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UNITED STATES – FINAL ANTI-DUMPING MEASURES ON STAINLESS STEEL FROM MEXICO

Report of the Panel

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TABLE OF CONTENTS

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LIST OF ANNEXES

ANNEX A

EXECUTIVE SUMMARIES OF FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX B

THIRD PARTIES WRITTEN SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF

ANNEX C

SECOND WRITTEN SUBMISSIONS OF THE PARTIES OR EXECUTIVE SUMMARIES THEREOF

ANNEX D

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF FIRST AND SECOND MEETINGS

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ANNEX E

REQUEST FOR THE ESTABLISHMENT
OF A PANEL

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TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3 and 4, adopted 23 July 1998, DSR 1998:VI, 2201
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector* ("*India – Autos*"), WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* ("*Dominican Republic – Import and Sale of Cigarettes*"), WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS302/AB/R
EC – Approval and Marketing of Biotech Products	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* ("*EC – Approval and Marketing of Biotech Products*"), WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan ("US – Hot-Rolled Steel")*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline ("US – Gasoline")*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R
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* ("*US – Shrimp (Article 21.5 – Malaysia)*"), WT/DS58/AB/RW, adopted 21 November 2001
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measures on Shrimp from Ecuador* ("*US – Shrimp (Ecuador)*"), WT/DS335/R, adopted 20 February 2007
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities* ("*US – Certain EC Products*"), WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/AB/R, adopted 23 January 2007

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US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ("*US – Gambling*"), WT/DS285/AB/R, adopted 20 April 2005
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* ("*US – Zeroing (EC)*"), WT/DS294/AB/R, adopted 9 May 2006
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
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* ("*US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
EC – Chicken Cuts	Appellate Body Report, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts* ("*EC – Chicken Cuts*"), WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, adopted 27 September 2005

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I. INTRODUCTION

1.1 On 26 May 2006, the Government of Mexico ("Mexico") requested consultations with the Government of the United States of America ("United States" or "US") pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "Agreement"), regarding the laws, regulations, administrative practices and methodologies for calculating dumping margins.[1] Consulations were held on 15 June 2006, but failed to resolve the dispute.

1.2 On 12 October 2006, Mexico requested the Dispute Settlement Body ("DSB") to establish a panel pursuant to Articles 4 and 6 of the DSU, Article XXIII of the GATT 1994 and Article 17 of the Anti-Dumping Agreement.

1.3 At its meeting on 26 October 2006, the DSB established a panel pursuant to the request of Mexico in document WT/DS344/4, in accordance with Article 6 of the DSU.

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

> "To examine, in the light of the relevant provisions of the covered agreements cited by Mexico in document WT/DS344/4, the matter referred to the DSB by Mexico in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 15 December 2006, Mexico requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.6 On 20 December 2006, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr. Alberto Juan Dumont

Members: Mr. Bruce Cullen
Ms Leora Blumberg

1.7 Chile, China, the European Communities, Japan and Thailand have reserved their rights to participate in the panel proceedings as third parties.

1.8 The Panel met with the parties on 22-23 May 2007 and on 17 July 2007. It met with the third parties on 23 May 2007.

[1] WT/DS344/1.

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II. FACTUAL ASPECTS

2.1 At issue in this dispute is what Mexico describes as the "Zeroing Procedures" under US law, which, according to Mexico, require the United States Department of Commerce ("USDOC") to calculate margins of dumping in investigations and periodic reviews in a manner that does not fully reflect export prices that are above the normal value. According to Mexico, this takes place through the non-inclusion in the numerator of the weighted average dumping margin calculations of the results of comparisons where the export price exceeds the normal value, when such results are aggregated in the calculation of the margins of dumping for the product under consideration as a whole. More specifically, Mexico takes issue with the "Zeroing Procedures" in connection with investigations where the weighted average normal value is compared with the weighted average export price (referred to by Mexico as "model zeroing in investigations"), and the periodic reviews where the weighted average normal value is compared with individual export transactions (referred to by Mexico as "simple zeroing in periodic reviews").

2.2 In addition to its two "as such" claims, Mexico also challenges the application by the USDOC of the "Zeroing Procedures" in the investigation and five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico*. The list of the anti-dumping measures subject to Mexico's "as applied" claims is as follows:

Investigation

Stainless Steel Sheet and Strip in Coils from Mexico, 64 FR 30790 (USDOC) (8 June 1999), subsequently amended as *Stainless Steel Sheet and Strip in Coils from Mexico*, 64 FR 40560 (USDOC) (27 July 1999)

Periodic Reviews

Stainless Steel Sheet and Strip in Coils from Mexico, 67 FR 6490 (USDOC) (12 February 2002), subsequently amended as *Stainless Steel Sheet and Strip in Coils from Mexico*, 67 FR 15542 (USDOC) (2 April 2002)

Stainless Steel Sheet and Strip in Coils from Mexico, 68 FR 6889 (USDOC) (11 February 2003), subsequently amended as *Stainless Steel Sheet and Strip in Coils from Mexico*, 68 FR 13686 (USDOC) (20 March 2003)

Stainless Steel Sheet and Strip in Coils from Mexico, 69 FR 6259 (USDOC) (10 February 2004)

Stainless Steel Sheet and Strip in Coils from Mexico, 70 FR 3677 (USDOC) (26 January 2005)

Stainless Steel Sheet and Strip in Coils from Mexico, 70 FR 73444 (USDOC) (12 December 2005)

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Mexico requests the Panel to find that:

(1) Model zeroing, as applied in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, and 18.4 of the Anti-Dumping Agreement; and Article XVI:4 of the WTO Agreement;

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(2) Model zeroing in investigations is, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, and 18.4 of the Anti-Dumping Agreement; and Article XVI:4 of the WTO Agreement;

(3) Simple zeroing in periodic reviews is, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 9.3, and 18.4 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement; and

(4) Simple zeroing, as applied in the five listed periodic reviews of *Stainless Steel Sheet and Strip in Coils from Mexico*, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 9.3, and 18.4 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement.[2]

3.2 The United States requests the Panel to dismiss Mexico's two "as such" claims because, in the view of the United States, there exists under US law no such measure as the "Zeroing Procedures". In the alternative, the United States requests the Panel to reject Mexico's "as such" claim regarding simple zeroing in periodic reviews because Mexico has failed to demonstrate that the Anti-Dumping Agreement disallows zeroing in periodic reviews. For the same reason, the United States also requests the Panel to reject Mexico's "as applied" claim regarding simple zeroing in the five periodic reviews at issue. With regard to Mexico's "as applied" claim regarding the use of model zeroing in the anti-dumping investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*, the United States acknowledges that the USDOC did use model zeroing in the investigation at issue. The United States also recalls the reasoning of the Appellate Body in *US – Softwood Lumber V* that such use was inconsistent with Article 2.4.2 of the Agreement and acknowledges that this reasoning is equally applicable to Mexico's "as applied" claim at issue.[3]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and their answers to questions. The parties' submissions and oral statements or executive summaries thereof, are attached to this report as annexes (see List of Annexes, pages iii and iv).[4]

V. ARGUMENTS OF THE THIRD PARTIES

5.1 Chile, China, the European Communities, Japan and Thailand reserved their rights to participate in these panel proceedings as third parties. Neither China nor Thailand provided a written submission, and Chile did not submit an oral statement to the Panel. The arguments of the European Communities and Japan are set out in their written submissions and oral statements, the arguments of Chile are set out in its written submission, and the arguments of China and Thailand are set out in their oral statements to the Panel. The third parties' submissions and oral statements, or executive summaries thereof, are attached to this report as annexes (see List of Annexes, pages iii and iv).

VI. INTERIM REVIEW

6.1 On 5 October 2007, we submitted the interim report to the parties. On 26 October 2007, the United States submitted a written request for the review of precise aspects of the interim report. Mexico did not make such a request. It did, however, direct the Panel's attention to a typographical

[2] Response of Mexico to Question 2 from the Panel Following the First Meeting.

[3] First Written Submission of the United States, para. 104; Response of the United States to Question 12 from the Panel Following the First Meeting.

[4] The English and Spanish versions of Mexico's executive summaries are reproduced as submitted by Mexico in their original language.

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error in the interim report. On 9 November 2007, Mexico submitted comments on the United States' comments on the interim report. The United States did not submit further comments since Mexico had not submitted comments on the interim report.

6.2 We have outlined our treatment of the parties' requests below. In addition to the changes explained below, where necessary, we also have made technical revisions to our report and corrected typographical errors brought to our attention by the parties.

A. REQUEST OF THE UNITED STATES

6.3 First, the United States requests that paragraphs 3.2, 7.15 and 7.43 of our report be amended in order to better reflect the United States' arguments regarding Mexico's claim on model zeroing. Mexico has not made any comment regarding the United States' request. We have amended paragraphs 3.2, 7.15 and 7.43 in order to accommodate the United States' concern.

6.4 Second, the United States requests that the last sentence of paragraph 7.30 be deleted. The United States finds this sentence unnecessary to the Panel's analysis in the remainder of the paragraph. The United States contends that this sentence implies that only measures of "general and prospective" application may be successfully challenged "as such" in WTO dispute settlement. The Unites States notes, however, that this issue is not presented in this dispute. Furthermore, the United States is of the view that the scope of an "as such" claim may not be so limited. The United States argues that a measure that does not mandate WTO-inconsistent behaviour can not be successfully challenged "as such" in WTO dispute settlement. According to the United States, Article 3.2 of the DSU does not stand for the proposition that ensuring "predictability and security" to the multilateral trading system is an objective of the WTO dispute settlement system. Rather, Article 3.2 provides that the dispute settlement system is a central element in providing "security and predictability" and that this is to be done by preserving the rights and obligations of Members and by clarifying the provisions of the WTO agreements.

6.5 Mexico disagrees with the United States' comment and asserts that it amounts to re-arguing the case, which can not be done at the interim review stage. Mexico argues that the United States' argument regarding the types of measures that may be subjected to WTO dispute settlement does not constitute a comment regarding a precise aspect of the interim report. Mexico also disagrees with the second aspect of the United States' comment regarding paragraph 7.30 and contends that Article 3.2 of the DSU makes clear that "security and predictability" to the multilateral trading system is indeed an object of the DSU.

6.6 We agree with the United States' contention that this dispute does not require us to decide what types of measures may be challenged "as such" in WTO dispute settlement. The last sentence of paragraph 7.30 of our report, therefore, does not reflect an assessment of this issue. In the same vein, our statement in the same paragraph regarding the term "security and predictability" referred to in Article 3.2 of the DSU, is not intended to ascribe a precise meaning to this term. None of these two statements are part of our legal reasoning with regard to Mexico's claims. We therefore decline to amend paragraph 7.30.

6.7 Third, the United States submits that the relevant part of paragraph 7.38 below does not reflect the United States' position as to the accuracy of the expert opinion, submitted by Mexico to the Panel, regarding the application of *Model Zeroing Procedures* under US law. The United States requests that the Panel delete the sentence starting with "In response to questioning..." from this paragraph. Mexico disagrees with the United States and argues that the sentence at issue contains a fair description of the United States' comments regarding the expert opinion on the application of *Model Zeroing Procedures* under US law.

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6.8 We have deleted the sentence in paragraph 7.38 referred to by the United States and made other changes to the paragraph in order to reflect the United States' position in a more comprehensible fashion.

6.9 Fourth, the United States requests that we explain, in paragraph 7.40 of our report, the provisions of US law pursuant to which the USDOC announced in the Federal Register that it would no longer make average-to-average comparisons in investigations without taking into consideration all comparable export transactions. To this end, the United States proposes adding a footnote to paragraph 7.40. Mexico opposes the United States' request. According to Mexico, the USDOC's notice described a practice that was not limited in scope or period of application. Regardless of the domestic law requirements pursuant to which it was announced, therefore, the notice at issue described a measure of general and prospective application.

6.10 In order to provide further factual clarification regarding the notice published in the Federal Register, we have added footnote 39 to paragraph 7.40. We have also made certain technical changes to the text of this paragraph at the request of the United States.

6.11 Fifth, the United States requests that we amend certain parts of paragraph 7.45 in order to better describe our finding and to ensure its consistency with other related findings that we have made. Mexico objects on the grounds that the changes suggested by the United States would alter the meaning of the Panel's findings. According to Mexico, the United States' comments imply that the duty imposed in an investigation may be changed over time and that it may not have continuing effect. We have amended paragraph 7.45, taking into consideration the views expressed by both parties.

6.12 Sixth, the United States notes our statement in paragraph 7.117 below to the effect that the concept of "product as a whole" has been developed by the Appellate Body. The United States argues that this concept was used for the first time by the European Communities in the *EC – Bed Linen* case and wants this to be mentioned in a footnote to paragraph 7.117. Mexico objects to the United States' request on the grounds that it amounts to re-arguing the United States' case and that it is not related to interim review. Furthermore, Mexico contends that whether a party to a previous dispute also used the term "product as a whole" in its argumentation is not relevant to the issue of whether the term "product" may be interpreted as referring to something narrower than the product under consideration as a whole for purposes of these proceedings.

6.13 Our statement that the notion of "product as a whole" has been developed by the Appellate Body is *obiter dictum* and thus has no bearing on our evaluation of Mexico's claims in these proceedings. We therefore do not find important to mention when and in which context this concept was first used in WTO dispute settlement. We have, however, made a modification to paragraph 7.117 so as to note that this concept was developed in WTO dispute settlement generally, without mentioning by whom.

6.14 Seventh, the United States takes issue with our reference to the object and purpose of specific treaty provisions in paragraphs 7.119 and 7.148 below. The United States asserts that according to Article 31(1) of the Vienna Convention on the Law of Treaties ("Vienna Convention"), it is the object and purpose of the treaty, not specific provisions thereof, that has to be taken into consideration in the interpretation of the treaty. The United States agrees with our interpretation based on the text of the treaty and therefore argues that we do not need to refer to object and purpose. If, however, we choose to make such a reference, the United States argues that we have to clarify that what we refer to is the object and purpose of the treaty, not specific provisions thereof. Mexico disagrees with the United States and argues that Article 31(1) of the Vienna Convention does not preclude the interpreter from taking into account the object and purpose of specific provisions of a treaty.

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6.15 Article 31(1) of the Vienna Convention reads:

"ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[5] (emphasis added)

6.16 We note that the term "object and purpose" in Article 31(1) is preceded by "its" whereas the term "context" is preceded by "their". Thus, we consider that Article 31(1) refers to the object and purpose of the treaty as a whole, rather then specific provisions thereof. Had drafters intended to refer to the object and purpose of specific provisions, they would have used "their", not "its", before "object and purpose", as in the case of the word "context".[6] We have therefore amended paragraphs 7.119 and 7.148 of our report accordingly.

6.17 Eighth, the United States requests the Panel to amend the third sentence of paragraph 7.122 in order to clarify that this sentence reflects Mexico's arguments. Mexico objects to the United States' request and contends that the mentioned sentence correctly reflects Mexico's views as contained in paragraph 62 of its second written submission to the Panel. We note that it is clear that the sentence referred to by the United States conveys Mexico's views regarding the object and purpose of the treaty provisions cited therein. Furthermore, footnote 92 to the preceding sentence indicates where Mexico presented the argument at issue. We therefore decline to make any changes to paragraph 7.122.

VII. FINDINGS

A. RELEVANT PRINCIPLES REGARDING STANDARD OF REVIEW, TREATY INTERPRETATION AND BURDEN OF PROOF

1. Standard of Review

7.1 Article 11 of the DSU provides the standard of review for WTO panels in general. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.[7]

7.2 Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

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[5] (1969) 8 *International Legal Materials* 679.

[6] We consider, however, that this does not preclude the interpreter from taking into account the object and purpose of specific treaty provisions, where warranted. In this regard, we find support in the Appellate Body's statement that "[t]o the extent that one can speak of the "object and purpose of a treaty provision", it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component". Appellate Body Report, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts* ("*EC – Chicken Cuts*"), WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, adopted 27 September 2005, para. 238.

[7] Article 11 of the DSU provides in part:

"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."

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> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

Thus, taken together Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement establish the standard of review we must apply with respect to both the factual and the legal aspects of the present dispute.

2. Rules of Treaty Interpretation

7.3 Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that these customary rules are reflected in Articles 31-32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention"*). Article 31(1) of the *Vienna Convention* provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.4 In the context of disputes under the Anti-Dumping Agreement, the Appellate Body has stated that:

> "The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* 'shall' interpret the provisions of the *AD Agreement* 'in accordance with customary rules of interpretation of public international law'. Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention'*). Clearly, this aspect of Article 17.6(ii) involves no 'conflict' with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *AD Agreement*. …
>
> The *second* sentence of Article 17.6(ii) … *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *AD Agreement*, which, under that Convention, would both be '*permissible* interpretations'. In that event, a measure is deemed to be in conformity with the *AD Agreement* "if it rests upon one of those permissible interpretations."[8] (emphasis in original)

7.5 Thus, under the Anti-Dumping Agreement, we have to follow the same rules of treaty interpretation as in any other dispute. Furthermore, Article 17.6(ii) provides explicitly that if we find

[8] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, paras. 57 and 59.

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more than one permissible interpretation of a provision of the Anti-Dumping Agreement, we have to uphold a measure that rests on one of those interpretations.

3. Burden of Proof

7.6 The general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member assert and prove its claim.[9] Mexico as the complaining party must therefore make a *prima facie* case of violation of the relevant provisions of the relevant WTO agreements, which the respondent must refute. 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.[10] We also note that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[11] In this respect, therefore, it is also for the United States to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

B. TERMINOLOGY USED TO DESCRIBE THE MEASURES AT ISSUE

7.7 The term "zeroing" refers to the calculation of a weighted average margin of dumping in a manner that does not fully reflect export prices that are above the normal value. Mexico takes issue with two different types of "zeroing": "model zeroing in investigations" and "simple zeroing in periodic reviews". According to Mexico's description, "model zeroing in investigations" occurs where the investigating authorities compare the weighted average normal value and the weighted average export price for each model of the product under consideration and treat as zero the results of model-specific comparisons where the weighted average export price exceeds the weighted average normal value, when such comparisons are aggregated for purposes of calculating the margin of dumping for the product under consideration as a whole in an anti-dumping investigation.[12] "Simple zeroing in periodic reviews" is used by Mexico to refer to a method whereby the authorities compare individual export transactions against monthly weighted average normal values and do not fully take into account the results of comparisons where the export price exceeds the monthly weighted average normal value when such results are aggregated in order to calculate the margin of dumping for the product under consideration as a whole in a periodic review.[13]

7.8 The United States submits that these terms used by Mexico to describe the measures at issue in these proceedings are not found under US law and asks the Panel not to make any inferences from them.[14]

7.9 We note that the terms "zeroing", "model zeroing in investigations" or "simple zeroing in periodic reviews" are not found under US law. Nor are they mentioned anywhere in the Anti-Dumping Agreement. We also note, however, that a number of WTO panels and the Appellate Body have, in the past, used the same or similar terms in order to describe the measure before them. We also find it useful to use the same terminology in our analysis in this report. We would like to emphasize, however, that our use of these terms is for ease of reference only and shall not be interpreted as an assessment of their WTO-compatibility.

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[9] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323 at 337.

[10] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ("*US – Gambling*"), WT/DS285/AB/R, adopted 20 April 2005, para. 140.

[11] Appellate Body Report, *US – Wool Shirts and Blouses*, *supra*, note 9, para. 337.

[12] First Written Submission of Mexico, para. 15.

[13] First Written Submission of Mexico, para. 21.

[14] First Written Submission of the United States, footnote 38.

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C. TERMS OF REFERENCE

7.10 Mexico, in its First Written Submission, identified the measure at issue as the "Zeroing Procedures" applied by the United States in all procedural contexts and in relation to all types of methods of comparison between the normal value and the export price. That is, Mexico challenged one single measure, the "Zeroing Procedures", manifested in different contexts.[15] The United States in its First Written Submission argued that Mexico had not identified the "Zeroing Procedures" as a single measure in its request for consultations and its request for the establishment of a panel. According to the United States, Mexico had identified two measures in connection with its "as such" claims in its request for establishment: "model zeroing in investigations" and "simple zeroing in periodic reviews". The United States therefore asked the Panel to disregard Mexico's "as such" claim regarding the "Zeroing Procedures" in all contexts and with regard to all kinds of comparisons between the normal value and the export price, and limit these proceedings to the two "as such" claims specifically raised in Mexico's panel request. In response to questioning on this issue, Mexico acknowledged that as far as its "as such" claims were concerned, the scope of its panel request was limited to "model zeroing in investigations" and "simple zeroing in periodic reviews". Mexico pointed out:

> "[A]s clarified in its oral responses to the questions from the Panel, Mexico's claims are limited to the two manifestations of the "Zeroing Procedures" that are described in its request— (1) the use of model zeroing in original investigations; and (2) the use of simple zeroing in periodic reviews."[16] (emphasis added)

7.11 Article 7 of the DSU provides that the terms of reference of a panel are determined by the scope of the complaining party's panel request. Both parties agree that as far as Mexico's "as such" claims are concerned, its panel request is limited to "model zeroing in investigations" and "simple zeroing in periodic reviews". A textual analysis of Mexico's panel request, in our view, confirms this conclusion. The request contains no mention of proceedings other than investigations and periodic reviews and no mention of comparison methodologies other than the weighted average to weighted average ("WA-WA") methodology in investigations and the weighted average to transaction ("WA-T") methodology in periodic reviews. The word "review" is preceded by the word "periodic" in each instance it is used in the request. Hence, it is clear that our terms of reference in these proceedings only contain two "as such" claims by Mexico, *i.e.* "model zeroing in investigations" and "simple zeroing in periodic reviews". We shall, therefore, only address these two "as such" claims by Mexico, because "[a] panel cannot assume jurisdiction that it does not have".[17] We would like to emphasize, however, that our conclusion here concerns solely the jurisdictional issue raised by the United States as to whether the Panel may address Mexico's "as such" claims other than "model zeroing in investigations" and "simple zeroing in periodic reviews". Whether or not the measures pertaining to these two claims actually exist under US law is a separate issue which we address below as part of our substantive assessment of Mexico's claims.

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[15] See, for instance, First Written Submission of Mexico, para. 12.

[16] Response of Mexico to Question 1(a) from the Panel Following the First Meeting.

Mexico repeated the same point in its Responses to Questions 1(b), 2 and 3 from the Panel Following the First Meeting.

[17] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 92.

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D. MODEL ZEROING IN INVESTIGATIONS

1. Arguments of Parties

(a) Mexico

7.12 Mexico has raised an "as such" as well as an "as applied" claim regarding model zeroing in investigations. Mexico argues that the rules and procedures relating to model zeroing in investigations are embodied in what Mexico describes as the "Zeroing Procedures" under US law. According to Mexico, in investigations where the US investigating authorities carry out intermediate calculations for the product under consideration, on the basis, among others, of models or transactions, and then aggregate the intermediate calculations to calculate the margin for the product under consideration, they do not fully take into account the results of intermediate calculations where the export price exceeds the normal value. In other words, the US authorities treat negative results as zero. This, in Mexico's view, gives rise to a number of inconsistencies with the United States' WTO obligations.

7.13 First, Mexico argues that model zeroing is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement because it precludes the calculation of a margin of dumping for the product under consideration as a whole. The ultimate margin only reflects part of the calculations for the product under consideration because negative results in the intermediate calculations are treated as zero. Second, Mexico contends that model zeroing in investigations is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement because it precludes the calculation of a margin of dumping based on a weighted average of prices of all comparable export transactions for the product under consideration as a whole. Third, Mexico submits that model zeroing in investigations is inconsistent with the obligation to carry out a fair comparison between the normal value and the export price as required under Article 2.4 of the Anti-Dumping Agreement because it artificially reduces the prices of certain export transactions. Fourth, Mexico argues that as an "administrative procedure" within the meaning of Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement, model zeroing in investigations is inconsistent with the obligations set forth in these provisions.

7.14 In addition to its "as such" claim regarding model zeroing in investigations, Mexico also contends that model zeroing "as applied" in the anti-dumping investigation on *Stainless Steel Sheet and Strip in Coils from Mexico* is, for the same reasons mentioned in connection with its "as such" claim, inconsistent with the United States' WTO obligations.

(b) United States

7.15 The United States contends that there exists no such measure as the "Zeroing Procedures" under US law and therefore invites the Panel to dismiss Mexico's "as such" claim regarding model zeroing in investigations. Even if the Panel finds that such a measure existed at the time the Panel was established, the United States directs the Panel's attention to the fact that through a policy change that came into effect on 22 February 2007, the USDOC stopped using model zeroing in investigations as from the mentioned date. Regarding Mexico's "as applied" claim, the United States acknowledges that the USDOC applied model zeroing in the anti-dumping investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*. The United States also recognizes that in *US – Softwood Lumber V*, the Appellate Body found the use of model zeroing to be inconsistent with Article 2.4.2 of the Agreement and that the Appellate Body's reasoning in that respect is equally applicable to this claim.[18]

[18] S*upra*, note 3.

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2. Arguments of Third Parties

7.16 We note that although Mexico acknowledged, subsequent to its First Written Submission, that the scope of its panel request was limited to "model zeroing in investigations" and "simple zeroing in periodic reviews", some of the third parties also addressed other types of zeroing because they prepared their submissions before Mexico's written acknowledgement regarding the scope of its panel request.

(a) Chile

7.17 Chile contends that the WTO-inconsistency of the zeroing methodology in investigations has been confirmed by previous Appellate Body decisions and expresses hope that this issue will be resolved on a multilateral level through amendment of the Anti-Dumping Agreement. Continued adjudication between WTO Members on this issue, which is costly and time consuming, should therefore be avoided. Chile submits that zeroing not only inflates the margin of dumping, but also yields a positive determination of dumping where there would have been no dumping absent zeroing. Chile therefore asks the Panel to find that zeroing is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement.

(b) China

7.18 Based on the WTO jurisprudence regarding zeroing, China argues that irrespective of the methodology used for the comparison of the normal value and the export price, the use of zeroing in investigations is inconsistent with Articles 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement. China is of the view that the Panel should not depart from the Appellate Body's jurisprudence because the arguments presented by the United States in these proceedings do not differ from the arguments raised in prior cases. China therefore invites the Panel to accept Mexico's claims and expects the United States to eliminate the use of zeroing in all anti-dumping proceedings.

(c) European Communities

7.19 The European Communities' third party submission mainly focuses on the WTO jurisprudence on zeroing and discusses in detail the significance of adopted Appellate Body reports for WTO panels dealing with similar legal issues. More specifically, the European Communities summarizes previous panel and Appellate Body findings on zeroing, with a particular emphasis on the latter, and notes that all the issues raised by Mexico in this case have already been discussed by the Appellate Body and that a relatively consistent line of jurisprudence has emerged. The European Communities then looks into the principle of *stare decisis*, *i.e.* the binding effect of previous court decisions on subsequent cases. In this regard, the European Communities first analyses the principle in the context of national legal systems and observes that unlike common law jurisdictions where lower courts are required to follow the decisions of higher courts on similar legal issues, in civil law jurisdictions the main task assigned to courts is to apply the written legal texts to the facts presented in a given case. Yet, the European Communities observes, courts in civil law jurisdictions do follow the decisions of higher courts carefully and apply them to similar issues raised before them. Likewise, the European Communities notes that high courts in civil law jurisdictions, such as Italy and France, also follow their own jurisprudence as a matter of judicial policy and practice. Furthermore, the European Communities points out that some judges even follow the decisions made by other courts at the same level.

7.20 As far as the international tribunals are concerned, the European Communities notes that *stare decisis* in principle does not apply in such tribunals and there is no legal norm that requires them to follow previous decisions by higher courts. The European Communities points out, however, that in practice most international tribunals do give certain weight to precedents when dealing with similar

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legal issues. In this regard, the European Communities mentions the practice of the European Court of Human Rights, the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court and the International Centre for Settlement of Investment Disputes. The European Communities also notes that when a lower court considers it appropriate to depart from the jurisprudence of its higher court, it generally identifies a cogent reason for such departure.

7.21 On the more specific issue of "precedent in the WTO dispute settlement system", the European Communities notes that there is no rule that requires WTO panels to follow adopted Appellate Body decisions and that such decisions are binding only on the parties to the proceedings and with regard to the dispute at issue. Nonetheless, the European Communities observes that panels in practice do follow Appellate Body decisions when dealing with similar legal issues. Through its decisions, the Appellate Body strives to establish consistency in its case law by citing its previous decisions where appropriate. According to the EC, this serves the need to provide "security and predictability to the multilateral trading system", as set forth in Article 3.2 of the DSU. The European Communities endorses this approach because "the need for security and predictability is also thought to require consistency in WTO case law, including in particular the Appellate Body decisions relating to questions of law and legal interpretations of the covered agreements".[19] Furthermore, the European Communities argues that Appellate Body decisions should be accorded particular authority by panels even though there is no written rule that requires them to do so. The European Communities recalls the pronouncements of the Appellate Body itself on this issue, including in *US – Oil Country Tubular Goods Sunset Reviews* where the Appellate Body opined that panels were expected to follow adopted Appellate Body decisions where the issues are the same. With regard to the dispute at issue, the European Communities considers Mexico's claims to be based on a consistent line of reasoning and findings developed by the Appellate Body. In the European Communities' view, the Appellate Body's jurisprudence on zeroing represents the correct legal analysis. In the interest of ensuring security and predictability for the multilateral trading system, the European Communities submits that this jurisprudence has to be followed by the Panel in this case.

(d) Japan

7.22 Japan generally submits that the "Zeroing Procedures" used by the US investigating authorities constitute a measure of general and prospective application and therefore may be challenged "as such" in WTO dispute settlement proceedings. Japan recalls the Appellate Body findings in previous zeroing cases and argues that these findings should be followed by the Panel in these proceedings. More specifically, Japan contends that the "Zeroing Procedures" challenged by Mexico in this case are the same as those found to be WTO-inconsistent by the Appellate Body in *US – Zeroing (Japan)* and contends that such past rulings should be followed in this case to ensure security and predictability for the international trading system.

7.23 Japan generally agrees with Mexico that the use of zeroing in investigations is inconsistent with Articles 2.1, 2.4.2 and 2.4 of the Anti-Dumping Agreement. Japan specifically supports Mexico with respect to investigations where the T-T methodology is used, but also claims that the same inconsistency arises in the context of the WA-WA and the WA-T methodologies. Japan submits that the definition of dumping in Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement requires the investigating authorities to make a determination of dumping for the product under consideration as a whole, irrespective of the methodology used for the comparison of the normal value and the export price. If the authorities carry out multiple comparisons, the results of all such intermediate comparisons have to be taken into consideration in determining the margin of

[19] Written Submission of the European Communities, para. 160.

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dumping for the product under consideration as a whole. Finally, Japan asserts that zeroing in investigations is inconsistent with the obligation to carry out a fair comparison between the normal value and the export price as required under Article 2.4 of the Agreement.

(e) Thailand

7.24 Thailand considers the use of zeroing to be inconsistent with the letter and the spirit of Article VI of the GATT 1994 and the Anti-Dumping Agreement. According to Thailand, as the Appellate Body has consistently held in the past zeroing cases, whenever investigating authorities use intermediate price comparisons while calculating the margin of dumping, they should take into account the results of all such comparisons where the export price exceeds the normal value. Thailand therefore invites the Panel to follow this line of reasoning in this case and accept Mexico's claims with regard to model zeroing in investigations, irrespective of the comparison methodology used.

3. Evaluation by the Panel

7.25 Mexico has raised an "as such" as well as an "as applied" claim regarding model zeroing in investigations. Below, we analyse each in turn.

(a) Model Zeroing in Investigations "As Such"

7.26 Mexico's "as such" claim on model zeroing in investigations raises the issue of the alleged existence of the measure at issue. Mexico submits that there exists, under US law, such a measure as the "Zeroing Procedures" as manifested in anti-dumping investigations where the normal value and the export price are compared on a WA-WA basis. In other words, Mexico asserts the existence of a measure called the "Zeroing Procedures" relative to model zeroing in investigations. The United States disagrees with Mexico's assertion that such a measure as the "Zeroing Procedures" exists under US law and therefore invites the Panel to dismiss Mexico's "as such" claim regarding model zeroing in investigations.

7.27 Mexico, in certain instances in its submissions, refers to this measure as the *Model Zeroing Procedures*.[20] We find this expression useful because it serves to distinguish the measure at issue in connection with Mexico's "as such" claim on model zeroing in investigations from the measure at issue in connection with Mexico's "as such" claim on simple zeroing in periodic reviews. For ease of reference, therefore, we shall use this expression to refer to the specific measure at issue in connection with the claim at issue.

(i) Alleged Existence of the Model Zeroing Procedures

7.28 The first issue that we have to address regarding Mexico's "as such" claim on model zeroing in investigations is whether the measure exists. We note that this inquiry concerns the alleged existence of the *Model Zeroing Procedures* at the time of the establishment of this Panel. Assuming that this measure existed when this Panel was established, the parties disagree whether it was subsequently withdrawn by the United States. The United States asserts that it was, but Mexico disagrees. If we find that the measure existed at the time of the establishment of this Panel, we will also have to address the issue of whether it was subsequently withdrawn. Furthermore, if we find that the measure was indeed withdrawn subsequent to the establishment of this Panel, we will also have to decide whether to make findings and rulings on an expired measure.

[20] See, for instance, First Written Submission of Mexico, paras. 57 and 61.

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Did the *Model Zeroing Procedures* Exist As of the Time of the Establishment of the Panel?

7.29 We are cognizant that we can only address the substance of Mexico's "as such" claim on model zeroing in investigations if there exists, under US law, such a measure as the *Model Zeroing Procedures*. We recall that the principles on the burden of proof applicable in these proceedings (*supra*, para. 7.6) require Mexico to present evidence sufficient to demonstrate the existence of such measure.

7.30 The types of measures that can be subject to the WTO dispute settlement proceedings have not been specified in the DSU. Article 3.3 of the DSU mentions that the WTO dispute settlement mechanism deals with the "measures taken by a Member". This indicates that there has to be a nexus between the measure that is contested and the Member against which the complaint is brought.[21] It does not, however, speak directly to the question of what types of measures may be challenged. We note, however, that this issue is not novel in the WTO dispute settlement system. A reading of the Appellate Body's decisions on this issue reveals that the concept of a "measure" that can be challenged in WTO dispute settlement is to be interpreted broadly. Recently, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body reasoned that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[22] The Appellate Body further indicated that a measure, for purposes of the WTO dispute settlement proceedings, consists "not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application".[23] We agree with the Appellate Body's approach regarding the concept of a "measure" for purposes of the WTO dispute settlement proceedings. In our view, not allowing "as such" actions against measures of general and prospective application would undermine the objective of ensuring the "security and predictability to the multilateral trading system" referred to in Article 3.2 of the DSU.

7.31 The United States does not disagree with the notion that the WTO dispute settlement system applies to, among others, acts that set forth norms that have a general and prospective application. It argues, however, that Mexico has not presented evidence sufficient to prove that such a measure exists in this case. We note that the issue of proving the existence of a measure subject to an "as such" claim has been discussed by the Appellate Body on several occasions. In *US – Oil Country Tubular Goods Sunset Reviews*, the United States, the Member complained against in that case, argued that because the Sunset Policy Bulletin was not a legal instrument that was binding for the US authorities, it did not constitute a measure subject to WTO dispute settlement.[24] The Appellate Body disagreed. According to the Appellate Body, the status of the Sunset Policy Bulletin was not relevant to the question of whether it could be challenged in the WTO. What mattered was whether it constituted a measure subject to WTO dispute settlement. The Appellate Body reasoned that the Sunset Policy Bulletin had normative value, that it had general and prospective application and concluded that it constituted a measure subject to the WTO dispute settlement.[25]

7.32 The measure at issue in these proceedings is different from the Sunset Policy Bulletin in that unlike the Sunset Policy Bulletin, the *Model Zeroing Procedures* are not manifested in a written form.

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[21] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* ("*US – Zeroing (EC)*"), WT/DS294/AB/R, adopted 9 May 2006, para. 187.

[22] (footnote omitted) Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3, para. 81.

[23] (footnote omitted) *Ibid.*, para. 82.

[24] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257, para. 184.

[25] *Ibid.*, para. 187.

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In our view, however, it would be inconsistent with the above-described approach regarding the concept of a "measure" to hold that only written instruments may constitute a measure. We do not, therefore, attribute a decisive role to the form in which the measure is manifested in considering whether the *Model Zeroing Procedures* may be challenged in the WTO. We note that this very issue arose in the recent *US – Zeroing (EC)* case which also involved zeroing and that the Appellate Body made a ruling along these same lines.[26] Nonetheless, the Appellate Body cautioned that a panel must not lightly assume the existence of a rule or norm constituting a measure of general and prospective application, especially when it is not in the form of a written document.[27] The Appellate Body identified certain criteria that a measure should possess in order to be susceptible to a challenge in the WTO dispute settlement proceedings:

> "In our view, when bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such. This evidence may include proof of the systematic application of the challenged "rule or norm". Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such."[28] (footnote omitted, emphasis added)

7.33 In so far as the claim at issue here, we recall that the alleged measure is the *Model Zeroing Procedures*. Turning to the criteria pronounced by the Appellate Body, we note that the measure challenged by Mexico is attributable to the United States. The fact that model zeroing occurs in connection with the margin calculations in anti-dumping investigations carried out by the USDOC clearly indicates this.

