**(COURTESY TRANSLATION)**

**BEFORE THE WORLD TRADE ORGANIZATION**

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

**(DS344)**

## APPELLANT SUBMISSION OF MEXICO

Geneva
**7 February, 2008**

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# I. INTRODUCTION

1. Mexico seeks review by the Appellate Body of certain issues of law and legal interpretations of the Panel in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R (circulated December 20, 2007)("Panel Report"). At issue is the measure referred to by the Panel as "simple zeroing." Simple zeroing is a measure pursuant to which the United States investigating authorities in an anti-dumping periodic review compare individual export transactions against monthly weighted average normal values and do not 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 exporter's or producer's margin of dumping for the product under consideration.[1]

2. In making its findings and conclusions regarding the consistency of simple zeroing with the provisions of the *General Agreement on Tariffs and Trade 1994* ("*GATT 1994*") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Anti-Dumping Agreement*"), the Panel failed to interpret the relevant provisions of the *GATT 1994* and the *Anti-Dumping Agreement* in accordance with the customary rules of interpretation of public international law as required by Articles 3.2 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* "*DSU*" and Article 17.6(ii) of the *Anti-Dumping Agreement*. In particular, the relevant interpretations set out in the Panel Report are not permissible under the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.

3. As set forth in detail below, the deficiencies in the Panel's reasoning and legal interpretations stem from several key flaws in the Panel's interpretation of the covered agreements and the Panel's role in the dispute settlement process.

4. First, the Panel below erred in failing to follow the Appellate Body's prior consistent findings and conclusions in *US-Zeroing (EC1)* and *US-Zeroing (Japan)*. Those disputes involved the identical measure (simple zeroing) applied by the United States and the identical issues involved in the present dispute. The Appellate Body in both *US-Zeroing (EC1)* and *US-Zeroing (Japan)* found that simple zeroing is inconsistent with the United States' obligations under Articles VI:I and VI:II of the GATT 1994 and Articles 2.1, 2.4 and 9.3 of the *Anti-Dumping Agreement*. Indeed, the Appellate Body in *US – Zeroing (Japan)* made a finding that simple zeroing is "as such" inconsistent with the United States' obligations under those agreements. The report of the Appellate Body in that case has been adopted by the Dispute Settlement Body. The adopted findings of the Appellate Body are final. Pursuant to that report, the United States must bring its measures into conformity with its obligations and cease to use simple zeroing in periodic reviews. By allowing the "as such" claim in *US – Zeroing (Japan)*, the report of the Appellate Body serves the purpose of "preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated".[2] The findings of the Panel in this dispute not only frustrate this purpose as they contradict clear findings of the Appellate Body, but also go counter to the objective of providing

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[1] See Panel Report, paras. 7.7 and 7.84-7.97.

[2] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

security and predictability to the multilateral trading system as provided by Article 3.2 of the DSU.

5. The Panel in the present dispute involving Mexico has identified no new arguments or proffered any reasoning or interpretations of law concerning simple zeroing that were not previously considered and rejected in some form by the Appellate Body in *US-Zeroing (EC1)* and *US-Zeroing (Japan)*. Multiple Panels and the Appellate Body have identified an expectation that panels will follow Appellate Body decisions where, as here, the issues are the same.[3] The Panel's failure to follow the Appellate Body in this case was unwarranted and, if left uncorrected, will diminish Mexico's rights under the agreements relative to other members.

6. The Panel's refusal to follow the Appellate Body's prior rulings stems from pervasive errors in the Panel's interpretation of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. First, the Panel mistakenly concluded that anti-dumping measures are concerned with the behaviour of importers in relation to individual import transactions. There is no support for this conclusion in the text or context of the relevant agreements. Significantly, the Panel's misperception of the object of anti-dumping measures has affected the Panel's conclusions with respect to the meaning of the terms "dumping" and "margin of dumping." Contrary to the Panel's conclusions, the Appellate Body has clearly and unequivocally confirmed that "margins of dumping" do not exist for individual importers or export transactions, but rather are based on the pricing behaviour of exporters and producers in relation to exports of the "product" under consideration.

