentence.

8.2 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent the United States has acted inconsistently with the provisions of the Anti-Dumping Agreement, it has nullified or impaired benefits accruing to Korea under that Agreement. We therefore recommend that the DSB request the United States to bring its measures into conformity with its obligations under the Anti-Dumping Agreement.

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[62] See Panel Reports, *US – Shrimp (Ecuador)* para. 7.40; *US – Shrimp (Thailand),* para. 7.34; and *US – Anti-Dumping Measures on PET Bags,* para. 7.24.

[63] See Panel Reports, *US – Shrimp (Ecuador); US – Shrimp (Thailand);* and *US – Anti-Dumping Measures on PET Bags.*

ANNEX A

FIRST WRITTEN SUBMISSIONS OF THE PARTIES OR EXECUTIVE SUMMARIES THEREOF

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ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF KOREA

1. In this dispute, Korea contends that the final determinations, amended final determinations, anti-dumping duty orders, and amended anti-dumping duty orders of the United States in three specific anti-dumping duty investigations involving Korean products are inconsistent with U.S. obligations under the first sentence of Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994* (the "Anti-Dumping Agreement"), due to the application of the methodology commonly known as "zeroing" by the United States Department of Commerce ("USDOC") in the calculation of dumping margins in the cases.

A. THE MEASURES AT ISSUE

2. The specific measures in this dispute are the final determinations, amended final determinations, anti-dumping orders and amended anti-dumping orders imposed by the United States in cases on imports of:

(i) Stainless Steel Plate in Coils from the Republic of Korea (A-580-831);

(ii) Stainless Steel Sheet and Strip in Coils from the Republic of Korea (A-580-834); and

(iii) Diamond Sawblades and Parts Thereof from the Republic of Korea (A-580-855).

In the final determinations and amended final determinations in these three cases, the USDOC applied the zeroing methodology to determine the dumping margins for certain Korean exporters of the products under investigation. Accordingly, for certain Korean exporters, the determinations and the ensuing anti-dumping orders reflected and included dumping margins that were calculated on the basis of zeroing.

3. In calculating the dumping margins for the respondents in each of the investigations, the USDOC:

(i) identified different "models," *i.e.*, types of products based on the most relevant product characteristics;

(ii) calculated weighted average prices for sales in the United States and weighted average normal values for sales in the comparison market on a model-specific basis, for the entire period of investigation;

(iii) compared the weighted average normal value of each model to the weighted average United States price for that same model;

(iv) calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated United States price for all models; and in doing so

(v) effectively set to zero all negative margins on individual models prior to summing the total amount of dumping for all models.

By applying this zeroing methodology, the USDOC calculated margins of dumping in amounts that exceeded the actual extent of dumping, if any, by the investigated companies. Consequently, the United States also collected anti-dumping duties in excess of those that would have been due had the zeroing methodology not been applied in contravention of U.S. obligations under the Anti-Dumping Agreement.

B. ARGUMENT

4. As the Panel is aware, the first sentence of Article 2.4.2 of the Anti-Dumping Agreement establishes the following requirements for comparison of export prices and normal values in an anti-dumping investigation:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis.

Under this provision, the existence of margins of dumping must normally be established using one of two permissible methodologies: (1) an average-to-average methodology that compares "weighted average normal value with a weighted average of prices of all comparable export transactions," or (2) a transaction-to-transaction methodology that compares transaction-specific normal values to transaction-specific export prices.

5. The zeroing methodology that the USDOC used in the anti-dumping investigations subject to this dispute is virtually identical to the methodology that was held to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (WT/DS141/R and WT/DS141/AB/R), and also in *United States – Final Dumping Determination on Softwood Lumber from Canada* (WT/DS264/R and WT/DS264/AB/R).

6. It is well-settled that an investigating authority may, when applying an average-to-average methodology, initially divide the product under investigation into "models" or other sub-groups, and compare average normal values to average export prices for the individual sub-groups. However, it is clear from Article 2.1 of the Anti-Dumping Agreement and Article VI of GATT 1994 that "dumping is defined in relation to a product as a whole as defined by the investigating authority." As the Appellate Body has observed, this means that "'[d]umping,' within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product." It follows, then, that "[w]hatever the method used to calculate the margins of dumping ... these margins must be, and can only be, established for the *product* under investigation as a whole." In sum, "[a]s 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."[1]

7. As a result, while investigating authorities may be permitted to compare normal values and export prices for sub-groups, the results of those comparisons do not constitute "margins of dumping" within the meaning of Article 2.4.2. Instead, those model-specific results "reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation." In other words, "[i]t is only on the basis of aggregating *all* such

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[1] *United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R, 11 August 2004.

intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole."[2]

8. In this regard, a proper aggregation of the intermediate results of model-specific comparisons must reflect the result of *all* such comparisons. As the Appellate Body has explained:

> We fail 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 for *all* product types. There is no textual basis under Article 2.4.2 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". If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.[3]

In short, an investigating authority is not permitted to disregard some of the intermediate results of model-specific comparisons, or to treat some of those intermediate results as being greater or less than they actually are.

9. The practice of zeroing, as employed by the USDOC in the cases subject to this dispute, does not comport with this requirement. As the Appellate Body has explained:

> Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole.[4]

10. In these circumstances, the USDOC's use of the zeroing methodology in investigations in the cases that are the subject of this dispute is not consistent with the requirements of Article 2.4.2 of the Anti-Dumping Agreement.

11. As the Panel is undoubtedly aware, this interpretation of the inconsistency of zeroing with the requirements of Article 2.4.2 is entirely in accordance with the Appellate Body's decision in the dispute concerning *United States – Final Dumping Determination on Softwood Lumber from Canada*.[5] The same result was also reached by panels reviewing the identical zeroing methodology used by the USDOC to calculate dumping margins in its anti-dumping investigations of shrimp from Ecuador and Thailand and of retail carrier bags from Thailand.[6] A similar result has also been reached by the Appellate Body in several additional disputes.[7]

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[2] *Id.*

[3] *Id.*, para. 98 (emphasis in original). The Appellate Body has noted that this interpretation is also consistent with a review of the context provided by other provisions of the Anti-Dumping Agreement. *See, id.*, paras. 99-100.

[4] *Id.*, para. 101 (emphasis in original).

[5] *Id.*, paras. 86-103, 122.

[6] *See United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, Panel Report, 30 January 2007; *United States – Measures Relating to Shrimp from Thailand*, Panel Report, WT/DS343/R, 29 February 2008; *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand,* Panel Report, WT/DS383/R, 22 January 2010. These Panels closely followed the reasoning of the Appellate Body in *US – Softwood Lumber* in concluding that the USDOC's application of its zeroing methodology in

12. In short, "there is a consistent line of Appellate Body Reports finding that 'zeroing' in the context of the weighted average-to-weighted average methodology in original investigations is inconsistent with Article 2.4.2, first sentence."[8] Of course, the Panel is not bound by the reasoning in prior Appellate Body and panel reports. Nevertheless, adopted Reports create legitimate expectations among WTO Members,[9] and "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."[10] And, because review of the text, context and object and purpose of Article 2.4.2 confirms that the practice of zeroing as described above is not consistent with the requirements of that provision, the Panel should rule that the USDOC's use of zeroing in its calculation of the margins of dumping for the products under investigation in the cases subject to this dispute is not consistent with the obligations of the United States under the Anti-Dumping Agreement.