7.34 Regarding the precise content of the *Model Zeroing Procedures*, Mexico points to various instruments. Mexico contends that the following constitute evidence that describes the content of the *Model Zeroing Procedures*: (a) the Standard Computer Programme used by the USDOC, (b) the Anti-Dumping Manual, (c) the application of the *Model Zeroing Procedures* in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*, (d) further evidence on the consistent application of the *Model Zeroing Procedures* in all investigations previously conducted by the USDOC, and (e) evidence showing continued application of the *Model Zeroing Procedures* in current investigations.

7.35 First, regarding the Standard Computer Programme used for dumping margin calculations by the USDOC, Mexico argues that the Standard Zeroing Line incorporated in this programme implements the *Model Zeroing Procedures* in investigations. That is, the Standard Computer Programme used by the USDOC treats as zero the results of intermediate comparisons yielding negative margins when the comparisons are aggregated for the calculation of the overall margin of dumping for the product as a whole. An expert opinion presented by Mexico confirms this assertion and further explains how model zeroing is carried out in investigations.[29] The expert opinion also

[26] Appellate Body Report, *US – Zeroing (EC)*, *supra*, note 21, paras. 190-193.
[27] *Ibid.*, para. 196.
[28] *Ibid.*, para. 198.
[29] Exhibit MEX-1, paras. 29-35.

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indicates that the USDOC has never changed the zeroing line of this Standard Computer Programme.[30]

7.36 Second, Mexico cites the Anti-Dumping Manual used by the USDOC as further evidence indicating that the USDOC regularly uses the Standard Computer Programme in its margin calculations in investigations. The Manual provides, in relevant parts:

> "**III. PROGRAMMING PROCEDURES**
>
> The basic elements of the new PC programming procedures for investigations and reviews are validated databases, proper calculation methodologies, the best computer platform, and standard programs. The purpose of the procedures is to improve the accuracy and consistency of computer calculations. Calculation accuracy occurs when a program has been thoroughly checked. Accuracy is a function of both using validated databases in standard programs and checking calculations for computational and substantive correctness. Calculation consistency occurs when every program uses the same standard calculation methodology."[31]

We note that the Manual shows that the USDOC is expected to use the Standard Computer Programme consistently in its margin calculations in investigations.

7.37 Third, Mexico points to the application of the *Model Zeroing Procedures* in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*, as proof of the existence of such Procedures. We note that the United States acknowledges that the USDOC did use model zeroing in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*.[32]

7.38 Fourth, Mexico asserts that the USDOC has consistently applied the *Model Zeroing Procedures* in past investigations. Mexico substantiates this assertion through an expert opinion, statements made by the United States before the previous WTO panels and the factual findings made by those panels. The expert opinion states that the *Model Zeroing Procedures* have been a consistent element of the USDOC's dumping margin calculation in all proceedings.[33] In response to questioning in this regard, the United States has argued that the expert's description of the application of *Model Zeroing Procedures* under US law was inaccurate in so far as it suggested that the USDOC was bound by the Standard Computer Programme. According to the United States, the expert opinion only describes the basic templates in the computer programme, which the USDOC has discretion to change. The United States also cites instances where the expert herself acknowledges that the USDOC made changes to the computer programmes, albeit in the context of periodic reviews. The United States acknowledges, however, that these changes did not include the zeroing aspects of the programmes.[34] Although the United States asserts that the Assistant Secretary for Import Administration has discretion to change the computer programmes used by the USDOC, including their zeroing aspects, the United States stated that such discretion had never been used until the policy change, dated 22 February 2007, with regard to investigations where the normal value and the export price were compared on a WA-WA basis.[35]

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[30] Exhibit MEX-1, paras. 16-17.
[31] Exhibit MEX-4D, p.8.
[32] S*upra*, note 3.
[33] Exhibit MEX-1, paras. 15-17.
[34] Response of the United States to Question 5 from the Panel Following the First Meeting.
[35] Response of the United States to Question 2 from the Panel following the Second Meeting.

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7.39 Finally, Mexico refers to the fact that the *Model Zeroing Procedures* were followed in every investigation conducted after January 2006.[36] While not providing a full list of these investigations, Mexico mentions certain examples where the USDOC defended the use of zeroing in some of these investigations.[37]

7.40 It seems clear to us, on the basis of the foregoing, that Mexico has presented evidence sufficient to demonstrate the precise content of the *Model Zeroing Procedures* "as such" under US law. In our view, the evidence about the precise content of the *Model Zeroing Procedures*, particularly the parts of the Anti-Dumping Manual that we cited above which indicate that the USDOC had to follow the Standard Computer Programme consistently in investigations, also demonstrates that these Procedures had general and prospective application. This shows that the *Model Zeroing Procedures* went beyond mere repetition of a certain methodology to specific cases and had become a "deliberate policy".[38] We observe below (paras. 7.44-7.45), that the USDOC made its policy change entailing the termination of model zeroing in investigations through an official notice in the Federal Register.[39] In our view, this confirms that the *Model Zeroing Procedures* had, until such change, a general and prospective application.

7.41 The United States argues that Mexico has not demonstrated the existence of the *Model Zeroing Procedures* as a measure that could be challenged before a WTO panel. The United States criticizes Mexico's reliance on past panel and Appellate Body findings regarding the existence of the zeroing procedures and argues that "a separate panel's findings are not evidence, but conclusions based on evidence".[40] We note that other WTO panels as well as the Appellate Body have made similar findings in cases that concerned the zeroing methodology applied by the United States in anti-dumping proceedings. Our findings are, however, based on the evidence presented by Mexico in these proceedings, not on the WTO jurisprudence. We therefore disagree with the United States' assertion.

7.42 On the basis of the foregoing considerations, we conclude that Mexico has presented evidence sufficient to demonstrate the existence of the *Model Zeroing Procedures* under US law as of the date of establishment of this Panel.

Were the *Model Zeroing Procedures* Subsequently Repealed by the United States?

7.43 The United States submits that as of 22 February 2007, the USDOC stopped using model zeroing in investigations. Mexico acknowledges that the United States did make such a change in its practice regarding model zeroing in investigations and that it applied its new practice in at least one investigation initiated subsequent to this date.[41] Mexico, however, considers that the United States has not eliminated the practice of model zeroing in investigations because this change in policy only

[36] Mexico has not explained the significance of January 2006. Our understanding is that the importance of this date in terms of the submission of evidence regarding the continued application of *Model Zeroing Procedures* is because it supersedes the date of the USDOC's determination in the last periodic review on *Stainless Steel Sheet and Strip in Coils from Mexico*, *i.e.* 12 December 2005. See, First Written Submission of Mexico, para. 136.

[37] First Written Submission of Mexico, paras. 76-78.

[38] See, Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/AB/R, adopted 23 January 2007, para. 85.

[39] The United States submits that the Federal Register notice announcing that the USDOC would no longer make average-to-average comparisons in investigations without taking into consideration all comparable export transactions was issued in connection with the implementation of DSB rulings and recommendations in the *US – Zeroing (EC)* dispute, as required under US law [Section 123(g) of the Uruguay Round Agreements Act (19 U.S.C. § 3533(g))]. Comments of the United States on the interim report of the Panel, para. 6.

[40] First Written Submission of the United States, para. 40.

[41] Response of Mexico to Question 13 from the Panel Following the First Meeting.

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affects the investigations ongoing as of, or initiated after, 22 February 2007. Mexico also argues that as long as the impact of model zeroing on existing anti-dumping measures is not removed, the measure cannot be considered to have been eliminated.

7.44 The official notice repealing model zeroing in investigations, published in the US Federal Register, reads in relevant parts:

> "**Final Modification Concerning the Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation**
>
> After considering all of the comments submitted, the Department is adopting this final modification concerning the calculation of the weighted-average dumping margin. The Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons."[42]
>
> "**Timetable**
>
> The effective date of this notice is 16 January 2007 ... The Department will apply this final modification in all current and future antidumping investigations as of the effective date."[43]

The effective date of this modification was subsequently changed to 22 February 2007.[44]

7.45 We note that, as Mexico also concedes, the notice makes clear that the practice of model zeroing in investigations was to be eliminated as of 22 February 2007. The United States also submitted evidence that the new method applied in at least one investigation.[45] We also note that the notice unambiguously states that the new policy will have prospective effect only. It will apply to investigations ongoing as of, or initiated after, the effective date of the notice. The issue therefore becomes whether in these circumstances Mexico's assertion that the measure relating to Mexico's "as such" claim regarding model zeroing in investigations has not been eliminated, can be sustained. In our view, it cannot. We recall that we are now considering an "as such" challenge to a rule or norm of general and prospective application. Whether the change in the United States' practice has retrospective effect does not have a bearing on the more general question of whether the measure has been repealed. The fact that the impact of the repealed measure will continue as long as the anti-dumping duty rates previously calculated through the use of model zeroing remain in place does not change the fact that the measure itself is no longer in force, and that it will not be followed in the future investigations. We therefore conclude that the measure at issue, *i.e.* the *Model Zeroing Procedures* under US law, expired on 22 February 2007. The question therefore becomes whether we should make findings and recommendations on this expired measure.

(ii) Should the Panel Make Findings and Recommendations on an Expired Measure?

7.46 Above, we found that the measure at issue with respect to Mexico's "as such" claim on model zeroing in investigations, *i.e.* the *Model Zeroing Procedures* under US law, expired on 22 February 2007. Thus, the measure which was in force as of the time of the establishment of the Panel, was, during the Panel proceedings, repealed. This raises the question of whether this Panel should make findings and recommendations on this expired measure.

[42] Exhibit MEX-10, p. 77722.
[43] Exhibit MEX-10, p. 77725.
[44] Exhibit MEX-11, p. 3783.
[45] Exhibit US-3, p. 9508.

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7.47 We asked for parties' views on this issue. While continuing to assert that the measure at issue has not been abandoned by the United States, Mexico argues that, if the Panel is of the view that the measure has been repealed, it should make findings on the measure's WTO consistency, and further asserts that if the Panel finds the measure to be inconsistent, it should also make recommendations. In this context, Mexico also points out that the Panel can, as some panels have done in the past, make qualified recommendations.[46] The United States maintains that the alleged measure does not exist, but acknowledges as a general matter that "if a measure exists at the time a panel is established but expires or is withdrawn during the course of the panel proceedings, it is still within the panel's terms of reference, and the panel may make findings regarding the WTO consistency of the measure".[47] We understand the United States' position to be that if the Panel finds that such a measure as the *Model Zeroing Procedures* existed under US law at the time of the establishment of the Panel and that it was withdrawn in the course of the panel proceedings, the Panel is not precluded from making findings regarding the alleged WTO-inconsistency of such a measure.

7.48 *Model Zeroing Procedures* in investigations "as such" was raised in Mexico's panel request and therefore is within this Panel's terms of reference. Hence, we are not precluded from addressing Mexico's claims with regard to this measure. As we have noted, however, the measure was withdrawn after the commencement of the panel proceedings. There is no specific provision in the DSU that addresses whether a WTO panel may or may not make findings and recommendations on a measure which, while within the panel's terms of reference at the outset of the panel proceedings, subsequently expires. We note, however, that this is not a novel issue in WTO dispute settlement proceedings. This specific issue has arisen in a number of cases, and panels, taking into consideration the particularities of the disputes before them, have used their discretion in deciding whether making findings on an expired measure would be appropriate in each case.[48]

7.49 According to Article 3.7 of the DSU, "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". We will in any case have to address the WTO-consistency of model zeroing in investigations because Mexico has also raised an "as applied" claim in this regard. In these circumstances, we find it appropriate to make findings regarding Mexico's claim on model zeroing in investigations "as such" in order to secure a positive solution to the dispute before us.

7.50 As to whether we should also make a recommendation, we fail to see what purpose would be served by a recommendation relating to a measure that no longer exists. We recall in this respect the views expressed by the Appellate Body in *US – Certain EC Products*:

> "We note, though, that there is an obvious inconsistency between the finding of the Panel that "the 3 March Measure is no longer in existence" and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO obligations. The Panel erred in

[46] Response of Mexico to Question 1(b) from the Panel Following the Second Meeting.

[47] Response of the United States to Question 1(b) from the Panel Following the Second Meeting.

[48] See for instance, Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3 and 4, adopted 23 July 1998, DSR 1998:VI, 2201, para. 14.9; Panel Report, *India – Measures Affecting the Automotive Sector* ("*India – Autos*"), WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827, paras. 7.26-7.29; Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* ("*Dominican Republic – Import and Sale of Cigarettes*"), WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS302/AB/R, paras. 7.340-7.344; Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* ("*EC – Approval and Marketing of Biotech Products*"), WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006, paras. 7.1303-7.1312.

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> recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists."[49]

We shall refrain from making recommendations even if we find this measure to be inconsistent with the United States' WTO obligations since we have found that the United States abandoned the practice of model zeroing in investigations as from 22 February 2007. We now proceed to our substantive analysis of Mexico's "as such" claim on model zeroing in investigations.

(iii) Is Model Zeroing in Investigations WTO-Inconsistent?

7.51 The United States concedes that prior to the policy change on 22 February 2007, the USDOC applied model zeroing in anti-dumping investigations. That is, the USDOC considered as zero results of intermediate model-specific comparisons when such results were aggregated in the calculation of the margin of dumping for the product under consideration as a whole. As we noted above, the United States acknowledges that in *US – Softwood Lumber V*, the Appellate Body found the use of zeroing in this context to be inconsistent with Article 2.4.2 of the Agreement and that this reasoning is equally applicable to this claim. Finally, the United States has presented no arguments in response to Mexico's contention that the use of model zeroing in investigations is WTO-inconsistent. In short, and excepting its arguments about the existence of the alleged measure as discussed above, the United States does not appear to contest Mexico's claim on this issue.

7.52 We recall that the rules on the burden of proof applicable in these proceedings (*supra*, para. 7.6) provide that the party claiming a violation of a provision of the WTO Agreement, in this case Mexico, by another Member, must assert and prove its claim. Mexico, therefore, has to present evidence and arguments sufficient to make a *prima facie* case of violation of the relevant provisions of the relevant WTO agreements. Thus, the fact that the United States does not contest Mexico's contention that the use of model zeroing in investigations is WTO-inconsistent does not discharge Mexico of its obligation to make a *prima facie* case. It follows that we shall find for Mexico in connection with its claim on model zeroing in investigations only if Mexico presents a *prima facie* case regarding the incompatibility of model zeroing in investigations with the relevant provisions of the relevant WTO agreements. In our view, our obligation to carry out an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as set forth in Article 11 of the DSU, lends support to our approach. With this in mind, we turn to the evaluation of the arguments that Mexico has presented in support of this claim.[50]

7.53 Mexico raises four arguments in support of its claim regarding the WTO-inconsistency of model zeroing in investigations. First, it asserts that model zeroing in investigations is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement because it precludes the calculation of a margin of dumping for the product under consideration as a whole. The ultimate margin only reflects part of the calculations for the product under consideration because negative results in the intermediate calculations are treated as zero. Second, Mexico contends that model zeroing in investigations is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement because it precludes the calculation of a margin of dumping based on a weighted average of prices of all comparable export transactions for the product under consideration as a whole. Third, Mexico submits that model zeroing in investigations is inconsistent with the obligation to carry out a fair

[49] Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities* ("*US – Certain EC Products*"), WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373, para. 81.

[50] We recall that this very issue arose in *US – Shrimp (Ecuador)* and the panel pointed out that it could only find for the complaining Member if that Member made a *prima facie* case on the inconsistency with the relevant provisions of the relevant WTO agreements of model zeroing in investigations. See, Panel Report, *United States – Anti-Dumping Measures on Shrimp from Ecuador* ("*US – Shrimp (Ecuador)*"), WT/DS335/R, adopted 20 February 2007, para. 7.9. We therefore also find support in this panel decision.

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comparison between the normal value and the export price as required under Article 2.4 of the Anti-Dumping Agreement because it artificially reduces the prices of certain export transactions. Fourth, Mexico argues that as an "administrative procedure" within the meaning of Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement, model zeroing in investigations is inconsistent with the obligations set forth in those provisions.

7.54 We find it appropriate to commence our assessment of Mexico's claim with the alleged violation of Article 2.4.2 of the Agreement and then move on to the next alleged violation, if, and to the extent necessary, to resolve the claim.

7.55 We recall that model zeroing in investigations has been found to be inconsistent with the obligation under Article 2.4.2 of the Agreement to compare the weighted-average of the normal value with the weighted-average of the prices of all comparable export transactions in all dispute settlement proceedings in which it was challenged, *i.e.* in the panel decisions in *EC – Bed Linen*, *EC – Tube or Pipe Fittings*, *US – Softwood Lumber V*, *US – Zeroing (Japan)*, *US – Shrimp (Ecuador)* and the Appellate Body decisions in *EC – Bed Linen* and *US – Softwood Lumber V*. We note that Mexico has developed its arguments on model zeroing mainly along the lines of this jurisprudence.[51]

7.56 Article 2.4.2 of the Agreement 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 of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." (emphasis added)

7.57 We note that the text of Article 2.4.2 provides that in investigations where the normal value and the export price are compared on a WA-WA basis, the weighted average normal value is to be compared with "a weighted average of prices of all comparable export transactions". Mexico asserts that through model zeroing in investigations, the USDOC ignores, in the calculation of the margin of dumping for the product under consideration as a whole, the results of intermediate comparisons made for different models in which the WA export price exceeds the WA normal value. This, in Mexico's view, is inconsistent with the obligation to take all comparable export transactions into consideration in the calculation of the margin of dumping for the product under consideration as a whole. In its argumentation, Mexico heavily relies on the findings of the Appellate Body in prior zeroing disputes, particularly in *US – Softwood Lumber V*.

[51] First Written Submission of Mexico, paras. 198-208.

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7.58 The Appellate Body in *US – Softwood Lumber V* started by pointing out that Article 2.4.2 permits multiple averaging.[52] That is, the investigating authorities may first break the subject product into models, perform a comparison on the basis of a WA normal value and a WA export price for each such model, and then aggregate these intermediate results in calculating the margin of dumping for the product under consideration as a whole. The Appellate Body agreed with the panel that Article 2.4.2 requires the authorities to take into consideration the average of prices of all comparable export transactions.[53] The Appellate Body observed that the parties disagreed as to whether this obligation was limited to model-specific comparisons or whether it also applied to the aggregation of such comparisons. The Appellate Body was of the view that the resolution of this issue centred on the interpretation of the terms "dumping" and "margins of dumping" in the Anti-Dumping Agreement.[54] The Appellate Body interpreted the definition of the term "dumping" under Article 2.1 to refer to the product under consideration as a whole as defined by the investigating authorities. It then noted that by virtue of the phrase "[f]or the purpose of this Agreement" in Article 2.1, this definition applies to the entire Agreement, including Article 2.4.2. The Appellate Body then concluded that dumping can be found to exist 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".[55]

7.59 In the view of the Appellate Body, the obligation set forth in Article 2.4.2 to take into account the weighted average of prices of all comparable export transactions applies not only to the model-specific comparisons, but also to their aggregation for purposes of establishing the margin of dumping for the product under consideration as a whole.[56] Consequently, the results of model-specific comparisons are not margins of dumping within the meaning of Article 2.4.2, but rather constitute intermediate calculations established by the authorities in the context of calculating the margin of dumping for the product under consideration as a whole.[57] It follows that when authorities use multiple averaging in their dumping determinations, Article 2.4.2 requires them to take into account the results of all model-specific comparisons in the calculation of the margin of dumping for the product under consideration as a whole.

7.60 At the outset, we note, and incorporate by reference, our reasoning below (paras. 7.102-7.105) regarding the importance of adopted Appellate Body reports on future panels dealing with similar legal issues. The issue we are addressing, model zeroing in investigations, is the same as the one addressed by the Appellate Body in *US – Softwood Lumber V*. Nonetheless, for the reasons set forth below, we only partially agree with the Appellate Body's reasoning regarding model zeroing in investigations, even though we also come to the same conclusion.

7.61 We note that the Appellate Body's reasoning is mainly based on the phrase "all comparable export transactions" under Article 2.4.2, interpreted in light of the definition of "dumping" under Article 2.1 of the Agreement. The Appellate Body reasoned that the phrase "all comparable export transactions" requires the authorities to take into consideration the weighted average of prices of all comparable export transactions, both in the context of model-specific comparisons and in the aggregation of such model-specific results. We agree with the Appellate Body that the phrase "all comparable export transactions" requires the authorities to take into consideration the weighted average of prices of all comparable export transactions in their dumping determinations in investigations. We consider that the text of Article 2.4.2 stipulates this requirement with sufficient clarity. We share the view of the Appellate Body regarding the interpretation of the phrase "all

[52] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875, para. 81.
[53] *Ibid.*, para. 86.
[54] *Ibid.*, para. 90.
[55] *Ibid.*, para. 96.
[56] *Ibid.*, para. 98.
[57] *Ibid.*, para. 97.

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comparable export transactions" under Article 2.4.2. Model zeroing runs counter to this requirement because it entails the omission of the results of model-specific comparisons where the WA export price exceeds the WA normal value, from the aggregation of model-specific results in the calculation of the margin of dumping. Model zeroing is, therefore, inconsistent with Article 2.4.2. We note, however, that, as discussed below in paras. 7.116-7.123, we do not share the Appellate Body's reasoning on the issue of "product as a whole" and have not relied on that reasoning in our assessment of Mexico's claim.

7.62 On the basis of the foregoing considerations, we conclude that Mexico has met its burden of proof regarding the inconsistency of model zeroing in investigations[58] with Article 2.4.2 of the Agreement. Having found model zeroing in investigations to be inconsistent with Article 2.4.2 of the Agreement, we need not, and do not, address Mexico's claims under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement in support of the same claim.

(b) Model Zeroing in Investigations "As Applied"

7.63 It is uncontested that the USDOC applied model zeroing in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*.[59] Having found model zeroing in investigations to be inconsistent "as such" with the obligation set out under Article 2.4.2 of the Agreement, we also find that the USDOC acted inconsistently with Article 2.4.2 in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico* by using model zeroing in the referenced investigation. As we have done with regard to Mexico's claim on model zeroing in investigations "as such", here too we decline to address Mexico's claims raised under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement in support of the same claim.

E. SIMPLE ZEROING IN PERIODIC REVIEWS

1. Arguments of Parties

(a) Mexico

7.64 Mexico has raised an "as such" as well as an "as applied" claim regarding simple zeroing in periodic reviews. Mexico argues that the rules and procedures relating to simple zeroing in periodic reviews are embodied in what Mexico describes as the "Zeroing Procedures" under US law.

7.65 Mexico generally asserts that dumping is an exporter-specific concept and that it can only exist with respect to individual exporters or foreign producers, not importers or individual import transactions. According to Mexico, simple zeroing in periodic reviews is inconsistent with the WTO rules in several regards. First, Mexico submits that simple zeroing in periodic reviews is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement because it leads to a margin of dumping greater than the margin for the product under consideration as a whole. This is because the US law requires the USDOC to treat as zero the results of intermediate price comparisons where the export price exceeds the normal value when such intermediate determinations are aggregated in order to calculate the margin of dumping for the product under consideration as a whole. Such a determination, in Mexico's view, only partially reflects the export transactions pertaining to the product under consideration as a whole. It therefore

[58] We recall that in paras. 7.7-7.9 above, we noted the description of the term "model zeroing in investigations" offered by Mexico, and decided to use it in our analysis in this case for ease of reference.

[59] *Supra*, note 3.

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artificially inflates the margin of dumping and causes the imposition of an anti-dumping duty above the exporter's true margin.

7.66 Second, Mexico contends that simple zeroing in periodic reviews is inconsistent with the obligation to carry out a fair comparison between the normal value and the export price as required under Article 2.4 of the Agreement because, as articulated by the Appellate Body in *US – Zeroing (Japan)*, a practice that gives rise to a margin of dumping above an exporter's real margin cannot be viewed as involving a fair comparison within the meaning of Article 2.4.

7.67 Third, Mexico asserts that as an "administrative procedure" within the meaning of Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement, simple zeroing in periodic reviews is also inconsistent with the obligations set out in these provisions.

7.68 In addition to its "as such" claims, Mexico also contends that by applying simple zeroing in five periodic reviews of the measure on *Stainless Steel Sheet and Strip in Coils from Mexico*, the USDOC acted inconsistently with the United States' WTO obligations.

(b) United States

7.69 The United States requests the Panel to dismiss Mexico's "as such" claim regarding simple zeroing in periodic reviews because, in the view of the United States, no such measure as the "Zeroing Procedures" exists under US law. In the alternative, the United States requests the Panel to reject Mexico's "as such" claim regarding simple zeroing in periodic reviews because Mexico has failed to demonstrate that the Anti-Dumping Agreement disallows zeroing in periodic reviews. For the same reason, the United States also requests the Panel to reject Mexico's "as applied" claim regarding simple zeroing in the five periodic reviews at issue.

7.70 More specifically, the United States argues that the Anti-Dumping Agreement cannot be interpreted to include a general prohibition on zeroing in all contexts. The exclusive textual basis for finding zeroing to be WTO-inconsistent is Article 2.4.2 of the Agreement, which only prohibits zeroing in the narrow context of investigations where the WA-WA methodology is used. The United States is of the view that it is at least a permissible interpretation of the Agreement that zeroing is allowed outside this particular context. The United States therefore asks the Panel to follow the correct and persuasive reasoning of past panels in this regard and refrain from following the Appellate Body's reasoning which, in the United States' view, fails to give credit to a permissible interpretation of the Agreement, inconsistently with Article 17.6(ii) of the Agreement. The United States submits that an interpretation that extends the prohibition on zeroing beyond the context of investigations where the WA-WA methodology is used would render the remainder of Article 2.4.2 of the Agreement meaningless. More specifically, the United States contends that if zeroing is prohibited in all contexts, the exceptional WA-T methodology provided for in that article would mathematically yield the same result as the WA-WA methodology. Such an approach would be inconsistent with the principle of effective treaty interpretation. The United States also notes that the European Court of First Instance approved zeroing in the context of the WA-T methodology based on this "mathematical equivalence" issue.[60]

7.71 The United States submits that Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement contain definitional provisions that normally do not impose independent legal obligations on Members while acknowledging that they may play an important role in interpreting other provisions of the Agreement. Furthermore, the United States is of the view that these provisions could be interpreted to allow a definition of dumping on a transaction-specific basis, as opposed to requiring the examination of export transactions at an aggregate level. The United States finds

[60] Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006 (Exhibit US-5).

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support for this reading of the definition of dumping in GATT practice as well as the negotiating history of the Uruguay Round Anti-Dumping Agreement. The United States asserts that the phrases "product as a whole" and "multiple comparisons" used by Mexico have been derived by the Appellate Body from the term "all comparable export transactions" in Article 2.4.2 and are not found in the text of the Agreement.

7.72 The United States also disagrees with Mexico's interpretation of Article 9.3 of the Agreement. In the view of the United States, reading this provision as disallowing importer-specific duty assessment would undermine the very purpose of imposing anti-dumping duties which is to remove the injurious effect of dumping. If, as Mexico proposes, Article 9.3 is interpreted to require an exporter-specific margin of dumping, this would allow importers with a high margin to benefit from the importers with lower margins and thus to continue to cause injury to the domestic industry.

7.73 The United States also submits that Mexico's interpretation of Article 9.3 renders the prospective normal value systems inoperative and runs counter to Article 9.4(ii) which clearly allows for such systems. Under the prospective normal value system, an importer's liability is the difference between the export price in a given transaction and the prospective normal value. According to the United States, there is no textual support in the Agreement for the proposition that prices in other export transactions are relevant to the calculation of the liability of an importer under the prospective normal value system.

7.74 The United States asserts that Article 2.4 of the Agreement does not resolve the issue of whether zeroing as such is fair or unfair. According to the United States, Mexico's reasoning under Article 2.4 is built on its reading of the obligation set forth in Article 9.3. If the Panel agrees that it is permissible to read Article 9.3 as allowing an importer-specific determination in duty assessment proceedings, such a determination would not yield a duty that exceeds the margin of dumping and there would be no argument about the unfairness of this assessment within the meaning of Article 2.4.

7.75 The United States contends that Mexico's claims under Articles XVI:4 of the WTO Agreement and 18.4 of the Anti-Dumping Agreement are dependent on its substantive claims and invites the Panel to exercise judicial economy with regard to these claims.

2. Arguments of Third Parties

7.76 We note that although Mexico acknowledged, subsequent to its First Written Submission, that the scope of its panel request was limited to "model zeroing in investigations" and "simple zeroing in periodic reviews", some of the third parties also addressed other types of zeroing because they prepared their submissions before Mexico's written acknowledgement regarding the scope of its panel request.

(a) Chile

7.77 Chile contends that the WTO-inconsistency of the zeroing methodology in periodic reviews has been confirmed by previous Appellate Body decisions and expresses hope that this issue will be resolved on a multilateral level through amendment of the Anti-Dumping Agreement. Continued adjudication between WTO Members on this issue, which is costly and time consuming, should therefore be avoided. Chile submits that zeroing not only inflates the margin of dumping, but also yields a positive determination of dumping where there would have been no dumping absent zeroing. Chile therefore asks the Panel to find that zeroing is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement.

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(b) China

7.78 Based on the WTO jurisprudence regarding zeroing, China argues that the use of zeroing in periodic reviews is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. China is of the view that the Panel should not depart from the Appellate Body's jurisprudence because the arguments presented by the United States in these proceedings do not differ from the arguments raised in the context of the past cases. China therefore invites the Panel to accept Mexico's claims and expects the United States to eliminate the use of zeroing in all anti-dumping proceedings.

(c) European Communities

7.79 The arguments of the European Communities addressing the importance of WTO jurisprudence on zeroing, summarized in paras. 7.19-7.21 above, also apply to this claim.

(d) Japan

7.80 Japan generally submits that the "Zeroing Procedures" used by the US investigating authorities constitute a measure of general and prospective application and therefore may be challenged "as such" in WTO dispute settlement proceedings. Japan recalls the Appellate Body findings in previous zeroing cases and argues that these findings should be followed by the Panel in these proceedings. More specifically, Japan contends that the zeroing measures challenged by Mexico in this case are the same as those found to be WTO-inconsistent by the Appellate Body in *US – Zeroing (Japan)* and contends that such past rulings should be followed in this case to ensure the security and predictability of the international trading system.

7.81 Regarding the use of zeroing in periodic reviews, Japan first observes that the chapeau of Article 9.3 contains a cross-reference to Article 2. It follows that the obligation to calculate an aggregate margin of dumping for the product under consideration as a whole also applies in the context of periodic reviews under US law. Japan disagrees with the United States' view that dumping can be defined on a transaction-specific basis. According to Japan, there is a difference between the normative meaning of dumping and the price difference that might occur on a transaction-specific basis. Drawing guidance from Article 6.10 of the Agreement, Japan also argues that in periodic reviews the authorities have to calculate a margin of dumping for exporters, not importers. Japan agrees that anti-dumping duties may be assessed on a transaction-specific basis under Article 9.3 of the Agreement, but adds that such assessment cannot exceed the margin of dumping calculated for the product under consideration as a whole in accordance with Article 2.

7.82 In sum, Japan agrees with Mexico that the use of zeroing in periodic reviews is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement.

(e) Thailand

7.83 Thailand considers the use of zeroing to be inconsistent with the letter and the spirit of Article VI of the GATT 1994 and the Anti-Dumping Agreement. According to Thailand, as the Appellate Body has consistently held in the past zeroing cases, whenever investigating authorities use intermediate price comparisons while calculating the margin of dumping, they should take into account the results of all such comparisons where the export price exceeds the normal value. Thailand therefore invites the Panel to follow this line of reasoning in this case and accept Mexico's claims with regard to simple zeroing in periodic reviews, irrespective of the comparison methodology used.

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3. Evaluation by the Panel

(a) Alleged Existence of the *Simple Zeroing Procedures*

7.84 As we noted above, Mexico argues that the rules and procedures pertaining to simple zeroing in periodic reviews are embodied in what Mexico describes as the "Zeroing Procedures" under US law. The United States, however, denies the existence of such a measure under its law. Mexico's claim, therefore, requires the Panel first to assess the issue of the alleged existence of the "Zeroing Procedures" under US law. Mexico, in certain instances in its submissions, refers to this measure as the *Simple Zeroing Procedures*[61]. This expression, in our view, serves to distinguish the measure at issue here from the first measure subject to Mexico's "as such" claim regarding model zeroing in investigations, discussed above. For ease of reference, therefore, we shall use the expression *Simple Zeroing Procedures* to refer to the specific measure at issue with regard to this claim.

7.85 We note that the evidence put forward by Mexico regarding the alleged existence of the *Simple Zeroing Procedures* under US law, and the United States' counterarguments, are similar to those presented in connection with Mexico's claim regarding model zeroing in investigations. Our analysis below is therefore also along the same lines as set out in paras. 7.29-7.42 above.

7.86 We are cognizant that we can only address the substance of Mexico's "as such" claim regarding simple zeroing in periodic reviews if there exists, under US law, such a measure as the *Simple Zeroing Procedures*. We recall that the principles on the burden of proof applicable in these proceedings (*supra*, para. 7.6) require Mexico to present evidence sufficient to demonstrate the existence of such a measure.

7.87 We recall our reasoning above (*supra*, paras. 7.30-7.32) regarding the types of measures that may be challenged in the WTO dispute settlement proceedings and the criteria that an alleged rule or norm has to possess in order for such a rule or norm to be susceptible to a challenge in the WTO. Based on the same reasoning, we now proceed to our assessment of whether the *Simple Zeroing Procedures*, which according to Mexico exist under US law, meet these criteria.

7.88 Turning to the criteria pronounced by the Appellate Body *US – Zeroing (EC)*[62], we note that the measure challenged by Mexico is attributable to the United States. The fact that simple zeroing occurs in connection with the margin calculations in periodic reviews carried out by the USDOC clearly indicates this.

7.89 Regarding the precise content of the *Simple Zeroing Procedures*, Mexico points to various instruments. Mexico contends that the following constitutes evidence that describes the content of the *Simple Zeroing Procedures*: (a) the Standard Computer Programme used by the USDOC, (b) the Anti-Dumping Manual, (c) the application of the *Simple Zeroing Procedures* in all the five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico*, (d) further evidence on the consistent application of the *Simple Zeroing Procedures* in all the periodic reviews previously conducted by the USDOC, and (e) evidence showing continued application of the *Simple Zeroing Procedures* in the current periodic reviews.

7.90 First, regarding the Standard Computer Programme used for dumping margin calculations by USDOC, Mexico argues that the Standard Zeroing Line incorporated in this programme implements the *Simple Zeroing Procedures* in periodic reviews. That is, the computer programme used by the USDOC treats as zero the results of intermediate comparisons yielding negative margins when the comparisons are aggregated for the calculation of the overall margin of dumping for the product under

[61] See, for instance, First Written Submission of Mexico, para. 103.
[62] *Supra*, note 28.

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consideration as a whole. An expert opinion presented by Mexico confirms this assertion and further explains how simple zeroing is carried out in periodic reviews.[63] The expert opinion also indicates that the USDOC has never changed the zeroing line of this Standard Computer Programme.[64]

7.91 Second, Mexico cites the Anti-Dumping Manual used by the USDOC as further evidence indicating that the USDOC regularly uses the Standard Computer Programme in its margin calculations in periodic reviews. The Manual provides, in relevant parts:

> "**III. PROGRAMMING PROCEDURES**
>
> The basic elements of the new PC programming procedures for investigations and reviews are validated databases, proper calculation methodologies, the best computer platform, and standard programs. The purpose of the procedures is to improve the accuracy and consistency of computer calculations. Calculation accuracy occurs when a program has been thoroughly checked. Accuracy is a function of both using validated databases in standard programs and checking calculations for computational and substantive correctness. Calculation consistency occurs when every program uses the same standard calculation methodology."[65]

We note that the Manual shows that the USDOC is expected to use the Standard Computer Programme consistently in its margin calculations in periodic reviews.