7. Second, the Panel erroneously conflated the operation of duty collection systems and the calculation of "margins of dumping." The Appellate Body has consistently distinguished between these two completely distinct concepts under the agreements. As the Appellate Body has noted, the agreements permit a wide range of collection systems including the retrospective system utilized by the United States and the various prospective systems used in most other countries. However, while the agreements provide for flexibility in the structure of such collection systems, all such systems are subject to the limitation in Article 9.3 that such collections "shall not exceed the margin of dumping established under Article 2" for the exporter or producer. The Panel's failure to observe this distinction has led the Panel to erroneous conclusions regarding the proper interpretation of the covered agreements, especially the meaning of "dumping" and "margins of dumping."

8. Third, the Panel's reasoning inappropriately permits "margins of dumping" to be defined differently under different contexts or systems of administration. For example, whereas it is clear from the text of the agreements that all imports from an exporter or producer found to be dumping must be considered for purposes of an injury analysis under Article 3, the Panel's reasoning suggests that for purposes of duty assessment only a selective subset of the same imports may be considered "dumped." The Appellate Body has correctly observed that such reasoning runs contrary to the uniform definition of dumping provided for in Article 2.1 of the Agreement.

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[3] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188; Article 3.2 of the DSU.

9. Fourth, the Panel erroneously based its conclusion on perceived "burdens" of administration. For example, the Panel assumed that the Appellate Body's interpretation of the agreements would "expand the scope of periodic reviews" to cover all export shipments of an exporter or producer. In fact, the United States system at issue in this dispute already requires that a periodic review requested by an individual importer must include *all* export shipments of the exporter(s) or producer(s) that shipped to that importer. Mexico knows of no review system that permits subdividing an exporter or producer into shipments only to a specific importer.

10. These and other errors are discussed in detail in this submission. As a whole, the errors identified herein require reversal of the Panel's decision by the Appellate Body.

## ARGUMENT

## II. ALL OF THE ISSUES RAISED BY MEXICO IN THIS APPEAL ARE THE SUBJECT OF PRIOR SPECIFIC FINDINGS BY THE APPELLATE BODY THAT SUPPORT THE POSITION OF MEXICO

11. As the Panel acknowledged, this is not the first dispute in which simple zeroing in periodic reviews has been challenged. The same simple zeroing measure was also challenged in *US – Zeroing (EC1)* and *US – Zeroing (Japan)*. In both disputes the Appellate Body clearly and unequivocally reached the conclusion that simple zeroing is inconsistent with the provisions of the *GATT 1994* and the *Anti-Dumping Agreement*.[4] In reaching this conclusion, the Appellate Body made legal findings on the precise issues that are appealed by Mexico in this proceeding.

12. The Panel in this dispute has chosen to disregard these prior, directly applicable, Appellate Body rulings on the same measures and with respect to the same legal questions presented. Instead, it has chosen to follow a series of panel decisions that were never adopted by the Dispute Settlement Body (DSB) and were in fact specifically reversed by the Appellate Body.

## III. THE APPELLATE BODY'S PRIOR FINDINGS REGARDING SIMPLE ZEROING IN PERIODIC REVIEWS SHOULD BE FOLLOWED

13. Although Appellate Body reports are, strictly speaking, not binding on panels in other disputes, there clearly is a legitimate expectation that panels will follow the findings and conclusions in such reports in subsequent disputes raising issues that the Appellate Body has expressly addressed. In its report in *US – Oil Country Tubular Goods Sunset Reviews*, 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."[5]

14. Following the Appellate Body's previous findings and conclusions is fully consistent with Article 3.2 of the DSU which expressly recognizes that "[t]he dispute settlement system is a central element in providing the security and predictability to the multilateral trading system." The

[4] Panel Report at para. 7.115.

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

dispute settlement system cannot fulfill this important function if panels refuse to follow the findings and conclusions in previously adopted Appellate Body reports adjudicating the same measures.