C. CONCLUSION

13. As this analysis demonstrates, the final determinations, amended final determinations, anti-dumping duty orders and amended anti-dumping orders of the United States in the three cases subject to this dispute are inconsistent with U.S. obligations under the first sentence of Article 2.4.2 of the Anti-Dumping Agreement.

14. Therefore, Korea requests that the Panel find that the United States acted inconsistently with the requirements of the first sentence of Article 2.4.2 of the Anti-Dumping Agreement when it calculated the anti-dumping margins in its anti-dumping investigations of Stainless Steel Plate in Coils from the Republic of Korea, Stainless Steel Sheet and Strip in Coils from the Republic of Korea, and Diamond Sawblades and Parts Thereof from the Republic of Korea. Korea further requests that the Panel recommend that the United States be instructed to bring its measure into conformity with its obligations under that provision.

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weighted-average to weighted-average comparisons in investigations is inconsistent with its obligations under Article 2.4.2 of the Anti-Dumping Agreement.

[7] *See United States – Laws, Regulations and Methodology for Calculating Dumping Margins (EC)*, WT/DS294/AB/R, Appellate Body Report, 18 April 2006, paras. 222 and 263(b); *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico,* WT/DS344/AB/R, Appellate Body Report, 30 April 2008, para. 109; *United States – Measures Relating to Zeroing and Sunset Reviews (Japan)*, WT/DS322/AB/R, Appellate Body Report, 9 January 2007, para. 121 *et seq*.

[8] *See United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand,* Panel Report, WT/DS383/R, 22 January 2010, para. 7.24.

[9] *See Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body Report, 4 October 1996, at 13; *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia)*, WT/DS58/AB/RW, Appellate Body Report, 22 October 2001, paras. 108-109; *United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R, 11 August 2004, paras. 109-112.

[10] *See United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, Appellate Body Report, 29 November 2004, para. 188 ("The Panel had before it exactly the same instrument that had been examined by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*; thus, it was appropriate for the Panel…to rely on the Appellate Body's conclusion in that case. Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.").

ANNEX A-2

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

1. The Republic of Korea ("Korea") claims that the United States breached its obligations under the first sentence of Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*) ("Anti-dumping Agreement") when the U.S. Department of Commerce applied the "zeroing" methodology to calculate certain dumping margins in the final determinations and amended final determinations in the anti-dumping investigations of Stainless Steel Plate in Coils from Korea, Stainless Steel Sheet and Strip in Coils from Korea, and Diamond Sawblades and Parts Thereof from Korea.[1]

2. As an initial matter, the United States would like to thank the Panel for providing adequate time to prepare this submission. This time was useful in allowing the United States to review the evidence and arguments presented by Korea and in turn helping to narrow the issues presented to the Panel, as indicated below.

3. In WTO dispute settlement, the complaining party bears the burden of proving that a Member has acted inconsistently with an obligation.[2] In addition, Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the covered agreements. Thus, recently, in *US – AD Measures on PET Bags*, the panel correctly stated that it had to satisfy itself that Thailand had established a prima facie case by presenting evidence and arguments to identify the measure being challenged and explain the basis for the claimed inconsistency with a WTO provision, despite the fact that the responding party did not contest the claims made by Thailand.[3]

4. In this dispute, Korea alleges that when calculating certain dumping margins in the challenged investigations, the Department of Commerce: (i) identified different "models," i.e., types, of products based on the most relevant product characteristics; (ii) calculated weighted average prices for sales in the United States and weighted average normal values for sales in the comparison market on a model-specific basis, for the entire period of investigation; (iii) compared the weighted average normal value of each model to the weighted average U.S. price for that same model; (iv) calculated the dumping margin for an exporter by summing the amount of dumping for each model and then dividing it by the aggregated U.S. price for all models; and (v) set to zero all negative margins on individual models before summing the total amount of dumping for all models.[4]

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[1] Korea's Request for the Establishment of a Panel*,* WT/DS402/3 (8 April 2010), pp. 1-2.

[2] *US – Corrosion-Resistant Steel CVD (AB)*, paras. 156-157.

[3] *US – AD Measures on PET Bags*, paras. 7.5-7.7. The panel in *US – AD Measures on PET Bags* cited with approval the reasoning of the panel in *US – Shrimp (Ecuador)*, which had similarly concluded:

> [T]he fact that the United States does not contest Ecuador's claims is not a sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favor of Ecuador if we are satisfied that Ecuador has made a *prima facie* case.
>
> *US – Shrimp (Ecuador)*, para. 7.9.

[4] First Written Submission of The Republic of Korea, paras. 4 and 17 (hereinafter "Korea's First Written Submission").

5. The United States does not contest the accuracy of Korea's description of the zeroing methodology set forth in paragraphs 4 and 17 of Korea's First Written Submission, as it relates to the investigations challenged in this dispute.

6. Korea specifies that its challenge pertains to the application of "zeroing" in the calculation of certain margins in anti-dumping investigations of Stainless Steel Plate in Coils from Korea, Stainless Steel Sheet and Strip in Coils from Korea, and Diamond Sawblades and Parts Thereof from Korea.[5] Specifically, with respect to the investigations of stainless steel plate in coils and stainless steel sheet and strip in coils, Korea's claim pertains to the use of the zeroing methodology in calculating margins for Pohang Iron & Steel Co. (POSCO) and the "all others" rate. With respect to the investigation of diamond sawblades, Korea's claim pertains to the use of the zeroing methodology in calculating margins for the three investigated Korean producers as well as the "all others" rate.

7. Korea provides the following descriptions of the calculation of the dumping margins at issue:

> In the SSPC [stainless steel plate in coils] investigation, the USDOC's use of the zeroing methodology affected the determination of dumping margins for the Korean exporter Pohang Iron & Steel Co., Ltd. ("POSCO"). In addition, . . .use of the zeroing methodology affected the determination of the "all-others" rate, which was equal to the rate established for [POSCO] . . . .[6]
>
> In the SSSS [stainless steel sheet and strip in coils] investigation the USDOC . . . applied its zeroing methodology to the determination of dumping margins for POSCO. In addition, the use of the zeroing methodology affected the determination of the "all-others" rate, which was equal to the rate calculated for POSCO . . . .[7]
>
> [Referring to the investigation of Diamond Sawblades], [t]he USDOC applied its zeroing methodology to the determination of dumping margins for the three investigated Korean producers: Ehwa Diamond Industrial Co., Ltd. ("Ehwa"), Hyosung Diamond Industrial Co. ("Hyosung"), and Shinhan Diamond Industrial Co., Ltd. ("Shinhan"). In addition, . . . use of the zeroing methodology affected the determination of the "all others" rate, which was calculated as the weighted-average of the responding companies' dumping margins . . . .[8]

8. To substantiate its factual claims, Korea has provided evidence consisting of the Department of Commerce's published determinations, issues and decision memoranda, and computer programs used to calculate the margins of dumping related to the final determinations in the original investigations at issue.