7.92 Third, Mexico argues that the USDOC applied the *Simple Zeroing Procedures* at issue in all the five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico*. The United States does not contest this fact.[66]

7.93 Fourth, Mexico asserts that the USDOC has consistently applied the *Simple Zeroing Procedures* in all the past periodic reviews. Mexico substantiates this assertion through an expert opinion, statements made by the United States before the previous WTO panels and the factual findings made by those panels. The expert opinion states that the *Simple Zeroing Procedures* have been a consistent element of the periodic reviews carried out by the United States.[67] In response to questioning in this regard, the United States has not contested the accuracy of this expert's description of the application of the *Simple Zeroing Procedures*. The United States has, however, argued that this description was inaccurate in so far as it suggested that the USDOC was bound by the Standard Computer Programme. According to the United States, the expert opinion only describes the basic templates in the computer programme, which the USDOC has discretion to change. The United States also cites instances where the expert herself acknowledges that the USDOC made changes to the computer programmes used in the five periodic reviews at issue in this case. The United States acknowledges, however, that these changes did not include the zeroing aspects of the programmes.[68] Although the United States asserts that the Assistant Secretary for Import Administration has discretion to change the computer programmes used by the USDOC, including their zeroing aspects, the United States acknowledges that such discretion has never been used in periodic reviews where the WA-T method was used.[69]

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[63] Exhibit MEX-1, paras. 29-35.
[64] Exhibit MEX-1, paras. 16-17.
[65] Exhibit MEX-4D, p.8.
[66] Response of the United States to Question 5 from the Panel Following the First Meeting.
[67] Exhibit MEX-1, paras. 15-17.
[68] Response of the United States to Question 5 from the Panel Following the First Meeting.
[69] Response of the United States to Question 2 from the Panel Following the Second Meeting.

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7.94 Finally, Mexico submits that in every periodic review between January 2006[70] and the initiation of the dispute settlement proceedings at issue where the WA-T method was used, the USDOC followed the Standard Computer Programme and zeroed. While not providing a full list of these periodic reviews, Mexico mentions certain examples where the USDOC defended the use of zeroing in proceedings initiated by interested parties. The United States has not contested this assertion. In one of the periodic reviews cited by Mexico, the USDOC rejects the respondents' assertion that the practice of zeroing has to be discontinued:

> "**Comment 9: Non-Offsetting for Export Sales that Exceed Normal Value**
>
> Ispat argues that the Department's refusal to offset non-dumped sales is contrary to WTO findings and should not be employed for the final results.
>
> ...
>
> **Department's Position**
>
> We have not changed our calculation of the weighted-average dumping margin for the final results.
>
> ...
>
> The Federal Circuit has affirmed the Department's methodology as a reasonable interpretation of the statute."[71]

7.95 It seems clear to us, on the basis of the foregoing, that Mexico has presented evidence sufficient to demonstrate the content of the *Simple Zeroing Procedures* under US law. In our view, the evidence about the content of the *Simple Zeroing Procedures*, particularly the parts of the Anti-Dumping Manual that we cited above which indicate that the USDOC has to follow the Standard Computer Programme consistently in periodic reviews, also demonstrates that these Procedures have general and prospective application. This shows that the *Simple Zeroing Procedures* have gone beyond mere repetition of a certain methodology to specific cases and have become a "deliberate policy."[72]

7.96 The United States argues that Mexico has not demonstrated the existence of the *Simple Zeroing Procedures* as a measure that could be challenged before a WTO panel. The United States criticizes Mexico's reliance on past panel and Appellate Body findings regarding the existence of the zeroing procedures and argues that "a separate panel's findings are not evidence, but conclusions based on evidence".[73] We note that other WTO panels as well as the Appellate Body have made similar findings in cases that concerned the zeroing methodology applied by the United States in anti-dumping proceedings. We note, however, that our findings are based on the evidence presented by Mexico in these proceedings, not on the WTO jurisprudence.

7.97 On the basis of the foregoing considerations, we conclude that Mexico has presented evidence sufficient to demonstrate the existence of the *Simple Zeroing Procedures* under US law.

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[70] *Supra*, note 36.
[71] Exhibit MEX-6J, p. 23-24.
[72] See, Appellate Body Report, *US – Zeroing (Japan)*, *supra*, note 38, para. 85.
[73] First Written Submission of the United States, para. 40.

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(b) Is Simple Zeroing in Periodic Reviews WTO-Inconsistent?

(i) Description of the Calculations in Periodic Reviews under US Law

7.98 The United States has a retrospective duty assessment system. Under the US system, the anti-dumping duty order imposed following an investigation does not necessarily constitute the final liability for the importers importing the subject product into the United States. The importer deposits a security in the form of a cash deposit at the time of importation. Subsequently, the importer[74] may, on an annual basis, ask the USDOC to calculate the importer's final liability for the imports made in the previous year. This is called a "periodic review" or an "administrative review" under US law. If the duty calculated in a periodic review exceeds the original cash deposit, the importer has to pay the difference. When the opposite is the case, the difference is reimbursed with interest. In cases where no final assessment is requested, the initial cash deposit paid at the time of importation is automatically assessed as the final duty. Besides assessing the final liability of importers for imports made during the period of review, the USDOC, in a periodic review, also calculates the cash deposit rate that would apply to imports made following the completion of the periodic review.

7.99 For purposes of calculating margins of dumping in a periodic review, the product under consideration is broken into models and a monthly WA normal value is determined for each model. Each export transaction is compared against the relevant monthly WA normal value. These comparisons are then aggregated. In such aggregation, the results of comparisons where the export price exceeds the WA normal value are treated as zero. A weighted average margin of dumping is calculated for each exporter, which then becomes the cash deposit for the following period. The calculation of the importer-specific assessment rate is also similar. The USDOC segregates, from the figures pertaining to the exporter, the results of the comparisons for each importer and divides it by the total value of imports made by the same importer.[75] In other words, the numerator for the exporter's weighted average dumping margin for the period of review, *i.e.* the future cash deposit rate, is the total of the comparisons where the normal value exceeds the export price and the denominator is the value of all exports from that exporter during the period of review. The numerator for the importer-specific assessment rate reflects the results of comparisons where the normal value exceeds the export price within the universe of the imports made by that particular importer, and the denominator is the total value of all imports by the importer.

7.100 Parties generally agree with the above description of the way the USDOC calculates margins of dumping in periodic reviews.[76]

(ii) Significance of WTO Jurisprudence

7.101 We recall that this is not the first case in the WTO in which simple zeroing in periodic reviews has been challenged. The WTO-consistency of simple zeroing in periodic reviews was questioned before the panels in *US – Zeroing (EC)* and *US – Zeroing (Japan)*. In both cases, the panels found this practice not to be inconsistent with the obligations set out in the relevant provisions cited by the complaining parties. We also recall that the Appellate Body reversed the decisions of both panels and found simple zeroing in periodic reviews to be WTO-inconsistent.

[74] The US law also allows the domestic interested parties, foreign producers or exporters to seek the initiation of a periodic review. See, Response of the United States to Question 3(a) From the Panel Following the Second Meeting.

[75] First Written Submission of Mexico, paras. 79-83.

[76] Responses of Mexico and the United States to Question 3(a) from the Panel Following the Second Meeting.

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7.102 We recall that we are not, strictly speaking, bound by previous Appellate Body or panel decisions that have addressed the same issue, *i.e.* simple zeroing in periodic reviews, which is before us in these proceedings. There is no provision in the DSU that requires WTO panels to follow the findings of previous panels or the Appellate Body on the same issues brought before them. In principle, a panel or Appellate Body decision only binds the parties to the relevant dispute. Certain provisions of the DSU, in our view, support this proposition. According to Article 19.2 of the DSU, for example, "[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements". In the same vein, Article 3.2 of the DSU provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

7.103 We also note, however, the Appellate Body's pronouncement, in *Japan – Alcoholic Beverages II*, regarding the impact of adopted panel reports for future panels dealing with similar issues. The Appellate Body opined:

> "Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*."[77] (footnote omitted, emphasis in original)

7.104 The above excerpt indicates that, although adopted panel reports only bind the parties to the dispute that they concern, the Appellate Body expects future panels to take them into account to the extent that the issues before them are similar to those addressed by previous panels. In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body reiterated its findings in *Japan – Alcoholic Beverages II* and held that the same analysis applies to adopted Appellate Body reports.[78] The Appellate Body clearly stated that the panel in the implementation proceedings under Article 21.5 of the DSU in *US – Shrimp (Article 21.5 – Malaysia)* did not err in following the interpretative guidance provided by the Appellate Body in the original proceedings. To the contrary, the Appellate Body expected the panel to do so.[79] More recently in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body opined 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".[80]

7.105 This indicates that even though the DSU does not require WTO panels to follow adopted panel or Appellate Body reports, the Appellate Body *de facto* expects them to do so to the extent that the legal issues addressed are similar. We also note, however, that the panel in *US – Zeroing (Japan)*, while recognizing the need to provide security and predictability to the multilateral trading system through the development of a consistent line of jurisprudence on similar legal issues, drew attention to the provisions of Articles 11 and 3.2 of the DSU and implied that the concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary

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[77] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 14.

[78] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*"), WT/DS58/AB/RW, adopted 21 November 2001, para. 109.

[79] *Ibid.*, para. 107.

[80] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra*, note 24, para. 188.

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rules of interpretation of public international law.[81] We also share the concern raised by the panel in *US – Zeroing (Japan)* regarding WTO panels' obligation to carry out an objective examination of the matter referred to them by the DSB.

7.106 After a careful consideration of the matters discussed above[82], we have decided that we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews. We are cognizant of the fact that in two previous cases, *US – Zeroing (EC)* and *US – Zeroing (Japan)*, the decisions of panels that found simple zeroing in periodic reviews to be WTO-consistent were reversed by the Appellate Body and that our reasoning set out below is very similar to these panel decisions. In light of our obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB, however, we have felt compelled to depart from the Appellate Body's approach for the reasons explained below.

(iii) Alleged Violations of Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement

Interpretation of the Relevant Treaty Provisions

7.107 Mexico bases its claim on the relevant treaty provisions as interpreted in prior Appellate Body decisions on zeroing. Mexico asserts that dumping is an exporter-specific concept and that it can only exist with respect to individual exporters or foreign producers, not importers or individual import transactions. According to Mexico, the definition of dumping under Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement applies to the product under consideration as a whole. Article VI:2 of the GATT 1994 stipulates that an anti-dumping duty may not be greater than the margin of dumping found with respect to the product under consideration. Article 9.3 of the Anti-Dumping Agreement provides that the amount of the anti-dumping duty cannot exceed the margin of dumping established under Article 2 of the Agreement. It follows that an anti-dumping duty calculated for a given producer or exporter may not be greater than the margin of dumping calculated for the product under consideration as a whole. That is, the margin of dumping established for a producer or exporter constitutes a ceiling for the duty that may be imposed on the product exported by that producer or exporter. According to Mexico, simple zeroing in periodic reviews is inconsistent with these principles because it does not fully reflect export prices that are above the normal value, in the calculation of the margin of dumping for the product under consideration as a whole. The results obtained through simple zeroing only partially reflect the export transactions of the product under consideration. Simple zeroing inflates the margin of dumping and as such is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement. Mexico also argues that simple zeroing is inconsistent with the obligation to carry out a fair comparison between the normal value and the export price as required under Article 2.4 of the Agreement.

7.108 The United States contends that the Agreement does not generally prohibit zeroing. According to the United States, the exclusive textual basis for finding zeroing to be WTO-inconsistent is Article 2.4.2 of the Agreement, which only prohibits zeroing in the narrow context of investigations where the WA-WA methodology is used. The United States urges the Panel to take into account the findings of previous panels in this regard which, according to the United States, held that the

[81] Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R, footnote 733.

[82] In our assessment of the importance of WTO jurisprudence, we also took into account the views expressed by third parties, particularly those of the European Communities which concentrated mainly on this issue.

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mentioned obligation under Article 2.4.2 does not apply outside the scope of WA-WA comparisons in investigations. The United States invites the Panel to find at least that this reasoning reflects a permissible interpretation of the Agreement. More specifically, the United States asserts that Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement cannot impose independent obligations because they contain definitional provisions. Furthermore, the United States is of the view that these two provisions may be interpreted to permit a transaction-based definition of dumping. The United States also argues that there is historical support for this proposition. Likewise, the United States contends that the definition of the word "product" does not necessarily refer to the "product as a whole". It follows that the term "margin of dumping" does not necessarily refer to the margin for the product under consideration as a whole. Determining the margin of dumping in periodic reviews without providing offsets for intermediate comparisons where the export price exceeds the normal value is therefore not inconsistent with the United States' WTO obligations. In the view of the United States, Mexico's interpretation of the relevant legal provisions would be inconsistent with Article 9.4(ii) of the Agreement which allows prospective normal value systems. The United States argues that Article 2.4 of the Agreement does not resolve the issue of whether zeroing is unfair. According to the United States, Mexico's claim under Article 2.4 is dependent on its claim under Article VI:2 of the GATT 1994 and Article 2.4.2 of the Anti-Dumping Agreement. It follows that if the Panel finds that the term "margin of dumping" for purposes of a periodic review may be interpreted on a transaction-specific basis, the Panel should also reject Mexico's claim under Article 2.4 because this would invalidate Mexico's argument that simple zeroing in periodic reviews yields a duty in excess of the exporter's real margin of dumping.

7.109 We note that Mexico's arguments, in support of its claim that the use of simple zeroing in periodic reviews is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement, are premised on the interpretation of these provisions by the Appellate Body, particularly in *US – Zeroing (EC)* and *US – Zeroing (Japan)*. The Appellate Body's line of reasoning is based on two principles. First, under the definition of "dumping" in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, "dumping" has to be established for the product under consideration as a whole.[83] According to the Appellate Body, this interpretation also applies to duty assessment proceedings under Article 9.3 since Article 9.3 refers to Article 2. In *US – Zeroing (EC)*, the Appellate Body opined:

> "We note that Article 9.3 refers to Article 2. It follows that, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established "for the product as a whole". Therefore, if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value. If the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not allowed to take into account the results of only some multiple comparisons, while disregarding others."[84] (footnote omitted)

7.110 Second, in the view of the Appellate Body, a determination of dumping in all anti-dumping proceedings, including duty assessment proceedings under Article 9.3 of the Agreement, has to be made in respect of each exporter or foreign producer subject to the proceeding. The Appellate Body found contextual support in Article 6.10 for its interpretation of the term "margin of dumping" under Article 9.3:

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[83] Appellate Body Report, *US – Zeroing (EC)*, *supra*, note 21, para. 126.
[84] *Ibid.*, para. 127.

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> "Article 6.10 of the *Anti-Dumping Agreement* provides relevant context for the interpretation of the term "margin of dumping" in Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Article 6.10, which is part of the context of Article 9.3, provides that "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". Therefore, under the first sentence of Article 6.10, margins of dumping for a product must be established for exporters or foreign producers. The text of Article 6.10 does not limit the application of this rule to original investigations, and we see no reason why this rule would not be relevant to duty assessment proceedings governed by Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994."[85]

7.111 Furthermore, the Appellate Body indicated that this interpretation is consistent with the definition of the notion of dumping:

> "Establishing margins of dumping for exporters or foreign producers is consistent with the notion of dumping, which is designed to counteract the foreign producer's or exporter's pricing behaviour. Indeed, it is the exporter, not the importer, that engages in practices that result in situations of dumping. For all of these reasons, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, margins of dumping are established for foreign producers or exporters."[86]

7.112 These two principle points of view regarding the calculation of the margins of dumping in periodic reviews leads to the conclusion that:

> "[I]n a review proceeding under Article 9.3.1, the authority is required to ensure that the total amount of anti-dumping duties collected from all the importers of that product does not exceed the total amount of dumping found in *all* sales made by the exporter or foreign producer, calculated according to the margin of dumping established for that exporter or foreign producer without zeroing. The same "ceiling" applies in review proceedings under Article 9.3.2, because the introductory clause of Article 9.3 applies equally to prospective and retroactive duty assessment systems."[87]

7.113 In the view of the Appellate Body, therefore, in any anti-dumping proceeding, including periodic reviews under Article 9.3, dumping has to be calculated for the product under consideration as a whole and in respect of the individual exporters or foreign producers subject to such proceeding. Once the authorities define the product under consideration, the scope of that definition also determines the scope of the authorities' dumping determination. Dumping cannot exist in relation to a type, model, or category of the product subject to the proceedings. Nor can dumping be found in relation to individual import transactions. It has to be calculated for each known exporter or foreign producer, as stipulated under Article 6.10 of the Agreement. It follows that when the calculation of dumping entails more than one level of comparisons between the normal value and the export price, the results of the intermediate comparisons are not margins of dumping. They are merely inputs to be taken into account in the determination of the margin of dumping for the product under consideration as a whole for each known exporter or foreign producer.

7.114 When applied to duty assessment proceedings under Article 9.3 of the Agreement, the above-described reasoning leads to the conclusion that the margin of dumping calculated for the product under consideration as a whole - exported by the exporter or foreign producer subject to such

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[85] *Ibid.*, para. 128.
[86] *Ibid.*, para. 129.
[87] Appellate Body Report, *US – Zeroing (Japan)*, *supra*, note 38, para. 156.

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proceedings - operates as the ceiling for the anti-dumping duties that may be collected from importers of that product. The chapeau of Article 9.3 provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". This means that:

> ""[T]he total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter", in accordance with Article 2."[88]

Consequently, a scheme that does not take into consideration the results of intermediate comparisons that yield negative dumping in the calculation of the overall margin for the product under consideration as a whole, would be inconsistent with Article 9.3 of the Agreement.

7.115 We respectfully disagree with the Appellate Body's reasoning. We recognize that our analysis inevitably resembles that of the panels in the last two cases that dealt with simple zeroing in periodic reviews, *US – Zeroing (EC)* and *US – Zeroing (Japan)*, and that the Appellate Body reversed those panels' findings that simple zeroing is not inconsistent with Article 9.3 of the Anti-Dumping Agreement. We would like to underline, however, that our analysis is not simply an unthinking repetition of these past panel decisions. Rather, it reflects our own appreciation of the facts and the legal arguments presented by the parties in these proceedings, as is required by our obligation under Article 11 of the DSU to carry out an objective examination of the matter before us.

7.116 We recall that the main premise of the Appellate Body's reasoning pertains to the definition of the concepts of "dumping" and "margins of dumping" used in Article 2.1 of the Agreement and Articles VI:1 and VI:2 of the GATT 1994. According to the Appellate Body, the margin of dumping has to be determined for the product under consideration as a whole. Accordingly, the results of the comparisons made at an intermediate stage before aggregating them in order to calculate the margin of dumping for the product as a whole are not margins of dumping. Likewise, the margin of dumping has to be calculated in respect of the exporter or the foreign producer subject to the anti-dumping proceeding, not the importer importing the product. It follows that dumping cannot be calculated on a transaction-specific basis; it has to be based on all exports of the subject product made in the period of review from the exporter or the foreign producer subject to the proceeding.

7.117 We disagree with these propositions. Mexico argues that the word "product" used in the provisions it cites refers to the "product as a whole". If follows that any determination of dumping has to be based on an aggregation of all export transactions. We note, however, that the expression "product as a whole" does not appear in the text of Article 2.1 of the Agreement or Articles VI:1 and VI:2 of the GATT 1994. It has been developed in WTO dispute settlement. We are not convinced that the treaty provisions cited by Mexico, on which the Appellate Body based its reasoning, necessarily compel a definition of "dumping" based on an aggregation of all export transactions. We note that the panel in *US – Zeroing (Japan)* also asked itself the question of how a requirement to base dumping margin calculations on the aggregation of export transactions may be inferred from the ordinary meaning of the words "product" or "products" under Article 2.1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994.[89] We agree with the following reasoning developed by that panel on this issue:

> "We fail to see why the notion that "a product is introduced into the commerce of another country" cannot apply to a particular export sale and would necessarily require an examination of different export sales at an aggregate level. Similarly, the notion of a margin of dumping as the *price difference* that exists when one price is *less* than another price (or constructed value) can easily be applied to individual

[88] (footnotes omitted) *Ibid.*, para. 155.
[89] Panel Report, *US – Zeroing (Japan)*, *supra*, note 81, para. 7.105.

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> transactions and does not require an examination of export transactions at an aggregate level. The terms "export price of a product exported from one country to another" in Article 2.1 of the *AD Agreement* and "the price of the product exported from one country to another" in Article VI:1 of the GATT 1994 can reasonably be interpreted to mean the price of the product in a particular export transaction."[90]

7.118 The Appellate Body disagreed with this view. In paragraphs 108-116 of its decision in *US – Zeroing (Japan)*, the Appellate Body repeated the conclusions that it had formulated in its previous decisions in *US – Softwood Lumber V* and *US – Zeroing (EC)*. It did not, however, provide a convincing response to the question we have highlighted above. That is, the Appellate Body did not explain how the texts of Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement necessarily require the interpretation that the words "product" or "products" used in the definition of "dumping" may only be interpreted as referring to the product under consideration as a whole, not to individual export transactions.

7.119 We are troubled by the fact that the principal basis of the Appellate Body's reasoning in the zeroing cases seems to be premised on an interpretation that does not have a solid textual basis in the relevant treaty provisions. We recall the rules on treaty interpretation (*supra*, paras. 7.3-7.5) which we have to follow in these proceedings. We are of the view that a good faith interpretation of the ordinary meaning of the texts of Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, read in their context and in light of the object and purpose of the mentioned agreements, does not exclude an interpretation that allows the concept of dumping to exist on a transaction-specific basis. We recall that according to the standard of review that we have to follow in these proceedings (*supra*, paras. 7.1-7.2), we are precluded from excluding an interpretation which we find permissible, even if there may be other permissible interpretations.

7.120 We also note that the use of the words "product" or "products" in other instances in Article VI and other provisions of the GATT 1994 or the Anti-Dumping Agreement does not necessitate the view that these terms cannot be interpreted as referring to individual export transactions. As the panel in *US – Zeroing (Japan)* noted in paragraph 7.108 of its report, for instance:

> "[T]he phrase "importation of any product" used in Article VI:6 and other provisions of the GATT 1994 does not mean that these provisions inherently cannot apply to an individual import transaction. Similarly, when Article VII:3 of the GATT 1994 refers to "the value for customs purposes of any imported product", the mere use of the word "product" cannot reasonably be interpreted to preclude the possibility to apply this term to the value of a product in a particular import transaction. If the word "product" in Article VII:3 does not necessarily require an examination of transactions at an aggregate level, we cannot see why such an examination is nevertheless required by the use of that word in Articles VI:1 and VI:2."[91]

7.121 We note that the Appellate Body did not explain whether the use of the words "product" or "products" in these other contexts, which may very well be interpreted on a transaction-specific basis, had any bearing on its interpretation. This is another reason why we find the Appellate Body's reasoning not to be convincing. The fact that these words may be interpreted in a significantly

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[90] *Ibid.*, para. 7.106.

[91] Footnotes omitted.

We also agree with that panel's view that this reasoning does not necessarily mean that "a Member may on the basis of a finding that some export sales under consideration are dumped (and are causing injury) impose a duty on all subsequent imports of that product without in any way taking into account the relative significance of those dumped sales compared to other, non-dumped sales under consideration". Panel Report, *US – Zeroing (Japan)*, *supra*, note 81, footnote 745.

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different way when used elsewhere in Article VI and other provisions of the GATT 1994 or the Anti-Dumping Agreement weakens the proposition that they must necessarily be interpreted to refer to the totality of exports of the product under consideration as a whole, as opposed to individual transactions, when they are used in the context of dumping determinations.

7.122 Mexico contends that because Article VII of the GATT 1994 deals with customs valuation, its purpose and objectives are completely different from those of Article VI. It is therefore normal that these two provisions ascribe different meanings to the word "product".[92] We note, however, that Mexico's argument is based solely on its understanding of the object and purpose of these two provisions and does not have any textual basis. We therefore disagree with Mexico in this regard.

7.123 On the basis of the foregoing, we feel compelled to share the interpretation by the panel in *US – Zeroing (Japan)* of the words "product" and "products" in Article VI of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement:

> "[T]he terms "dumping" and "margin of dumping" in Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 are defined in relation to "product" and "products" does not warrant the conclusion that these terms, by definition, cannot apply to individual transactions and inherently require an examination of export transactions at an aggregate level in which the same weight is accorded to export prices that are above normal value as to export prices that are below normal value."[93]

7.124 We also disagree with the second element of the Appellate Body's reasoning that generally prohibits zeroing, *i.e.* that dumping has to be calculated with respect to individual exporters or foreign producers. We note that the obligation to pay anti-dumping duties is not incurred on the basis of a comparison of an exporter's total sales, but on the basis of an individual sale between the exporter and its importer. It is therefore a transaction-specific liability. This importer-specific or transaction-specific character of the payment of anti-dumping duties has, therefore, to be taken into consideration in interpreting Article 9.3. Article 9.3 reads in relevant parts:

> "*Article 9*
>
> *Imposition and Collection of Anti-Dumping Duties*
>
> ...
>
> 9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.
>
> 9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.
>
> 9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess

[92] Second Written Submission of Mexico, para. 62.
[93] Panel Report, *US – Zeroing (Japan)*, *supra*, note 81, para. 7.112.

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> of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision." (footnote omitted)

7.125 Article 9.3 deals with the imposition and collection of anti-dumping duties. It requires that the amount of the duty not exceed the margin of dumping as established under Article 2. The two sub-paragraphs of Article 9.3 contain more specific obligations regarding the assessment of anti-dumping duties under the retrospective and prospective systems of duty collection. In a retrospective system, which is employed in the United States, payments collected at the time of importation (such as the cash deposit rate in the US system) are not definitive duties. An importer has the right to ask the authorities to calculate its final liability in respect of the importations made in a past period. The authorities then have to calculate the importer's final liability and if there is any excessive payment, refund the corresponding amount to the importer with interest. In a prospective system, however, the payment of the anti-dumping duty at the time of importation is generally considered to be definitive. If the importer believes that the amount of the anti-dumping duty it paid exceeded its margin of dumping, it can ask the authorities for a refund. When such a request is made, the authorities have to calculate the actual margin of dumping and refund anti-dumping duties that exceeded the margin of dumping.

7.126 It is significant to note in this regard that the text of Article 9.3 itself does not contain any obligation to aggregate export transactions in duty assessment proceedings. We note that an importer does not incur liability for the payment of anti-dumping duties on the basis of the totality of exports made by an exporter. In our view, Articles 9.3.1 and 9.3.2 have to be interpreted in light of this specific purpose because the former concerns the calculation of the final liability of individual importers (in the case of a retrospective system), and the latter the refund of duties paid in excess of the margin of dumping of individual importers (in the case of a prospective system). The fact that final duties or refunds in duty assessment proceedings are calculated for individual importers, in our view, leads to the conclusion that Article 9.3 does not exclude an importer and import-specific calculation, and does not necessarily require a calculation on the basis of all sales made by an exporter.

7.127 We disagree with the Appellate Body's view that a determination of dumping in all anti-dumping proceedings, including duty assessment proceedings under Article 9.3 of the Agreement, has to be made in respect of each exporter or foreign producer subject to the proceeding. We also disagree with the view that Article 6.10 lends support to this view. In this regard, we agree with the panel in *US – Zeroing (Japan)* that:

> "Article 6 of the *AD Agreement* contains provisions designed to ensure transparency and due process in the conduct of anti-dumping investigations. In that context, Article 6.10 provides that, as a rule, authorities must determine an individual margin of dumping for each known exporter or producer of the product under investigation but also lays down certain rules that must be observed when it is not possible to determine such an individual margin of dumping. Neither the phrase "product under investigation" nor the reference to an individual margin of dumping for an exporter or producer in our view provides any guidance with respect to the precise methodology to be used for the purpose of calculating that margin of dumping. As in Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, the use of the word "product" in Article 6.10 does not exclude the possibility of applying the concept of dumping to individual transactions. Even assuming *arguendo* that the notion of an "individual margin of dumping for each known exporter or producer" implies an

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> obligation to determine a single margin of dumping for each known exporter or producer based on an analysis of the totality of the export transactions under consideration, it does not necessarily follow that in deriving such a single margin an authority must accord the same weight to transactions in which the export price is above the normal value as to transactions in which the export price is below the normal value. Nothing in the text of Article 6.10 indicates that such a margin may not be calculated as an overall weighted average margin of dumping in which the numerator consists of the sum of the amounts by which export prices are less than normal value and the denominator reflects the total value of all export transactions."[94] (footnotes omitted)

7.128 We recall the rules on treaty interpretation (*supra*, paras. 7.3-7.5) which we have to follow in these proceedings. We are of the view that it is at least a permissible interpretation of Article 9.3 of the Agreement that the concept of dumping may be interpreted on an importer-specific basis. We recall that according to the standard of review that we have to follow in these proceedings (*supra*, paras. 7.1-7.2), we are precluded from excluding an interpretation which we find permissible, even if there may be other permissible interpretations. We therefore disagree with Mexico's assertion that the text of Article 9.3 of the Agreement necessarily requires dumping determinations in duty assessment proceedings to be specific to individual exporters or foreign producers.

Contextual Support for the Panel's Interpretation of the Relevant Treaty Provisions

7.129 A review of the relevant context provides further support for the proposition that the provisions cited by Mexico, Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement, do not prohibit simple zeroing in periodic reviews.

Existence of the Prospective Normal Value Systems

7.130 The first contextual support is found in Article 9.4(ii) of the Agreement, which provides in relevant parts:

> "9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> ...
>
> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined[.]"

7.131 Article 9.4(ii) clearly provides for a prospective normal value system. In a prospective normal value system, the importer's liability is determined through the comparison of the price paid by the importer in a given transaction and the prospective normal value. Under this system, prices paid in other export transactions have no bearing on this importer's liability. In other words, the fact that other importers do not dump, or dump at a lower margin, does not affect the liability of an importer who imports at dumped prices. If the determination of liability for anti-dumping duties can be determined on a transaction-specific basis in a prospective normal value system, there is no reason why the same cannot be the case in the context of the retrospective duty assessment system under Article 9.3.2.

[94] *Ibid.*, para. 7.111.

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7.132 The Appellate Body in *US – Zeroing (Japan)* disagreed with this reasoning. According to the Appellate Body, the duty paid in a prospective normal value system does not represent the calculation of a margin of dumping. Nor does it mean that the total amount of the duties paid in such a system can exceed the margin of dumping established for the exporter or foreign producer at issue. The Appellate Body then went on and opined:

> "Under a prospective normal value system, exporters may choose to raise their export prices to the level of the prospective normal value in order to avoid liability for payment of anti-dumping duties on each export transaction. However, under Article 9.3.2, the amount of duties collected is subject to review so as to ensure that, pursuant to Article 9.3 of the *Anti-Dumping Agreement*, the amount of the anti-dumping duty collected does not exceed the margin of dumping as established under Article 2. It is open to an importer to request a refund if the duties collected exceed the exporter's margin of dumping. Whether a refund is due or not will depend on the margin of dumping established for that exporter."[95] (footnote omitted)

7.133 Here too, we feel compelled to disagree with the Appellate Body. The Appellate Body suggests that duties collected under a prospective normal value system are subject to a duty assessment proceeding under Article 9.3.2. The Appellate Body's view seems to be that duties collected under a prospective normal value system would be subject to such duty assessment proceeding in the same way as any other anti-dumping duty assessed on a prospective basis. We note that in an anti-dumping investigation, authorities base their dumping determinations on past data and impose the duty on the basis of that data. After the duty is imposed, however, there is always a possibility of an importer paying a duty above its margin of dumping. There is therefore a need for having a mechanism for the refund of duties paid in excess of the margin of dumping of individual importers. Under the current system embodied in the Anti-Dumping Agreement, this objective is achieved through the duty assessment proceedings provided for under Article 9.3. Obviously, we do not consider duties collected under a prospective normal value system to be exempt from duty assessment proceedings. That is because in such a system, just as in other systems of duty collection, there may be changes subsequent to the imposition of the duty, which may necessitate a duty assessment proceeding. We note that Article 9.3 does not shed light on how duty assessment proceedings are to be carried out. We would think, however, that a duty assessment proceeding with regard to duties collected on the basis of a prospective normal value system would have to be consistent with the nature of the referenced system. It would have been quite illogical, in our view, if the drafters allowed prospective normal value systems and yet envisaged that duties collected under such a system would be subject to a duty assessment proceeding under Article 9.3 in a manner that would require the authorities to calculate a margin of dumping not on the basis of the data pertaining to the importer seeking the initiation of the proceeding, but based on the aggregated data pertaining to the exporter(s) from whom the importer imports. The prospective normal value system is based on the notion of transaction-based duty collection. The Appellate Body's reasoning that duties collected under such a system are nevertheless subject to duty assessment proceedings just like other duties assessed on a prospective basis is, therefore, far from being convincing.

Mathematical Equivalence Between the First and the Third Methodologies in the Absence of Zeroing

7.134 The second contextual support stems from the fact that a general prohibition on zeroing cannot be reconciled with the existence of the third comparison methodology (WA-T) under Article 2.4.2. We recall the relevant parts of Article 2.4.2:

> "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

[95] Appellate Body Report, *US – Zeroing (Japan)*, *supra*, note 38, para. 160.

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> 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."

7.135 We note that Article 2.4.2 allows a comparison of WA normal value with individual export transactions only if certain conditions are met: first, the pattern of export prices must differ significantly among different purchasers, regions or time periods. Second, the authorities must explain why such differences cannot be taken into account appropriately through the use of one of the two principal methodologies.

7.136 An interpretation of the relevant treaty provisions that prohibits zeroing in all contexts would, in our view, render the third methodology *inutile* because this methodology would then mathematically yield the same result as the WA-WA methodology. That is, absent zeroing, the third methodology would lead to the same mathematical result as the WA-WA methodology. We recall that the principle of effectiveness requires that "interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[96]

7.137 We note that the Appellate Body, in *US – Zeroing (Japan)*, disagreed with this proposition and opined:

> "The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions or time periods". The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern."[97] (emphasis added)

7.138 The Appellate Body states that the second sentence of Article 2.4.2 implies that the universe of export transactions in the third methodology will necessarily be more limited than those in the first two methodologies. This is because, in order to unmask targeted dumping, the authorities will base their dumping determinations on the subset of the export transactions that fall within the relevant price pattern.

7.139 This approach leaves certain questions unanswered. First, the Appellate Body has not pointed to any textual basis for the proposition that the export transactions to be used in the third methodology would necessarily be more limited than those in the first two methodologies. In light of the text of Article 2.4.2, it is not evident to us that dumping determinations in the third methodology could be limited to the subset of the export transactions that fall within the relevant price pattern. The second sentence of Article 2.4.2 simply mentions that the authorities may, under certain circumstances, compare prices of individual export transactions with the WA normal value. It does not mention in any way whether such comparison may, or has to, be limited to the subset of export transactions that fall within the relevant price pattern. Second, assuming that this proposition does in fact have a

[96] (footnote omitted) Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p. 23.

[97] Appellate Body Report, *US – Zeroing (Japan)*, *supra*, note 38, para. 135.

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textual basis in the Agreement, the Appellate Body did not explain how the authorities would treat the remaining export transactions. If, for instance, what the Appellate Body meant is that the export transactions that do not fall within the relevant price pattern are to be excluded from dumping determinations, this would mean disregarding them. Given the Appellate Body's strongly expressed view that dumping has to be determined for the product under consideration as a whole and hence all export transactions pertaining to the product under consideration have to be taken into consideration by the authorities, we do not consider that this can be what the Appellate Body meant. Alternatively, if the Appellate Body meant that the authorities would use the WA-WA methodology with respect to the export transactions that do not fall within the relevant price pattern, and combine these results with the results obtained through the WA-T methodology for the prices that fall within the pattern, we note that such an approach would also lead to the same mathematical result as the WA-WA methodology.[98] We therefore do not consider that the Appellate Body's approach invalidates the mathematical equivalence problem.

7.140 Mexico argues "that mathematical equivalency does not exist if intermediate monthly average normal values are used in the average to transaction method and period-long average normal values are used in the average to average method".[99] Mexico submitted calculation tables in order to illustrate this point.[100] Through these tables, Mexico demonstrated that if one uses monthly WA normal value in the third methodology and annual WA normal value in the first, the resulting margins of dumping will be different. We note, and the United States does not dispute, that if WA normal value figures are based on different time periods in connection with the WA-WA and the WA-T methodologies, such calculations will yield different mathematical results. For instance, if annual WA normal value is used in the WA-WA methodology and monthly WA normal value in the WA-T methodology, as Mexico did in its tables, these two calculations will result in different margins of dumping. Mexico argues that this disproves the mathematical equivalence argument presented by the United States. We disagree. Mexico has shown no support in the text of Article 2.4.2 for the proposition that the normal value figures used under the WA-WA and the WA-T methodologies may, or have to, be based on different time periods. If they are based on the same time periods, then the mathematical equivalence holds. In this regard, we agree with the panel in *US – Zeroing (Japan)* that "[t]here exists no substantive difference between "a weighted average normal value" in the first sentence of Article 2.4.2 and "a normal value established on a weighted average basis" in the second sentence of that provision".[101] We also note that the justification for the use of the asymmetrical third methodology under Article 2.4.2 is the significant difference between the pattern of export prices, not the normal value. Hence, Article 2.4.2 does not, in our view, lend support to Mexico's proposition that the time frame for the determination of the WA normal values under the first and the third methodologies may be different.[102]

7.141 Mexico argues that because the terminology used in the first and the second sentences of Article 2.4.2 to describe the WA normal values to be used under the first and the third methodologies is not identical, the use of WA monthly normal values under the third methodology is not prohibited. According to Mexico, "[h]ad the drafters intended these phrases to have precisely the same meaning, they would have been expected to use the identical language or provided cross-references between the sentences".[103] While Mexico is right that the phrases used in Article 2.4.2 to refer to the WA normal

[98] Through Table 2 in Exhibit US-2, the United States has shown that using the WA-T and the WA-WA methodologies in combination under the second sentence of Article 2.4.2 would yield the same mathematical result as using the WA-WA methodology for the totality of the calculations. Mexico has not objected to the calculations submitted in this table.