15. In this dispute, not only are the *identical* measures and issues raised in Mexico's appeal the subject of findings and conclusions in two adopted Appellate Body reports, the responding party in those two previous disputes is also the responding party in this dispute—i.e., the United States. Moreover, in one of these adopted reports—*US – Zeroing (Japan)*— the Appellate Body found that simple zeroing in periodic reviews is "as such" inconsistent with the *GATT 1994* and the *Anti-Dumping Agreement*. Thus, the Appellate Body's finding was not limited to a specific set of facts "as applied".

16. Clearly in these circumstances the previous findings and conclusions of the Appellate Body should be followed. Indeed, were the Appellate Body to rule differently in this dispute, that result would be to determine that Mexico has different, and significantly diminished, rights under the agreements from the rights of other WTO members. Such a disparate result is clearly unacceptable and would undermine the integrity of the agreements. It would also violate Article 3.2 of the DSU, which prohibits dispute settlement rulings from diminishing the rights and obligations provided in the covered agreements.

## IV. THE PANEL ERRRED IN FINDING THAT "SIMPLE ZEROING" IS "AS SUCH" NOT INCONSISTENT WITH ARTICLES VI:1 AND VI:2 OF GATT 1994 AND ARTICLES 2.1 AND 9.3 OF AD AGREEMENT

### A. Summary of Relevant Appellate Body Findings and Conclusions

17. Mexico begins this section with a brief summary of the relevant legal findings and conclusions as they have been explained and confirmed in the consistent line of Appellate Body reports dealing with the identical measure that is at issue here. These decisions represent the only legal findings with respect to these issues that have been adopted by the Dispute Settlement Body.

18. The Panel claims that the reasoning followed by the Appellate Body in concluding that simple zeroing is inconsistent with the covered agreements is based on principles that the Panel found to be erroneous.[6] However, the Panel is incorrect. The Appellate Body has consistently based its reasoning on three "fundamental disciplines" that apply under the *Anti-Dumping Agreement* and the GATT 1994 to all antidumping proceedings and which are firmly rooted in the text of the agreements as well as their design and architecture.

19. First, under the governing definitions of "dumped" and "dumping" in Articles VI:1 and VI:2 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement*, "dumping" must be established for the product under consideration *taken as a whole* with respect to each exporter or producer under investigation or review. "Dumping" is not and may not be measured for individual importers or import transactions. As the Appellate Body in *US – Zeroing (Japan)* recalled, "dumping" is defined in Article VI:1 of the *GATT 1994* as occurring when a "product" of one

[6] Panel Report at para. 7.109.

country is introduced into the commerce of another country at less than normal value of the "product." Consistent with this definition, Article VI:2 provides for the levying of anti-dumping duties in respect of a "dumped product" in order to offset or prevent the injurious effect of dumping.[7]

20. As further explained by the Appellate Body:

> "This definition of dumping is carried over into the *Anti-Dumping Agreement* by Article 2.1. Furthermore, by virtue of the opening phrase of Article 2.1—"[f]or the purposes of this Agreement"— this definition applies throughout the Agreement.[8] Thus, the terms "dumping", as well as "dumped imports", have the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper reviews, and periodic reviews. In each case, they relate to a *product* because it is the product that is introduced into the commerce of another country at less than its normal value in that country."[9]

21. The Appellate Body also clarified that "margin of dumping" is likewise defined in terms of the "product" under consideration:

> Article VI:2 defines "margin of dumping" as the difference between the normal value and the export price and establishes the link between "dumping" and "margin of dumping". The margin of dumping reflects the magnitude of dumping. It is also one of the factors to be taken into account to determine whether dumping causes or threatens material injury. Article VI:2 lays down that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Thus, the margin of dumping also is defined in relation to a "product".[10]

22. The second fundamental legal principle properly relied upon by the Appellate Body is that:

> …the *Anti-Dumping Agreement* prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. This is because dumping is the result of the pricing behaviour of individual exporters or foreign producers. Margins of dumping are established accordingly for each exporter or foreign producer on the basis of a

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7 Appellate Body Report, *US – Zeroing (Japan)*, para. 108.

8 See Appellate Body Report, *US – Softwood Lumber V*, para. 93. See also Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 109 and 127.

9 Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

10 *Ibid*, para. 110 (footnotes omitted).