9. The United States has reviewed the factual evidence submitted by Korea and does not contest that the submitted documentation, including the computer programs used to calculate the dumping margins, were generated by the Department of Commerce during its conduct of the three original investigations at issue.

10. Korea argues that the zeroing methodology applied to certain exporters in the three challenged original investigations is the same as the methodology found by the Appellate Body to be inconsistent with Article 2.4.2 of the Anti-dumping Agreement in *US – Softwood Lumber Dumping*.[9] The United States recognizes that in *US – Softwood Lumber Dumping*, the Appellate Body found that

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[5] Korea's First Written Submission, para. 2.
[6] Korea's First Written Submission, para. 8.
[7] Korea's First Written Submission, para. 11.
[8] Korea's First Written Submission, para. 14.
[9] Korea's First Written Submission, para. 18.

the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with the first sentence of Article 2.4.2 when it interpreted the terms "margins of dumping" and "all comparable export transactions" as used in the first sentence of Article 2.4.2 in an integrated manner.[10] The United States acknowledges that this reasoning is equally applicable to the margins at issue in this dispute.

11. To the extent that Korea suggests that the Panel should simply base its findings upon a "consistent line of Appellate Body Reports,"[11] however, it should be noted that prior panel and Appellate Body reports are not binding on panels considering other disputes.[12] The rights and obligations of Members flow from the text of the covered agreements. While prior adopted panel and Appellate Body reports may be taken into account, the Panel in this dispute is not bound to follow the reasoning set forth in any prior report. Rather, as noted above, under Article 11 of the DSU, the Panel is charged with making its own objective assessment of the matter before it, including its own objective assessment of the facts, and the applicability of and conformity with the relevant covered agreements.

[10] *See US – Softwood Lumber Dumping (AB)*, paras. 62-117.

[11] Korea's First Written Submission, para. 24.

[12] *See US – Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan-Alcoholic Beverages II (AB)* and *US – Shrimp (Article 21.5 – Malaysia (AB)*). As the Appellate Body noted in its *US – Softwood Lumber Dumping* report, adopted reports "'are not binding, except with respect to resolving the particular dispute between the parties to that dispute.'" *US – Softwood Lumber Dumping (AB)*, para. 111 (quoting *Japan – Alcoholic Beverages II (AB)*).

ANNEX B

THIRD PARTIES' WRITTEN SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF

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ANNEX B-1

THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. The European Union makes this third party written submission because of its systemic interest in the correct and consistent interpretation and application of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement") and the *Dispute Settlement Understanding* ("DSU").

2. The European Union considers that there is no dispute before the parties as to the relevant facts of the case, the interpretation of the relevant law and its application to the facts. Indeed, as regards the facts of this case, according to the United States, "[it] does not contest the accuracy of Korea's description of the zeroing methodology set forth in paragraphs 4 and 17 of Korea's First Written Submission, as it relates to the investigations challenged in this dispute".[1] As regards the evidence submitted by Korea to prove its case, the United States notes that "[it] has reviewed the factual evidence submitted by Korea and does not contest that the submitted documentation, including the computer programs used to calculate the dumping margins, were generated by the Department of Commerce during its conduct of the three original investigations at issue".[2] Finally, with respect to the interpretation of the relevant provisions of the *Anti-Dumping Agreement* and its application to the facts of this case, the United States confirms that "[it] acknowledges that [the reasoning of the Appellate Body in *US – Softwood Lumber Dumping*, which found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with the first sentence of Article 2.4.2] is equally applicable to the margins at issue in this dispute".[3]

3. Under these circumstances, once the Panel has outlined the agreement of the parties on all those issues (i.e., the facts, the interpretation of the relevant law and the application of the law to the facts), the report of the Panel could be limited to making the finding that the parties agree that there is no dispute, and then recommend that the United States bring the measures at issue into conformity with its obligation under the covered agreements. In fact, in view of the circumstances of this case, where the United States has acknowledged that its measures are inconsistent with the *Anti-Dumping Agreement*, the European Union considers that the Panel could make use of the possibility of making suggestions under Article 19.1 of the *DSU,* and suggest that the United States should bring the measures at issue into conformity immediately.

4. This approach would be in accordance with Article 11 of the *DSU*. A panel has a basic obligation under Article 11 of the *DSU* to make an objective assessment of the matter before it. Such assessment should include the facts, evidence and legal argument. Indeed, the Panel would distinguish between a finding that the parties agree with respect to a particular fact, evidentiary matter or legal issue; and the panel itself making such finding or recommendation.

5. To the extent that there is no dispute between the parties, the European Union recalls that the prompt settlement of disputes is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of the Members; that all Members have agreed to engage in *DSU* procedures in good faith in an effort to resolve disputes; and that all

[1] US First Written Submission, para. 5.
[2] US First Written Submission, para. 9.
[3] US First Written Submission, para. 10.

Members undertake to accord sympathetic consideration to representations made by any other Member.[4] In order to ensure a prompt settlement of the dispute, the European Union considers that the Panel could adapt its working procedures in view of the agreement by the parties and stop its proceedings once it has received the views of the third parties. In other words, the European Union considers that, in view of the US acknowledgment of the correctness of the facts, evidence, interpretation of the relevant law and its application to the facts of this case, there is no need for a hearing, questions from the Panel or subsequent submissions from the parties. This would also be in line with the requirement of making "the procedures more efficient" as contained in Article 12.8 of the *DSU*.

6. Finally, the European Union wants to comment on the US position with respect to prior panel and Appellate Body reports. The United States considers that the rights and obligations of WTO Members flow, not from panels or the Appellate Body, but from the text of the covered agreements, and requests that this Panel make an objective assessment of the matter before it.[5] The European Union observes that panels and the Appellate Body have found the use of zeroing in original investigations to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* in many disputes so far.[6] The European Union notes that the Appellate Body Report in *US-Stainless Steel (Mexico)* addresses in general terms the relevance of previous panel and Appellate Body reports.[7] In particular, the Appellate Body clarified the role of its previous reports and indicated how panels should act in cases where the same legal issues arise:[8]

> [T]he legal interpretation embodied in adopted panel and Appellate Body. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, ***absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case***.
>
> In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play. In order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body. Pursuant to Article 17.6 of the DSU, the Appellate Body is vested with the authority to review "issues of law covered in the panel report and legal interpretations developed by the panel". Accordingly, Article 17.13 provides that the Appellate Body may "uphold, modify or reverse" the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. ***The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU***. Clarification, as envisaged in

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[4] *DSU*, Article 3.3, 3.10 and 4.2.

[5] US First Written Submission, para. 11.