[99] Oral Statement of Mexico at the Second Meeting, para. 27.

[100] Exhibit MEX-12.

[101] Panel Report, *US – Zeroing (Japan)*, *supra*, note 81, para. 7.129.

[102] *Ibid.*

[103] Mexico's Comments on the United States' Response to Question 3 from the Panel Following the Second Meeting.

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values in the context of the first and the third methodologies are not identical, this does not, in our view, suffice to assert that they refer to different normal values that may be based on different time frames. Mexico has not explained how exactly the text of Article 2.4.2 supports such an interpretation. It is, in our view, at least one of the permissible interpretations of Article 2.4.2 that, contrary to Mexico's point of view, this provision does not justify the establishment of the WA normal values in the context of the first and the third methodologies on the basis of different time periods. We therefore disagree with Mexico's argument, taking into consideration the principles on the treaty interpretation that we follow in this case (*supra*, paras. 7.3-7.5).

7.142 Mexico notes that the methodology used in the calculation tables submitted by Mexico based on a comparison of WA monthly normal values with individual export transactions is the same methodology prescribed in US Regulations for investigations where targeted dumping is identified and the third comparison methodology is used.[104] The United States does not dispute this fact.[105] We understand Mexico to argue that because the US Regulations allow for the use of monthly WA normal values in the use of the third methodology, the United States cannot logically argue in these proceedings that Article 2.4.2 of the Agreement disallows such an approach. We recall that we are not called upon to assess the consistency of the mentioned US regulatory provisions with the WTO rules. The claim that we are addressing concerns the use of simple zeroing in periodic reviews. We therefore need not, and do not, express any views about the WTO-consistency of the regulatory provisions under US law regarding the use of WA monthly normal values in investigations where targeted dumping is identified. What the US law prescribes regarding the use of WA monthly normal values in connection with the third methodology under the second sentence of Article 2.4.2 is irrelevant to our assessment of whether Article 2.4.2 allows such an approach.

7.143 Based on the foregoing considerations, we reject Mexico's claim that simple zeroing in periodic reviews is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement. As we mentioned in paras. 7.119 and 7.128 above, our conclusion in this regard rests upon a permissible interpretation of the relevant treaty provisions invoked by Mexico, which, according to our standard of review (*supra*, paras. 7.1-7.2), we cannot disregard even if there may be other permissible interpretations of such provisions.

(iv) Alleged Violations of Article 2.4 of the Anti-Dumping Agreement

7.144 Mexico's arguments in support of its claim that the use of simple zeroing in periodic reviews is inconsistent with Article 2.4 of the Anti-Dumping Agreement are premised on the interpretation of this provision developed by the Appellate Body, mainly in *US – Zeroing (Japan)*. Mexico asserts that Article 2.4 requires the authorities to carry out a fair comparison between the normal value and export price while comparing them for purposes of calculating a margin of dumping. Mexico recalls that any determination of dumping has to be made for the product under consideration as a whole. The *Simple Zeroing Procedures* under US law, however, "result in calculation of dumping and margins of dumping that do not reflect all of the transactions involving the product under consideration as a whole".[106] A comparison that fails to take into account certain export transactions cannot result in a determination of dumping for the product under consideration as a whole and cannot be considered as a "fair comparison" within the meaning of Article 2.4. In Mexico's view, zeroing is inherently biased

[104] Oral Statement of Mexico at the Second Meeting, para. 35.

[105] The United States submits, and Mexico does not contest, that although the US Regulations provide for the use of monthly WA normal values in investigations where targeted dumping is found, these provisions have never been used by the USDOC. Response of the United States to Question 5 from the Panel Following the Second Meeting. We do not, however, find this fact to be relevant to our assessment of Mexico's argument regarding the issue of mathematical equivalence.

[106] First Written Submission of Mexico, para. 245.

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and hence in violation of the fair comparison requirement of Article 2.4 because it artificially inflates the margin of dumping by ignoring certain export transactions.

7.145 We note that Mexico's claim under Article 2.4 is premised on the assumption that Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement prohibit simple zeroing in periodic reviews. Mexico argues that these provisions require the authorities in a periodic review to calculate an individual margin of dumping for each exporter or foreign producer concerned and to base such calculations on an aggregation of all export transactions by each individual exporter or foreign producer. It follows that failing to base dumping determinations in a periodic review on an aggregation of all export transactions from individual exporters or foreign producers artificially inflates such margins and therefore is inherently unfair. We disagreed with this assumption above (*supra*, para. 7.123), while addressing Mexico's claim regarding the alleged inconsistency of simple zeroing in periodic reviews with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement. That is, we disagreed with Mexico's assertion that these provisions require investigating authorities in a periodic review to base their dumping determinations on an aggregation of all export transactions from each exporter. We therefore also reject Mexico's claim that simple zeroing in periodic reviews is inherently inconsistent with the obligation to carry out a fair comparison between the normal value and the export price as stipulated under Article 2.4 of the Anti-Dumping Agreement.

(v) Potential Consequences of a General Prohibition on Zeroing

7.146 Finally, we note that accepting Mexico's interpretation of Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement as prohibiting simple zeroing in periodic reviews would lead to undesirable results. If, while calculating in a periodic review the amount of the duty to be paid by a given importer, the authorities have to take into account the export prices paid by other importers importing from the same exporter or foreign producer, this would have unfair consequences in the market. In this situation, importers with high margins of dumping would be favoured at the expense of importers who do not dump or who dump at a lower margin. In such situations, importers importing at dumped prices would pay less than their true margin of dumping because of other importers refraining from importing at dumped prices. We agree with the United States that "[t]his kind of competitive disincentive to engage in fair trade could not have been intended by the drafters of the Antidumping Agreement and should not be accepted ... as consistent with a correct interpretation of Article 9.3".[107] In addition, we note that such an approach would unnecessarily expand the scope of periodic reviews because the exporters would have to submit information pertaining to all of their export transactions rather than those pertaining to the importer requesting the review. This would, in our view, also cause administrative inconvenience because the investigating authorities would have to analyze all that information and be unable to complete the review in a timely manner. Such a heavy burden could also encourage non-cooperation on the part of the exporters.

7.147 Furthermore, imposing on the investigating authorities an obligation to take into consideration the prices of non-dumped imports while calculating the amount of the liability in a periodic review would, in our view, also preclude the achievement of the function of anti-dumping duties, *i.e.* removing the injurious effect of dumping. The fact that some imports are made at non-dumped prices would not, in our view, change the fact that the domestic industry in the importing country is injured by dumped imports. In other words, the injury suffered by the domestic industry because of dumped imports would not be removed by imports at non-dumped prices. Finally, as we noted in more detail in para. 7.133 above, we recall that a general prohibition on zeroing would render the administration of prospective normal value systems impractical.

[107] Oral Statement of the United States at the Second Meeting, para. 18.

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7.148 We do not consider such anomalies to be the intention of the drafters. These potential concerns over a general prohibition on zeroing, in our view, lend support to our interpretation of the relevant treaty provisions provided above.

(c) Conclusion

7.149 We have found simple zeroing in periodic reviews[108] "as such" not to be inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 9.3 and 2.4 of the Anti-Dumping Agreement. We therefore also reject Mexico's "as applied" claim regarding the five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico* carried out by the USDOC.

7.150 Having rejected Mexico's main claims regarding simple zeroing in periodic reviews under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 9.3 and 2.4 of the Anti-Dumping Agreement, we decline to make findings on Mexico's dependent claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 On the basis of the above findings, we conclude that:

(a) Model zeroing in investigations "as such" is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement,

(b) The USDOC acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico* by using model zeroing,

(c) Simple zeroing in periodic reviews is "as such" not inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 9.3 and 2.4 of the Anti-Dumping Agreement,

(d) The USDOC did not act inconsistently with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 9.3 and 2.4 of the Anti-Dumping Agreement by using simple zeroing in the five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico*.

8.2 We have applied judicial economy with regard to:

(a) Mexico's claims under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement regarding model zeroing in investigations,

(b) Mexico's claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement regarding simple zeroing in periodic reviews.

8.3 We recommend that the DSB request the United States to bring its measure mentioned in paragraph 8.1(b) above into conformity with its obligations under the WTO Agreement. We have made no recommendation regarding model zeroing in investigations "as such" because, as mentioned

[108] We recall that in paras. 7.7-7.9 above, we noted the description of the term "simple zeroing in periodic reviews" offered by Mexico, and decided to use it in our analysis in this case for ease of reference.

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in para. 7.50 above, we have found that the USDOC stopped using it during these dispute settlement proceedings.

8.4 Mexico asks the Panel to suggest that the United States implement the DSB recommendations and rulings in this dispute in respect of its "as such" claims by eliminating *Model Zeroing Procedures* and *Simple Zeroing Procedures*. In addition, Mexico asks the Panel to suggest that the United States eliminate zeroing from the five periodic review results subject to these proceedings. Mexico does not seek a suggestion with regard to the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico* by requesting the revocation of the anti-dumping duty.[109] The United States notes that a suggestion is not essential to the resolution of a dispute in the WTO dispute settlement system. According to the United States, a Member is free to choose the means to implement the DSB recommendations and rulings. In a case like this where the same measure is subject to other implementation processes, making a suggestion may cause complications over such processes. The United States therefore asks the Panel to reject Mexico's request for a suggestion.

8.5 We note that by virtue of Article 19.1 of the DSU, a panel has discretion to ("may") suggest ways in which a Member could implement the recommendation that the Member concerned bring the measure into conformity with the covered agreement in question. Having made no recommendations to the DSB on Mexico's claims with respect to which Mexico seeks a suggestion, however, we cannot, and do not, make any suggestion under Article 19.1 of the DSU in these proceedings.

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[109] Response of Mexico to Question 16 from the Panel Following the First Meeting.

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ANNEX A

EXECUTIVE SUMMARIES OF FIRST WRITTEN SUBMISSIONS OF THE PARTIES

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ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. Mexico seeks rulings from this Panel that the United States' Zeroing Procedures are inconsistent with the United States' obligations under the relevant WTO Agreements, both "as such" and "as applied" with respect to the original investigation and five periodic reviews of the antidumping duty order on *Stainless Steel Sheet and Strip in Coils from Mexico* ("*Stainless Steel from Mexico*").

2. Mexico argues specifically that the Zeroing Procedures used by the US Department of Commerce ("USDOC") in original investigations (where comparisons are normally made on an average-to-average or on a transaction-to-transaction basis) are "as such" and "as applied" in the original anti-dumping investigation of *Stainless Steel from Mexico* inconsistent with Articles VI:1 and VI:2 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Articles 2.1, 2.4, 2.4.2, and 18.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (*"Anti-Dumping Agreement*").

3. Mexico further argues that the Zeroing Procedures used by the USDOC in periodic reviews (where comparisons are normally made on an average-to-transaction basis) are "as such" and "as applied" in the five periodic reviews investigation of *Stainless Steel from Mexico* inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 9.3, and 18.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (*"Anti-Dumping Agreement*").

II. STANDARD OF REVIEW

A. GENERAL CONSIDERATIONS

4. Mexico notes that Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") provides the standard of review for WTO panels in general. Article 11 specifically requires a panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements". Article 3.2 of the DSU further provides that the provisions of the covered agreements are to be clarified "in accordance with customary rules of interpretation of public international law".

5. Mexico further notes that Article 17.6(i) of the *Anti-Dumping Agreement* sets forth additional standards of review applicable to disputes under the *Anti-Dumping Agreement*, including the requirement that the panel, in its assessment of the facts of the matter, "shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective". If so, the panel should uphold the factual finding "even though the panel might have reached a different conclusion". With respect to legal interpretations, Article 17.6(ii) of the *Anti-Dumping Agreement* requires the panel to interpret the relevant provisions of the Agreement "in accordance with customary rules of interpretation of public international law". Where the panel

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finds that a relevant provision of the Agreement "admits of more than one permissible interpretation", Article 17.6 requires the panel to uphold the authorities' interpretation "if it rests upon one of those permissible interpretations".

6. Mexico states that it is generally accepted that the "customary rules of interpretation" referenced in Article 3.2 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* are reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties ("Vienna Convention").* Article 31(1) of the *Vienna Convention* provides that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose".

B. ADHERENCE TO PRIOR DECISIONS OF THE APPELLATE BODY

7. Mexico argues that there is an expectation that panels will respect prior Appellate Body rulings on the same issues, which is derived from Article 3.2 of the DSU which expressly requires panels to promote the systemic values of "security and predictability" in "the multilateral trading system". Mexico points to the Panel decision in *US – Zeroing (EC 1)*, recognizing this expectation, in which it is stated that "although previous Appellate Body decisions are not strictly speaking binding on panels, there clearly is a legitimate expectation that panels will follow such decisions in subsequent cases raising issues that the Appellate Body has expressly addressed". Mexico notes that the Appellate Body has further supported this principle in, among other cases, *US – Oil Country Tubular Goods Sunset Reviews*, wherein the Appellate Body stated 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".

8. Mexico argues that the "as such" measure at issue in the present dispute – the USDOC's Zeroing Procedures – is identical to the measure that was under consideration in *US – Zeroing (EC 1)*, *US – Softwood Lumber V, US – Softwood Lumber V (Article 21.5 – Canada)*, and, most recently, *US – Zeroing (Japan)*, and the Appellate Body in each of these cases has "expressly addressed" the issues raised by Mexico in this proceeding. Mexico urges the Panel to follow these prior Appellate Body rulings in this case to achieve the measure of "security and predictability" called for in Article 3.2 of the DSU.

III. SUMMARY OF ARGUMENTS AND CLAIMS

A. USDOC ZEROING PROCEDURES MAY BE CHALLENGED "AS SUCH"

9. Mexico describes the specific measure at issue in this proceeding as the "Zeroing Procedures", which constitutes a norm or rule of general and prospective application pursuant to which the USDOC, in calculating overall margins of dumping, disregards or treats as zero the results of intermediate price comparisons where the export price exceeds the normal value ("negative results" or "negative margins"). Mexico notes that this measure has been consistently manifested in all procedural contexts including original investigations, periodic reviews and sunset reviews. Furthermore, it is applied regardless of the price comparison methodology used (whether average-to-average, transaction-to-transaction, or average-to-transaction).

10. In its First Written Submission and the annexes thereto, Mexico presented detailed explanations and documentations concerning the precise content of the Zeroing Procedures. This documentation included the standard computer programs for original investigations and periodic reviews, the USDOC "Antidumping Manual", documentation of the application of the Zeroing Procedures in the original investigation and six completed periodic review determinations concerning *Stainless Steel from Mexico*, evidence of past consistent application of the Zeroing Procedures in past

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original investigations and periodic reviews (including expert statements, documented statements and concessions from US authorities, and prior WTO dispute settlement reports), and evidence of continued application of the Zeroing Procedures in original investigations and periodic reviews.

11. Mexico argues, consistent with the three-part test articulated by the Appellate Body in *United States – Zeroing (EC-1)*, that because this measure is attributable to the United States, because its precise content is known and well-documented, and because it is a general rule or norm of prospective application, it may be challenged "as such".

B. ZEROING PROCEDURES "AS SUCH" AND "AS APPLIED" IN ORIGINAL INVESTIGATIONS ARE INCONSISTENT WITH THE UNITED STATES' WTO OBLIGATIONS

12. Mexico states that in pursuance of the challenged Zeroing Procedures, the USDOC normally calculates margins of dumping in original investigations, by first making intermediate price comparisons, on a model-by-model basis, between period average export prices and period average normal values for each model. The USDOC then aggregates the results of these comparisons to calculate a margin of dumping for the exporter or producer. However, in aggregating these comparison results, the USDOC disregards, or treats as zero, any comparison results where the average export price exceeds the average normal value for the model. This manifestation of the Zeroing Procedures is commonly referred to as "model zeroing". Mexico argues that this calculation methodology systematically results in margins of dumping which are inflated when compared to the margin of dumping that would have resulted had the Zeroing Procedures not been used. Mexico states that the USDOC applied the Zeroing Procedures in the original investigation of *Stainless Steel Sheet and Strip in Coils from Mexico* ("*Stainless Steel from Mexico*").

1. The Zeroing Procedures Used in Original Investigations are "As Such" Inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*

13. Mexico argues that the Zeroing Procedures applied in original investigations as described above violate the relevant agreements, specifically Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. Mexico notes that the concepts of "dumping" and "margins of dumping" contained in Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*, refer to the "product" under consideration taken as a whole in each anti-dumping proceeding. Mexico argues that these definitions should be interpreted consistently across the relevant agreements and in *all* procedural contexts and in relation to *all* price comparison methodologies used.

14. Mexico argues that the margins of dumping calculated using the Zeroing Procedures – by disregarding or treating as zero individual comparison results where the export price exceeds the normal value in calculating margins of dumping – do not reflect a margin of dumping for the product as a whole under consideration. The Zeroing Procedures instead result in a margin of dumping for the exporter or producer that reflects only part of the product under investigation, in violation of the definitions of "dumping" and "margins of dumping" contained in the relevant agreements.

2. The Zeroing Procedures Used in Original Investigations are "As Such" Inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*

15. Mexico argues that the Zeroing Procedures followed by the USDOC in original investigations are also inconsistent with the terms of the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, which requires a comparison of the weighted-average normal value with a weighted-average of prices of "all comparable export transactions". This language in Article 2.4.2 likewise requires determination of a single margin of dumping for the product under consideration taken "as a

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whole". Accordingly, price comparison results obtained at the level of individual models are not "margins of dumping" within the meaning of the agreements. The United States may not, therefore, consistent with the first sentence of Article 2.4.2, ignore or treat as zero intermediate comparison results where the export price exceeds the normal value. Mexico argues that the United States, in both of the most recently completed panel proceedings dealing with the Zeroing Procedures as used in original investigations (*i.e., US – Zeroing (EC 1)* and *US – Zeroing (Japan)*), chose not to contest the Panel findings of inconsistency of that measure with the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*.

3. The Zeroing Procedures Used in Original Investigations Are "As Such" Inconsistent with Article 2.4 (first sentence) of the *Anti-Dumping Agreement*

16. Mexico states that the Zeroing Procedures followed in original investigations are also "as such" inconsistent with the "fair comparison" requirement of the first sentence of Article 2.4 of the *Anti-Dumping Agreement*.

17. Mexico argues first that any measure that results in the collection of duties in excess of the margin of dumping for the product as a whole for the exporter or producer under consideration necessarily fails to meet the "fair comparison" standard contained in the first sentence of Article 2.4. The Appellate Body most recently found this to be the case in *US – Zeroing (Japan)*.

18. Mexico further argues that the US Zeroing Procedures violate Article 2.4 because such zeroing unnecessarily inflates margins of dumping, as the Appellate Body has found in previous cases.

4. The Zeroing Procedures Used in Original Investigations Are "As Such" Inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*

19. Mexico argues that because the Zeroing Procedures challenged are an "administrative procedure" within the meaning of Article XVI:4 of the Marrakech Agreement establishing the World Trade Organization ("WTO Agreement") and Article 18.4 of the *Anti-Dumping Agreement*, this measure is also in violation of those provisions, as the Zeroing Procedures as applied in administrative proceedings are not in conformity with the United States' obligations under the relevant agreements for the reasons noted.

5. The Zeroing Procedures "As Applied" in the Original Investigation of *Stainless Steel from Mexico* Are Inconsistent with Articles VI:1 and VI:2 of the GATT 1994; Articles 2.1, 2.4 (first sentence) and 18.4 of the *Anti-Dumping Agreement*; and Article XVI:4 of the WTO Agreement

20. Mexico states that the USDOC applied a form of Zeroing Procedures known as "model zeroing" in the original investigation of *Stainless Steel from Mexico*. For the same reasons, the Zeroing Procedures used in original investigations are "as such" inconsistent with the relevant agreements, Mexico argues that the United States' specific application of zeroing in the original investigation of *Stainless Steel from Mexico* is consequently "as applied" inconsistent with the United States' obligations under the relevant agreements.

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C. ZEROING PROCEDURES "AS SUCH" AND "AS APPLIED" IN PERIODIC REVIEWS ARE INCONSISTENT WITH THE UNITED STATES' WTO OBLIGATIONS

21. Mexico states that the USDOC calculates margins of dumping in periodic reviews by first making intermediate price comparisons between individual export prices and monthly average normal values. The USDOC then aggregates the results of these comparisons to calculate a margin of dumping for the exporter or producer of the subject product. However, in aggregating these comparison results, the USDOC disregards, or treats as zero, any comparison results where the average export price exceeds the average normal value for the model. This manifestation of the Zeroing Procedures is commonly referred to as "simple zeroing". Mexico argues that where negative price comparisons appear in the database, the resulting "margin of dumping" is systematically inflated in relation to the actual margin of dumping for the product as a whole that would result if the Zeroing Procedures were not used.

1. The Zeroing Procedures Used in Periodic Reviews Are "As Such" Inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*

22. Mexico argues that for much the same reasons with regard to original investigations, the Zeroing Procedures used in periodic reviews violate the United States' obligations under Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* because margins of dumping calculated using zeroing do not reflect the margin of dumping for the exporter or foreign producer for the product as a whole under consideration. By selectively disregarding, or treating as zero, any individual comparison results where the export price exceeds the normal value in calculating "margins of dumping", the US Authorities violate their obligation to calculate a margin for the "product" as a whole.

2. The Zeroing Procedures Used in Periodic Reviews Are "As Such" Inconsistent with Article 9.3 of the *Anti-Dumping Agreement*

23. Mexico argues the Zeroing Procedures used by the USDOC in periodic reviews also violate the terms of Article 9.3 of the *Anti-Dumping Agreement* with regard to the imposition and collection of anti-dumping duties. Article 9.3 of the *Anti-Dumping Agreement* states that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". By disregarding the comparison results for certain transactions (those where the export price exceeds normal value), Mexico argue the USDOC's Zeroing Procedures calculate a margin of dumping that is inconsistent with Article 2. Mexico states that by disregarding intermediate comparison results where the export price exceeds normal value, the margin of dumping determined by the USDOC on this basis results in an inflated "margin of dumping" for the "product". Accordingly, the Zeroing Procedures applied in periodic reviews exceed the margin of dumping for the exporter or producer under Article 2 as provided for by Article 9.3 of the *Anti-Dumping Agreement.* Mexico's asserts that this conclusion is fully consistent with the Appellate Body's reasoning and findings in prior cases, including, *inter alia, US – Zeroing (EC 1)* and *US – Zeroing (Japan*).

3. The Zeroing Procedures Used in Periodic Reviews Are "As Such" Inconsistent with Article 2.4 (first sentence) of the *Anti-Dumping Agreement*

24. Mexico also argues that the Zeroing Procedures followed in periodic reviews are "as such" inconsistent with the "fair comparison" requirement of the first sentence of Article 2.4. Mexico notes that the Appellate Body recently found (in *US – Zeroing (Japan)*) that any measure that results in the collection of duties in excess of the margin of dumping for the product as a whole for the exporter or producer under consideration necessarily fails to meet the "fair comparison" standard contained in

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Article 2.4, first sentence. In addition, Mexico argues, the US Zeroing Procedures violate Article 2.4 because such zeroing systematically inflates margins of dumping.

4. The Zeroing Procedures Used in Periodic Reviews are "As Such" Inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*

25. Mexico argues that, for the same reasons that Zeroing Procedures used in original investigations violate the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*, the Zeroing Procedures used in periodic reviews constitute a measure that is, as such, inconsistent with these provisions.

5. The Zeroing Procedures "As Applied" in the five Periodic Reviews of *Stainless Steel from Mexico* Are Inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 (first sentence), 9.3 and 18.4 of the *Anti-Dumping Agreement*; and Article XVI:4 of the WTO Agreement

26. Mexico states that the USDOC applied a form of Zeroing Procedures known as "simple zeroing" as described above in each of the five periodic reviews of *Stainless Steel from Mexico* challenged by Mexico. Mexico argues that for the same reasons the Zeroing Procedures used in periodic reviews are "as such" inconsistent with the relevant agreements, the United States' specific application of zeroing in the periodic reviews of the anti-dumping order on *Stainless Steel from Mexico* is consequently "as applied" inconsistent with the United States' obligations under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 (first sentence), 9.3 and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the WTO Agreement.

IV. CONCLUSION

27. Mexico respectfully requests that the Panel make findings that:

(1) the US Zeroing Procedures applied in original investigations are, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the WTO Agreement, regardless of the comparison methodology used;

(2) the US Zeroing Procedures applied in the original investigation of *Stainless Steel Sheet and Strip in Coils from Mexico* are, as applied, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, and 18.4 of the *Anti-Dumping Agreement*; and Article XVI:4 of the WTO Agreement;

(3) the US Zeroing Procedures applied in periodic reviews are, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 9.3, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the WTO Agreement, regardless of the comparison methodology used;

(4) the US Zeroing Procedures as applied in the five listed periodic reviews of *Stainless Steel Sheet and Strip in Coils from Mexico* are, as applied, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 9.3, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the WTO Agreement.

28. Pursuant to Article 19.1 of the DSU Mexico urges the Panel to suggest that DSB recommend that the United States bring its measures into conformity with its WTO obligations by eliminating both "as such" and "as applied" the Zeroing Procedures in all antidumping procedural contexts.

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Mexico notes that there have been many instances in which panels have exercised their discretion under Article 19.1 to make a suggestion regarding implementation to promote the resolution of the dispute, particularly where – as in the present case – the violations of the responding party are fundamental and pervasive.

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ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. In this dispute, Mexico asks this Panel to read an obligation into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), notwithstanding the fact that there is no textual basis for the obligation that Mexico proposes.

II. GENERAL PRINCIPLES

2. **Burden of Proof**: In WTO dispute settlement, the burden of proving that an obligation has not been satisfied is on the complaining party. Accordingly, the burden is on Mexico to prove that US measures exist that are inconsistent with US obligations under the relevant covered agreement. The burden is not on the United States.

3. **Standard of Review**: In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) of the AD Agreement. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation". Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.

4. Article 11 of the 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 relevant covered agreements. The Appellate Body has explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised. Articles 3.2 and 19.2 of the DSU contain the fundamental principle that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the DSB, cannot add to or diminish the rights and obligations provided in the covered agreements.

5. While prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members, the Panel in this dispute is not bound to follow the reasoning set forth in any Appellate Body report. The rights and obligations of the Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. In this regard, the "security and predictability" referred to in the first sentence of Article 3.2 results from the application of the correct interpretive approach set forth in the second sentence of Article 3.2 – the customary rules of interpretation of public international law – to the provisions of the WTO Agreement. A result which adds to or diminishes the rights or obligations of Members is the antithesis of the "security and predictability" referred to in Article 3.2. Appellate Body reports should be taken into account only to the extent that the reasoning is persuasive. The Appellate Body itself has stated that its reports are not binding on panels.

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III. ARGUMENT

A. SCOPE OF "AS SUCH" CLAIMS

6. In both its request for consultations and its request for the establishment of a panel, Mexico clearly and specifically identified two distinct methodologies being challenged "as such" – the use of "zeroing" in average-to-average comparisons in original investigations and the use of "zeroing" in assessment proceedings. Yet, in its First Submission, Mexico asserts that it is challenging "a single zeroing measure, the Zeroing Procedures", regardless of the procedural setting or the comparison methodology employed by the United States authorities.

7. The Panel's terms of reference are to "examine, in the light of the relevant provisions of the covered agreements cited by Mexico in document WT/DS344/4, the matters referred to the DSB by Mexico in that document". It is clear from reading "that document" that Mexico was challenging the use of zeroing in two very distinct circumstances which it describes in great detail. Mexico's reason for attempting to expand the scope of its "as such" claims is that in the time that transpired between the establishment of this Panel and the time Mexico was required to make its First Submission, the Appellate Body issued its report in *US - Zeroing (Japan)*. In that report, the Appellate Body concluded that there was one single rule it called the "zeroing procedures" which it found to be inconsistent with US obligations. However, the prerequisite to the Appellate Body's finding was that "zeroing" in all contexts and with respect to all comparison methodologies was in Japan's request for the establishment of a panel and request for consultations, and therefore within the panel's terms of reference. This situation is not present here. Mexico's "as such" claim against a "single zeroing measure" must fail on this basis alone. In light of its terms of reference and Article 7 of the DSU, the Panel may only address those matters identified in Mexico's request for establishment of a panel. That is, the Panel can only consider Mexico's claim regarding zeroing in investigations using average-to-average comparisons and zeroing in assessment proceedings, based on the evidence and argumentation Mexico presents with respect to those "measures".

8. The Appellate Body has identified several criteria in evaluating whether a measure exists that can be challenged as such: whether the rule or norm embodied in that measure is attributable to the responding Member; the precise content of the rule or norm; and whether the rule or norm has general and prospective application. In addition, the Appellate Body has explained that "particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document". The Appellate Body has further explained that its statement "did not mean that a mere abstract principle would qualify as a "rule or norm" that can be challenged as such". This follows from the fact that the alleged measure must be "attributable to" the responding Member. Article 3.3 and Article 4.2 of the DSU both help to illustrate the required degree of relationship between an alleged measure and a Member in order for that alleged measure to be subject to WTO dispute settlement. Article 3.3 refers to a measure "taken" by a Member and Article 4.2 refers to a measure "taken" within the territory of a Member. Accordingly, "attributable to" means "taken" by a Member within its territory. Were a panel to opine on an "abstract principle", and not a measure taken by the responding party, it would be issuing an advisory opinion, which is not provided for in the DSU. Hence, in carrying out its mandate under its terms of reference to examine the matter referred to the DSB in the complaining Member's panel request – the matter consisting of the measures identified in the request and the claims set forth therein – a panel must in the course of the proceedings determine whether the measure actually exists.

9. Mexico has not established that a "single zeroing measure" exists. Mexico states that the findings concerning the precise content of zeroing procedures in the panel reports in *US – Zeroing (Japan)* and *US – Zeroing (EC)* "*themselves* constitute conclusive evidence as to the precise content of the measure challenged by Mexico in this case". However, as a general matter, a separate panel's

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findings are not evidence, but conclusions based on evidence. Further, the specific evidence before that separate panel, cited now by Mexico, does not support the Panel repeating those findings here.

10. Among the arguments Mexico offers for the existence of a "single zeroing measure" is that Commerce has always "zeroed", and that Commerce cannot point to a case in which it did not. However, it is entirely to be expected that an administering authority will seek not to act arbitrarily by treating the same circumstances differently. Mexico seems to expect that if an administering authority is not acting in an arbitrary and inconsistent manner, there must be a separate measure requiring the consistent approach. This assumption is not only baseless, but it is very troubling that the consequence of good administrative practice would be to subject a Member to a finding that it is somehow maintaining a separate measure subject to dispute settlement.

11. As Mexico acknowledges, Commerce has never "zeroed" in a targeted dumping context and only once in a transaction-to transaction comparison, nor has Commerce ever made statements about its intentions with respect to zeroing in these contexts. Mexico cites to nothing in US law and no act by Commerce, whether in a statement or otherwise, that would permit the conclusion that Commerce will, as a matter of general and prospective application, "zero" in these contexts. Absent such evidence, it is not possible to conclude that there is a "single zeroing measure" covering all comparison methodologies and all contexts.

12. Mexico also cites to Commerce's use of standard computer programmes that incorporate Commerce's dumping margin calculation methodology and containing a so-called "standard zeroing line". Mexico refers to a so-called expert's statement to the effect that the "standard zeroing line" is always included. However, this is nothing more than yet another description of what Commerce has done in the past, without any indication that it will do so as a matter of general and prospective application. Commerce officials adjust the programmes based on policy decisions in individual proceedings; the programmes are not their masters.

13. Mexico purports to refer to "concessions made by the United States" before other panels. However, a cursory examination of these "concessions" demonstrates that they are neither concessions nor do they support Mexico's position. In addition, Mexico's own argumentation contradicts its assertion that there is a "single zeroing measure". Mexico divides its presentation into two separate sections, one dealing with "USDOC Zeroing Procedures in Original Investigations" and another with "USDOC Zeroing Procedures in Periodic Reviews". This division, and the use of the plural, is in itself probative that there is no one single measure.

14. Finally, the United States is providing offsets when calculating margins of dumping on the basis of average-to-average comparisons in antidumping investigations. This further demonstrates that there is no one "single zeroing measure".

B. CLAIMS REGARDING ASSESSMENT PROCEEDINGS

15. The AD Agreement provides no general obligation to consider transactions for which the export price exceeds normal value as an offset to the amount of dumping found in relation to other transactions at less than normal value. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body found that the exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation in Article 2.4.2 that "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* . . . ". This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation phase when using the average-to-average comparison methodology in Article 2.4.2. There is no textual basis for the additional obligations that Mexico would have this Panel impose.

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16. Subsequent to *US – Softwood Lumber Dumping (AB)*, three panels comprising trade remedies experts and experienced panelists and WTO negotiators, examined whether the obligation not to "zero" when making average-to-average comparisons in an investigation extended beyond that defined context. In every case, these panels determined that the customary rules of interpretation of public international law do not support a reading of the AD Agreement that expands the zeroing prohibition beyond average-to-average comparisons in an investigation. This Panel should likewise find that, at a minimum, it is permissible to interpret the AD Agreement as not prohibiting zeroing outside the context where the interpretation of "all comparable export transactions" articulated in the Appellate Body report in *US – Softwood Lumber Dumping* is applicable.

17. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body specifically recognized that the issue before it was whether so-called "zeroing" was prohibited under the average-to-average comparison methodology found in Article 2.4.2. Thus, the report found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology". The Appellate Body reached this conclusion by interpreting the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2 in an "integrated manner". The obligation to provide offsets, therefore, was tied to text of the provision addressing the use of the average-to-average comparison methodology in an investigation, and did not arise out of any independent obligation to offset prices. Any assertion by Mexico that there is a general prohibition of "zeroing", or one specifically applicable to the more particular context of assessment proceedings, cannot be reconciled with the interpretation articulated in *US – Softwood Lumber Dumping (AB)*. If there is a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the meaning ascribed to "all comparable export transactions" by the Appellate Body in that dispute would be redundant of the general prohibition of zeroing and therefore "inutile".

18. The need to avoid such redundancy was recognized in *US – Zeroing (Japan)(AB)* when the Appellate Body changed its interpretation of this phrase. In *US – Softwood Lumber Dumping (AB)*, "margins of dumping" and "all comparable export transactions" were interpreted in an integrated manner. The Appellate Body found that in aggregating the results of the model-specific comparisons, "all" comparable export transactions must be accounted for. Thus, the phrase necessarily referred to all transactions across all models of the product under investigation, i.e. the product "as a whole". However, in *US – Zeroing (Japan)(AB)*, the Appellate Body reinterpreted "all comparable export transactions" to relate solely to all transactions within a model, and not across models of the product under investigation. In doing so, the Appellate Body abandoned the only textual basis for its reasoning in *US – Softwood Lumber Dumping (AB)*.

19. In addition, a general prohibition of zeroing that applies beyond the context of average-to-average comparisons in investigations, would be inconsistent with the remaining text of Article 2.4.2, which provides for the "targeted dumping" methodology that may be utilized in certain circumstances. The "targeted dumping" methodology was drafted as an exception to the obligation to engage in symmetrical comparisons in an investigation. The mathematical implication of a general prohibition of zeroing, however, is that the targeted dumping clause would be reduced to inutility. That is because the targeted dumping methodology, provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. In *US – Zeroing (EC)*, *US – Softwood Lumber Dumping (Article 21.5)* and *US – Zeroing (Japan)*, each of the panels recognized that the customary rules of interpretation of public international law precluded an interpretation that rendered the targeted dumping provision of Article 2.4.2 redundant. Mexico has not offered any explanation as to how this defect is avoided under its interpretation of the AD Agreement.