> comparison between normal value and export prices, both of which relate to the pricing behaviour of that exporter or foreign producer. In order to assess properly the pricing behaviour of an individual exporter or foreign producer, and to determine whether the exporter or foreign producer is in fact dumping the product under investigation and, if so, by which margin, it is obviously necessary to take into account the prices of all the export transactions of that exporter or foreign producer.[11]

23. In reaching this legal conclusion, the Appellate Body found support in other provisions of the *Anti-Dumping Agreement* which likewise make it clear that "dumping" and "margins of dumping" must relate to the exporter or foreign producer of the "product" at issue. For example, Article 6.10 requires, "as a rule", that investigating authorities determine "an individual margin of dumping for each known exporter or producer". Similarly, Article 9.4 of the *Anti-Dumping Agreement* refers to situations where anti-dumping duties are applied to exporters or foreign producers not examined individually in an investigation, and provides that such duties shall not exceed "the weighted average margin of dumping established with respect to the selected exporters." In addition, Article 9.5 indicates that the purpose of new shipper reviews is to determine "individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product" and refers to a "determination of dumping in respect of such producers or exporters."[12]

24. The third fundamental principle at issue in this appeal, and one that was entirely ignored by the Panel, relates to another element of the concept of "dumping" contained in the text of the agreements. The Appellate Body has correctly observed that the *Anti-Dumping Agreement* and the *GATT 1994* are not concerned with dumping *per se*, but with dumping that causes or threatens to cause material injury to the domestic industry.[13] Article 3.1 stipulates that a determination of injury "shall be based on an objective examination of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products." Furthermore, Article 3.5 of the *Anti-Dumping Agreement* lays down that "[t]he authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry and the injuries caused by these other factors must not be attributed to dumped

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[11] *Ibid*, para. 111 (footnotes omitted).

[12] *Ibid*, para. 112 (footnotes omitted).

[13] The Appellate Body observed in this regard that Article VI:1 of the *GATT 1994* states that dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry". Article VI:6(a) also stipulates that no anti-dumping duty shall be levied unless the importing Member "determines that the effect of the dumping ... is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry." Article 11.1 of the *Anti-Dumping Agreement* further provides that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." Appellate Body Report, *US – Zeroing (Japan)*, para. 113, n.300.

imports." Among the non-attribution factors listed in this Article are "the volume and prices of imports not sold at dumping prices."[14]

25. Considering these three fundamental principles, the Appellate Body noted:

> it is evident from the design and architecture of the *Anti-Dumping Agreement* that: (a) the concepts of "dumping" and "margins of dumping" pertain to a "product" and to an exporter or foreign producer; (b) "dumping" and "dumping margins" must be determined in respect of each known exporter or foreign producer examined; (c) anti-dumping duties can be levied only if dumped imports cause or threaten to cause material injury to the domestic industry producing like products; and (d) anti-dumping duties can be levied only in an amount not exceeding the margin of dumping established for each exporter or foreign producer. These concepts are interlinked. They do not vary with the methodologies followed for a determination made under the various provisions of the *Anti-Dumping Agreement*.[15]

26. Accordingly:

> A product under investigation may be defined by an investigating authority. But "dumping" and "margins of dumping" can be found to exist only in relation to that product as defined by that authority. They cannot be found to exist for only a type, model, or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the *level* of an individual transaction. Thus, when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather, they are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer."[16]

27. As the Appellate Body correctly observed, these fundamental principles apply with equal force in all anti-dumping proceedings, including periodic reviews as well as original investigations. The definitions of "dumping" and "dumped" described above in Articles VI:1 and VI:2 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement* apply without limitation throughout the agreements. As the Appellate Body explained in *US – Zeroing (EC)*:

> 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*

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[14] Appellate Body Report, *US – Zeroing (Japan)*, para. 113 (footnotes omitted).

[15] *Ibid*, para. 114 (footnotes omitted).

[16] *Ibid*, para. 115 (footnotes omitted).