[6] *See* Appellate Body Report, *EC – Bed Linen*, para. 66; Appellate Body Report, *US – Softwood Lumber V*, para. 117; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 124; Appellate Body Report, *US – Zeroing (Japan)*, para. 138; and Appellate Body Report, *US – Zeroing (EC)*, para. 222. In addition, model zeroing in original investigations has been found to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* by all panels that have examined that practice, including the panels in *EC – Bed Linen*, *EC – Tube or Pipe Fittings*, *US – Softwood Lumber V*, *US – Zeroing (EC)*, *US – Zeroing (Japan)*, and *US – Shrimp (Ecuador)*, *US – Shrimp (Thailand)* and *US – Continued Zeroing*.

[7] Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 157 – 162.

[8] Appellate Body Report, *US - Stainless Steel from Mexico*, paras. 160 – 162 (emphasis added).

> Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, ***the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case***.
>
> We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above.

7. The European Union fully agrees with these statements without reservation. In this respect, the final sentence of paragraph 160 refers to "an adjudicatory body" (in the singular), which seems to indicate that the phrase refers to the situation in which it is the same body in both the previous case and the case to be decided. That is, it refers to the situation in which a panel might be called upon to resolve the same legal issue that it has previously resolved; or the situation in which the Appellate Body might be called upon to resolve the same legal issue that it has already resolved. We note that the phrase refers to "cogent reasons" as the basis for a change in view. By contrast, the European Union notes that paragraph 161 of the Appellate Body Report in *US – Stainless Steel (Mexico)* addresses the hierarchical relationship between panels and the Appellate Body. It concludes that the relevance of clarification provided by the Appellate Body on issues of legal interpretation is not limited to the application of a particular provision in a specific case. There is no express reference to "cogent reasons". Finally, in paragraph 162 of the Appellate Body Report in *US – Stainless Steel (Mexico)* the Appellate Body states that it was deeply concerned about the panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues.

8. In other words, WTO panels are obliged to correctly apply the law; in the context of this dispute this also means that the Panel should follow the rulings of the Appellate Body where the Appellate Body has previously interpreted the same legal questions. Otherwise, the security and predictability enshrined in Article 3.2 of the *DSU* would be put in serious danger.

9. In sum, the European Union considers that, to the extent that the Panel wants to make an independent finding about the interpretation of the relevant law and its application to the facts, the Panel should follow previous Appellate Body's reports on the same legal issue, and consequently find that the USDOC's use of zeroing in the original investigations challenged by Korea is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement.*

ANNEX B-2

THIRD PARTY WRITTEN SUBMISSION OF JAPAN

1. This dispute is one of the numerous disputes brought to the WTO dispute settlement procedure concerning "zeroing" used in the United States' anti-dumping procedures. Japan, as shown by its own recourse to the WTO dispute settlement procedure, has an interest in the issue of the WTO-consistency and implementation by the United States regarding "zeroing".

2. The basis of claim by the Republic of Korea ("Korea") is that the United States Department of Commerce's use of "zeroing" when calculating the dumping margins for certain investigated exporters in the investigation of three products from Korea is inconsistent with the United States' obligations under Article 2.4.2 of the *Agreement of Implementation of Article VI of the GATT 1994* (*Anti-Dumping Agreement*).[1] Japan totally supports the Korea's claim. Japan shares the same recognition with both parties that in *US – Softwood Lumber Dumping* the Appellate Body found that the use of "zeroing" in calculating margins of dumping on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions (the "weighted-average-to-weighted-average methodology") in investigations was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[2]

3. Japan notes that the United States does not contest that the submitted documentation by Korea, including the computer programs used to calculate the dumping margins, was generated by the United States Department of Commerce during its conduct of the three original investigations at issue.[3] In addition, it should be noted that the United States also acknowledged that the reasoning shown in *US – Softwood Lumber Dumping* was equally applicable to the Korea's claim in this case.[4]

4. In this regard, Japan recalls that the United States acknowledged that the reasoning shown in *US – Softwood Lumber Dumping* was equally applicable to *US – Shrimp (Ecuador)* and *US – AD Measures on PET Bags.* In these cases, the panels correctly concluded the measures of the use of "zeroing" in calculating margins of dumping on the basis of the "weighted-average-to-weighted-average methodology" were inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[5]

5. In light of the foregoing, Japan agrees with the request of Korea that the Panel should find that the United States acted inconsistently with the requirement of Article 2.4.2 of the *Anti-Dumping Agreement*. Japan expects that the United States would take appropriate actions with respect to measures at issue so that "prompt settlement of situations", as stated in Article 3.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, will be achieved.

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[1] First Written Submission of Korea, para. 2.

[2] Appellate Body Report, *US – Softwood Lumber Dumping*, paras. 62-117, First Written Submission of Korea, para. 18.

[3] First Written Submission of The United States, para. 9.

[4] First Written Submission of The United States, para. 10.

[5] Panel Report, *US – Shrimp (Ecuador)*, para.8.1, Panel Report, *US – AD Measures on PET Bags*, para. 8.1.

ANNEX C

ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF

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ANNEX C-1

OPENING STATEMENT OF KOREA

Mr. Chairman and Members of the Panel.

1. On behalf of the Republic of Korea, I would like to extend our thanks for your participation in this proceeding. The dispute settlement system established by the WTO Agreements only works through the willingness of panelists to devote their time and effort, as you have, to consider the arguments of the parties. We very much appreciate, therefore, the opportunity you have given us today to present Korea's views on the issues raised in this dispute.

2. This dispute is, of course, one in a long line brought to challenge the practice known as "zeroing" that has been used in anti-dumping investigations by the United States. Following a number of rulings by the Appellate Body holding that the practice of zeroing in anti-dumping investigations is not consistent with the provisions of Article 2.4.2 of the Anti-Dumping Agreement, the United States itself agreed several years ago to cease using that practice. However, the change in U.S. practice only affected investigations pending on, or initiated after, 22 February 2007.[1] We have, therefore, commenced this dispute to correct the effects of using "zeroing" in three investigations involving Korean products that were completed before the change in U.S. practice took effect.

3. As described in our first submission, this dispute challenges the use of zeroing by the United States Department of Commerce ("USDOC") in the following three cases:

(1) Stainless Steel Plate in Coils from the Republic of Korea;

(2) Stainless Steel Sheet and Strip in Coils from the Republic of Korea; and

(3) Diamond Sawblades and Parts Thereof from the Republic of Korea.

4. We have already provided extensive documentation in our first submission to demonstrate that, in calculating the dumping margins for the respondents in each of the investigations, the USDOC used the following five-step process:

(1) It identified different "models," i.e., types of products based on the most relevant product characteristics;

(2) It calculated weighted average prices for sales in the United States and weighted average normal values for sales in the comparison market on a model-specific basis, for the entire period of investigation;

(3) It compared the weighted average normal value of each model to the weighted average United States price for that same model;

[1] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722 (27 December 2006) (Exhibit KOR-4-A); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 Fed. Reg. 3783 (26 January 2007) (Exhibit KOR-4-B).