20. Despite the findings *of fact* of the panels that the results of the targeted dumping methodology "will necessarily always yield a result identical to that of an average-to-average comparison", under a

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general prohibition of zeroing, the Appellate Body has found this concern to be "overstated". The Appellate Body has asserted that mathematical equivalence will occur only in "certain situations" and represents "a non-tested hypothesis". These objections, however, are not persuasive. First, the panels have specifically addressed all of the situations under which it was argued that mathematical equivalence would not obtain and found these situations did not represent methodologies consistent with the AD Agreement. The targeted dumping provision is rendered inutile if the only alternative methodologies that do not result in mathematical equivalence are, themselves, not consistent with the AD Agreement. Second, mathematical equivalence is not a "non-tested hypothesis" because a WTO Member that actively utilizes this methodology is actually faced with this problem in administering its antidumping duty regime.

21. Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 are definitional provisions that do not impose independent obligations. Nevertheless, these definitions are important to the interpretation of other provisions of the AD Agreement at issue in this dispute. In particular, it is most significant that Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define "dumping" and "margins of dumping" so as to require that export transactions be examined at an aggregate level. The definition of "dumping" in these provisions references "product . . . introduced into the commerce of another country at less than its normal value". This definition describes the real-world commercial conduct by which a product is imported into a country, *i.e.*, transaction by transaction.

22. In addition, the term "less than normal value" is defined as when the "price of the product exported . . . is less than the comparable price . . . ". Again, this definition describes the real-world commercial conduct of pricing such that one price is less than another price. The ordinary meaning of "price" as used in the definition of dumping is the "payment in purchase of something". In the *US – Zeroing (Japan)* dispute, the panel found that this definition "can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level".

23. There is nothing in the GATT 1994 or the AD Agreement that suggests that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. Indeed, the commercial reality is that the foreign producer or exporter itself exclusively enjoys the benefit of the extent to which the price of a non-dumped export transaction exceeds normal value.

24. In *US – Zeroing (Japan)*, the panel noted that "the record of past discussions in the framework of GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions". Well before the recent debate about "zeroing" or "offsets", a Group of Experts convened to consider numerous issues with respect to the application of Article VI of the GATT 1947. In this report, the Group of Experts considered that the "ideal method" for applying antidumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product concerned".

25. The methodology of not offsetting dumping based on comparisons where the export price was greater than normal value was examined by two GATT panels and was found to be consistent with the Antidumping Code. In view of these findings, the Uruguay Round negotiators actively discussed whether the use of "zeroing" should be restricted. The text of Article VI of the GATT 1947, however, did not change as a result of the Uruguay Round agreements. The normal inference one draws from the absence of a change in language is that the drafters intended no change in meaning.

26. Mexico's claim ultimately depends on the reasoning set forth in the Appellate Body reports in *US – Zeroing (EC)* and *US – Zeroing (Japan)*, which rejected the notion that dumping may occur with respect to an individual transaction in the absence of the textual basis that was present in *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*. This interpretation relies on the term

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"product" as being solely and exclusively synonymous with the concept of "product as a whole". In particular, it denies that the ordinary meaning of the word "product" or "products" used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. However, as the panel report in *US – Zeroing (Japan)* explained, "[T]here is nothing inherent in the word "product[]" (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis . . .".

27. Examination of the term "product" as used throughout the AD Agreement and the GATT 1994 demonstrates that the term "product" in these provisions does not exclusively refer to "product as a whole". Instead, "product" can have either a collective meaning or an individual meaning. Therefore, the words "product" and "products" as they appear in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 cannot be understood to provide a textual basis for an interpretation requiring that margins of dumping established in relation to the "product" must necessarily be established on an aggregate basis for the "product as a whole".

28. Likewise, examination of the term "margins of dumping" itself provides no support for Mexico's interpretation of the term as solely, and exclusively, relating to the "product as a whole". As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed:

> [T]here is dumping when the export "price" is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase "price difference", it would be permissible for a Member to interpret the "price difference" referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that "price difference" as the "margin of dumping".

Thus, the panel saw "no reason why a Member may not . . . establish the "margin of dumping" on the basis of the total amount by which transaction-specific export prices are less than the transaction-specific normal values".

29. Additionally, the term "margin of dumping", as used elsewhere in the GATT 1994 and the AD Agreement, does not refer exclusively to the aggregated results of comparisons for the "product as a whole". As used in the Note Ad Article VI:1, which provides for importer-specific price comparison, the term "margin of dumping" cannot relate to aggregated results of all comparisons for the "product as a whole" because an exporter or foreign producer may make export transactions using multiple importers. Similarly, the term "margin of dumping" as used in Article 2.2 of the AD Agreement would require the use of constructed value for the "product as a whole", even if the condition precedent for using constructed value under Article 2.2 relates only to a portion of the comparisons. The panel in *US – Softwood Lumber Dumping (21.5)* observed that this "would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2".

30. As explained above, the term "margin of dumping", as defined in Article 2.1 of the AD Agreement and Article VI of the GATT 1994, may be applied to individual transactions. This understanding of the term "margin of dumping" is particularly appropriate in the context of antidumping duty assessment. In the real world of administering antidumping regimes, the individual transactions are both the means by which less than fair value prices are established and the mechanism by which the object of the transaction (i.e., the "product") is "introduced into the commerce of the importing country". Likewise, antidumping duties are assessed on individual entries resulting from those individual transactions. Therefore, the obligation set forth in Article 9.3 to assess no more in antidumping duties than the margin of dumping, is similarly applicable at the level of individual transactions.

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31. In Mexico's view, a Member breaches Article 9.3 by failing to provide offsets, because Members are required to calculate margins of dumping on an exporter-specific basis for the product "*as a whole*" and, consequently, a Member is required to aggregate the results of "*all*" "*intermediate comparisons*", including those for which the export price exceeds the normal value. The United States notes that the terms upon which Mexico's interpretation rests are conspicuously absent from the text of both Articles 2.1 and 9.3. Mexico's interpretation is not mandated by the definition of dumping contained in Article 2.1, as described above.

32. As the panel in *US – Zeroing (EC)* correctly concluded, there is "no textual support in Article 9.3 for the view that the AD Agreement requires an exporter-oriented assessment of antidumping duties . . .". The Panel in *US – Zeroing (Japan)* similarly rejected the conclusion that the "margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value . . .". In *US – Zeroing (Japan)*, the panel explained that the importer-and import-specific obligation to pay an antidumping duty "lend[s] further support to the view . . . that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, . . . entails a general prohibition of zeroing".

33. Although, dumping involves differential pricing behaviour of exporters or producers between its export market and its normal value, dumping nevertheless occurs at the level of individual transactions. Moreover, the remedy for dumping provided for in Article VI:2 of GATT 1994, i.e., antidumping duties, are applied at the level of individual entries for which importers incur the liability. In this way, the importer may be induced to raise resale prices to cover the amount of the antidumping duty, thereby preventing the dumping from having further injurious effect. If instead, the amount of the antidumping duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer, then the antidumping duty will be insufficient to have the intended effect. The importer of the dumped product would remain in a position to profitably resell the product at a price that continues to be injuriously dumped. For this reason, if Mexico's interpretation of the margin of dumping is adopted as the sole permissible interpretation of Article 9.3, the remedy provided under the AD Agreement and the GATT 1994 will be prevented from addressing injurious dumping. These concerns led the panel in *US – Zeroing (Japan)* to reject the same interpretation that Mexico offers in this dispute. The panel found that this result was not supported by the text of Article 9.3, which "contains no language requiring such an aggregate examination of export transactions in determining final liability for payments of antidumping duties . . .".

34. It also follows that if a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the amount of dumping is greatest will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports. As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed, the perverse incentives created by providing offsets also arise in the context of prospective assessment systems:

> [An] obligation to take all (including non-dumped) comparisons into account in determining the margin of dumping for the product as a whole . . . is illogical, as it would provide importers clearing dumped transactions with a double competitive advantage vis-à-vis other importers: first, . . . the lower price inherent in a dumped transaction; second, . . . offsets, or credits, "financed" by the higher prices paid by other importers clearing non-dumped, or even less-dumped, transactions.
>
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> Again, this makes no sense in the context of a prospective normal value duty assessment system, because (as even Canada acknowledges) the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction.

35. Mexico's interpretation of Article 9.3, requiring that antidumping duty liability be determined for the product "as a whole", is inconsistent with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment. Because in a prospective normal value system, liability for antidumping duties is incurred only to the extent that prices of individual export transaction are below the normal value, the panel in *US – Zeroing (Japan)* concluded, "the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transaction below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value". If in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, there is no reason why liability for payment of antidumping duties may not be similarly assessed on the basis of export prices less than normal value in the retrospective system applied by the United States.

36. Further, accepting Mexico's interpretation that a Member must aggregate the results of "*all*" comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value systems, in order to take into account "*all*" of the exporters' transactions. This result, however, is contrary to the very concept of the prospective normal value system. In effect, prospective normal value systems will become retrospective, a conclusion also reached in a Canadian parliamentary report on potential changes to its prospective normal value system. In that report and at its trade policy review, Canada expressed its view that in a prospective normal value system, each entry provides a margin of dumping.

37. The United States respectfully requests that the Panel reject Mexico's "as such" and "as applied" claims regarding antidumping assessment proceedings.

38. Mexico's claim of inconsistency with Article 2.4 adopts the reasoning set forth in the Appellate Body report in *US – Zeroing (Japan)*, finding that a methodology cannot be viewed as involving a "fair comparison" under Article 2.4 if the resulting assessments exceed the "margin of dumping established in accordance with Article 2, as we have explained previously". The reasoning upon which Mexico relies, however, is entirely consequential of the Appellate Body report's previous analysis of the term "margin of dumping". Indeed, the passage quoted by Mexico makes plain that the rationale followed in the Appellate Body report was based on the *results* of the comparison methodology in relation to the previously interpreted "margin of dumping", rather than on any inherently unfair aspect of the comparison methodology itself. Therefore, resolution of Mexico's claims regarding assessment proceedings depends not on the text of Article 2.4, but on whether it is permissible to interpret the term "margin of dumping" as used in Article 9.3 as applying to transactions.

39. As the panels in *US – Zeroing (EC)* and *US – Zeroing (Japan)* have concluded, it is permissible to interpret "margin of dumping" as used in Article 9.3 as applying to an individual transaction. As a consequence, there is no obligation to aggregate transactions in calculating margins of dumping in an assessment proceeding, and there can be no obligation to offset the antidumping duty liability for a transaction to reflect the extent to which other transactions were not dumped. Therefore, if the Panel finds, as the prior panels have found, that it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction, then the

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challenged assessment will not exceed the margin of dumping and there will be no basis, according to the rationale adopted by Mexico, for a finding of inconsistency with Article 2.4.

40. The targeted dumping provision is an exception to the symmetrical comparison methodologies generally required by Article 2.4.2. It is not an exception to the fair comparison requirement of Article 2.4. Thus, an interpretation of Article 2.4 that generally prohibits zeroing would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 without meaning.

41. Mexico's claims with respect to Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement depend upon a finding of inconsistency with other provisions of the AD Agreement and the GATT 1994. Mexico's claims with respect to these provisions should be rejected. Even if Mexico should prevail on any of its underlying claims, it is not necessary for the Panel to address these claims and the Panel should, instead, exercise judicial economy.

C. MEXICO'S AS APPLIED CLAIM WITH RESPECT TO INVESTIGATIONS

42. The United States 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 Article 2.4.2, by interpreting the terms "margins of dumping" and "all comparable export transactions" as used in Article 2.4.2 in an integrated manner. The United States acknowledges that this reasoning is equally applicable with respect to this claim.

D. MEXICO'S REQUEST FOR A SUGGESTION

43. The DSU does not identify any legal consequences that flow from suggestions under Article 19.1. It is well-established that a Member has the right to determine the "means of implementation". That a complaining party may prefer one form of implementation over another does not affect the responding party's right to determine such implementation. In a dispute, such as this, where a Member has undertaken implementation to comply with its WTO obligations in connection with another dispute involving the same obligations alleged in the present dispute, such suggestions may unnecessarily complicate ongoing compliance efforts. The United States, therefore, respectfully requests that the panel reject Mexico's request for a suggestion.

IV. CONCLUSION

44. The United States requests that the Panel reject Mexico's "as such" claims and its "as applied" claims regarding assessment proceedings.

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ANNEX B

THIRD PARTIES WRITTEN SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF

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ANNEX B-1

THIRD PARTY WRITTEN SUBMISSION OF CHILE

1. Chile would like to thank the Panel for the opportunity to present its views in this dispute, in which it reserves its third party rights owing to its systemic interest in the application of the so-called zeroing methodology in its various forms.

2. Mexico questions the zeroing procedures "as such" as well as their application by the United States Department of Commerce (USDOC) in the specific case of *Stainless Steel from Mexico*, both in the original investigation and in five periodic reviews. We shall be commenting only on the application "as such" of the zeroing procedures, both in original investigations and in reviews, as we are not familiar enough with the factual details of the specific case to comment on the practical application of the procedures.

3. Bearing this in mind, Chile would like to note that prior Appellate Body rulings have confirmed that this methodology, used both in dumping investigations and in subsequent administrative reviews, is inconsistent with multilateral disciplines. Chile agrees with those conclusions. Moreover, in *US – Zeroing (Japan)*, the Appellate Body made two determinations: firstly, that the zeroing methodology was inconsistent "as such" with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and with Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994); and secondly, that the zeroing methodology was inconsistent with the WTO both in the calculation of dumping (on a transaction-to-transaction basis) in original investigations as well as in periodic reviews.

4. The application of the zeroing methodology carries with it a definite possibility of exacerbating dumping margins or even fabricating them where they do not exist.

5. We welcome the USDOC's decision to terminate this practice in the calculation of dumping on a weighted average basis in original investigations. However, we regret that this decision is not comprehensive, and although the United States has yet to comply with the recommendations and rulings of the DSB in the above-mentioned dispute, Chile hopes that a definitive solution will be reached - which clearly calls for a reform that excludes the use of the methodology at issue at all stages of anti-dumping investigations.

6. As long as there is no comprehensive and definitive solution to this practice which violates the Anti-Dumping Agreement and the GATT 1947, there will be new challenges like the one raised by Mexico, and probably new decisions condemning its use. It is not very helpful to insist on using a methodology which has been identified as contrary to international rules.

7. Without prejudice to the above, Chile considers a bilateral solution to be limited by its very scope, and it involves costs for the parties and for the system. To initiate proceedings in the WTO knowing full well from repeated precedents what the result will be is a tiresome and costly process. Consequently, any definitive solution will have to be multilateral, involving an express confirmation in the Anti-Dumping Agreement of the prohibition of the use of this methodology both in investigations and in subsequent reviews under all types of price comparison.

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8. In conclusion, Chile respectfully requests the Panel to give full consideration to the Panel and the Appellate Body conclusions in this respect, and in particular to the logic behind those conclusions. This would necessarily lead this Panel to conclude that the zeroing procedures as such, as challenged by Mexico, are contrary to Article VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement. Chile hopes that this will happen, but also hopes that the United States will comply with the relevant prior recommendations and rulings, since only prompt and full compliance will ensure the predictability and certainty of the WTO dispute settlement system. Not to mention – as former US Trade Representative Robert Zoellick once pointed out – that such compliance would place the United States in a better position to request the other countries to respect trade rules.

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ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

I. INTRODUCTION

1. The dispute brought by Mexico against the US is the latest in a long series of complaints regarding "zeroing" practices and methodology in anti-dumping cases. The EC's written submission starts from Mexico's assertion that the issues raised in this particular panel proceeding have been brought up frequently before, and that Mexico's claims are supported by a consistent body of WTO case law, including in particular by Appellate Body reports. The EC has not been in a position to comment in writing on the US' position on these assertions, as for scheduling reasons it drafted its written submission before receipt of the US' first written submission. The EC reserves its right to comment further in its oral statement, taking into account the US' first written submission.

2. Assuming however, that Mexico is correct in its assertions, there is an important systemic question that arises in the EC's view: are panels obliged to follow previous decisions rendered on identical questions, in particular those contained in adopted Appellate Body reports? In its written submission the EC, based on a summary of Mexico's case, proceeds with a review of the previous case law of the WTO on "zeroing", paying particular attention to the reasoning and findings contained in the relevant Appellate Body reports. The EC then looks into the precedential value of these previous decisions, through a two-pronged analysis. First, it analyses the policy and practices observed by other adjudicatory bodies, both at the national and international level. This is followed by an examination of the functions of the WTO dispute settlement system, the role of the Appellate Body therein and a discussion of the WTO case law on the value of precedent.

3. The EC concludes that the reasoning and findings of the Appellate Body are to be regarded as the correct position in law and that in the interest of ensuring security and predictability of the multilateral trading system, this Panel should follow the reasoning and findings contained in the relevant Appellate Body reports.

II. SUMMARY OF MEXICO'S CASE

4. Mexico argues that the "zeroing procedures" used by the US in an original anti-dumping investigation of *Stainless Steel from Mexico* are "as such" and "as applied" inconsistent with several provisions of the GATT and the Anti-Dumping Agreement. Mexico further argues that the "zeroing procedures" used by the US in five periodic reviews are "as such" and "as applied" inconsistent with the GATT and the Anti-Dumping Agreement.

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

5. The EC agrees with Mexico that "zeroing" has been contested several times in WTO dispute settlement proceedings, and addressed in a series of adopted panel and Appellate Body reports. In its written submission the EC reviews in some detail the salient reasoning and findings of the Appellate Body ("AB") in each of these reports.

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6. In *EC - Bed Linen* the AB found the EC's use of "model zeroing" in original investigations to be inconsistent with several provisions of the Anti-Dumping Agreement. It held, *inter alia*, that Art. 2.1 read in the light of Art. 2.4.2 of the Anti-Dumping Agreement makes clear that the margins of dumping to which Art. 2.4.2 refers are the margins of dumping for the product as a whole; that in determining a dumping margin for a product, Art. 2.4.2 refers to a comparison of "all" comparable transactions and that a comparison between export prices and normal value that does not take into account all transactions does not constitute a "fair comparison" between export price and normal value, as required by Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.

7. In *US - Softwood Lumber V* the US appealed the finding that by not taking into account all comparable export transactions in its zeroing practice in the original anti-dumping investigation at issue, it violated Article 2.4.2 of the Anti-Dumping Agreement. On appeal, the AB confirmed its earlier ruling in *EC - Bed Linen* emphasizing that under Article 2.4.2. of the Anti-Dumping Agreement "dumping" and "margins of dumping" can only be established for the product under investigation as a whole. The AB also considered and explicitly rejected a number of arguments that have been made since by the US in other zeroing cases on a recurrent basis: that other dumping margin methodologies provided for in Article 2.4.2 (*e.g.*, the transaction-to-transaction comparison) provide "important context" for the permissibility of "zeroing" under the average-to-average methodology in the original investigation at issue; the alleged historical background of Art. 2.4.2; that the AB need not follow its findings in other cases, in particular *EC – Bed Linen*, and the standard of review set out in Art. 17.6(ii) of the Anti-Dumping Agreement.

8. In *US – Zeroing (EC1)* the AB was asked to review the panel's findings on the application by the US of "zeroing" methodology in anti-dumping proceedings, including original investigations, and assessment or review proceedings. The EC had challenged US legal instruments, procedures, methodologies and practice related to these types of "zeroing," on both an "as such" and "as applied" basis. On appeal the AB confirmed that the zeroing methodology employed by the US in original antidumping investigations ("model zeroing" using average-to-average comparison) was inconsistent Art. 2.4.2 of the Anti-Dumping Agreement. In addition, the AB held that the zeroing methodology applied by the US in the administrative review process ("simple zeroing" using the average-to-transaction method) was inconsistent with Article 9.3 of the Antidumping Agreement and GATT Article VI:2. The AB referred explicitly to its prior rulings in *EC – Bed Linen and US – Softwood Lumber V*. It held that the margin of dumping established for an exporter or foreign producer operates as "a ceiling" for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding. At the same time, the AB addressed and rejected again the US argument of the standard of review set out in Anti-Dumping Agreement Article 17.6(ii).

9. The US also appealed the panel's conclusion that the zeroing methodology at issue could be challenged as a "measure" "as such". The AB considered this matter in some detail, referring to earlier case law on the concept of "measure". As for zeroing methodology as a measure, it noted that there is no threshold requirement. It set out a particular standard for such challenges against a "rule or norm" constituting a measure of general and prospective application. On this basis it concluded that the zeroing methodology, as it relates to original investigations, in which the average-to-average comparison method is used, can be challenged, as such.

10. In *US – Softwood Lumber V (Art. 21.5-Canada)*, the AB was asked to review a revised anti-dumping duty determination by the US ("Section 129 Determination"). In this determination, instead of the average-to-average method, the US based the revised duty rates on a comparison of normal value and export prices on a transaction-to-transaction basis, again adopting zeroing methodology.

11. The AB rejected the panel's finding that the US determination in the Section 129 proceeding was not inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement. It analysed

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Article 2.4.2 in detail, concluding that zeroing in the transaction-to-transaction methodology does not conform to the requirement of Article 2.4.2. It noted explicitly that this interpretation was consistent with its previous rulings on "zeroing" related to the average-to- average comparison methodology under this provision. The AB also rejected arguments based on the "mathematical equivalence" argument, for a number of reasons, considering *inter alia*, the concerns of the panel and the US over the weighted average-to-transaction methodology to be overstated.

12. The AB then considered and rejected again contextual arguments made by the US based on other provisions of the Anti-Dumping Agreement and GATT; US arguments based on historical materials and the US argument on the standard of review of Article 17.6(ii) of the Anti-Dumping Agreement. Finally, the AB stated that the use of zeroing under the transaction-to-transaction methodology in the Section 129 Determination, was also inconsistent with the "fair comparison" requirement in Article 2.4.

13. In *US – Zeroing (Japan)*, Japan challenged zeroing methodologies and procedures applied by the US in original investigations, periodic reviews, new shipper reviews, changed circumstances reviews and sunset reviews as a "measure" "as such". Japan also challenged these measures on an "as applied" basis in a number of anti-dumping proceedings with respect to products from Japan, specifically, in one original investigation, various periodic reviews, and two sunset reviews. The panel concluded that the "zeroing procedures" are a "measure" that can be challenged "as such" and found that, in maintaining model zeroing procedures in the context of original investigations, the US acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement. However, the panel rejected all other challenges by Japan.

14. On appeal the Appellate Body comprehensively reversed the panel's report to the extent that the latter had rejected Japan's claims. Firstly, the AB confirmed its earlier findings that the "zeroing procedures" at issue constitute a measure which can be challenged as such under different comparison methodologies and in different stages of anti-dumping procedures. It reversed the panel's finding that the US does not violate Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement by maintaining the zeroing procedures when calculating dumping margins on the basis of transaction-to-transaction comparisons in original investigations. The AB referred to "fundamental principles" involved in the concepts of "dumping" and "margins of dumping"; confirmed its earlier case law on these concepts as well as its earlier rulings on "zeroing" as such in original investigations involving the transaction-to-transaction and average-to-average methods. The Appellate Body again rejected contextual arguments made by the US. The AB also took firm exception to the fact that the panel had come to conclusions on the basis of reasoning relating to Art. 2.4.2 of the Anti-Dumping Agreement, which the Appellate had rejected earlier. Moreover, the AB again rejected arguments and findings that went counter to its earlier rulings that zeroing procedures in original investigations violate the fair comparison requirement.

15. The AB also reversed the panel's finding that the US does not violate Articles 9.3 and 9.5 of the Anti-Dumping Agreement and GATT Article VI:2 by maintaining the zeroing procedures in periodic reviews and new shipper reviews, referring to its earlier case law. Further, the AB reversed the panel's finding that zeroing in the context of periodic reviews and new shipper reviews is not, as such, inconsistent with Article 2.4. Also in relation to these investigations, it held that the fair comparison requirement was breached. Further, the Appellate Body reversed the panel's finding that zeroing as applied by the US in the 11 periodic reviews at issue in this appeal was not inconsistent with Articles 2.1, 2.4, 9.1, and 9.3 of the Anti-Dumping Agreement and GATT Articles VI:1 and VI:2. Also on this point the AB referred to earlier rulings. Finally, the AB reversed the panel's finding that the US acted consistently with Articles 2 and 11 of the Anti-Dumping Agreement when, in the sunset reviews at issue, it relied on margins of dumping that had been calculated using zeroing in previous anti-dumping proceedings. It found instead that the US violated Article 11.3 of the Anti-Dumping Agreement. Again, the AB referred to its earlier decisions in relation to this point.

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IV. PRECEDENTIAL VALUE OF THESE APPELLATE BODY FINDINGS

16. The conventional wisdom is that there is no *stare decisis* in the WTO dispute settlement system, and that panel and Appellate Body reports are considered binding only on the immediate parties to the dispute. *Stare decisis* is characteristic for national legal systems of the common law tradition. In international law generally, this doctrine of binding precedent is not formally accepted. Consequently, insofar as it does not formally acknowledge *stare decisis*, the WTO dispute settlement system is not unique among international adjudicatory bodies.

17. However, there are important considerations that qualify the principles outlined above. All legal systems, whether national or international, and regardless of formal adherence to *stare decisis*, have an interest in ensuring continuity of the jurisprudence. Further, in all legal systems decisions rendered by hierarchically superior courts or tribunals are generally followed by subsidiary bodies.

18. As to the first consideration, whether as a matter of doctrine or practice, all legal systems place a high value on consistency, certainty and predictability of the jurisprudence of their adjudicatory bodies, particularly as regards decisions rendered by the highest courts. In common law systems change of precedent is done relatively rarely and with great aforethought and discussion. The highest courts in civil law systems, despite formally rejecting the doctrine of binding precedent, also follow their previous decisions as a matter of judicial policy and practice. Further, the policy and practice of international courts and tribunals demonstrate that the need for ensuring consistency and predictability of the jurisprudence also prevails in the international arena.

19. Consequently, formal rejection of the doctrine of *stare decisis* should not be confused with the interest that adjudicatory systems have in maintaining continuity in the case law. Departures from previous decisions are carefully considered and require the identification of cogent reasons for doing so. Even where adjudicatory bodies are not formally bound by their previous decisions, they will nevertheless consider themselves bound by the law as authoritatively expressed in a decision. Further, the general rule that a judicial or arbitral decision only binds the immediate parties does not prevent that decision from being treated in a later case as the correct legal position.

20. The second consideration relates to whether lower courts or tribunals need to follow decisions rendered by hierarchically superior bodies. Also on this question the practice and principles observed in other dispute settlement systems is noteworthy. In common law jurisdictions the primary function of an appellate court is to give predictability and stability to the field of law it judges. This is done in large part by *stare decisis* which obliges subsidiary bodies to follow the rulings of higher courts in their jurisdiction. But in civil law jurisdictions as well, lower courts tend to follow decisions of higher courts, even in the absence of an explicit legal rule to that effect. In the international arena adjudicatory systems with a hierarchical structure are less common. However, where there is an appellate structure, the prevailing rule seems to be again that decisions of the hierarchically higher body are followed by the subsidiary body, at the very least insofar as points of law are concerned. This does not mean that there would be no scope whatsoever for subsidiary bodies to develop the case law. It does mean however, that departure from decisions taken by higher courts on issues of law must be carefully considered and based on cogent reasons.

21. The EC submits that the above considerations also apply in the WTO dispute settlement system. A paramount function of this system is to create and maintain a uniform body of rules. This is clearly reflected in Art. 3(2) DSU, according to which, *inter alia*, the dispute settlement system aims at providing "security and predictability to the multilateral trading system". The Appellate Body occupies a superior position in the hierarchy of this system (Art. 17.4; 17.6 and 17.13 DSU). The primary function of the Appellate Body is to provide predictability and stability to the multilateral trading system through its decisions on issues of law covered in panel reports and legal interpretations developed by panels.

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22. It is not disputed that Appellate Body reports do not have precedential effect or automatic applicability, qua reports, beyond the immediate parties. However, it is unquestionable that when interpreting the covered agreements, the Appellate Body aims at ensuring consistency in its case law (see: AB's reasoning and findings in *US – Softwood Lumber V* (paras. 109-112) referring to AB's previous reasoning and findings in *Japan – Alcoholic Beverages II* (at 108) and *US – Shrimp (Article 21.5 – Malaysia)* (para.109)).

23. Are WTO panels obliged to follow Appellate Body decisions? The Appellate Body itself has stated that a panel that takes account of the reasoning in an adopted Appellate Body report commits no "error" (*US – Shrimp (Article 21.5 – Malaysia)* (para. 109)). But it does not follow, *a contrario*, that panels would be free to depart from Appellate Body reports on issues of law and legal interpretations. The Appellate Body has explicitly stated panel reports – and equally adopted Appellate Body reports – "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute" (*Japan – Alcoholic Beverages II* (at 108-109)). Further, the Appellate Body has explicitly ruled that panels are bound by the legal analysis of the Appellate Body "especially where the issues are the same" (*US – Oil Country Tubular Goods Sunset Reviews* (para.188)). The EC submits that as the Appellate Body is the hierarchically superior body, tasked with deciding on issues of law and legal interpretations, its rulings must be regarded as commanding particular authority for panels as authoritative pronouncements on the law.

V. CONCLUSIONS

24. Mexico asserts that none of the issues raised in this panel proceeding are new. The EC agrees that Mexico's claims appear to be supported in law by a consistent body of reasoning and findings, contained in all reports issued by the Appellate Body since the *EC - Bed Linen* case on zeroing in anti-dumping cases. The reasoning and findings of the Appellate Body are, in the EC's view, to be regarded as the correct position in law. In the interest of ensuring security and predictability of the multilateral trading system, the EC submits that this Panel should follow the reasoning and findings contained in these Appellate Body reports.

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ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. The Appellate Body ruled clearly in the past disputes that zeroing procedures may be challenged "as such" and are incompatible with Articles VI:2 of the GATT 1994 and Articles 2.4, 2.4.2, 9.3, 9.5 and 11.3 of the AD Agreement. Particularly, it found that zeroing is prohibited in *all circumstances whenever calculating the "margins of dumping"*, that is, regardless of the specific phase or comparison methods. For the security and predictability of the multilateral trading system, Japan urges the Panel to follow the prior rulings of the Appellate Body and approve Mexico's claims that the zeroing measures are inconsistent "as such" with Articles 2.1, 2.4, 2.4.2 and 9.3 of the AD Agreement.

II. ZEROING PROCEDURES ARE A MEASURE "WHICH CAN BE CHALLENGED AS SUCH"

2. In recent anti-dumping disputes, the Appellate Body held that the word "measure" has a broad meaning; an alleged "measure" will be assessed in WTO law irrespective of its legal character in domestic law; and, significantly, a "measure" need not be binding or mandatory in domestic law. In *US – Corrosion-Resistant Steel*, the Appellate Body noted that the measures examined by the past GATT/WTO panels include those consisting of "*acts setting forth rules or norms that are intended to have general and prospective application"*.

3. The USDOC, in calculating overall margins of dumping, *always disregards and treats as zero* the result of intermediate price comparisons where the export price exceeds the normal value in all anti-dumping procedures regardless of the types of comparison (a *weighted average- to–weighted average* ("W-W"), a *transaction–to–transaction* ("T-T") or a *weighted average–to–transaction* ("W-T") comparison) that it adopts. Such methodology of margin calculation is exactly what is called "zeroing" which should be regarded as a single measure that can be challenged "as such" under the WTO law.

III. ZEROING USED IN INVESTIGATIONS IS INCONSISTENT "AS SUCH" WITH ARTICLES 2.1, 2.4.2 AND 2.4 OF THE AD AGREEMENT

A. THE CONCEPT OF "DUMPING" AND "MARGINS OF DUMPING"

4. Japan supports the Mexico's contention that zeroing is prohibited "as such" in investigations using a T-T comparison. The Appellate Body held, in *US – Softwood Lumber V (Article 21.5 – Canada)*, that zeroing is prohibited on the "as applied" basis by Articles 2.1, 2.4.2 and 2.4 in original investigations using a T-T comparison.

5. Article 2 of the AD Agreement sets forth the "agreed disciplines" for determining "dumping" and "margins of dumping". Japan further notes that Article 2.1 defines "dumping" as follows: "For the purpose of this Agreement, *a product* is to be considered as being *dumped*" (emphasis added.) This definition reiterates the definition of "dumping" in Article VI:1 of the GATT 1994. Article VI:2

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also defines the term "margin of dumping" by reference to the "product". Based on the texts of Articles 2.1 and VI, "dumping" and "margins of dumping" must be established for the product under investigation as a whole. This definition of "dumping" and "margins of dumping" applies throughout the AD Agreement for purposes of all anti-dumping proceedings. Based on this analysis, in *US – Zeroing (EC)* and *US – Softwood Lumber V*, the Appellate Body held that "*dumping is defined in relation to a product as a whole*".

6. On the basis of this interpretation of Article 2.1 and Article VI:1, the Appellate Body further found that "if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value". This requirement under Article 2.1 to aggregate multiple comparison results in calculating a margin of dumping for the "product" as a whole should be followed, when an authority conducts multiple model-specific W-W comparisons, multiple transactions-specific W-T comparisons and multiple transaction-specific T-T comparisons.

B. DETERMINATION OF MARGINS OF DUMPING BASED ON T-TO-T COMPARISONS IN ORIGINAL INVESTIGATIONS

7. The United states rebuts that "all comparable export transactions" language in the text of Article 2.4.2 of the AD Agreement is the textual basis for an obligation to provide offsets and therefore this language in Article 2.4.2 applies only to antidumping investigations and only when authorities use the W-W comparison pursuant to Article 2.4.2. This interpretation is apparently false.

8. As clarified in *US – Softwood Lumber V (Article 21.5 – Canada)*, the reference in the first sentence of Article 2.4.2 to "a comparison" in the singular and to "export prices" in the plural suggests the need for an overall calculation exercise involving aggregation of multiple transactions. The text of Article 2.4.2 indicates that the calculation of a dumping margin using the T-T comparison methodology is a multi-step exercise in which the results of transaction-specific comparisons are inputs that are to be aggregated in order to establish the dumping margin of the product under investigation for each exporter or producer.

9. Japan does not consider that the absence of the phrase "all comparable export transactions" in the context of the T-T comparison suggests that zeroing should be permissible under that methodology. Under T-T comparison, unlike W-W, all export transactions are taken into account individually and matched with the most appropriate transactions in the domestic market.

C. CONTEXTUAL ARGUMENTS RELATING TO THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE AD AGREEMENT

10. The United States further rebuts that the general zeroing prohibition would, yielding identical results between the W-W and W-T comparison, render the targeted dumping exception in Article 2.4.2 a complete nullity (the "mathematical equivalence" argument).

11. However, in *US - Softwood Lumber V(Article 21.5-Canada)*, the Appellate Body decisively rejected this argument, by noting that, without actual application ever by the Unites States of the W-T comparison method, the "mathematical equivalence" argument "rests on untested hypothesis". It also noted that, given the exceptional nature of the method authorized in the second sentence of Article 2.4.2, that sentence "alone cannot determine the interpretation of the two methodologies provided in the first sentence…", and that "there is considerable uncertainty regarding how precisely the third methodology should be applied", because it has never been invoked. Finally, the Appellate

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Body affirmed that "mathematical equivalence" does not necessarily arise when using W-T and W-W comparisons without zeroing.

12. Accordingly, the second sentence of Article 2.4.2 does not provide contextual support for a finding that zeroing is permissible under T-T comparison methodology.

D. ARTICLE 2.4 OF THE AD AGREEMENT

13. The use of zeroing under T-T comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. Therefore the United States acts inconsistently with Article 2.4 of the AD Agreement.

IV. THE ZEROING PROCEDURES IN PERIODIC REVIEWS

14. The United States contends that in periodic reviews, the term "margins of dumping" in Article 9.3 of the AD Agreement can be interpreted to apply on a transaction–specific basis and that therefore the provision of this Article permits the determination of transaction specific margins in periodic reviews.

15. The *chapeau* of Article 9.3 of the AD Agreement, which governs periodic reviews, states "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Based on this requirement as well as the ones under Article VI:2 of the GATT 1994 and Article 9.1 of the AD Agreement, the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding.

16. The express reference to Article 2 in the chapeau of Article 9.3 includes, among others, Article 2.1, which defines "dumping" for purposes of the entire AD Agreement in relation to the "product" under investigation as a whole. In *US – Zeroing (EC)*, the Appellate Body made an explicit interpretive connection between the "product as a whole" requirement of Article 2.1 and dumping determinations under Article 9.3. Based on the interpretation of Article 2.1 mentioned earlier, for purposes of periodic reviews as well, the investigating authority must aggregate all multiple comparison results to establish a margin of dumping for the "product" under investigation as a whole.

17. The Appellate Body clearly rejected the United States' argument that, in a periodic review, "dumping" and "margins of dumping" can be determined on an importer- or an import-specific basis. The Appellate Body explained in *US – Zeroing (EC)* that "[e]stablishing margins of dumping for exporters or foreign producers is consistent with the notion of dumping, which is designed to counteract the foreign producer's or exporter's pricing behavior. Under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, margins of dumping are established for foreign producers or exporters".