> *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.[17]

28. In addition, the obligation to make a determination of dumping in respect of each exporter or foreign producer subject to the proceeding is not limited to original investigations:

> 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*.[18]

29. Moreover, 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.[19]

30. These two principles regarding the calculation of the margins of dumping in periodic reviews lead to the conclusion that:

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17 Appellate Body Report, *US – Zeroing (EC)*, para. 127 (footnotes omitted).

18 *Ibid.*, para. 128.

19 *Ibid.*, para. 129.

> [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.[20]

31. As confirmed by the Appellate Body, therefore, in any anti-dumping proceeding, including periodic reviews under Article 9.3, the margin of dumping must be calculated in respect of the individual exporters or foreign producers subject to such proceeding and for the product under consideration taken as a whole. Once the authorities define the product under consideration, the scope of that definition also determines the scope of the authorities' dumping determination. Therefore, "dumping" as defined in the *Anti-Dumping Agreement* cannot exist in relation to a specific type, model, or category of the product subject to the proceedings, or in relation to individual import transactions. Rather, the degree to which dumping has occurred must be determined for each exporter or producer under consideration, as stipulated under Article 6.10 of the Agreement, based on all its export sales of the product under consideration taken as a whole.

32. 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." Rather, they are 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.

33. When applied to duty assessment proceedings under Article 9.3 of the Agreement, the above-described reasoning necessarily leads to the conclusion that the margin of dumping calculated for the product under consideration as a whole - for each exporter or foreign producer subject to such proceedings - operates as the upper limit for the anti-dumping duties that may be collected for that product from the exporter or producer. 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:

> ". . .the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter", in accordance with Article 2.[21]

34. Consequently, a method of calculation of anti-dumping duties that aggregates the results of intermediate comparisons, but fails to include the results where normal value is lower than the export price 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: the "margin of dumping" must

[20] Appellate Body Report, US – Zeroing (Japan), para. 156.

[21] *Ibid.*, para. 155 (footnote omitted).

aggregate the results of all sales comparisons of the product under consideration for each exporter or producer under consideration.

35. The Panel erroneously rejected the fundamental legal principles governing the issue of the proper calculation of anti-dumping duties as identified by the Appellate Body and thereby committed a legal error. This error led the Panel to the incorrect conclusion that simple zeroing is permissible under the *GATT 1994* and the *Anti-Dumping Agreement*. Mexico addresses each of these errors below.

## B. The Errors in the Panel's Reasoning are the Result of its Incorrect Application of the Customary Rules of Treaty Interpretation

36. The specific errors in the Panel's reasoning, which are discussed in detail below, are symptomatic of its incorrect application of the customary rules of treaty interpretation that are codified in Articles 31 and 32 of the *Vienna Convention*, specifically the application of "context" and "object and purpose" in Article 31(1).

37. The foregoing legal findings of the Appellate Body are based on interpretations that properly take into account the text *and* context of the relevant terms.[22] Moreover, the interpretations give harmonious meaning to all applicable provisions of the *Anti-Dumping Agreement* and *GATT 1994* as a whole.[23] The detailed character of the Appellate Body's interpretations necessarily reflects it appropriately giving meaning to all of the relevant terms in their context and in light of the object and purpose of the Agreements.

38. The terms "dumping" and "margins of dumping" are illustrative. These terms appear throughout the *Anti-Dumping Agreement* and Article VI of *GATT 1994* and are applicable to all of the various stages of anti-dumping proceedings. The Appellate Body has interpreted these terms harmoniously in all of these contexts and in light of the object and purpose of the Agreements..

39. In contrast to the approach of the Appellate Body, the Panel has focused on specific uses of the terms in a manner that neglects the broader context of the Agreements as a whole. This narrow application of the rules of treaty interpretation underlies the interpretative errors discussed below.

## C. Product as a Whole

40. The Panel erroneously rejected the fundamental principle that dumping and margins of dumping must be determined with respect to the "product" at issue, taken as a whole. The primary basis for the Panel's rejection of this principle is the Panel's observation that the phrase "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*.[24] The Panel claimed that the expression was instead "developed in WTO dispute

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[22] Appellate Body Report, *EC – Chicken Cuts*, para. 193.