(4) It calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated United States price for all models; and in doing so

(5) It effectively set to zero all negative margins on individual models prior to summing the total amount of dumping for all models.[2]

And, as we noted in our first submission, this zeroing methodology is virtually identical to the methodology that was held to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in *EC – Bed Linen*, and also in *US – Softwood Lumber from Canada*.[3]

5. We have also explained in detail in our first submission how this methodology is inconsistent with the requirements of Article 2.4.2 of the Anti-Dumping Agreement.[4] In the interest of brevity, I will not repeat our entire argument, but will make only a few additional observations.

6. *First,* it is clear that Korea has presented a *prima facie* case that the measures adopted by the United States in the three investigations that are the subject of this dispute are not consistent with the obligations set forth in the relevant provision of the Anti-Dumping Agreement. Among other things, we have provided extensive documentation showing that the USDOC did, in fact, employ a methodology involving the five steps I have described. This documentation included not only the published determinations by the USDOC, but also the actual computer instructions the USDOC used to set the dumping margins to zero when the export price or constructed export price was greater than normal value. We have cited the relevant language in Attachment 1 to our first submission. An explanation of the manner in which that language caused the USDOC to "zero" negative dumping margins is set forth in footnotes 8, 15 and 23 of our first submission. And, significantly, the United States has confirmed that our interpretation of the relevant documentation is correct.[5]

7. Furthermore, we have also provided an extensive analysis of the relevant provisions of the Anti-Dumping Agreement. As we have shown, it is clear from Article 2.1 of the Anti-Dumping Agreement and Article VI of GATT 1994 that "dumping is defined in relation to a product as a whole as defined by the investigating authority."[6] This means, to use the Appellate Body's words, that "'[d]umping,' within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product."[7] It follows, then, that "[w]hatever the method used to calculate the margins of dumping ... these margins must be, and can only be, established for the *product* under investigation as a whole."[8] In sum, "[a]s 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."[9]

8. As a result, while investigating authorities may be permitted to compare normal values and export prices for sub-groups, the results of those comparisons do not constitute "margins of dumping" within the meaning of Article 2.4.2. Instead, those model-specific results "reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for

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[2] *See* Korea's First Written Submission, Attachment 1.
[3] *See* Korea's First Written Submission, para. 18.
[4] *See* Korea's First Written Submission, paras. 16 to 24.
[5] *See* U.S. First Written Submission, para. 9.
[6] *See United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R, 11 August 2004, paras. 92-93.
[7] Id., para. 93.
[8] Id., para. 96.
[9] Id.

the product under investigation."[10] In other words, "[i]t is only on the basis of aggregating *all* such intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole."[11]

9. In these circumstances, a proper aggregation of the intermediate results of model-specific comparisons must reflect the result of *all* such comparisons.[12] An investigating authority is not permitted to disregard some of the intermediate results of model-specific comparisons, or to treat some of those intermediate results as being greater or less than they actually are.

10. The practice of zeroing, as employed by the USDOC in the cases subject to this dispute, does not comport with this requirement. "Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are."[13] As a result, "Zeroing … does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price."[14] And, consequently, "Zeroing thus inflates the margin of dumping for the product as a whole."[15] In these circumstances, the USDOC's use of the zeroing methodology in investigations in the cases that are the subject of this dispute is not consistent with the requirements of Article 2.4.2 of the Anti-Dumping Agreement.

11. Taken as a whole, therefore, it is clear that Korea has satisfied its burden of presenting a *prima facie* case. Unless that case has been rebutted by the United States, the Panel must find in favour of Korea's claims.

12. This leads me to my second point — which is that there does not appear to be any dispute between the Parties regarding the factual matters described in our first submission. Indeed, in its first submission, the United States has informed the Panel that it "does not contest the accuracy of Korea's description of the zeroing methodology set forth in paragraphs 4 and 17 of Korea's First Written Submission, as it relates to the investigations challenged in this dispute."[16] In addition, the United States has also informed the Panel that it "has reviewed the factual evidence submitted by Korea and does not contest that the submitted documentation, including the computer programs used to calculate the dumping margins, were generated by the Department of Commerce during its conduct of the three original investigations at issue."[17] And, finally, the United States has not disputed Korea's claim that the zeroing methodology utilized in the three investigations that are the subject of the present case is virtually identical to the methodology that was held to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in *Softwood Lumber*.

13. The third point I would like to make is to emphasize that the argument outlined in our first submission, which I have summarized for you today, is based on a careful reading of the relevant provisions of the Anti-Dumping Agreement. It is obviously significant that the Appellate Body has adopted a similar analysis in its decisions. But, it is even more significant that the reasoning set forth in our first submission, as well as the reasoning adopted by the Appellate Body, stands on its own as an appropriate interpretation of the relevant provisions.

14. My fourth point is that the United States has not objected to the reasoning relied upon by Korea in this dispute. Instead, the United States has informed the Panel that it:

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[10] Id., para. 97.
[11] Id.
[12] Id., para. 98.
[13] Id., para. 101 (emphasis in original).
[14] Id. (emphasis in original).
[15] Id.
[16] *See* U.S. First Written Submission, para. 5.
[17] *See* U.S. First Written Submission, para. 9.

> recognizes that in *US – Softwood Lumber Dumping*, the Appellate Body found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with the first sentence of Article 2.4.2 when it interpreted the terms "margins of dumping" and "all comparable export transactions" as used in the first sentence of Article 2.4.2 in an integrated manner. The United States acknowledges that this reasoning is equally applicable to the margins at issue in this dispute.[18]

By the same token, the United States has not offered any arguments suggesting that the zeroing methodology utilized in the three investigations that are the subject of this dispute is consistent with the provisions of Article 2.4.2.

15. We understand that the United States has objected to any suggestion that past decisions by the Appellate Body might be considered "binding" precedent.[19] For its part, the European Union appears to take issue with the U.S. position regarding the legal import of such past decisions.[20] This apparent disagreement between the United States and the European Union certainly touches upon an interesting question of legal nuance that may be important in other disputes. However, their disagreement would not appear to have any relevance to the present dispute.

16. As we noted in our first submission, it is well-settled that the Panel is not strictly bound by the reasoning in prior Appellate Body and panel reports. Thus, we have not made the claim that the United States is objecting to.[21] Nevertheless, it is clear that adopted Reports create legitimate expectations among WTO Members[22], and "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."[23]

17. Importantly, although the United States and the European Union may disagree about the philosophical issue of just how binding the non-binding past reports should be, there is no disagreement about the actual legal issue presented in this dispute. As indicated in our first submission, and as I have described earlier, a review of the text, context and object and purpose of Article 2.4.2 confirms that the practice of zeroing, as employed by the USDOC in the three investigations that are the subject of this dispute, is not consistent with the requirements of that provision.

18. Consequently, the facts and the law relevant to the present dispute are clear. The zeroing methodology that the United States used in the three investigations that are the subject of this dispute is not permissible. And, as a result, the Panel should issue a report finding that the measures at issue

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[18] *See* U.S. First Written Submission, para. 9.