18. The Appellate Body also recognized that neither the AD Agreement nor the GATT 1994 prevents Members from *assessing* duties on an import - or importer-specific basis, provided that the total amount of duties levied does not exceed the margin of dumping for the "product", for the exporter or foreign producer.

19. In periodic reviews, the United States calculates: (1) a margin for each *exporter* that becomes the duty deposit rate for all entries of the product exported to the United States by that exporter until the next review; and (2) an *importer*-specific assessment rate based on the total amount of dumping attributable to each importer, which determines that importer's liability for the review period.

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20. In light of its interpretation of Articles 9.3 and VI:2, in conjunction with other relevant provisions including Articles 2.1 and VI:1, the Appellate Body in *US – Zeroing (EC)* found that "the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared". Accordingly, the zeroing methodology is inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.

21. The United States criticizes this conclusion on the grounds that if a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the amount of dumping is greatest will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports.

22. However, anti-dumping duties are designed to counteract an exporter's pricing, and not an importer's, and because it is exporters that create a situation of dumping, the maximum amount of duties must be assessed in relation to exporter's margin of dumping. Furthermore, if duties are imposed on importers, it must be ensured that the total amount of duties does not exceed the exporter's margins of dumping. The above-mentioned situation on which the United States bases its criticism is consistent with the exporter-associated nature of the notion of dumping, not importer.

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ANNEX C

SECOND WRITTEN SUBMISSIONS OF THE PARTIES OR EXECUTIVE SUMMARIES THEREOF

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ANNEX C-1

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

1. In its First Written Submission, the United States fully responded to the arguments made by Mexico in its First Written Submission. The United States does not intend to duplicate those arguments here. Rather, the United States wishes to address two misstatements made by Mexico at the first meeting of the Panel and the so-called "systemic arguments" raised there by Mexico and the third parties.

2. In its Opening Statement, Mexico misrepresented one of the arguments made by the United States in its First Written Submission. Mexico stated that the United States "erroneously assumes that dumping is conduct engaged in by individual importers".[1] Mexico went on to say that the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") does not address the conduct of individual importers or individual import transactions, but instead consistently prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. Likewise, in its Closing Statement Mexico attributed to the United States the "contention that importers as opposed to exporters are the parties that engage in injurious dumping".[2]

3. This is incorrect, and completely misses the point. The United States has never said that importers engage in dumping. Rather, our fundamental point has been that dumping can occur at the level of an individual export transaction. In addition, the United States has emphasized that different provisions of the AD Agreement address different aspects of an antidumping proceeding and conduct or actions by different actors. In particular, the remedy for dumping provided for in Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 9.3 of the AD Agreement is antidumping duties, which are applied to individual entries for which importers are liable for payment. Mexico's arguments, and the Appellate Body reasoning it relies on, fail to take the importer- and import-specific nature of antidumping duty assessment into account. Under this interpretation of Article 9.3, antidumping duties would be prevented from fulfilling their intended purpose as a remedy for injurious dumping for the numerous reasons set forth in paragraphs 88 through 92 of the First Written Submission of the United States.

4. A second statement from Mexico's Opening Statement that we wish to address is Mexico's accusation that the United States has failed to comply with the findings of the Dispute Settlement Body in related cases.[3] Mexico presented no evidence of this, and there is none. Beyond highlighting the absence of facts underlying many of Mexico's arguments – such as facts supporting the existence of a separate "zeroing" measure (or measures) – Mexico's statement calls into question its statements of concern over the importance of complying with multilateral dispute settlement procedures. Those procedures protect not only complaining parties who consider that a responding party has breached its obligations, but also responding parties against groundless, unilateral judgments of breach by complaining parties. In this regard, the United States takes note of the requirements in Article 23.2(a) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

5. Finally, the United States also wishes to address comments Mexico and several third parties have made in connection with their request that "in the interest of security and predictability" the

[1] Opening Statement of Mexico at the First Substantive Meeting, para. 23.
[2] Closing Statement of Mexico at the First Substantive Meeting, para. 10.
[3] Opening Statement of Mexico at the First Substantive Meeting, para. 37.

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panel follow the recent Appellate Body reports relating to the issues in this dispute. The United States explained in its First Written Submission how Mexico's conception of "security and predictability" is antithetical to how that phrase is used in the DSU[4], and will not repeat that explanation here. However, the United States would like to note several misstatements in these comments.

6. For example, Mexico and some of the third parties argue that the findings of the Appellate Body with respect to zeroing provide a "consistent body of reasoning and findings"[5] and have "coherently and consistently addressed"[6] the issues, and therefore that reasoning and findings should be followed. The United States has demonstrated in its First Written Submission that the reasoning and findings of the Appellate Body with respect to any prohibition of zeroing in the AD Agreement has been consistent only in its results – the reasoning itself has shifted, and in fact has contradicted itself. Indeed, even panels have struggled to understand the shifting Appellate Body reasoning.

7. As the United States has also demonstrated in its First Written Submission, it is the panels in the various recent zeroing disputes that have provided coherent and well-reasoned arguments as to why the obligation to provide offsets does not extend beyond the context of average-to-average comparisons in investigations. Inasmuch as that reasoning is persuasive and, more fundamentally, correct, it is that reasoning this Panel should follow. There is nothing in the DSU or the WTO Agreement that, as one third party would have it, requires that the "decisions of the hierarchically superior body" be followed by the "lower body".[7] As that same third party itself recognizes, it is "not disputed that adopted panel and Appellate Body reports are binding . . . only on the immediate parties to the dispute".[8]

8. In addition, the fact that there have been "numerous zeroing-related disputes"[9] has no relevance with respect to how this particular dispute should be decided. While it may indicate that some WTO Members disagree with zeroing as a policy matter, it does not prove that the AD Agreement, as written and as agreed to by all Members, prohibits zeroing in all contexts. The implication that the number of disputes on an issue – or the number of disputants favoring one position – can serve as a basis for disregarding the text of a WTO agreement in favor of a preferred policy outcome is antithetical to the function and obligations of WTO panels to apply the rules as written, and not to change them. The task faced by the Panel is whether the text of the AD Agreement itself requires offsets in the context of assessment proceedings, such as Commerce's periodic reviews identified by Mexico in this dispute. The United States takes note of the statement by Chile in its Third Party Submission that the only definitive resolution of the "zeroing" issue would be through explicit, Member-negotiated confirmation in the AD Agreement that zeroing is prohibited.[10] Indeed, that would be the case because currently no prohibition of zeroing in all contexts can be found in the text of the AD Agreement.

9. As Mexico has stated, "[This dispute] is about the correct legal interpretation of the relevant provisions of the GATT 1994 and the Anti-dumping Agreement. Mexico asks only that this panel correctly interpret these provisions giving due consideration to prior Appellate Body findings on the identical issues."[11] As the United States has already stated, this Panel must make its own objective assessment of the matter, including its own objective assessment of the correct legal interpretation of the relevant provisions of the covered Agreements. This means that if the Panel's objective assessment of the correct legal interpretation of the relevant provisions – including whether the

[4] First Written Submission of the United States, para. 27.
[5] Third Party Oral Statement by the European Communities, para.5.
[6] Oral Statement of Thailand, para. 3.
[7] Third Party Oral Statement by the European Communities, para. 4.
[8] Third Party Oral Statement by the European Communities, para. 4.
[9] Oral Statement of Thailand, para. 2.
[10] Comunicación de Chile como Tercero, para. 7.
[11] Closing Statement of Mexico at the First Substantive Meeting, para. 3 (emphasis added).

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provisions admit of other permissible interpretations – differs from an interpretation in a prior Appellate Body report, then the Panel is not bound to follow reasoning it finds to be unpersuasive or adopt a finding it considers to be incorrect.

10. To summarize the main issues in this dispute, this Panel should reject the claim that there is an unwritten measure, taken by the United States in its territory, that requires the Department of Commerce ("Commerce") to zero with respect to assessment proceedings that can be challenged "as such". The United States has explained in detail in its First Written Submission why the allegations by Mexico in its First Written Submission that it is challenging "one single zeroing measure" cannot stand.[12] Furthermore, Mexico has failed to provide evidence of the existence of any act or instrument of the United States that requires it to zero in any context. Mexico has only provided evidence of what Commerce has done in the past.

11. With respect to the substantive arguments, the Panel should reject Mexico's request that this Panel create an obligation to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same assessment proceeding[13] exceed normal value, notwithstanding the absence of any textual basis for such an obligation. For the reasons set forth in the United States First Written Submission, the United States respectfully requests the Panel to refrain from reading into the AD Agreement and Article VI of the GATT 1994 an obligation that is not reflected in the text. Instead, the United States requests that this Panel remain faithful to the text by finding that the US actions in the assessment proceedings at issue rest upon a permissible interpretation of the AD Agreement in accordance with the customary rules of interpretation of public international law and the standard of review under Article 17.6(ii) of the AD Agreement.

[12] In addition, as the United States noted in its First Written Submission and Mexico acknowledged during the First Substantive Meeting of the Panel, the United States is no longer making average-to-average comparisons in original investigations without providing offsets for non-dumped comparisons.

[13] Mexico refers to assessment proceedings as "periodic reviews".

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ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. The claims presented by Mexico refer to Zeroing. Mexico seeks findings that the use of model zeroing by the US Department of Commerce ("USDOC") in calculating margins of dumping in original investigations and the use of simple zeroing in periodic reviews is inconsistent with the United States' obligations under Article VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, and 9.3 of the *Anti-Dumping Agreement*, both "as such" and "as applied" in the contested final determinations.

2. There are two essential textual foundations to Mexico's claims in this case. The first is the definitions of "dumping" and "margins of dumping" contained in Articles VI:1 and VI:2 of the GATT 1994 and in Article 2.1 of the *Anti-Dumping Agreement*. These terms refer to the dumping of the specific "product" that is under investigation or review (not to individual transactions, models or other sub-groupings within the product). The "product" under investigation or review is the product defined by the investigating authorities taken in its entirety. In the case of the as-applied determinations challenged by Mexico, this would be "stainless steel sheet and strip in coils" as defined by the USDOC. Accordingly, any purported "margins of dumping" that is calculated with respect to stainless steel sheet and strip in coils from Mexico must relate to that product taken as a whole. Any calculation of the margin of dumping that is based on less than, or only part of, the transactions for the product under consideration – such as price differences for certain models or individual transactions – do not reflect the margin of dumping for the "product" at issue and are therefore inconsistent with these fundamental definitions.

3. The second is the fact that the *Anti-Dumping Agreement* and the remedies contained therein are directed toward the conduct of individual producers and exporters. Exporters or producers "dump". Importers do not dump but instead purchase dumped products.

4. The USDOC calculates margins of dumping in original investigations and in periodic reviews in two stages. In the first stage, the USDOC makes intermediate comparisons between export prices and normal value. Such intermediate comparisons can be made using different comparison methodologies, including average-to-average, transaction-to-transaction, or average-to-transaction comparisons. Regardless of the comparison methodology applied, the results of such intermediate comparisons are not "margins of dumping" within the meaning of Article VI of the GATT or Article 2 of the *Anti-Dumping Agreement*. Margins of dumping are instead determined in the second stage, in which the USDOC aggregates the intermediate comparison results to arrive, in the third stage, at a margin of dumping for the exporter or producer for the entire product under investigation or review.

5. Zeroing is concerned with the second step in the margin calculation – the aggregation stage. Zeroing is the rule or norm attributable to the United States of general and prospective effect pursuant to which the USDOC in aggregating intermediate comparison results invariably ignores or treats as zero price comparison results where the export price exceeds the normal value (negative comparison results). Zeroing negative intermediate comparison results violates the covered agreements because the resulting aggregate margin of dumping does not fully, nor does it accurately, reflect the margin of dumping for the product under consideration taken as whole. The margin of dumping resulting from the application of Zeroing at the aggregation stage instead reflects only a part of, or less than, the

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product under consideration. Moreover, because only negative intermediate comparison results are disregarded or treated as zero, this measure also systematically and unfairly inflates the resulting margin of dumping above its actual magnitude for the product as a whole.

6. The calculation of margins of dumping employing Zeroing results is inconsistent with the definitions of "dumping" and "margins of dumping" as set forth in Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* which relate to the dumping of a product taken in its entirety. In the case of periodic reviews, by leading to the collection of duties in excess of the margin of dumping determined under Article 2, this methodology also violates Article 9.3 of the *Anti-Dumping Agreement*. In both original investigations and periodic reviews, by calculating margins of dumping in excess of the margin of dumping for the product as a whole, the resulting calculation is inconsistent with the broad fairness requirement embodied in Article 2.4 of the *Anti-Dumping Agreement*.

7. The issue before the Panel is not whether the covered agreements contain an affirmative obligation to "provide offsets" to margins of dumping, as the United States would have it, but rather, whether the covered agreements permit investigating authorities to systematically ignore or alter the results of intermediate price comparisons in calculating margins of dumping.

8. The Appellate Body, in an unbroken line of reports from *EC – Bed Linen* to *US – Zeroing (Japan)*, has consistently interpreted the text of the covered agreements in precisely the same manner as Mexico and has reached precisely the same legal conclusions – namely that Zeroing violates the obligation under the agreements to calculate a single margin of dumping for each exporter or producer for the product under investigation or review. Mexico urges this Panel to follow the Appellate Body's reasoning.

9. The arguments advanced by the United States cannot be squared with the text of the agreements and it relies exclusively on reasoning presented in panel reports that were subsequently reversed on appeal.

ARGUMENT

II. MEXICO'S "AS SUCH" CLAIMS RELATED TO INVESTIGATIONS AND PERIODIC REVIEWS ARE PROPERLY BEFORE THE PANEL

A. MEXICO'S "AS SUCH" CLAIMS ARE WITHIN THE PANEL'S TERMS OF REFERENCE

10. Mexico specifically challenges the manifestation of the single measure (i.e., Zeroing procedures) in two principal contexts: original investigations and periodic reviews. The structure of Mexico's challenge in no way diminishes the unitary nature of the Zeroing measure at issue. The substantive content of the measure is *identical* in both procedural contexts specifically challenged by Mexico, *i.e.*, pursuant to the challenged measure the USDOC systematically and invariably disregards results where the export price exceeds normal value when aggregating intermediate comparison results to determine the margin of dumping for the exporter or producer. The challenged manifestations and Mexico's "as such" and "as applied" claims are clearly within the scope of this Panel's terms of reference.

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B. MEXICO PROVIDED SIGNIFICANT – AND SUFFICIENT – EVIDENCE OF THE EXISTENCE AND NATURE OF THE ZEROING MEASURE AT ISSUE IN THIS PROCEEDING

11. Mexico has presented overwhelming evidence demonstrating the specific content of the Zeroing measure, that it is attributable to the United States, and that it constitutes a rule of general and prospective effect. The evidence before this Panel is nearly identical to – and perhaps even more extensive than – the evidence based upon which the Appellate Body in *US – Zeroing (Japan)* found that a single Zeroing measure exists, which can be challenged "as such".

12. With respect to the United States' assertion that Mexico has identified no evidence that United States has actually zeroed in all possible contexts, Mexico is under no obligation to do so. Mexico challenges the manifestation of the single Zeroing measure in two contexts – original investigations and periodic reviews. Mexico has presented ample evidence that the United States has consistently employed the Zeroing Procedures complained of in both contexts.

13. As to the claim that Mexico has provided no evidence that the USDOC cannot – or will not – change its methodology in future cases, the United States misstates the standard for establishing that a measure exists, which can be challenged "as such". The standard requires only that Mexico demonstrate the precise content of the measure, that the measure is attributable to the United States, and that the measure has general and prospective application. Mexico has done so.

14. As the Appellate Body noted in *US – Zeroing (Japan)*, paragraph 85, relying on evidence nearly identical to that presented in the current dispute, "the evidence … shows that what is at issue goes beyond the simple repetition of the application of a certain methodology to specific case". That the USDOC *could* change its methodology is of no significance in this case. The evidence before this Panel demonstrates that the Zeroing measure is a rule or norm that has general and prospective application – indeed, it is a deliberate policy that has been, and continues to be systematically applied by the USDOC.

C. USDOC'S POLICY ANNOUNCEMENT RELATED TO INVESTIGATIONS HAS NO EFFECT ON MEXICO'S "AS SUCH" CLAIMS RELATED TO INVESTIGATIONS OR REVIEWS

15. The United States notes that it has announced a change in policy as of 22 February 2007. This asserted change in policy does not detract from – nor does it render moot – Mexico's "as such" challenge with respect to the general and prospective nature of the single Zeroing measure.

16. The measure that remains following the change in policy is no different than the measure originally challenged, with the exception that it purportedly no longer manifests itself with respect to the application of one particular calculation methodology (average-to-average) in one type of proceeding (original investigations). Its application is still "general" and "prospective" with respect to all other manifestations including the other manifestation and methodology challenged—simple zeroing in periodic reviews.

17. Even with respect to average-to-average comparisons in original investigations, the general and prospective effect of the rule or norm on investigations prior to 22 February 2007 – in which the Zeroing measure was uniformly applied by the USDOC – fully remains, because the orders issued as a result of these investigations continue to affect imports being made today. That the United States has undertaken to recalculate dumping margins without Zeroing in a handful of specific investigations is of no consequence to the remaining investigations, the results of all of which were – and continue to be – impacted by Zeroing.

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III. ZEROING IS NOT PERMITTED IN PERIODIC REVIEWS

A. ARTICLE 2.4.2

1. The "All Comparable Transactions" Clause in Article 2.4.2, First Sentence

18. The United States and Mexico differ on the significance of the "all comparable export transactions" clause in the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. The United States claims that this clause was "integral" to the Appellate Body's original finding in *US – Softwood Lumber V* that Zeroing is prohibited under Article 2.4.2 in the context of average-to-average comparisons in original investigations. The United States goes so far as to claim that the "all comparable export transactions" clause provides "the only textual basis" for the Appellate Body's determination in that case. The United States hopes to persuade the Panel that there is no textual basis for recognizing a general prohibition on Zeroing that extends beyond that context.

19. The United States has misread the Appellate Body's reasoning in *US – Softwood Lumber V* and subsequent Appellate Body reports. The "all comparable export transactions" language did not significantly guide the Appellate Body's reasoning in those cases and is *not* the textual basis for the general prohibition on Zeroing. It is instead the reference to "margins of dumping" in Article 2.4.2, 9.3, and elsewhere, and the interpretation of that term by the Appellate Body that provides the textual foundation to the general prohibition on Zeroing.

(a) US – Softwood Lumber V

20. The Appellate Body's report in *US – Softwood Lumber V* found that the "all comparable export transactions" clause refers to the manner in which intermediate comparisons are made on an average-to-average basis in the first step of the margin calculation and does not speak to or resolve the question of whether Zeroing is permissible where it actually occurs, in the second aggregation step of the calculation. The latter question is instead an issue of interpreting the terms "dumping" and "margins of dumping".

21. The "all comparable export transactions" language pertains to the first step of the calculation process in which the investigating authority conducts intermediate price comparisons and requires only that investigating authorities include "all" of the "comparable" export transactions within each of the comparison sub-groups.

(b) Subsequent Appellate Body Reports

22. Contrary to the United States' claims, there has been no "shift" in the Appellate Body's reasoning with regard to zeroing. Subsequent Appellate Body reports considering the Zeroing issue are consistent with the reasoning followed in *US – Softwood Lumber V* and confirm that the "all comparable export transactions" language is *not* the textual basis for the general prohibition on Zeroing at the aggregation stage (see *US – Zeroing (EC 1)*, *US – Softwood Lumber V (Article 21.5 - Canada)*, and *US – Zeroing (Japan)*).

(c) Alleged "Redundancy" of the "All Comparable Export Transactions" Clause

23. The preceding discussion of the Appellate Body's reasoning in *US – Softwood Lumber V* also effectively responds to, and refutes, the claim of the United States that the recognition of a general prohibition on Zeroing renders the "all comparable export transactions" language redundant. As demonstrated above, the prohibition on Zeroing identified in *US – Softwood Lumber V*, and every other Appellate Body decision considering the issue, is not rooted in the "all comparable export transactions" language. Moreover, the "all comparable export transactions" language relates

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specifically to the manner in which intermediate price comparisons are structured in the first step of the margin calculation where comparisons are made on an average-to-average basis. Thus, the general prohibition on Zeroing identified by the Appellate Body in no way conflicts with or renders "inutile" the "all comparable export transactions" language in the first sentence of Article 2.4.2.

2. "Targeted Dumping" and Alleged "Mathematical Equivalence"

24. The United States' First Written Submission claims that "[t]he mathematical implication of a general prohibition of zeroing … is that the targeted dumping clause would be reduced to inutility". The United States' arguments regarding mathematical equivalence are addressed in Mexico's response to Question 9 of the Panel.

B. ARTICLE 2.1 OF THE ANTIDUMPING AGREEMENT AND GATT ARTICLE VI

25. The general prohibition against Zeroing identified by the Appellate Body is rooted in the term "margin of dumping" in Articles 2.4.2 and Article 9.3. As the Appellate Body has found, these terms are defined in Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*, and refer to the "product" under investigation or review taken in its entirety.

26. The United States nevertheless continues to challenge the Appellate Body's conclusion that "margins of dumping" necessarily refers to the margin of dumping for the exporter or producer for the product under investigation or review taken as a whole. It insists instead that "dumping" and "margins of dumping" can be interpreted as relating to individual import transactions and other groupings of less than the entire product under review. It advances a series of erroneous arguments in support of this contention.

1. Reading the Definitional Provisions of Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*

27. The United States asserts that Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 are definitional provisions that, "read in isolation, do not impose independent obligations". However, Mexico is not proposing to read these provisions in isolation. To the contrary, these definitions are being properly read in connection with and specifically to interpret the operative language contained in Article 2.4.2 ("margins of dumping") and Article 9.3 ("margin of dumping").

2. "Real-World" Commercial Conduct

28. The United States next claims that "dumping" refers to "real-world commercial conduct by which a product is imported into a country, i.e., transaction by transaction". Subjective views held by the United States regarding purported "real-world commercial conduct" cannot override the text of the agreements.

3. Historical Background Documents

29. As in previous disputes, the United States also seeks to rely on a handful of selected historical "background" documents to bolster its claim that "dumping" has in the past been viewed by certain Members as applying at the level of individual import transactions. It is only if interpretation under Article 31 of the Vienna Convention leads to an "ambiguous or obscure" meaning and/or a "manifestly absurd or unreasonable" result that this Panel – or any other – would need to resort to supplementary means of interpretation. There is no such meaning or result in this instance, particularly in the light of the Appellate Body's numerous decisions regarding Zeroing.

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30. Nevertheless, even if this Panel chose to consider the documents, they would be of no – or at best, extremely limited – probative value in resolving the issues presented. In *US – Softwood Lumber V (Article 21.5 - Canada)*, paragraph 121, the Appellate Body concluded "the historical materials do not provide any additional guidance for the question of whether zeroing under the transaction-to-transaction comparison methodology is consistent with Article 2.4.2 of the *Anti-Dumping Agreement*". This Panel should similarly reject these documents as irrelevant.

4. Use of Term "Product" Throughout GATT 1994 and *Anti-Dumping Agreement*

31. The United States takes issue with the Appellate Body's interpretation of the word "product" as used in connection with "dumping" and "margins of dumping" as referring to the product taken as a whole. According to the United States, there is evidence that the term "product" as used in the GATT 1994 and the *Anti-Dumping Agreement* does not exclusively refer to the "product as a whole". Mexico responds to the arguments as follows.

32. First, the United States' reference to the use of the term "product" in Article VII:3 of the GATT 1994 is not relevant. Article VI is concerned with market-based price discrimination by *exporters or producers* with respect to specified products, whereas the customs valuation provisions of Article VII are concerned with the value of individual import transactions. The two provisions are completely distinguishable. The argument by the United States is reminiscent of the claim made in *US – Softwood Lumber V (Article 21.5 - Canada)* concerning the use of the word "product" in Article II of the GATT. The Appellate Body in that case correctly, and summarily, rejected that comparison.

33. Second, the United States makes reference to the term "product" as used in relation to the "levy" of anti-dumping duties on a "product" under Articles VI:2, VI:3, VI:6(a) and VI:6(b) of the GATT 1994 as further evidence that "product" may refer to individual import transactions. However, the United States incorrectly conflates rules concerning the determination of margins of dumping on the one hand with *assessment* or levying of the duties on the other. Margins of dumping must be determined with reference to the product taken as a whole. Assessments, on the other hand, may be carried out at the level of individual importers, and Mexico has never contended otherwise. However, the assessment of duties against individual importers remains, by virtue of Article 9.3, subject to an overall cap based on the margin of dumping determined for the product (as a whole) under Article 2.

34. The United States' next argument, based on the fact that dumping is defined as where the export price is "less than" the normal value, does not conflict with Mexico's argument. The definition referred to by the United States identifies the margin of dumping with the "product" under investigation. As repeatedly discussed herein, the "product" at issue refers to the product under investigation as defined by the investigating authorities. Margins of dumping may be calculated only with reference to that product taken as a whole, not with respect to individual transactions or parts thereof.

35. The United States next points to a provision of the GATT heretofore not considered relevant to this dispute, Ad Article VI:1, which deals with "hidden dumping". This reference essentially *supports* Mexico's point that the structure of Article VI should be read to define "product" consistently throughout the *Anti-Dumping Agreement*. The reference to the "margin of dumping" in this provision can hardly be construed as being limited solely to a single importer, if the exporter or producer sells to many importers.

36. The United States also argues that if the Appellate Body's interpretation of the word "product" is adopted, then Article 2.2 of the *Anti-Dumping Agreement* would require constructed value to be calculated for the "product as a whole". This same argument was considered and rejected by the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)*.

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C. ARTICLE 9.3

1. Prior Appellate Body Decisions Support Mexico's Claim that the Zeroing Procedures are inconsistent with Article 9.3 of the *Anti-Dumping Agreement*

37. Pursuant to Article 9.3 of the *Anti-Dumping Agreement*: "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The Appellate Body has previously set forth a clear analysis leading to the conclusion that the Zeroing Procedures are inconsistent with Article 9.3 and Mexico fully endorses this conclusion.

38. As indicated by the express language of Article 9.3, for the purposes of duty assessment and collection proceedings, the margin of dumping – which sets the maximum amount of the duties to be imposed – must be calculated in accordance with the provisions set forth in Article 2 of the *Anti-Dumping Agreement*, including Article 2.1. Article 2.1 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 require that "dumping" and "margins of dumping" must be established for the product under review as a whole. Citing to the Appellate Body Report in *US-Softwood Lumber V*, the Appellate Body in *US – Zeroing (EC 1)*, paragraph 127, noted that the reference to Article 2 in Article 9.3 confirms that "the amount of the assessed anti dumping duties shall not exceed the margin of dumping as established 'for the product as a whole".

39. The Appellate Body in *EC – Bed Linen* and *US – Softwood Lumber V* expressly held that the provisions of Article 2.1 of the *Anti-Dumping Agreement* are neither expressly nor implicitly limited to any particular phase or phases of an anti-dumping proceeding. In *US – Softwood Lumber V*, the Appellate Body therein stated "unambiguously" that its conclusion that "the terms "dumping" and "margins of dumping" in Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the product under investigation as a whole". As previously demonstrated by Mexico, this conclusion was not based solely on the first sentence of Article 2.4.2, but "also on the context found in Article 2.1 of the *Anti-Dumping Agreement*". Therefore, the requirement to calculate margins of dumping for the product as a whole clearly applies to periodic reviews under Article 9.3.

2. Importers do not engage in "dumping"

40. Mexico disagrees with the United States' claim that, if applied, Mexico's interpretation of Article 9.3 would prevent anti-dumping duties "from fulfilling their intended purpose under Article VI:2 of the GATT 1994, because importers that contribute the most to injurious dumping would be favored over other importers (and domestic competitors) that price fairly". This argument improperly focuses on the behavior of importers rather than the behavior of exporters. It is well-established that "dumping" describes the price discriminatory behavior engaged in by exporters or foreign producers, not by importers. The importer does not set the export price and does not have any part in setting the normal value for a product, which is the benchmark against which dumping must be measured. It is only by altering the export price or the normal value, both of which relate to the exporter that dumping can be eliminated.

3. The elimination of Zeroing is not inconsistent with prospective systems

41. Mexico disagrees with the United States that retrospective and prospective systems are intended to be fundamentally different in their operation and results or that Article 9.4(ii) may be interpreted as endorsing the concept of transaction-specific margins of dumping in prospective normal value systems. The systems are not intended to, and cannot reasonably be interpreted as allowing for different definitions of "dumping", "margins of dumping", or "product". The difference between prospective and retrospective assessment systems is that in the former, the duties deposited at the time of importation are definitive, while in the latter they are not. However, "the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and*

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collection of anti-dumping duties". In order to conform to the requirements of the *Anti-Dumping Agreement*, a collection system must provide for a refund procedure if the duties actually assessed and collected exceed the "margin of dumping" calculated under Article 2.

42. This is clearly reflected in the text of Article 9.3.2 concerning prospective normal value systems. That provision requires refund procedures "upon request" and clearly distinguishes between "the anti-dumping duty assessed on a prospective basis" and the "margin of dumping", requiring refunds where the former exceeds the latter. The interpretation proffered by the United States holds that the amount assessed on a prospective basis is a "margin of dumping". If that were so, then amounts assessed would always equal the margin of dumping and the entire refund obligation under Article 9.3.2 would be rendered a nullity.

43 The US argument that Mexico's interpretation of Article 9.3 (requiring the aggregation of the results of all comparisons on an exporter-specific basis) "would require that retrospective reviews be conducted" in all cases, including in prospective normal value systems is also incorrect. As the Appellate Body determined in *US – Zeroing (Japan)*, paragraph 162, prospective normal value systems may collect definitive anti-dumping duties from importers, and those importers will not be liable for any additional anti-dumping duties. However, such payments are necessarily subject to refund procedures to the degree that the total amount of anti-dumping duties collected exceeds the "margin of dumping".

D. ARTICLE 2.4

44. In its First Written Submission, the United States argues that there is no independent standard of "fairness" that is violated by Zeroing and that Mexico's argument with regard to Article 2.4 is entirely "consequential" to its Article 9.3 argument. Mexico disagrees. The "fair comparison" language in Article 2.4 "creates an independent obligation", the scope of which is not limited to the general subject matter addressed in paragraph 4 (*i.e.*, price comparison). This independent obligation applies to all comparison methodologies employed in all types of anti-dumping proceedings. WTO precedents recognize the "inherent bias" of the Zeroing methodology in all types of proceedings. The Zeroing methodology inflates the margins contrary to the terms of the *Anti-Dumping Agreement* and indeed turns a negative dumping margin into a positive one. It is this fundamental "unfairness" – the biased and distortive effects of Zeroing – which underlies Mexico's argument with respect to Article 2.4.

IV. ARTICLE XVI:4 OF WTO AGREEMENT AND ARTICLE 18.4 OF THE ANTI-DUMPING AGREEMENT

45. The United States asserts that Mexico's claims concerning Article XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement* "depend upon a finding of inconsistency with other provisions of the *Anti-Dumping Agreement* and the GATT 1994".

46. Even if the Panel agrees with this position, it should make findings in favor of Mexico's argument (which is set forth in more detail in its First Written Submission) that the Zeroing Procedures are inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*.

V. AS APPLIED CLAIM WITH RESPECT TO THE ORIGINAL INVESTIGATION

47. In its First Written Submission, the United States recognizes that the USDOC zeroed in the original investigation being challenged "as applied" in this proceeding, and that such Zeroing has been

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found to be "inconsistent with Article 2.4.2". Mexico welcomes this acknowledgment. However, for reasons relating to implementation, Mexico maintains its request for a finding of WTO-inconsistency with respect to this claim.

VI. MEXICO'S REQUEST FOR A SUGGESTION

48. There is no doubt regarding the Panel's authority to make suggestions concerning implementation, as Mexico has requested in this dispute. Article 19.1 of the DSU states that "[i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations". Dispute settlement panels have exercised this discretion in past cases to suggest that implementation be achieved through revocation of the anti-dumping measure (see *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* and *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*). Panels in disputes involving other types of measures have also suggested that their recommendations be implemented by specific means of outright revocation or repeal of the entire measure at issue. In yet other cases, Panels have made even more specific suggestions with respect to compliance.

VII. CONCLUSION

49. For the foregoing reasons, and in order to be consistent with the Mexico's request for the establishment of a panel, Mexico respectfully requests that the Panel find that:

(a) Zeroing, as applied in the original investigation of Stainless Steel Sheet and Strip in Coils from Mexico, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, and 18.4 of the Anti-Dumping Agreement; and Article XVI:4 of the WTO Agreement;

(b) Zeroing in original investigations is, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, and 18.4 of the Anti-Dumping Agreement; and Article XVI:4 of the WTO Agreement;

(c) Zeroing in periodic reviews is, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.1, 2.4, 9.3, and 18.4 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement; and

(d) Zeroing, as applied in the five listed periodic reviews of Stainless Steel Sheet and Strip in Coils from Mexico, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 9.3, and 18.4 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement.

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ANNEX D

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF FIRST AND SECOND MEETINGS

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ANNEX D-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF MEXICO – FIRST MEETING

Mr Chairman, members of the Panel:

I. SECURITY AND PREDICTABILITY IN THE WTO CASE LAW

1. Article 3.2 of the DSU states that the dispute settlement system is a "central element" in providing security and predictability to the multilateral trading system, which creates an expectation that panels will adopt the reasoning in previous Appellate Body reports on the same issues. The question of whether the *Anti-Dumping Agreement* allows investigating authorities to disregard or "zero" intermediate price comparisons where the export price exceeds normal value, was ruled on for the first time in 2001 by the Appellate Body in *EC – Bed Linen*. The zeroing procedures in that first case were applied in the context of an original investigation and in reference to comparisons between the weighted average of export prices and normal value, as defined in Article 2.4.2. However, the principles of definition set in the text of the Agreements, as the Appellate Body observed, clearly exceed the ambit of original investigations and average-to-average comparison.

2. This became evident in the next "zeroing" case analysed by the Appellate Body: *US - Softwood Lumber V*. Here, the Appellate Body extended its findings regarding zeroing practices, which apply in an original investigation where transaction-to-transaction comparison is used. In reaching its conclusion, the Appellate Body interpreted the text on the definitions of "dumping", "margins of dumping" and "product", in Article VI of the GATT 1994 and Article 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, in the same way as it had in *EC – Bed Linen*.

3. The Appellate Body again relied on the same provisions of the Agreements and the same interpretation in *US – Zeroing (EC 1)*, in which it determined that the United States' zeroing procedure in original investigations where the average-to-average comparison methodology is used, is incompatible "as such" with the United States' obligations under the Agreements, and that the zeroing procedures as applied in sixteen periodic reviews where the comparison was between individual export prices and monthly average normal value, was likewise incompatible with the United States' obligations for calculating margins of dumping for the exporter in question, and in respect of the investigated product as a whole.

4. More recently, in *US – Zeroing (Japan)*, the Appellate Body resolved the last outstanding issue when it recognized that zeroing procedures in administrative reviews, sunset reviews and other proceedings are inconsistent "as such" with Article VI of the GATT 1994 and the relevant provisions of the *Anti-Dumping Agreement*. Again, an essential part of the Appellate Body's reasoning was consistency in applying the definitions of "dumping", "margins of dumping" and "product" discussed in *EC – Bed Linen*.

5. In examining the Appellate Body's consistent treatment of this matter in its reports, this Panel should acknowledge two relevant points. First, despite the United States' efforts to confuse the issue, the measure challenged in each of the above-mentioned cases is the same. As the Appellate Body said in *US – Zeroing (Japan)*, there is a single zeroing measure that applies in different contexts. Secondly, in its decisions in all these cases, the Appellate Body has changed neither its reasoning nor its interpretation of the text of the Agreements. Although the facts themselves have been different in each case, the Appellate Body's construction of the Agreements has been consistent in all the cases.

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In its reports, the Appellate Body has always relied on the same fundamental principles of the Agreements.

6. In view of the foregoing, Mexico submits that the texts of the Agreements can support only the conclusion that *all* sales comparisons should be considered in calculating dumping margins.

II. THE CONCEPTS OF "DUMPING", "MARGINS OF DUMPING", AND "PRODUCT"

7. The position taken by Mexico and the Appellate Body rests on a number of basic principles of law. First, "dumping" and "margins of dumping", as defined in Article VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*, relate to the "product" in question. Secondly, the concepts of "dumping" and "margins of dumping" relate only to the behaviour involved in establishing exporter or producer prices for the exported product.

8. The Appellate Body established in several cases a definition of the terms "dumping" and "margins of dumping" that is clear, coherent and in keeping with the texts. The United States, on the other hand, supports interpretations of these terms that are incompatible with the text, context, intent and object of the Agreement and so are incompatible with the customary rules of interpretation of public international law.