[23] Appellate Body Report, *Korea –Dairy Safeguard*, para. 81; Appellate Body Report, *Argentina – Footwear*, para. 81.

[24] Panel Report at para. 7.117.

settlement,"[25] and that the obligation to calculate a margin of dumping for the product "as a whole" cannot be inferred from the ordinary meaning of the words "product" or "products."[26] While acknowledging the lengthy explanation provided by the Appellate Body in paragraphs 108 to 116 of *US – Zeroing (Japan)* summarized above, the Panel asserted that this explanation was not "convincing" and that "the Appellate Body did not explain how the texts of Article VI:1 and VI:2 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement* necessarily give rise to 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 the individual export transactions."[27] The Panel asserted further that the principle identified by the Appellate Body "does not have a solid textual basis in the relevant treaty provisions" and 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."[28]

41. The Panel erred in the above reasoning. The Appellate Body's interpretation is certainly not weakened by the absence of the precise words "as a whole" in Article 2.1 of the Anti-Dumping Agreement next to the word "product." Nor is it weakened by the fact that it may not be possible to infer these words from the "ordinary meaning" of the word "product."[29] It is the Appellate Body's appropriate consideration of the context of these terms in the Agreements that makes their interpretations correct, and makes impermissible an interpretation allowing the calculation of anti-dumping duties based on selected individual export transactions.

42. The Appellate Body carefully and precisely read the words "product" and "products" in the context of the Agreements and their object and purpose and properly concluded that the only meaning of those terms that is consistent with that context as well as their object and purpose is that the terms refer to the product sold by a producer or exporter, taken as a whole. The alternative interpretation proffered by the Panel is unsupported by the text or the context of the Article VI of the *GATT 1994* and the *Anti-Dumping Agreement* and is therefore impermissible. In particular, as the Appellate Body has pointed out, interpreting the word "product" as referring to individual export transactions or the "margin" calculated for individual importers is inconsistent with: (1) the fundamental obligation to calculate a margin of dumping for each individual exporter or producer, a task that cannot be accomplished without taking into account the prices of all export transactions of the exporter or producer under consideration; and (2) the obligation to levy anti-dumping duties only if the dumped imports cause or threaten to cause material injury to

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[25] The Panel originally stated in the Interim Report that the phrase was "developed by the Appellate Body" but in response to comments by the United States this phrase was altered to read "developed in WTO dispute settlement." See Panel Report, paras. 6.12, 6.13.

[26] Panel Report para. 7.117.

[27] *Ibid*, para. 7.118.

[28] *Ibid*, para. 7.119.

[29] Mexico notes that the phrase "product in an individual export transaction" (or whatever other alternative description the Panel believes would accurately describe the meaning of the word "product" in this context) is also absent from the text.

the domestic industry producing the like product, an obligation that likewise cannot be fulfilled if the investigating authorities are free to disregard some or most of the sales comparisons for an exporter.[30]

43. In an effort to support its preferred interpretation of the words "product" and "products," the Panel resurrected an earlier reasoning of the Panel in *US – Zeroing (EC1)*, referring to the use of the word "product" in the context of Article VI:6[31] and Article VII of the *GATT 1994*.[32] According to the Panel "[t]he fact that these words may be interpreted in a significantly different ways" when used elsewhere in the *GATT 1994* "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."[33]

44. In response to the identical argument offered by the United States before the Panel, Mexico pointed out that Article VII of the *GATT 1994* is not concerned with the pricing behaviour of exporters and producers but rather with the presentation of value for purposes of duty application on individual imports. Thus, the contexts of Article VI and Article VII are entirely different from each other and it is therefore natural, and to be expected, that the term "product" could have different meanings in these separate contexts.[34]

45. The Panel erroneously and without elaboration rejected Mexico's argument on the grounds that it is "based solely on Mexico's understanding of the object and purpose of these two provisions and does not have any textual basis."[35] To the contrary, this view is soundly based on appropriate principles of treaty interpretation which have been consistently applied by the Appellate Body.