[19] *See* U.S. First Written Submission, para. 11.

[20] *See* E.U. Third Party Submission, paras. 6 to 9.

[21] *See* Korea's First Written Submission, para. 24.

[22] *See Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body Report, 4 October 1996, at 13; *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (Recourse to Article 21.5 of the DSU by Malaysia), WT/DS58/AB/RW, Appellate Body Report, 22 October 2001, paras. 108-109; *United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R, 11 August 2004, paras. 109-112.

[23] *See United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, Appellate Body Report, 29 November 2004, para. 188 ("The Panel had before it exactly the same instrument that had been examined by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*; thus, it was appropriate for the Panel…to rely on the Appellate Body's conclusion in that case. Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.").

are not consistent with the requirements of Article 2.4.2 of the Anti-Dumping Agreement, and recommending that the United States bring those measures into conformity with its obligations.

19. Thank you for your attention.

ANNEX C-2

OPENING STATEMENT OF THE UNITED STATES

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on this Panel. We will not offer a lengthy statement, as our first written submission fully presents the U.S. views on the arguments raised by Korea. We are hopeful that our statement today, like our first written submission, will help to narrow the issues presented to the Panel.

2. As stated in our written submission, the United States has fully reviewed the factual evidence presented by Korea and does not contest that the documents submitted by Korea were generated by the Department of Commerce during its conduct of the three original investigations at issue.

3. Further, the United States recalls the Appellate Body's finding in *US – Softwood Lumber V* that the use of "zeroing" with respect to average-to-average comparisons in investigations was inconsistent with the first sentence of Article 2.4.2 of the Anti-dumping Agreement[1], when it interpreted the terms "margins of dumping" and "all comparable export transactions" in an integrated manner.[2] The United States acknowledges this reasoning applies equally to the margins at issue in this dispute.

4. To be clear, as Korea and the United States agree, prior adopted panel and Appellate Body reports are not binding on panels considering other disputes. Rather, the rights and obligations of Members flow from the text of the covered agreements.[3] In that regard, we disagree strongly with the presentation by one third party relating to the status of adopted Appellate Body reports under the DSU and their relation to the role of this Panel. In addressing the issues presented in this dispute, what we have asked you to do, and are confident you will do, is to fulfil your function under Article 11 of the DSU[4], and make an objective assessment of the matter before you, including an objective assessment of the facts and the conformity of the challenged measures with the relevant covered agreements.

5. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[2] *See US – Softwood Lumber V (AB)*, paras. 62-117.
[3] U.S. First Written Submission, para. 11, n. 12; Korea's First Written Submission, para. 24.
[4] *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

ANNEX C-3

CLOSING STATEMENT OF KOREA

Mr. Chairman and Members of the Panel,

1. Our proceedings today have confirmed that there is no dispute between the parties regarding the facts and the law that apply to this case. The zeroing methodology utilized by the U.S. Department of Commerce in the three investigations that are the subject of this dispute is not consistent with the requirements of Article 2.4.2 of the Anti-Dumping Agreement. The U.S. measures should, therefore, be brought into conformity with the obligations established by Article 2.4.2.

2. Article 3.3 of the DSU reminds us that "[t]he *prompt* settlement of [disputes] … is *essential* to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."[1] In accordance with that objective, and in the absence of any disagreement between the parties with respect to the substantive issues in this dispute, Korea appreciates the Panel's willingness to consider whether a modification of its Working Procedures - to eliminate, for example, the requirement of a rebuttal submission and a second substantive meeting between the Parties and the Panel - might be appropriate to allow a resolution to be achieved as promptly as possible.

3. Thank you, again, for your attention.

[1] (Emphasis added.)

ANNEX D

ORAL STATEMENTS OF THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

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ANNEX D-1

ORAL STATEMENT OF CHINA

China shares the view with Korea that it is well-settled by the Appellate Body and panels that the practice of zeroing employed by the Ministry of Commerce of the United States (the "USDOC") is not consistent with the requirement of Article 2.4.2 of the Anti-Dumping Agreement, first sentence.

Besides requesting that the Panel recommend that the United States be instructed to bring its measures into conformity with its obligations under the relevant covered agreements of the WTO, China further urges the United States to provide a package solution to this issue so as to avoid any more disputes on zeroing.

The USDOC modified its methodology in anti-dumping investigations with respect to the calculation of the weighted-average dumping margin on 16 January 2007. However, there are still many exporters suffering today from the zeroing methodology adopted in anti-dumping determinations conducted before that date, including Chinese exporters. According to current practice of the USDOC, these companies could not have the benefit of the modification by the USDOC simply because the USDOC refuses to recalculate the relevant anti-dumping rates conducted before that date.

China takes the view that it would be an unnecessary cost for the member whose companies are suffering from the zeroing methodology if it has to bring such case before the WTO. The precious resources of the WTO should not be wasted in such a manner. China requests the United States to recalculate the anti-dumping rates upon applications of relevant companies and provide a package solution to this issue so as to ensure that it fully brings its measures into conformity with its obligations under the relevant covered agreements of the WTO.

ANNEX D-2

ORAL STATEMENT OF THE EUROPEAN UNION

Mr. Chairman, distinguished members of the Panel,

1. Following your indication, the EU will be brief in its intervention of today. As mentioned in our written submission, the EU considers that there is no "dispute" before the parties as to the facts of the case, as shown by the evidence, the interpretation of the relevant law and its application to the facts. There is no "debate", "controversy" or "difference in opinion" between the parties. The rights and obligations of both parties seem to have been acknowledged by Korea and the U.S. in this case and, therefore, there is no need for the Panel to clarify the meaning of the covered agreements.[1]

2. In the EU's view, where certain matters are put to the Panel as agreed between the parties, that might consequently have an effect on the precise terms of the findings that the Panel can make, which findings are eventually to be adopted by the DSB. Thus, under the circumstances of the present case, the report of the Panel could be limited to making the finding that the parties agree that there is no dispute, and then recommend that the United States bring the measures at issue into conformity with its obligation under the covered agreements. The Panel would distinguish between a finding that the parties agree with respect to a particular fact, evidentiary matter or legal issue; and the Panel itself making such finding or recommendation. This would be consistent with the Panel's obligations under Article 11 of the *DSU*.

Thank you for your attention. We are ready to respond to any questions you may have.

[1] *DSU*, Article 3.2 ("The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law").

ANNEX E

SECOND WRITTEN SUBMISSIONS OF THE PARTIES OR EXECUTIVE SUMMARIES THEREOF

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ANNEX E-1

SECOND WRITTEN SUBMISSION OF KOREA

1. This submission is presented by the Government of the Republic of Korea ("Korea"), in accordance with the time-table established by the Panel in the dispute settlement proceedings concerning *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea* (WT/DS402) to respond to the arguments presented by the United States in its first written submission, in its statement at the first substantive meeting of the Panel, and in its response to the Panel's questions.