"Margins of Dumping" – calculated for the product as a whole and not for individual transactions or models

9. Article VI:1 and VI:2 of the GATT 1994 defines "dumping" in relation to a "product". This definition is carried over to the *Anti-Dumping Agreement* by Article 2.1, and by virtue of the opening phrase of the latter, "[f]or the purpose of this Agreement", the definition applies throughout the Agreement. Article 2.1 is thus a rule that governs the interpretation and the context of the term "margin(s) of dumping" throughout the Agreement. Similarly, the term "dumping" has the same meaning for all provisions of the Agreement and for all types of anti-dumping proceedings. Consequently, any "dumping" or "margin of dumping" in conformity with the Agreement must be calculated in relation to the product under investigation or review.

10. This raises the question of what the Agreements refer to when they use the term "product". The Appellate Body gave the answer in *EC – Bed Linen*. It found that the "product" for which the dumping and margins of dumping are calculated is and must be the investigated product "as a whole".

11. The terms "dumping" and "margins of dumping" necessarily relate to the same definition of "product" "because it is the product that is introduced into the commerce of another country at less than its normal value in that country" (Report of the Appellate Body, *US – Zeroing (Japan)*, para. 109). This concept of dumping for a defined product under investigation or review is also a factor taken into account in determining whether dumping causes or threatens injury.

12. Mexico concedes that it is permissible – even necessary in some circumstances – to carry out intermediate price comparisons on a model or transaction basis. However, as the Appellate Body has found time and again, starting with *EC – Bed Linen* and up to *US – Zeroing (Japan)*, such intermediate comparisons cannot be treated as "margins of dumping" as defined in the Agreements.

13. The United States' interpretation wrongly assumes that it is individual importers that engage in dumping. This position is at odds with the text and the intent of the Agreements.

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"Margins of dumping" – calculated in respect only of individual exporters or foreign producers

14. The *Anti-Dumping Agreement* does not address the behaviour of individual importers or individual import transactions. Rather, it provides consistently that determinations of dumping are carried out in respect of every exporter or foreign producer investigated.

15. The focus on the exporter is evident throughout the text of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, and the Appellate Body found that this fact is clearly confirmed by the text of Article 6.10 of the *Anti-Dumping Agreement*.

16. Anti-dumping measures are designed to offset the effects of the pricing behaviour of producers and exporters, since the producer or exporter is necessarily involved in determining the price of the exports giving rise to sales at a price lower than normal value. Accordingly, the prices of *all* the export transactions of an exporter or foreign produce must be taken into account in determining whether it has engaged in dumping and, if so, to what extent.

17. There is a clear distinction between the establishment or collection of duties and the margin of dumping, which sets a ceiling on the amount of the duties that may be established or collected.

III. INTERPRETATION OF THE PHRASE "ALL COMPARABLE EXPORT TRANSACTIONS" IN ARTICLE 2.4.2

18. The United States overlooks this fundamental point when it reiterates in its First Submission that it is the phrase "all comparable export transactions" in Article 2.4.2 of the *Anti-Dumping Agreement* that lays down the requirement to calculate margins of dumping in reference to the "product" as a whole. It submits that, while the phrase "all comparable export transactions" refers solely to average-to-average comparisons, zeroing is prohibited only in the context of such comparisons.

19. In Mexico's view, this position is not supported by the reports of the Appellate Body. In the first case, *EC – Bed Linen*, in which zeroing was addressed and where the parties referred expressly in their arguments to Article 2.4.2, it is plain that the principles that led the Appellate Body to determine that investigating authorities may not ignore or alter the results of intermediate price comparisons, were to be found in the definitions of "dumping" and "margins of dumping" in Article VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. The fact that the phrase, "all comparable export transactions" was discussed in the context of Article 2.4.2 and the related arguments, was not a decisive element in the report of the Appellate Body.

20. Nor does Mexico agree with the United States' argument in its First Written Submission that in its report in *US – Softwood Lumber V*, the Appellate Body relied on the phrase "all comparable transactions" in Article 2.4.2. As in its earlier report, in *EC – Bed Linen*, the Appellate Body based its findings in *US – Softwood Lumber V* essentially on the definitions of "dumping" and "margins of dumping" that apply throughout the *Anti-Dumping Agreement*. The Appellate Body rejected the United States' argument, concluding that "dumping" and "margins of dumping" apply only to the investigated product as a whole and may not be determined at the level of a sub-product, model or category of that product.

21. The United States further argues that the report of the Appellate Body would void the phrase "all comparable export transactions" of meaning if zeroing were prohibited in all the comparison methods provided for in Article 2.4.2. However, as the Appellate Body said, the reason why the phrase "all comparable export transactions" appears only in connection with the average-to-average comparison methodology is that this is the only methodology to which it is relevant. Since in the average-to-average methodology groups of transactions can be aggregated, the phrase "all comparable export transactions" requires that each group include all transactions that are comparable, and that no

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export transaction be excluded when margins of dumping are determined on the basis of this methodology. Furthermore, the average-to-average comparison methodology involves calculating a weighted average export price, whereas the transaction-to-transaction methodology takes account of all export transactions individually and compares them with the most appropriate transactions on the domestic market. Consequently, as the Appellate Body observed, the phrase "all comparable export transactions" is simply not relevant to the transaction-to-transaction methodology.

IV. MEXICO'S REQUEST FOR FINDINGS

22. The United States has expressed concern that Mexico refers to zeroing procedures as if they were a single measure. It is beyond all doubt that, as the Appellate Body concluded in *US – Zeroing (Japan)*, there is one single zeroing measure.

V. CONCLUSION

23. Mexico would again remind the Panel that the measure challenged as such in this dispute is the same as the measure on which the Appellate Body issued a decision in cases brought by Canada, the European Communities and Japan. The Appellate Body has consistently held that the measure is in breach of the United States' obligations under the Agreements.

24. In the interests of the security and predictability of the WTO system and in order to ensure that the Agreements negotiated by Members are implemented as their texts require, we urge the Panel to allow all Mexico's claims.

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ANNEX D-2

CLOSING STATEMENT OF MEXICO – FIRST MEETING

I. INTRODUCTION

Mr. Chairman, Members of the Panel:

1. On behalf of the Mexican delegation, it is once again our privilege to appear before you to present the views of Mexico concerning the issues in this dispute.

2. Our closing statement will be brief and will focus on some key points.

3. In its opening statement, the United States equated Mexico's position regarding the security and predictability of WTO dispute settlement to "the Panel need do nothing more than blindly follow prior Appellate Body reports". This is incorrect. This dispute is not about the primacy of Appellate Body reports over panel proceedings nor is it about the doctrine of precedent. Rather, it is about the correct legal interpretation of the relevant provisions of the GATT 1994 and the Anti-dumping Agreement. Mexico asks only that this panel correctly interpret these provisions giving due consideration to prior Appellate Body findings on identical issues.

4. It is notable that in the oral statements of the parties given yesterday, no new issues were raised. The first written submissions of the parties express fully the issues before the Panel.

5. The differences in the positions of Mexico and the United States can be distilled into two questions.

6. First, which WTO terms and provisions form the foundation for the prohibition against zeroing? The United States takes the position that the sole basis for the prohibition is the phrase "all comparable export transactions" in Article 2.4.2 of the Anti-dumping Agreement. Mexico takes the position that the foundation of the prohibition is found in the meaning of the terms "dumping", "margins of dumping" and "product" in Articles VI:1 and 2 of GATT 1994 and Article 2.1 of the Anti-dumping Agreement.

7. Second, when interpreting the WTO terms and provisions applicable to the assessment of anti-dumping duties, should the focus be on the importer or the exporter/producer? The United States takes the position that the focus should be on the importer. Mexico takes the position that the focus should be on the exporter/producer.

8. Contrary to the submissions of the United States, the responses to these questions do not give rise to more than one "permissible" interpretation for each response.

9. The response to each question poses a single permissible interpretation. In both instances, the interpretations posed by Mexico are the permissible ones. Mexico's interpretations attribute a consistent meaning to the applicable terms and provisions as they are used throughout the Anti-dumping Agreement. They take into account the entire context of the Anti-dumping Agreement. They follow the interpretations presented by the Appellate Body in its reports concerning zeroing practices.

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10. In contrast, the interpretations posed by the United States do not attribute consistent meaning to the applicable terms and provisions as they are used throughout the Anti-dumping Agreement. They do not take into account the entire context of the Anti-dumping Agreement. Finally, they directly contradict the interpretations presented by the Appellate Body in its reports concerning zeroing practices. The interpretations posed by the United States are, simply put, not permissible.

11. Embedded in the United States' submissions are arguments that rely on factual scenarios related to the technical application of anti-dumping duties. The findings required in this dispute do not require the Panel to consider the many different factual scenarios regarding the technical application of anti-dumping duties. Rather, they require the Panel to focus on the text of the applicable terms and provisions of GATT 1994 and the Anti-dumping Agreement and interpret those terms and provisions in a manner that is consistent with the rules of interpretation set out in Articles 31 and 32 of the *Vienna Convention of the Law of Treaties* as incorporated in Article 3.2 of the DSU.

12. Thank you once again for agreeing to serve on this Panel and for your efforts, and those of the Secretariat and translators, in preparing for this meeting.

13. This concludes our closing statement. We would be pleased to respond to any questions you may have.

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ANNEX D-3

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES – FIRST MEETING

Mr. Chairman, Members of the Panel:

Procedural Issues

1. This Panel is tasked with making its own objective assessment of the matter before it. This includes an assessment of the facts as well as the conformity of the challenged measures with the relevant covered agreements. Mexico and some third parties, however, would have this Panel neglect its responsibilities in the name of "security and predictability". According to them, it is sufficient that the Appellate Body previously has found zeroing to be inconsistent with provisions of the WTO Agreements.

2. The Appellate Body itself has stated that its reports are not binding on panels. Prior panel and Appellate Body reports should be taken into account only to the extent that the reasoning contained in them is persuasive. In our first written submission, we have provided cogent reasons why the findings and reasoning of the Appellate Body in *US – Zeroing (Japan)* and *US – Zeroing (EC)* are seriously flawed with respect to certain aspects relevant to this dispute and therefore should not be followed.

3. "Security and predictability" is not an independent obligation, nor is it a stated "object and purpose" of any WTO Agreement. The only reference to this phrase in the WTO Agreement is in DSU Article 3.2, which makes clear that security and predictability are achieved only when the dispute settlement system works as provided therein – that is, through the proper application of customary rules of interpretation of public international law to the agreed-upon provisions of the covered agreements, in order to preserve the rights and obligations to which the Members agreed. Security and predictability is provided by a dispute settlement system that does not add to or diminish the rights and obligations of WTO Members. A panel is not permitted to follow a prior panel or Appellate Body report in the name of "security and predictability" where that prior report has added to or diminished rights and obligations.

Scope of this Dispute

4. In light of its terms of reference and Article 7 of the DSU, this Panel may only address those matters identified by Mexico in its request for establishment of a panel. In its request for consultations and its request for the establishment of a panel, Mexico identified two alleged measures it was challenging "as such" - the use of "zeroing" in average-to-average comparisons in original investigations and the use of "zeroing" in assessment proceedings. Yet, in its first written submission, Mexico asserts that it is challenging a "single zeroing measure" in all antidumping proceeding contexts.

5. Mexico argues that in *US – Zeroing (Japan)*, the Appellate Body concluded that there was one single rule which it found to be inconsistent with US obligations. A prerequisite for the Appellate Body to reach that conclusion was its finding that "zeroing" in all contexts and with respect to all types of comparisons was within the scope of Japan's request for establishment of a panel and request for consultations. That is clearly not the case here.

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6. There is nothing in US law that requires a monolithic use of "zeroing" in all contexts. This is supported by the fact that Commerce is no longer making average-to-average comparisons in original investigations without providing offsets for non-dumped comparisons, a fact which Mexico acknowledges in its first written submission. Mexico relies on descriptions of what Commerce has done in the past to argue the existence of a "single zeroing measure". Aside from the fact that these past examples do not cover all the contexts supposedly covered by the so-called "single zeroing measure", Mexico's arguments imply that if an administering authority acts in a non-arbitrary and consistent manner, this should expose it to dispute settlement for somehow maintaining a separate measure. This is a very troubling proposition.

The Claimed Obligation to Provide Offsets

7. Mexico argues that the Antidumping Agreement imposes on Members an obligation to provide an offset to dumping in all types of antidumping proceedings, including assessment proceedings. Mexico does this despite the absence of a textual basis for such an obligation and a permissible interpretation of the Antidumping Agreement that does not require such offsets.

8. In the disputes to date that have addressed the issue of offsets, the only textual basis panels have identified for an obligation to provide offsets has been the "all comparable export transactions" language in the text of Article 2.4.2 of the Antidumping Agreement. This is consistent with the approach articulated by the Appellate Body in *US – Softwood Lumber Dumping*. The phrase "all comparable export transactions" in Article 2.4.2 applies only to antidumping investigations and only when authorities use average-to-average comparisons pursuant to Article 2.4.2. The panels have consistently found that the obligation to provide offsets applies only as a consequence of the text-based obligation to include all comparable export transactions when making weighted-average to weighted-average comparisons in an investigation. The panels have also consistently found that there is no textual basis for an obligation to provide offsets outside the context of average-to-average comparisons in investigations. The analysis offered by the prior panels is persuasive and correct.

9. Article 2.4.2 provides for two symmetrical comparison types, average-to-average and transaction-to-transaction, and a third asymmetrical comparison type, average-to-transaction, which may be used under certain conditions. With respect to the average-to-average comparisons, the phrase "all comparable export transactions", as interpreted by the Appellate Body in *US – Softwood Lumber Dumping*, addresses whether the relevant comparison may be made at the level of averaging groups (or "models"). Under this reading, the word "all" in "all comparable export transactions" refers to all transactions across all models of the product under investigation. This is the textual basis for the conclusion that margins of dumping based on average-to-average comparisons must relate to the "product as a whole" rather than individual averaging group comparisons. This phrase, "all comparable export transactions", however, applies only to the use of average-to-average comparisons in an investigation.

10. A general prohibition of zeroing would negate and contradict the interpretation of the phrase "all comparable export transactions" that was the basis of the obligation to provide offsets in the context of average-to-average comparisons. However, in *US – Zeroing (Japan)*, the Appellate Body did just that by reinterpreting "all comparable export transactions" to relate solely to all transactions within a model, and not across models for the product under investigation. In doing so, the Appellate Body abandoned the only textual basis in the Antidumping Agreement for prohibiting zeroing. In this case, Mexico argues that margins of dumping calculated in assessment proceedings must relate to the "product as a whole", and cannot be calculated for individual transactions. However, "product as a whole" is not a term found in the Antidumping Agreement nor does it have any defined meaning. To the extent the concept of "product as a whole" has any relevance to the Antidumping Agreement, it is only as a shorthand for the operation of the phrase "all comparable export transactions" in the context

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of average-to-average comparisons in investigations. Mexico's argument relies entirely on the concept of "product as a whole" being applied in a manner detached from that textual basis.

11. Mexico seeks to redefine the concept of dumping contained in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994 such that the terms "dumping" and "margins of dumping" relate "solely, and exclusively, to the "product" under consideration taken "as a whole"".

12. The text of these provisions defines and describes dumping as occurring in the course of individual commercial transactions. The commercial reality is that prices are generally set in individual transactions and products are "introduced into the commerce" of the importing country in individual transactions. In other words, dumping – as defined under these provisions – may occur in a single transaction. To the extent that some transactions introduce merchandise into the market of an importing country at a price above normal value, this is to the benefit of the seller, not the domestic industry injured by other transactions made at less than normal value.

13. Mexico asserts that dumping and margins of dumping "are concepts that have no meaning unless considered with reference to the product under consideration taken as a whole". The Appellate Body reports relied upon by Mexico are unpersuasive because they cannot alter the simple fact that the relevant text of these provisions, the relevant context for interpreting the meaning of these terms, and the well-established prior understanding of these concepts all confirm that dumping and margins of dumping do have a meaning in relation to individual transactions. Our written submission sets forth the textual, contextual, and other evidence that the concepts of dumping and margins of dumping are applicable to individual transactions. That evidence conclusively establishes that the terms dumping and margins of dumping as used in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994 do not support the existence of an obligation to provide offsets for instances of non-dumping in assessment proceedings.

14. Mexico's misinterpretation of the term "margin of dumping" is the basis for its claim of inconsistency with Article 9.3. Article 9.3 requires that the amount of the antidumping duty assessed shall not exceed the margin of dumping. That obligation, just like the term "margin of dumping" itself, may be applied at the level of individual transactions. This understanding is particularly appropriate in the context of antidumping duty assessments, where duties are assessed on individual customs entries resulting from individual transactions for which importers are liable for payment. Mexico's argument that excess antidumping duties were assessed in this dispute depends on its misinterpretation of the term "margin of dumping" referred to in Article 9.3 as relating exclusively to the product "as a whole" considered on an exporter-wide basis. The panels examining this issue have consistently observed that interpreting the term "margin of dumping" as relating exclusively to the "product as a whole" for all importers of product from a particular exporter is inconsistent with the importer- and import-specific obligation to pay an antidumping duty.

15. Mexico's interpretation of Article 9.3 cannot be reconciled with the recognition in Article 9 of prospective normal value systems of assessment. Under such systems, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. If the margin of dumping must relate exclusively to the "product as a whole" determined on an exporter-specific basis, the administration of such an assessment system is simply impossible. An obligation to account for other imports in assessing antidumping duties on a particular entry is contrary to the very concept of a prospective normal value system and, if accepted, would effectively render prospective normal value systems WTO-inconsistent unless they were converted to a retrospective system by adopting retrospective assessment reviews.

16. Antidumping duties are applied at the level of individual entries. In this way, an importer may be induced to raise resale prices to cover the amount of the antidumping duty, thereby preventing

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the dumping from having further injurious effect. If, instead, the amount of the antidumping duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer, then the antidumping duty will be insufficient to have the intended effect. The importer of the dumped product would remain in a position to profitably resell the product at a price that continues to be injuriously dumped. If Mexico's reading of "margin of dumping" is accepted as the sole permissible interpretation of Article 9.3, the remedy provided under the Antidumping Agreement and the GATT 1994 will be prevented from fully addressing injurious dumping.

17. Mexico claims inconsistency with the "fair comparison" requirement of Article 2.4, arguing that the United States has assessed antidumping duties "in excess of the actual margin of dumping for the product" because the duties assessed exceeded the margin of dumping for the product as a whole. The relevant text of Article 2.4, however, provides only that a "fair comparison shall be made between the export price and the normal value". The text of Article 2.4 does not address whether any particular assessment of antidumping duties exceeds the margin of dumping, whether "dumping" and "margins of dumping" are concepts that apply to individual transactions, or whether a margin of dumping may be specific to each importer. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is "fair" or "unfair". Resolution of Mexico's claim depends not on the text of Article 2.4, but on whether it is permissible to interpret the term "margin of dumping" as used in Article 9.3 as applying to transactions. As prior panels have found, it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction. Therefore, the challenged assessments do not exceed the margin of dumping and there is no basis for a finding of inconsistency with Article 2.4.

18. Any interpretation that gives rise to a general prohibition of zeroing also renders the second sentence of Article 2.4.2, the "targeted dumping provision", inutile. This is because the targeted dumping methodology mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. This defect cannot be ignored or assumed away by supposing that the targeted dumping provision permits an authority to ignore any obligation in the Antidumping Agreement other than the obligation to use one of the two symmetrical comparison methods.

19. The United States respectfully disagrees with the Appellate Body's reasoning in *US – Zeroing (Japan)* that the Antidumping Agreement includes a general prohibition of zeroing. The United States agrees with the reasoning applied by the panels that outside the context of average-to-average comparisons in investigations the Antidumping Agreement does not impose an obligation to provide offsets for non-dumping. At a minimum, we urge this Panel to find that a permissible interpretation of the Antidumping Agreement, consistent with the Appellate Body's original interpretation in *US – Softwood Lumber Dumping* and faithful to the text of the Antidumping Agreement, contains no obligation to provide for an offset to dumping in assessment proceedings.

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ANNEX D-4

CLOSING STATEMENT OF THE UNITED STATES – FIRST MEETING

Mr. Chairman, Members of the Panel:

1. On behalf of the United States' delegation, I would once again like to thank you and the members of the Secretariat for your work on this dispute. We appreciated the opportunity to provide you with preliminary thoughts on your questions and look forward to providing you with additional comments in our written responses and our second submission.

2. We will be very brief in our closing statement. Mexico would have this Panel merely follow the Appellate Body report in *US – Zeroing (Japan)* without engaging in its own analysis. Having failed to include a "single zeroing measure" in its request for establishment of the panel, Mexico even argues that the Panel should find the existence of such a measure because the Appellate Body did so in a separate dispute.

3. Mexico would have the Panel do this in the interest of "security and predictability". Security and predictability is provided by a dispute settlement system that does not add to or diminish the rights and obligations to which the Members agreed. This requires the proper application of customary rules of interpretation of public international law to the agreed upon provisions of the covered agreements. Therefore, any prohibition of zeroing must be found in the text of the Antidumping Agreement. Aside from a prohibition of zeroing in the context of average-to-average comparisons in original investigations, there is plainly no general prohibition of zeroing.

4. Mexico's proposed obligation to treat non-dumped imports as a remedy for injurious dumping by reducing the assessment of antidumping duties on dumped imports depends upon a definition of dumping that is not based upon the text of the Antidumping Agreement, but on an abstract concept of dumping. Ultimately Mexico's interpretation cannot be reconciled with the commercial, administrative realities to which the Antidumping Agreement must relate.

5. The prior panels addressing this issue have recognized the deficiencies inherent in Mexico's proposed interpretation and have found that the relevant text, the relevant context, and the well-established prior understanding of the terms "dumping" and "margin of dumping" as used in the Antidumping Agreement demonstrate that these concepts are not devoid of meaning except in relation to the product as a whole.

6. As detailed in our first written submission, Mexico's interpretation cannot be reconciled with the ordinary meaning of the terms with which dumping and margins of dumping are defined, and which describe dumping as occurring in the course of ordinary commercial transactions, and which do not define products as "introduced into the commerce" of the importing country "as a whole", or prices of all the products at issue in an assessment proceeding generally being set "as a whole".

7. Mexico's interpretation cannot be reconciled with the Appellate Body's interpretation of the phrase "all comparable export transactions" in *US – Softwood Lumber Dumping*.

8. Nor can it be reconciled with the targeted dumping provision in the second sentence of Article 2.4.2; with the importer- and import-specific obligation to pay antidumping duties; with the

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existence of prospective normal value systems of assessment as provided in Article 9; and, with the effective functioning of antidumping duties as a remedy for injurious dumping.

9. Finally, let me reiterate the position of the United States with respect to Mexico's particular claims in this dispute. First, regarding Mexico's "as such" claims, Mexico has failed to establish the existence of any measure that may be challenged "as such", whether the measures are taken as described in Mexico's panel request – as they must be – or as a single measure as described in Mexico's first written submission. Accordingly, Mexico's "as such" claims should be rejected in their entirety.

10. Second, regarding Mexico's "as applied" claim relating to the investigation of stainless steel from Mexico for which the Department of Commerce used average-to-average comparisons without providing offsets for non-dumped comparisons, the United States does not contest that its calculation in this investigation was inconsistent with the obligation to account for "all comparable export transactions" in calculating the "margin of dumping" as these terms were interpreted by the Appellate Body in *US – Softwood Lumber Dumping*.

11. Third, a correct interpretation of the Antidumping Agreement does not impose an obligation to provide offsets for instances of non-dumping in assessment proceedings. Accordingly, Mexico's "as applied" claims with respect to the five periodic reviews should be rejected.

12. Mr. Chairman, Members of the Panel, we appreciate this opportunity to present these closing comments and look forward to continuing to work with you on these issues.

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ANNEX D-5

THIRD PARTY ORAL STATEMENT OF CHINA

1. Mr. Chairman, distinguished members of the panel, it is my great honour to appear before you today to present the views of China as a third party to these proceedings.

2. Notwithstanding China did not submit a written submission to the panel, China would like to emphasize its systematic interests in this dispute regarding whether the "zeroing procedures" adopted by the United States in the original anti-dumping investigation and periodic reviews are consistent with the GATT and the Anti-Dumping Agreement.

3. Both Mexico and United States don't contest the fact that all major issues arising under this case have been examined by the Appellate Body in previous anti-dumping disputes. Thus, the reasoning and findings of the Appellate Body in these disputes can provide valuable guidance in the present case. In this regard, China would like to draw the attention of the panel to the Appellate Body's findings in "*EC - Bed Linen*", "*US- Softwood Lumber V*", "*US – Zeroing (EC1)*", "*US – Softwood Lumber V (Art. 21.5-Canada)*" and "*US – Zeroing (Japan)*".

4. In these disputes, the Appellate Body found that the zeroing procedure may be challenged "as such" and is prohibited in all circumstances whenever calculating the "margins of dumping" regardless of the specific phase or comparison methods. To be more specific, no matter the comparing method is weighted average-to–weighted average ("W-W"), transaction–to–transaction ("T-T") or weighted average–to–transaction ("W-T"), the use of zeroing in original investigation is always inconsistent with Articles 2.1, 2.4.2 and 2.4 of AD Agreement. As to the zeroing methodology in the administrative reviews, it has also been found incompatible with AD Agreement Article 9.3 and GATT Article VI:2. On all these matters, China believes that the legal position is clear, and sees little purpose in a lengthy re-iteration of the consistent jurisprudence developed by the Appellate Body in these cases. Besides, China can't find any remarkable new argument in United States' rebuttal comparing with those it has raised before. Since these arguments have all been dismissed by the Appellate Body with well-founded reasoning, China sees no reason why the present panel shall depart from the Appellate Body's prior rulings.

5. In light of the forgoing, China urges the Panel to approve Mexico's claims that the zeroing measures adopted by the United States are inconsistent "as such" with Articles 2.1, 2.4, 2.4.2 and 9.3 of the AD Agreement. It is time for the United States to eliminate the systematic use of zeroing, a practice which is not permissible under the WTO Agreement and harmful to the balance of rights and obligations established by it.

6. Mr. Chairman, this concludes the oral statement of China as a third party to this proceeding. Thank you for your attention.

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ANNEX D-6

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

Mr. Chairman, Members of the Panel:

1. The European Communities appreciates this opportunity to appear before you today. The European Communities makes this third party oral statement because of its systemic interest in the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").

2. This case also raises important substantive issues in relation to Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Implementation of Article VI ("Anti-Dumping Agreement") thereof. However, none of the issues raised in this proceeding relating to anti-dumping are new. Mexico's claims appear to be supported by a consistent body of reasoning and findings, contained in all reports issued by the Appellate Body since the *EC-Bed Linen* case. Further, the European Communities has been unable to detect anything new in the argumentation used by the United States to defend its zeroing methodologies and practices.

3. The European Communities' oral statement will therefore be brief. In its written submission the European Communities set out at length the systemic reasons why in its view, this Panel should follow the findings and conclusions contained in previous Appellate Body reports on zeroing.[1]

4. It is not disputed that adopted panel and Appellate Body reports are binding, *qua* reports, only on the immediate parties to the dispute. Further, like many other international adjudicatory systems, the WTO dispute settlement system does not formally recognise the doctrine of *stare decisis* – the doctrine of binding judicial precedent. But these principles do not detract from the interest that the WTO dispute settlement system has in common with all other responsible adjudicatory systems: maintaining consistency, stability and predictability of the case law. Further, as the European Communities has set out at length in its written submission, in all adjudicatory systems, whether national or international, that are two- or multi-tier systems, decisions of the hierarchically superior body are binding on the hierarchically lower body, in particular on issues of law.

5. The European Communities submits that in the WTO dispute settlement system the expectations upon panels are no different. A paramount function of this system is to create and maintain a uniform body of rules. This is clearly reflected in Art. 3.2 DSU, according to which the WTO dispute settlement system aims at providing "security and predictability to the multilateral trading system". The Appellate Body occupies a superior position in the hierarchy of this system (Art. 17 DSU). Its very purpose is to provide predictability and stability to the multilateral trading system through its decisions on issues of law covered in panel reports and legal interpretations developed by panels.

6. It is beyond dispute that the practice of zeroing in anti-dumping cases has been contested many times in WTO dispute settlement proceedings. The Appellate Body in particular has adjudicated on the issues raised in this case frequently, including in cases involving different variations of zeroing, both in original anti-dumping investigations and reviews, in different factual circumstances and between different parties.[2]

[1] See EC's written submission, 11 April 2007, part IV.

[2] In its written submission the European Communities has reviewed the salient reasoning and findings of the Appellate Body in each of these reports. See EC's written submission, 11 April 2007, part III. Reference

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7. The United States does not contest this, but argues that this Panel should not follow these Appellate Body reports. On the contrary, the United States explicitly invites this Panel to re-apply findings and follow the reasoning contained in panel reports that have been rejected and overturned – in many cases more than once– by the Appellate Body, in reports which have subsequently been adopted by the Dispute Settlement Body.

8. The European Communities submits that the suggestion by the United States that this Panel should be free to depart from adopted Appellate Body reports on issues of law and legal interpretations relating to the covered agreements, is misguided.

9. The Appellate Body itself has addressed this very question in several cases. As set out in the European Communities' written submission, some of these cases are particularly relevant as they deal with appeals in zeroing cases. In *US –Softwood Lumber V (Art. 21.5 – Canada)*, the United States requested the Appellate Body not to "import wholesale the findings and reasoning" from another case, *EC – Bed Linen*, on the following grounds: the United States was not a party to the latter dispute, the arguments raised in that case were different, and the United States' practice of zeroing was not at issue in the *EC – Bed Linen* case.

10. The Appellate Body started its response to this request by recalling its previous statement in *Japan – Alcoholic Beverages II*, according to which adopted panel reports create "legitimate expectations among Members". It also referred to its statement in *US – Shrimp (Article 21.5 – Malaysia)*, according to which this principle of legitimate expectations also applies to adopted Appellate Body reports. The Appellate Body then recalled that it had in *US – Shrimp (Article 21.5 – Malaysia)* explicitly approved of a panel report that had used reasoning and findings of an adopted Appellate Body report; and that it explicitly held that the panel had been correct in using the Appellate Body's findings as a "tool for its own reasoning". The Appellate Body proceeded with citing Article 3.2 of the DSU in full and stated, in response to the United States' request, that it had decided to take account of the reasoning and findings contained in the Appellate Body report in *EC – Bed Linen*, "as appropriate".[3]

11. Furthermore, there should be no doubt that the Appellate Body expects panels to follow its conclusions: in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body explicitly held 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"[4]; and in *US – Zeroing (Japan)*, the Appellate Body took firm exception to the fact that the panel had come to conclusions on the basis of reasoning relating to the Anti-Dumping Agreement, which the Appellate Body had rejected earlier.[5]

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is made in particular to the adopted Appellate Body Reports in the following cases: *EC – Bed Linen*, adopted 12 March 2001; *US – Softwood Lumber V*, adopted 31 August 2004; *US – Zeroing (EC1)*, adopted 9 May 2006; *US – Softwood Lumber V (Article 21.5 – Canada)*, adopted 15 August 2006; *US – Zeroing (Japan)*, adopted 9 January 2007.

[3] See EC's written submission, 11 April 2007, paras. 155-159.

[4] *Ibid*., para. 166.

[5] *Ibid*., para. 85.

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12. In conclusion, the European Communities submits that as the Appellate Body is the hierarchically superior body in the WTO dispute settlement system, tasked with deciding on issues of law and legal interpretations, its rulings must be regarded as commanding particular authority for panels, as authoritative pronouncements on the law. The United States' submission that this Panel should not follow Appellate Body findings and reasoning in zeroing cases, and that analogous cases can be decided in a contrary sense by this Panel, must be rejected.

13. The European Communities stands ready to participate further in the discussion, or to answer any questions that this Panel may have regarding the matters set out in its written submission. Thank you for your attention.

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ANNEX D-7

THIRD PARTY ORAL STATEMENT OF JAPAN

I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel, on behalf of the Government of Japan, I thank you for your attention to this matter. This morning, Japan will focus mainly on the arguments of the parties concerning the WTO-consistency of the use of zeroing in periodic reviews and endeavour to reinforce Japan's position on the issue as much as possible.

2. Before talking about the issues related to periodic reviews, let me briefly point out the fundamental flaw in the United States' argument on the "scope of the *as such* claims" made by Mexico. The United States contends that the *as such* claim made by Mexico on "a single zeroing measure, the Zeroing Procedures" is baseless because it addressed only limited aspects of the use of zeroing within the whole antidumping regime of the United States. In doing so, the United States even quotes the Appellate Body's report in *United States – Zeroing* (DS322) brought by Japan. However, in that dispute, the point that the Appellate Body made clear was to the contrary to the United States' contention. There, the Appellate Body upheld the Panel's conclusion that the "zeroing procedures" under different comparison methodologies, and in different stages of antidumping proceedings, simply reflect different manifestations of a single rule or norm.[1] The mere fact that Mexico's request for panel establishment did not cover as wide range of zeroing as the Japan's case never undermines the single nature of zeroing procedures which can be challenged as such. The zeroing procedures, as such, have been declared inconsistent with the US obligations in DS322, and the subject of the Mexico's claims is simply a part of such WTO incompatible measure.

II. THE UNITED STATES MISUNDERSTANDS THE NOTION OF "DUMPING"

3. Turning to specific arguments, first of all, Japan would like to point out that the normative notion of "dumping" that is defined by the provisions of Antidumping Agreement and the GATT 1994 is different from the individual transaction at a price lower than normal value of a product.

4. The United States argues that "dumping nevertheless occurs at the level of individual transactions" as a starting point of its argument with regard to permissibility of zeroing in periodic reviews.[2] However, when the exporting price is less than normal value, it is just a "discount" that occurs at the level of the individual transactions. It is not "dumping" as set forth in the provisions of Antidumping Agreement and the GATT 1994. We can find no textual support in the Antidumping Agreement to consider a mere "discount" at the level of an individual transaction as "dumping". As the Appellate Body has repeatedly stated clearly, the existence of dumping has to be decided only in relation to "a product" as defined by the authority, as the texts of Article 2.1 of Antidumping Agreement and Article VI of the GATT 1994 suggest[3].

5. Thus, the interpretation of the United States that "dumping" can exist at the level of an individual transaction is in contradiction with the interpretation of Antidumping Agreement and the

[1] *See* Appellate Body Report, *US – Zeroing (Japan)*, para. 88.
[2] United States' First Written Submission, para.89.
[3] Appellate Body Report, *US –Zeroing(Japan)*, paras. 108-109, 115; Appellate Body Report, *US – Softwood Lumber V*, para 93.

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GATT 1994 by the Appellate Body in the past zeroing disputes, and therefore subsequent arguments of the United States based on such misinterpretation are also incorrect.

III. ARTICLE 9 READ TOGETHER WITH ARTICLE 2 OF THE ANTIDUMPING AGREEMENT DOES NOT SUPPORT THE ARGUMENTS OF THE UNITED STATES

6. Secondly, the United States submits that "there is no textual support in Article 9.3 for the view that the AD Agreement requires an exporter-oriented assessment of antidumping duties"[4], and asserts that "the obligation set forth in Article 9.3 to assess no more in antidumping duties than the margin of dumping" is applicable "at the level of individual transactions".[5]

7. Japan does not deny that the amount of antidumping duty can be assessed on individual transactions. However, as required by Article 9.3 of the Antidumping Agreement, the assessment shall not lead to the imposition of an amount exceeding the "margin of dumping as established under Article 2". And the "margin of dumping" must be determined for the product as a whole, as the Appellate Body has repeatedly pronounced.

8. The Appellate Body has also held that Articles 9.2 and 9.5 of the Antidumping Agreement and Article VI:2 of the GATT 1994 confirm the view that antidumping duties are imposed "on the product", not on individual transactions.[6] Moreover, consistent with the rules under Article 2 of the Antidumping Agreement, the "margin of dumping" must be established for the "product" as a whole.[7] As a result, in a duty assessment review, the authority must ensure that the aggregate amount of the duty levied on the product during the review period does not exceed the margin of dumping for the product for that period.

9. Accordingly, the argument of the United States is not supported by the texts as well as the interpretation by the Appellate Body of the provisions under the Antidumping Agreement and GATT 1994.

IV. THE EXISTENCE OF A PNV SYSTEM CANNOT JUSTIFY ZEROING

10. Thirdly, the United States continues to argue that, under the prospective normal value (PNV) system, "margins of dumping" may be calculated for individual import transactions.[8]

11. However, the Appellate Body has previously considered, and rejected, this argument.[9] The Appellate Body concluded that a "margin of dumping" is not determined at the time of importation on a transaction specific basis[10]: margins are first calculated in original investigations; antidumping duties are imposed upon each entry for importation of the product; the amount of duties initially imposed may be reviewed, and in the case of the prospective system, a "refund" must be paid in accordance with Article 9.3.2 of the Antidumping Agreement "when the duties paid exceed the actual margin of dumping".[11] In *any* review under Article 9.3 – under *any* system of duty collection – the

[4] United States' First Written Submission, para.85.
[5] *Ibid.*, para.83.
[6] Appellate Body Report, *US – Softwood Lumber V*, para.94 and 99.
[7] Appellate Body Report, *US – Zeroing(Japan)*, para. 110.
[8] United States' First Written Submission, para.93.
[9] Appellate Body Report, *US – Zeroing (Japan)*, paras. 161 and 162.
[10] Appellate Body Report, *US – Zeroing (Japan)*, para.151. *See also*, Appellate Body Report, *US – Zeroing (EC)*, para. 128. Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87 ("the results of transaction-specific comparisons are not, in themselves, "margins of dumping" ").
[11] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 112.

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authority must determine a margin of dumping for the product as a whole by aggregating all multiple comparison results.[12]

V. MEMBERS MUST REFUND TO ENSURE THAT THE AMOUNT OF ANTIDUMPING DUTIES DOES NOT EXCEED THE MARGIN OF DUMPING DETERMINED FOR AN EXPORTER

12. Finally, it is not limited to the case of the prospective system that the authority needs to refund all or part of the deposits to meet the obligation under Article 9.3. Japan emphasizes that under Article 9.3, to the extent that the total amount of duties were collected at the time of importation in the form of a deposit in excess of the margin of dumping determined upon review for individual exporters, the authority should refund such exceeding amount. As stated by the Appellate Body, "[u]nder any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter"[13] and the Antidumping Agreement "provides for a refund if the ceiling is exceeded".[14]

13. Accordingly, regardless of what sort of duty assessment system is used, the authority must refund to the importers (1) all deposits paid at the time of entries when no margin of dumping is established in reviews for those entries, or (2) such amount of deposits as exceed the margin of dumping as established in such reviews.

VI. CONCLUSION

14. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute taking into consideration the points that Japan has raised, so as to ensure fair and objective application of the Antidumping Agreement. Thank you for your attention, Mr. Chairman, distinguished Members of the Panel.

[12] Appellate Body Report, *US – Zeroing (EC)*, para. 132.
[13] Appellate Body Report, *US – Zeroing (Japan)*, para. 162.
[14] Appellate Body Report, *US – Zeroing (Japan)*, para.163.

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ANNEX D-8

THIRD PARTY ORAL STATEMENT OF THAILAND

1. Mr. Chairman and Members of the Panel: Thailand appreciates the opportunity to participate in this proceeding and to present its views today.

2. Thailand reserved its right to participate as a third party in this proceeding under Article 10.2 of the *Dispute Settlement Understanding* due to our concern about the continued use of "zeroing" by the United States in original investigations as well as periodic reviews. In Thailand's view, the use of zeroing in any circumstance is inconsistent with both the spirit and the substance of Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*. In effect, the use of zeroing either artificially creates margins of dumping where none would otherwise have been found or, at a minimum, artificially inflates margins of dumping and the consequent imposition of anti-dumping measures, whether in an original proceeding or a periodic review. As evidenced by the numerous zeroing-related disputes either concluded or initiated against the United States just over the course of the previous year, Thailand is not alone in this view.

3. Thailand generally supports the arguments made by Mexico, the European Communities, and Japan regarding the United States' use of zeroing in this dispute. Because these delegations have already submitted detailed analyses, we do not think it necessary to repeat those arguments today. We instead simply remind the Panel that the Appellate Body's rulings to date on the issue of zeroing have coherently and consistently addressed the numerous different arguments put before it in each dispute, ranging from *EC – Bed Linen* to the latest *US – Zeroing (Japan)*. To summarize, the Appellate Body has held that whenever an investigating authority uses intermediate comparisons between subgroups of export prices and normal values – whether on a model-by-model, transaction-by-transaction or any other basis – as a step to arrive at the overall dumping margin for that product, the investigating authority may not, in aggregating those intermediate comparisons, "zero" the results of some of those comparisons.

4. Regardless of whether each successive Appellate Body report states this principle in identical terms, addresses all of the different methodologies in which zeroing can be used, or repeats all of the reasoning of previous reports, Thailand considers this principle to have been fully and correctly reasoned by the Appellate Body and to apply equally and fully to the issues that are before the Panel in this case. We agree also with the arguments made by the European Communities on the need for security and predictability within the multilateral trading system.[1] Thailand therefore urges this Panel to follow the reasoning and findings of the Appellate Body, and rule that as submitted by Mexico the use of zeroing by the United States in original investigations and periodic reviews - regardless of the comparison methodology used - is inconsistent with its obligations under Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*.

5. Thank you.

[1] Third Party Submission by the European Communities, para. 167.

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ANNEX D-9

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF MEXICO – SECOND MEETING

I. INTRODUCTION

Mr. Chairman, Members of the Panel:

1. In this opening statement, we do not intend to provide an exhaustive presentation of Mexico's case. Instead, we limit our discussion to certain key points concerning Mexico's claims against the United States' Zeroing Measures respecting model zeroing in original investigations and simple zeroing in periodic reviews.

II. MODEL ZEROING IN ORIGINAL INVESTIGATIONS

2. Mexico maintains its request for a finding on this claim. As outlined in Mexico's response to Question 13 of the Panel, the scope of the United States' abandonment of model zeroing in original investigations is incomplete. Accordingly, for implementation reasons, a Panel finding on this claim is necessary. Mexico also maintains its "as such" claim regarding model zeroing in original investigations to the extent that such zeroing in original investigations has not been fully abandoned by the United States, as described in Mexico's response to Question 13 of the Panel. Although the United States has not acknowledged the merits of this claim, Mexico has presented a *prima facie* case with respect to each requisite element of this claim and the United States has not rebutted Mexico's *prima facie* case.

III. SIMPLE ZEROING IN PERIODIC REVIEWS

3. Mexico and the United States have filed detailed submissions on Mexico's claim regarding simple zeroing in periodic reviews. It is clear from a review of these submissions that Mexico has presented a *prima facie* case with respect to each requisite element of this claim and that the United States has not rebutted Mexico's *prima facie* case.

IV. OTHER KEY ISSUES

4. We would like to elaborate upon certain key issues that have been raised by the United States.

A. EVIDENCING A MEASURE THAT CAN BE CHALLENGED AS SUCH

5. The Appellate Body has found that an "as such" claim of the kind asserted by Mexico can be sustained where the complaining party establishes clearly through arguments and supporting evidence: (1) that the alleged rule or norm is attributable to the responding Member; (2) its precise content; and (3) that it has general and prospective application.

6. The United States does not appear to seriously challenge the first or second prongs of this test. There is no doubt that the zeroing measure is attributable to the United States, specifically that it is attributable to the USDOC as the investigating authority in US anti-dumping proceedings. Likewise, Mexico has amply documented the specific content of the Zeroing measures as applied by the USDOC in original investigations and periodic reviews and the fact that this measure is invariably

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applied in all periodic reviews and in all original investigations (at least until February 2007) as rule of general and prospective application.

B. THE MANDATORY/DISCRETIONARY DISTINCTION

7. As it has done in the past, the United States seeks to sidestep these conclusions by asserting that zeroing is not *mandated* under the US anti-dumping laws. In its response to Question 19 of the Panel, the United States argues that "[i]n order to find that a measure, as such, breaches an obligation, the measure must mandate that breach". In making this argument, the United States mischaracterizes the applicability of the mandatory/discretionary distinction to the facts of this dispute.

8. In both *US – Zeroing (EC)* and *US – Zeroing (Japan)*, there was no issue as to whether zeroing was "mandated" under US law. There is similarly no such issue in this dispute.

C. MATHEMATICAL EQUIVALENCY

9. Mexico notes that the mathematical equivalency argument was considered and rejected by the Appellate Body in both *US – Softwood Lumber V (21.5)* and *US – Zeroing (Japan)*. The argument has no merit based on these two adopted Appellate Body reports.

10. Although there is no need for Mexico to further rebut the mathematical equivalency argument, in light of the fact that the United States has introduced Exhibit US-10 to support its response to Question 15 of the Panel, Mexico is presenting an example of its own that demonstrates the absence of mathematical equivalency.

11. In order for the US allegation of "inutility" to be sustained in this case, its argument of mathematical equivalency must hold in all possible circumstances. Mexico will employ the figures in the United States' example to show that mathematical equivalency will *not* hold in all possible circumstances. The United States bases its example on the assumption that identical period-long average normal values in both average-to-average and average-to-transaction comparisons must always be used. This assumption was adopted, erroneously in Mexico's view, by panels in *US – Softwood Lumber V (21.5)* and *US – Zeroing (Japan)*.[1] The Appellate Body has neither specifically endorsed nor rejected this assumption in its decisions to date.

12. The statutory provisions governing targeted dumping are set out in 19 U.S.C. § 1677f-1(d)(1)(B) and the regulatory provisions in 19 CFR § 351.414(e) and (f) (**Exhibit MEX-3**). Paragraph (e), *inter alia*, sets out a requirement for contemporaneous monthly average normal values. Thus, the USDOC Regulations explicitly link the "average-to-transaction" method in targeted dumping investigations to the use of contemporaneous monthly average normal values. Moreover, the Regulations specifically link the "average-to-average" method with the use of period-long average normal values.

13. Mexico presents in its example that mathematical equivalency does not exist if intermediate monthly average normal values are used in the average to transaction method and period-long average normal values are used in the average to average method. Mexico offers this example because it is entirely consistent with US domestic law on this subject.

14. The examples provided above demonstrate, by means of the same comparison methodologies specified under the USDOC Regulations for A-T comparisons made in periodic reviews and for A-T comparisons used to evaluate targeted dumping in original investigations, that the US claim of

[1] Panel Report, *US – Softwood Lumber V (21.5)*, paras. 5.49-5.51; Panel Report, *US – Zeroing (Japan)*, paras. 7.128-7.129.

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mathematical equivalency, absent zeroing, fails. Indeed, there is plainly no mathematical equivalency between these methods, because the use of monthly normal values in the US system of conducting A-T comparisons removes the prospect of uniform equivalency.

V. CONCLUSION

15. Mexico again reminds the Panel that the measure at issue challenged as such by Mexico is identical to the measure decided by the Appellate Body in cases brought by Canada, the EC and Japan. The Appellate Body has consistently determined that this measure is contrary to the United States' obligations under the Agreements. In reaching its determinations, the Appellate Body has considered and rejected virtually all of the arguments presented by the United States in this dispute and has interpreted the text of the Agreements in accordance with recognized principles of international law applicable to dispute settlement proceedings and has applied its reasoning in a coherent and consistent manner.

16. Mr. Chairman, and members of the Panel, these prior decisions must be taken into account. Their reasoning has withstood the arguments posed against them by the United States. Third Party submissions in this case overwhelmingly support our case. For the sake of the security and predictability of the WTO system, and to ensure that the Agreements negotiated by the Members are enforced in accordance with their text, we urge you to sustain Mexico's claims in their entirety.

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ANNEX D-10

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES - SECOND MEETING

1. We note Mexico's acknowledgment in response to the Panel's questions that its claims are limited by the language of its panel request to the use of model zeroing in average-to-average comparisons in original investigations and simple zeroing in periodic reviews. Mexico continues to cling to its argument that there is a single measure taken by the United States that requires the Department of Commerce to "zero". Mexico presents no new evidence of the existence of a measure that prescribes and requires specific action. It merely continues to present the same evidence of past actions by Commerce. Mexico has not demonstrated that there is any "as such" measure requiring zeroing, because there is no such measure.

2. Mexico insists on making accusations regarding alleged non-compliance by the United States with respect to the DSB recommendations and rulings in *US – Zeroing (EC)*. Mexico states that it "does not agree that the United States fully abandoned the use of 'model zeroing' in investigations as of February 22, 2007". Mexico argues that full compliance would require the United States to revise all existing measures.

3. Aside from the fact that it is not for Mexico to unilaterally determine the non-compliance of another Member, as DSU Article 23 makes clear, we note that the EC does not appear to share Mexico's view. In its recent request for consultations under Article 21.5, the complaint of the EC is limited to its "as applied" claims. Indeed at the 24 April 2007 meeting of the DSB, the EC welcomed the decision to abandon zeroing in original investigations when calculating the dumping margin on a weighted average-to-weighted average basis.

4. Moreover, in arguing that a Member can implement a ruling against a measure "as such" only by revising all applications of that measure, Mexico improperly blurs the distinction between "as such" and "as applied" claims.

5. Mexico also continues to argue that a suggestion from the Panel regarding implementation is necessary. However, it is well-established that a Member has the right to determine the means of implementation. Further, Mexico appears to be seeking though a suggestion a result that goes well beyond any right it might have under the Agreement. In this connection, we note Mexico's recognition that the provision of offsets in the original investigation on stainless steel would still result in a margin of dumping well above the *de minimis* threshold. Therefore, the antidumping order would remain in place.

6. Regarding the alleged legal basis for requiring offsets, Mexico explains that its claim that the Antidumping Agreement contains an obligation to reduce antidumping duties to account for instances of non-dumping rests on two essential textual foundations. These two supposed foundations fail to support Mexico's claims with respect to periodic reviews.

7. Mexico's first alleged textual foundation is that the terms "dumping" and "margin of dumping" as they are defined in Article VI:1 and VI:2 of the GATT 1994 and in Article 2.1 of the Antidumping Agreement have no meaning except in relation to the product taken in its entirety. The text of these definitions, however, does not contain the words "taken in its entirety" or "taken as a whole" or any words to that effect. Instead, the text of these definitions contains only the word "product". Mexico admits that the term "product" can refer to individual transactions in the context of

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numerous provisions of the GATT 1994, including within Article VI. Nevertheless, Mexico argues that those uses of the term "product" are distinguishable because they arise in contexts other than the determination of margins of dumping. By so arguing, Mexico effectively concedes that the ordinary meaning of the term "product" – standing alone – cannot serve as the textual basis for an interpretation that requires the phrase "margin of dumping" to relate solely to the "product as a whole". Moreover, Mexico has identified no other textual basis for interpreting the term "product" – as used in the definitions of "dumping" and "margin of dumping" – to mean the "product as a whole". Nor has Mexico identified any textual basis for excluding the possibility that the term "product" – as used in these definitions – may include the concept of individual transactions.

8. In fact, the text of these definitions supports the individual transaction meaning of the term "product", since the price of a product is established for each transaction and since each transaction is introduced into the commerce of the importing country. The fact that prices are set in individual transactions and the fact that products are introduced into the commerce of an importing country pursuant to individual transactions are not "subjective views" of the United States, as Mexico argues. Rather, this is the actual commercial conduct that is described by the text of the provisions of the Antidumping Agreement. As the panel in *US – Zeroing (Japan)* concluded, the definition of dumping itself "undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions".

9. Mexico argues that a second essential foundation of its claims in this case is the notion that the remedies contained in the Antidumping Agreement are not directed toward importers. It is not disputed that dumping results from the pricing behaviour of exporters and producers. It is also indisputable, however, that antidumping duties are directed at importers. The fact that importers are the parties that actually pay the antidumping duties must not be ignored if antidumping duties are to be an effective remedy to "offset or prevent" dumping as provided in Article VI:2 of the GATT 1994.

10. Mexico misunderstands the remedies provided for in the Antidumping Agreement as punitive measures directed at the conduct of producers and exporters. On the contrary, antidumping duties are remedial measures taken to "offset or prevent" dumping and its injurious effects by removing any incentive the importer has to import merchandise at less than normal value and to induce the importer to increase the resale price to cover the expense of the antidumping duties and prevent further injurious effect. Mexico interprets the Antidumping Agreement to require that the amount of antidumping duties be reduced in the amount by which some transactions are sold at prices in excess of normal value. Mexico is essentially arguing that non-dumped transactions constitute a remedy for dumped transactions that supplants the remedy provided for in the Antidumping Agreement. There is no basis for this interpretation in the provisions of the GATT 1994 or the Antidumping Agreement.

11. The lack of a textual basis for Mexico's claims with respect to periodic reviews is also demonstrated by Mexico's attempt to apply the "product as a whole" concept in a manner that is detached from the concept's underlying textual basis in the first sentence of Article 2.4.2 of the Antidumping Agreement. The concept of "product as whole", however, was originally derived from the phrase "all comparable export transactions" in the first sentence of Article 2.4.2. Not surprisingly, Mexico is forced to acknowledge that the phrase "all comparable export transactions" cannot lend any support to its claims with respect to periodic reviews, because that phrase pertains only to average-to-average comparisons in original investigations.

12. Nevertheless, Mexico attempts to find support for its interpretation in the Appellate Body report in *US – Softwood Lumber Dumping* by asserting that the phrase "all comparable export transactions" was not integral to the Appellate Body's reasoning in that report. Mexico's assertion is erroneous, because the Appellate Body expressly stated that it was interpreting the term "margins of dumping" and the phrase "all comparable export transactions" in an "integrated manner". Thus, the Appellate Body did not ignore, but instead based its findings on, the phrase "all comparable export

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transactions". In addition, the fact that the Appellate Body was not deriving its interpretation of "margins of dumping" solely from the definitions in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994 is further demonstrated by the fact that the Appellate Body declined to address the contextual argument that a general prohibition of zeroing would be inconsistent with the provision for transaction-to-transaction comparisons in Article 2.4.2. If the Appellate Body was articulating a general prohibition of zeroing based on the definitional provisions, as Mexico argues, there would have been no sound basis for declining to address the transaction-to-transaction context.

13. For these reasons, Mexico's proposed interpretation is at odds with the provisions of the Antidumping Agreement upon which it relies. With respect to Article VI:2 and Ad Article VI:2 of the GATT 1994, and Articles 2.2, 2.4.2 second sentence, and Article 9 of the Antidumping Agreement, the implications of the interpretation proposed by Mexico provide further contextual support for the conclusion that Mexico's interpretation is not correct. Mexico's proposed interpretation carries with it implications that simply cannot be reconciled with these provisions.

14. Article 2.4.2 provides for average-to-transaction comparisons under certain circumstances as an alternative to average-to-average or transactions-to-transaction comparisons. The interpretation offered by Mexico is incorrect because it renders inutile the average-to-transaction comparisons provided for in the second sentence of Article 2.4.2. Contrary to Mexico's arguments, the United States is not asserting an "affirmative defense" based on the second sentence. Rather, the United States is arguing that application of the customary rules of interpretation of public international law leads to the conclusion that Mexico's proposed interpretation fails to give effect to the provisions of Article 2.4.2, second sentence.

15. The redundancy of the average-to-transaction comparison type with the average-to-average comparison type, if offsets are granted, is a function of the mathematics of calculating weighted averages, and can be readily demonstrated, as the United States did in its response to the Panel's questions. As detailed in our submissions, under Mexico's interpretation that the Antidumping Agreement incorporates a general prohibition of dumping, this comparison type is rendered a nullity because it cannot mathematically produce a result that differs from the average-to-average comparison type.

16. With respect to Article 9.3, Mexico argues that excess antidumping duties have been assessed. This argument rests on its misinterpretation of the term "margin of dumping" in Article 9.3 as relating exclusively to the product "as a whole", and as considered exclusively from the perspective of the exporter and on an aggregate basis over some frame of reference that is nowhere mentioned in the text. This interpretation of the term "margin of dumping" in Article 9.3 is not supported by the text of the Article. Indeed, this interpretation is at odds with the text of Article 9.3, which provides for determination of final liability for antidumping duties that are paid by importers on the basis of individual import transactions.

17. The mismatch between the nature of the assessment proceedings provided for in Article 9.3 and the interpretation of the term "margin of dumping" proposed by Mexico result in perverse incentives and absurd results. In particular, as previously noted, the reduction of antidumping duties to account for non-dumped transactions will result in a remedy that is insufficient to "prevent or offset" dumping and its injurious effects as intended by Article VI:2 of the GATT 1994. Moreover, the offsets contemplated by Mexico would confer an additional competitive disadvantage upon importers who refrain from importing dumped merchandise from the same exporter or producer as an importer that does import dumped merchandise. Under Mexico's proposed interpretation, the antidumping duty liability for the importer of the dumped transactions would be reduced by the offset attributable to the non-dumped import transactions. This kind of competitive disincentive to engage in fair trade could not have been intended by the drafters of the Antidumping Agreement and should not be accepted by the Panel as consistent with a correct interpretation of Article 9.3.

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18. In addition, an obligation to account for other imports in assessing antidumping duties on a particular entry is contrary to the very concept of a prospective normal value system provided for in Article 9. Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. If the margin of dumping must relate exclusively to an aggregation of all transactions constituting the "product as a whole", as Mexico argues, the administration of such an assessment system cannot function as intended.

19. Under Mexico's interpretation, a prospective normal value assessment system necessarily requires retrospective reviews on the basis of the aggregation of transactions because, according to Mexico, the margin of dumping for the "product as a whole" can never be known at the time of importation. Nothing in the text of Article 9, however, suggests that the refund proceeding described therein necessarily must relate to an aggregated examination of all transactions. Nor does Mexico attempt to explain why, if refund proceedings under Article 9.3 require aggregation of transactions for the "product as a whole", Article 9.3 fails to provide for any time frame over which the transactions would be aggregated. Thus, it is impossible to discern from the text the universe of transactions that comprise the "product as a whole".

20. Mexico tries to avoid the natural conclusion of its own argumentation by explaining that the possibility of retrospective refund proceedings would arise in a prospective normal value system only if the sum total of antidumping duties applied upon importation were to exceed the margin of dumping determined on the basis of aggregating all transactions and providing offsets for non-dumped transactions. But, under Mexico's own interpretation, this would arise in virtually every circumstance. Upon entry of any non-dumped transaction, under a prospective normal value system, zero antidumping duty liability is incurred. Under Mexico's interpretation, however, each of those non-dumped transactions will result in an offset that must reduce the antidumping duty liability for the other dumped transactions. Thus, the only way to avoid the necessity of a retrospective review under Mexico's interpretation of a prospective normal value system is if there are no non-dumped transactions. This interpretation contradicts the prospective nature of the assessment system described in the text of Article 9.

21. Nevertheless, Mexico argues that the US position renders the refund proceeding a nullity because it means that, without an aggregated retrospective determination of the margin of dumping, the margin of dumping and the antidumping duty applied at the time of importation would always be identical. This is not correct; a more limited refund proceeding is consistent with the prospective nature of this type of assessment system. For example, a refund proceeding would be necessary to deal with instances in which the price or other relevant elements of the transaction change after importation of the product occurs. In such instances the actual margin of dumping may differ from the antidumping duty applied upon importation.

22. Mexico also argues that zeroing is inconsistent with the "fair comparison" requirement of Article 2.4 because it is "biased" and "inflates" the margin of dumping. The relevant text of Article 2.4, however, provides only that a "fair comparison shall be made between the export price and the normal value". It is not disputed, however, that the United States makes a "fair comparison" between export price and normal value for each export transaction in an assessment proceeding. Mexico's claims relate not to the comparison of export price and normal value, but to a supposed obligation to aggregate the results of those comparisons. Mexico has repeatedly argued that zeroing does not occur when export price and normal value are compared, but when the results of those comparisons are aggregated without providing offsets for the non-dumped transactions. Accordingly, Mexico's complaints with respect to zeroing can have no bearing on whether the United States makes a fair comparison of export price and normal value consistent with Article 2.4.

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23. Even if the "fair comparison" requirement of Article 2.4 were pertinent to Mexico's claims, there is no textual basis in Article 2.4 for concluding that the denial of offsets for non-dumped transactions is unfair. If the Panel finds, as prior panels have found, that it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction, then there will be no basis for a finding that the margins of dumping calculated by the United States in periodic reviews are "inflated" or the result of "bias".

24. In summary, Mexico has failed to reconcile its proposed general prohibition of zeroing with a correct interpretation based on the text and context of the relevant provisions of the Antidumping Agreement. The practical consequences of adopting Mexico's interpretation counsel strongly in favour of the interpretation adopted by prior panels, which is that, except for the context of average-to-average comparisons in investigations, the Antidumping Agreement does not impose an obligation to provide offsets for non-dumping.

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ANNEX E

REQUEST FOR THE ESTABLISHMENT OF A PANEL

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ANNEX E-1

REQUEST FOR THE ESTABLISHMENT
OF A PANEL BY MEXICO

WORLD TRADE ORGANIZATION

WT/DS344/4
16 October 2006

(06-5021)

Original: Spanish

UNITED STATES – FINAL ANTI-DUMPING MEASURES ON STAINLESS STEEL FROM MEXICO

Request for the Establishment of a Panel by Mexico

The following communication, dated 12 October 2006, from the delegation of Mexico to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

Acting on instructions from the relevant Mexican Government authorities, I hereby request the establishment of a panel pursuant to Articles 4 and 6 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII of the General Agreement on Tariffs and Trade of 1994 (GATT 1994) and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (Anti-Dumping Agreement), regarding the issues listed hereunder:

1. Consultations

On 26 May 2006, the Government of Mexico requested consultations with the Government of the United States of America (United States) under Articles 4 and 6 of the DSU, Article XXII:1 of the GATT 1994 and Article 17 of the Anti-Dumping Agreement, regarding the laws, regulations, administrative practices, measures and methodologies for calculating dumping margins, including zeroing practices.[1] The consultations were held on 15 June 2006. They allowed a better understanding of the parties' positions but failed to resolve the dispute.

2. Measures

In the anti-dumping proceedings carried out by the United States Department of Commerce (USDOC) the United States uses the following methodologies to calculate dumping margins:

[1] WT/DS344/1; G/L/778; G/ADP/D67/1 (1 June 2006).

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In original investigations, USDOC first subdivides reported comparison market and export sales (also known as "normal value" sales) by "control number" into a series of "averaging groups" on a model-specific basis. For each averaging group, it compares normal value and export price, and takes as the "dumping margin" the amount by which normal value exceeds export price. It then aggregates the results of the various model-based comparisons. In doing so, however, it adds up only "positive" results, disregarding (treating as zero, or "zeroing") the negative results (i.e. comparison results where the weighted-average export price for the model exceeds the weighted-average normal value). This practice is known as "model zeroing". Lastly, USDOC calculates the overall margin of dumping for the period of investigation by dividing the sum of the positive differences (numerator) by the total value of all the export sales used for comparisons (including those with negative differences) (denominator).

In periodic reviews (i.e. when USDOC calculates the magnitude of dumping margins in order to assess an importer's final liability for payment of anti-dumping duties and any future cash deposit rate), USDOC first subdivides reported comparison market sales (also known as "normal value" sales) by "control number" into a series of monthly "averaging groups" on a model-specific basis. The comparison is usually between each reported individual export transaction and the average normal value of the identical or most similar contemporaneous monthly averaging group to which it corresponds. USDOC then aggregates the results of these comparisons. In doing so, however, it adds only the "positive" comparison results, disregarding (zeroing) the negative comparison results (i.e. comparison results where the individual export price for the model exceeds the weighted-average normal value). This practice is known as "simple zeroing".

- In order to determine the amount of cash deposits, USDOC calculates an overall margin of dumping for the period of the periodic review for the "class or kind of merchandise" by dividing the sum of the positive differences (numerator) by the total value of all the export sales used in the comparisons (including those with negative differences) (denominator).

- In order to determine the amount of the anti-dumping duties to be assessed, USDOC usually calculates the importer-specific amount by dividing the sum of the positive differences (numerator) for each importer by the total customs entered value of each importer's export sales.

This means that the United States calculates a margin of dumping and collects anti-dumping duties in excess of the actual dumping practiced by the companies concerned. The United States uses this methodology systematically in all periodic reviews.

The calculation methodologies described above are measures of general and prospective application, and the United States implements them pursuant to the following laws, regulations, administrative procedures and measures:

- Sections 736, 751, 771(35)(A) and (B), and section 777(A)(c) and (d) of the Tariff Act of 1930, as amended;

- The Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. I;

- USDOC regulations codified at Title 19 of the United States Code of Federal Regulations, sections 351.212(b), 351.414(c), (d) and (e);

- The Import Administration Anti-Dumping Manual (1997 edition), including the computer program(s) to which it refers.

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The calculation methodologies described above were applied by the United States respectively for determining the dumping margin in the original anti-dumping investigation and for the final results of the periodic reviews listed in the annex attached hereto.

3. Claims

1. As such claims

Mexico considers that the above-mentioned United States laws, regulations, administrative procedures, measures and methodologies for determining the dumping margin in original investigations and periodic reviews are inconsistent, as such, with the obligations of the United States under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), the GATT 1994 and the Anti-Dumping Agreement, and that they have resulted in the nullification or impairment of benefits accruing to Mexico under Article 3.8 of the DSU. In particular, Mexico considers that the United States laws, regulations, administrative procedures, measures and methodologies for determining the margin of dumping in original investigations and in periodic reviews described above are, as such, inconsistent with at least the following provisions:

- With respect to original investigations and periodic reviews: Article 1 of the Anti-Dumping Agreement and Article VI:1 and VI:2 of the GATT 1994 as regards the zeroing methodology and the consequent imposition and collection of anti-dumping duties;

- With respect to original investigations: Articles 2.1, 2.4, and 2.4.2 of the Anti-Dumping Agreement insofar as the comparison of normal value and export price is inconsistent with these provisions;

- With respect to periodic reviews: Articles 2.1 and 2.4 of the Anti-Dumping Agreement insofar as the comparison of normal value and export price is inconsistent with these provisions;

- With respect to periodic reviews: Article 9 (including but not limited to Article 9.3) of the Anti-Dumping Agreement insofar as the measures result in the imposition and collection of an anti-dumping duty in an amount in excess of the margin of dumping pursuant to Article 2 of the Anti-Dumping Agreement;

- With respect to original investigations and periodic reviews: Article XVI:4 of the WTO Agreement and Article 18 of the Anti-Dumping Agreement insofar as the United States has failed to take all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations, administrative procedures and measures with the provisions of the GATT 1994 and the Anti-Dumping Agreement.

2. As applied claims

In the original investigation and periodic reviews identified in the Annex attached hereto, the United States applied the laws, regulations, administrative procedures, measures and methodologies described above. Accordingly, Mexico considers that the determinations made by USDOC and the subsequent anti-dumping duty assessments and future cash deposit requirements are inconsistent with the following provisions of the Anti-Dumping Agreement, the GATT 1994 and the WTO Agreement:

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- With respect to the original investigation: Article VI:1 and VI:2 of the GATT 1994, Articles 1, 2.1, 2.4, 2.4.2 and 18.4 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement, for the reasons set forth above;

- With respect to the periodic reviews: Article VI:1 and VI:2 of the GATT 1994, Articles 1, 2.1, 2.4, 9 (including, but not limited to Article 9.3) and 18.4 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement, for the reasons set forth above.

4. Request

Accordingly, Mexico respectfully requests that a panel be established pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 17 of the Anti-Dumping Agreement. The terms of reference shall be the terms provided in Article 7 of the DSU. Mexico asks that this request be placed on the agenda of the next meeting of the WTO Dispute Settlement Body that will take place on 26 October 2006.

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ANNEX

United States – Final Anti-Dumping Measures on Stainless Steel from Mexico (Investigation and Order)

Specific Case No. 1

The measure

This case concerns the imposition of anti-dumping duties on certain stainless steel products from Mexico (USDOC case number A-201-822; 64 Federal Register (FR) 30790 of 8 June 1999 and 64 FR 40560 of 27 July 1999). The *ad valorem* rate of the anti-dumping duty was 30.85 per cent for ThyssenKrupp Mexinox S.A. de C.V. and all other companies.

Use of the zeroing methodology

In calculating the dumping margin in the original investigation of stainless steel from Mexico, USDOC utilized the zeroing methodology. It thus disregarded results where the difference between the applicable normal value and the export price was negative, i.e. where normal value was lower than export price.

Dumping margin without zeroing

By using the above methodology, USDOC calculated a dumping margin of 30.85 per cent. Had it not used the zeroing methodology (i.e. had the negative comparison results been included), the dumping margin would have been lower. The use of zeroing increased the exposure of ThyssenKrupp Mexinox S.A. de C.V. to the imposition of excessive anti-dumping duties through the collection of excessive estimated duty deposits.

United States –Final Anti-Dumping Measures on Stainless Steel from Mexico (First Review)

Specific Case No. 2

The measure

This case concerns the imposition of anti-dumping duties on stainless steel from Mexico (USDOC case number A-201-822; 67 FR 6490 of 12 February 2002 and 67 FR 15542 of 2 April 2002). The review period was from January 1999 to June 2000 and the *ad valorem* rate of the anti-dumping duties was 2.28 per cent for ThyssenKrupp Mexinox S.A. de C.V.

Use of the zeroing methodology

In calculating the dumping margin in the first periodic review of stainless steel from Mexico, USDOC utilized the simple zeroing methodology, thereby disregarding results where the difference between the applicable normal value and the export price was negative, i.e. where normal value was lower than export price.

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Dumping margin without zeroing

By using the above methodology, USDOC calculated a dumping margin of 2.28 per cent. Had it not used the simple zeroing methodology (i.e. had the negative comparison results been included), the dumping margin would have been -6.02 per cent, and no anti-dumping duties would have been collected.

United States –Final Anti-Dumping Measures on Stainless Steel from Mexico (Second Review)

Specific Case No. 3

The measure

This case concerns the imposition of anti-dumping duties on certain stainless steel products from Mexico (USDOC case number A-201-822; 68 FR 6889 of 11 February 2003 and 68 FR 13686 of 20 March 2003). The review period was from July 2000 to June 2001, and the *ad valorem* rate of the anti-dumping duties was 6.15 per cent for ThyssenKrupp Mexinox S.A. de C.V.

Use of the zeroing methodology

In calculating the dumping margin in the second periodic review of stainless steel from Mexico, USDOC utilized the simple zeroing methodology, thereby disregarding results where the difference between the applicable normal value and the export price was negative, i.e. where normal value was lower than export price.

Dumping margin without zeroing

By using the above methodology, USDOC calculated a dumping margin of 6.15 per cent. Had it not used the simple zeroing methodology (i.e. had the negative comparison results been included), the dumping margin would have been 1.83 per cent, and lower anti-dumping duties would have been collected.

United States –Final Anti-Dumping Measures on Stainless Steel from Mexico (Third Review)

Specific Case No. 4

The measure

This case concerns the imposition of anti-dumping duties on stainless steel from Mexico (USDOC case number A-201-822; 69 FR 6259 of 10 February 2004). The review period was from July 2001 to June 2002, and the *ad valorem* rate of the anti-dumping duties was 7.43 per cent for ThyssenKrupp Mexinox S.A. de C.V.

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Use of the zeroing methodology

In calculating the dumping margin in the third periodic review of the anti-dumping investigation concerning certain stainless steel products from Mexico, USDOC utilized the simple zeroing methodology, thereby disregarding results where the difference between the applicable normal value and the export price was negative, i.e. where normal value was lower than export price.

Dumping margin without zeroing

By using the above methodology, USDOC calculated a dumping margin of 7.43 per cent. Had it not used the simple zeroing methodology (i.e. had the negative comparison results been included), the dumping margin would have been 4.96 per cent, and lower anti-dumping duties would have been collected.

United States –Final Anti-Dumping Measures on Stainless Steel from Mexico (Fourth Review)

Specific Case No. 5

The measure

This case concerns the imposition of anti-dumping duties on stainless steel from Mexico (USDOC case number A-201-822; 70 FR 3677 of 26 January 2005). The review period was from July 2002 to June 2003, and the *ad valorem* rate of the anti-dumping duties was 5.42 per cent for ThyssenKrupp Mexinox S.A. de C.V.

Use of the zeroing methodology

In calculating the dumping margin in the fourth periodic review of stainless steel from Mexico, USDOC utilized the simple zeroing methodology, thereby disregarding results where the difference between the applicable normal value and the export price was negative, i.e. where normal value was lower than export price.

Dumping margin without zeroing

By using the above methodology, USDOC calculated a dumping margin of 5.42 per cent. Had it not used the zeroing methodology (i.e. had the negative comparison results been included), the dumping margin would have been 1.54 per cent, and lower anti-dumping duties would have been collected.

United States –Final Anti-Dumping Measures on Stainless Steel from Mexico (Fifth Review)

Specific Case No. 6

The measure

This case concerns the imposition of anti-dumping duties on stainless steel from Mexico (USDOC case number A-201-822; 70 FR 73444 of 12 December 2005). The review period was from

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July 2003 to June 2004, and the *ad valorem* rate of the anti-dumping duties was 2.96 per cent for ThyssenKrupp Mexinox S.A. de C.V.

Use of the zeroing methodology

In calculating the dumping margin in the fifth periodic review of stainless steel from Mexico, USDOC utilized the simple zeroing methodology, thereby disregarding results where the difference between the applicable normal value and the export price was negative, i.e. where normal value was lower than export price.

Dumping margin without zeroing

By using the above methodology, USDOC calculated a dumping margin of 2.96 per cent. Had it not used the zeroing methodology (i.e. had the negative comparison results been included), the dumping margin would have been -4.57 per cent, and no anti-dumping duties would have been collected.

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