2. In Korea's view, a review of the U.S. submissions confirms that there is no substantive disagreement between the Parties regarding the factual and the legal issues that are relevant in this dispute. Korea has presented a prima facie case that the "zeroing" methodology employed by the United States Department of Commerce ("USDOC") in the three investigations that are the subject of this dispute is not consistent with the requirements of Article 2.4.2 of the Anti-Dumping Agreement. It is Korea's understanding that the United States does not dispute Korea's arguments on the relevant facts or law.

3. In its letter to the Panel of 18 October 2010, the United States indicated that it is "not in a position to waive the second meeting at this time, but … will be examining the issue further in the light of Korea's answers to the Panel's questions." We would note that there appears to be no difference between the Parties regarding the answers to questions 1 or 2 of the Panel's questions. We understand that the United States may have concerns regarding the responses to the Panel's third question, which addressed the calculation of the "all others" rate. To be honest, we are not entirely sure what those concerns might be, or how we might address them. We would note, however, that it is not necessary for the Panel to reach a decision on the specific issue addressed by its third question, in light of the fact that there appears to be agreement between the Parties that Korea's only claim in this dispute - i.e. that the methodology used by the USDOC in the three investigations was not consistent with Article 2.4.2 of the Anti-Dumping Agreement - is correct. Whether and to what extent the correction of that methodology would also require a modification of the "all others" rate is an issue that can be addressed by the USDOC in its implementation of the Panel's ruling.

4. In these circumstances, and in light of the argument and evidence presented by Korea and the agreement of the Parties on the substantive issues in this dispute, Korea reiterates its request that the Panel find that the USDOC acted inconsistently with the requirements of the first sentence of Article 2.4.2 of the Anti-Dumping Agreement when it calculated the dumping margins in its anti-dumping investigations of Stainless Steel Plate in Coils from the Republic of Korea, Stainless Steel Sheet and Strip in Coils from the Republic of Korea, and Diamond Sawblades and Parts Thereof from the Republic of Korea. Korea further requests that the Panel recommend that the United States be instructed to bring its measures into conformity with its obligations under that provision.

ANNEX E-2

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

1. In this rebuttal submission, the United States provides comments on certain issues raised in Korea's answers to the first set of questions from the Panel.

2. As noted in our first written submission and in Korea's statements at the meeting with the Panel, the United States does not contest certain evidence that Korea has brought forward in support of its arguments as to "zeroing" in the calculation of certain margins of dumping in the investigations at issue.[1] In particular, the United States does not contest that the documentation submitted by Korea, including the computer programs used to calculate the dumping margins, were generated by the Department of Commerce during its conduct of the three original investigations at issue. However, as the parties agree, it is for the Panel to determine whether Korea has established a prima facie case, including with respect to whether, as a matter of fact, the United States did not provide offsets for non-dumped comparisons in the investigations at issue. Whether Korea has established that a prima facie case that any failure to provide offsets in the investigations at issue is inconsistent with Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-dumping Agreement") is also for the Panel to decide, as a matter of law.

3. The Panel asked both parties in Question 3, "Do the parties agree that the Appellate Body's findings and reasoning in *US – Softwood Lumber V* extends to the calculation of the "all others" rate in each investigation?" Korea did not answer the question directly, but its answer does not support a finding that the reasoning set forth in *US – Softwood Lumber V (AB)* extends to the determination of the "all others" rate.

4. As the panel in the *US – Shrimp (Ecuador)* dispute acknowledged, the issue of the "all others" rate was not explicitly addressed in *US – Softwood Lumber V (AB)*.[2] However, because the United States understood that the findings concerning the company-specific margins in *US – Softwood Lumber V (AB)* necessarily affected the all others rate, when implementing the DSB's recommendations and rulings the United States recalculated both the individual company rates and the "all others" rate, without a separate finding having been made with respect to the "all others" rate.[3]

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[1] E.g. with respect to the investigation of stainless steel plate in coils: Exh. KOR-1-H; Exh. KOR-1-I at lines 16065-16087 (demonstrating that there were non-dumped comparisons); with respect to the investigation of stainless steel sheet and strip in coils: Exh. KOR-2-E; Exh. KOR-2-F at lines 13809-13840 (demonstrating that there were non-dumped comparisons); with respect to the investigation of diamond sawblades: Exh. KOR-3-G at line 2611; Exh. KOR-3-I at line 5119; Exh. KOR-3-K at line 2619 (demonstrating that there were non-dumped comparisons).

[2] *US – Shrimp (Ecuador)*, para. 7.42.

[3] The panel report in *US – Shrimp (Ecuador)* stated that "[o]ur finding that Ecuador has established that the calculation of the margins of dumping for Exporklore and Promarisco was inconsistent with Article 2.4.2 means that the calculation of the ‘all others' rate as the weighted average of the individual rates necessarily incorporates this methodology. The parties agree." *US – Shrimp (Ecuador)*, para. 7.42 (footnotes omitted). In that dispute, the United States had explained that, with respect to the findings in *US – Softwood Lumber V*, "The U.S. Department of Commerce . . .understood that these findings concerning the company-specific margins necessarily affected the "all others" rate. Therefore, when the United States implemented the DSB recommendations and rulings, Commerce recalculated both the individual company rates and the "all others" rate, without a separate claim having been made under Article 9.4." *See* Annex B-3, U.S. Answers to the Panel's Questions, para. 1.

Similarly, any challenges to the "all others" rates in this dispute are consequential to Korea's challenge to the antidumping measures themselves.

5. As explained in the response by the United States to Question 3 from the Panel[4], the reasoning set forth in *US – Softwood Lumber V (AB)* focused on how the existence of dumping is determined, pursuant to the methodology described in the first sentence of Article 2.4.2 of the Antidumping Agreement. The "all others rate" is determined as a consequence of the finding that dumping exists to a degree sufficient to justify the imposition of the dumping measure, and it is not determined using the methodology described in Article 2.4.2.

6. Finally, the United States notes that in its response to Panel Question 3, Korea referred to Article 9.4 of the Anti-dumping Agreement. It should be noted that the panel in *US – Shrimp (Ecuador)* did not make any findings, or offer any analysis, under Article 9.4.

7. Moreover, Article 9.4 is not within the Panel's terms of reference. Korea did not make a claim with respect to Article 9.4 in its panel request. Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* requires that a panel request "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[5] At a minimum, providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly would require that Korea's panel request identify Article 9.4.[6] Accordingly, Article 9.4 is not within the Panel's terms of reference. Subject to confirmation from Korea's submission being filed today that Korea did not request a finding under Article 9.4, the United States does not see the need for a second meeting with the Panel.

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[4] U.S. Answers to Panel's First Set of Questions, para. 2.

[5] The Appellate Body has explained that:

> [T]he requirements in Article 6.2 serve two distinct purposes. First, as a panel's terms of reference are established by the claims raised in panel requests, the conditions of Article 6.2 serve to define the jurisdiction of a panel. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response. To ensure that such purposes are fulfilled, a panel must examine the request for the establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU". Such compliance must be "demonstrated on the face" of the panel request, read "as a whole".
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> *US – Continued Zeroing (AB)*, para. 161 (footnotes omitted).

[6] *See, e.g.*, *Korea – Dairy (AB),* para. 124 ("Identification of the treaty provisions claimed to have been violated by the respondent is . . . a minimum prerequisite if the legal basis of the complaint is to be presented at all.") (footnote omitted).

ANNEX F

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY KOREA

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ANNEX F-1

REQUEST FOR THE ESTABLISHMENT OF
A PANEL BY KOREA

WORLD TRADE ORGANIZATION

WT/DS402/3
9 April 2010

(10-1874)

Original: English

UNITED STATES – USE OF ZEROING IN ANTI-DUMPING MEASURES INVOLVING PRODUCTS FROM KOREA

Request for the Establishment of a Panel by Korea

The following communication, dated 8 April 2010, from the delegation of Korea to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

Upon instructions from my authorities, and on behalf of the Government of the Republic of Korea ("Korea"), I hereby request, pursuant to Articles 4 and 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Article XXIII of the *General Agreement on Tariffs and Trade of 1994* (the "GATT 1994"), and Article 17.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994* (the "Anti-Dumping Agreement"), that a panel be established with respect to certain anti-dumping measures imposed by the United States on imports of Stainless Steel Plate in Coils, Stainless Steel Sheet and Strip in Coils, and Diamond Sawblades and Parts Thereof from the Republic of Korea.

On 24 November 2009, Korea requested consultations with the United States pursuant to Article 4 of the DSU, Article XXII:1 of the GATT 1994, and Article 17 of the Anti-Dumping Agreement with regard to the practice, commonly referred to as "zeroing," by which the United States Department of Commerce ("USDOC") treats transactions with negative dumping margins as having margins equal to zero for purposes of determining the weighted-average dumping margins in the anti-dumping investigations that resulted in the above-referenced measures. Consultations were held in Washington, DC, on 22 December 2009 and in Geneva on 2 February 2010. While these consultations allowed a better understanding of the Parties' positions, they failed to resolve the dispute.

The Government of Korea hereby requests that a panel be established concerning the USDOC's use of the practice of zeroing negative dumping margins in calculating overall weighted

average margins of dumping in final determinations and amended final determinations in investigations in the following three specific cases involving Korean products:

(1) Stainless Steel Plate in Coils from the Republic of Korea (A-580-831);

(2) Stainless Steel Sheet and Strip in Coils from the Republic of Korea (A-580-834); and

(3) Diamond Sawblades and Parts Thereof from the Republic of Korea (A-580-855).

The effect of the USDOC's zeroing practice in the cases listed above has been either to artificially create margins of dumping where none would otherwise have been found, or to inflate margins of dumping.

The zeroing methodology that the USDOC used in the anti-dumping investigations in these cases is virtually identical to the methodology that was held to be inconsistent with the Anti-Dumping Agreement in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (WT/DS141/R and WT/DS141/AB/R), and also in *United States – Final Dumping Determination on Softwood Lumber from Canada* (WT/DS264/R and WT/DS264/AB/R). The United States has announced a change in the dumping margin calculation methodology employed in new antidumping investigations, as a result of which the United States will no longer utilize the practice of zeroing in any investigations that were pending as of 22 February 2007.[1] However, the United States did not apply this change in methodology in the three specific cases listed above.

I have attached a list of the determinations and anti-dumping duty orders that the United States has issued to date in the antidumping investigations in the three cases that are the subject of this request.

The Government of Korea considers that the measures at issue in this dispute are inconsistent with the obligations of the United States under the Anti-Dumping Agreement. Specifically, Korea considers that each of these measures is inconsistent with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement because the United States' use of "zeroing" was not consistent with the methodologies for establishing margins of dumping described in that provision, and artificially inflated the margins of dumping by precluding a determination for the product as a whole.

Korea hereby requests that a panel be established pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 17.4 of the Anti-Dumping Agreement with the standard terms of reference set forth in Article 7 of the DSU. Korea asks that this request for the establishment of a panel be placed on the agenda of the meeting of the Dispute Settlement Body scheduled for 20 April 2010.

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[1] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (27 December 2006); and *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (26 January 2007).

[Annex]

A. Stainless Steel Plate in Coils from the Republic of Korea (Case No. A-580-831)

1. Notice of Final Determination of Sales at Less than Fair Value

Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils ("SSPC") from the Republic of Korea, 64 Fed. Reg. 15444 (31 March 1999), as amended by *Notice of Amendment of Final Determinations of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From the Republic of Korea; and Stainless Steel Sheet and Strip in Coils From the Republic of Korea,* 66 Fed. Reg. 45279 (28 August 2001)

2. Final Injury Determination

Certain Stainless Steel Plate From Belgium, Canada, Italy, Korea, South Africa, and Taiwan, 64 Fed. Reg. 25515 (12 May 1999)

3. Antidumping Order

Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 64 Fed. Reg. 27756 (21 May 1999), as amended by Notice of Amended Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 Fed. Reg. 11520 (11 March 2003), as amended by Notice of Amended Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 Fed. Reg. 16117 (2 April 2003), and as amended by Notice of Correction to the Amended Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 Fed. Reg. 20114 (24 April 2003)

B. Stainless Steel Sheet and Strip in Coils from the Republic of Korea (Case No. A-580-834)

1. Notice of Final Determination of Sales at Less than Fair Value

Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 64 Fed. Reg. 30664 (8 June 1999), as amended by Notice of Amendment of Final Determinations of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From the Republic of Korea; and Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 66 Fed. Reg. 45279 (28 August 2001)

2. Final Injury Determination

Certain Stainless Steel Sheet and Strip From France, Germany, Italy, Japan, The Republic of Korea, Mexico, Taiwan, and The United Kingdom, 64 Fed. Reg. 40896 (28 July 1999)

3. Antidumping Order

Notice of Antidumping Duty Order; Stainless Steel Sheet and Strip in Coils From United Kingdom, Taiwan and South Korea, 64 Fed. Reg. 40555 (27 July 1999)

C. Diamond Sawblades and Parts Thereof from the Republic of Korea (Case No. A-580-855)

1. Notice of Final Determination of Sales at Less Than Fair Value

Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea, 71 Fed. Reg. 29310 (22 May 2006) as amended by Amended Final Determination of Sales at Less Than Fair Value: Diamond Sawblades and Parts Thereof From the Republic of Korea, 75 Fed. Reg. 14126 (24 March 2010)

2. Final Injury Determination

Diamond Sawblades and Parts Thereof from China and Korea, Inv. Nov. 731-TA-1092 and 1093 (Final) (Remand), USITC Pub. 4007 (May 2008), approved in Diamond Manufacturers Coalition v. United States, CIT Court No. 06-00247, 2009 Ct. Intl. Trade LEXIS 6; Slip Op. 2009-5 (13 January 2009)

3. Antidumping Order

Diamond Sawblades and Parts Thereof From the People's Republic of China and the Republic of Korea: Antidumping Duty Orders, 74 Fed. Reg. 57145 (4 November 2009)

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