46. In summary, Mexico established before the Panel both textual and contextual support for the correct interpretation that the term "product" necessarily refers to the product under consideration *taken as a whole* with respect to each exporter or producer examined. No other meaning of the term can be reconciled with the terms "dumping" and "margins of dumping" (further discussed below). Mexico also notes that the necessary relationship between dumping and material injury or threat thereof, and, indeed, the context, object and purpose of the agreements to remedy or offset such dumping and injury by exporters and producers validates the interpretation offered by Mexico and refutes the Panel's proffered interpretation.

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30 *See, e.g.*, Appellate Body Report, *US – Zeroing (Japan)*, paras. 111, 113.

31 The Panel never articulated the basis of its argument concerning the use of the term "product" in the context of Article VI:6. Therefore, Mexico cannot respond to that point.

32 Panel Report, paras. 7.120, 7.121.

33 *Ibid*, para. 7.121.

34 Second Written Submission of Mexico, para. 62.

35 Panel Report, para. 7.122.

## D. Exporter- or Producer-Specific Margins of Dumping

47. The Panel erroneously rejected a second fundamental principle concerning this issue, namely, that dumping must be calculated with respect to each exporter or foreign producer examined. It will be recalled that the Appellate Body has previously identified that the requirement to calculate "margins of dumping" with respect to exporters and producers is consistently and frequently reflected in the text of the Agreements, including Articles 6.10 and 9.4 of the *Anti-Dumping Agreement* which clearly refer to margins of dumping in relation to individual exporters or producers.[36] Indeed, as the Appellate Body has also observed, the pricing behaviour that is the subject of the Anti-Dumping agreement is the pricing behaviour of individual exporters or producers, not importers.[37] Mexico further notes that, as the Appellate Body has also held, there is no textual support for the notion that *importers* can "dump" a product.

48. The above points notwithstanding, the Panel rejected the principle that "dumping" measures only exporter or producer behaviour, asserting 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."[38]

49. The Panel's reasoning on this key point is incorrect. First, the Panel erred by equating the mechanism chosen by national authorities to collect anti-dumping duties from importers with the rules that must be followed by the investigating authorities in measuring margins of dumping for exporters. The two concepts are fundamentally different under the Agreements, as the Appellate Body has consistently recognized. Obviously, the liability to pay anti-dumping duties at the time of entry, like liability to pay Customs duties, may be imposed upon importers. Just as obviously, however, the pricing behaviour that is to be offset by the assessment of anti-dumping duties is engaged in by exporters and producers, not importers. Importers do not incur antidumping liability as a result of their own actions or decisions, but as the result of exporters' or producers' behaviour. Thus, imposing liability to pay anti-dumping duties on importers does not in any way support the Panel's assertion that "dumping" is or may be "importer-specific."

50. The Panel's further assertion that the obligation to pay anti-dumping duties is not incurred on the basis of a comparison of an exporter's total sales but is instead incurred on the basis of an individual sale between the exporter and its importer, is also factually incorrect. Article 9.3 of the *Anti-Dumping Agreement*, which applies to all systems of collection, clearly states that the anti-dumping duty collected "shall not exceed the margin of dumping as established under Article 2." The "margin of dumping" referred to in Article 9.3 is, as noted above, the margin of dumping for the party that is the object of the measure and who engages in "dumping" -- the exporter or producer under consideration. Anti-Dumping duties may be collected from importers, but

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36 *See, e.g.*, Appellate Body Report, *US-Zeroing (Japan)*, para. 112.

37 *Ibid*, para. 111.

38 Panel Report, para. 7.124.

importers do not "dump" and cannot have "margins of dumping" within the meaning of the Agreements.

51. While the *liability* to pay anti-dumping duties may be based on a specific transaction, the *rate and amount* of that payment is subject to the limit imposed under Article 9.3: the margin of dumping calculated for the exporter or producer under Article 2.

52. The Panel's mistaken belief that "margins of dumping" within the meaning of the agreements can exist for importers undermines its analysis throughout the Panel Report. For example, in paragraphs 7.125 and 7.126 of the Panel Report, the Panel, in describing collection under a "prospective" system, observed that an importer can request a refund if it believes that the amount of anti-dumping duty it paid exceeds "its margin of dumping." In fact, Article 9.3.2 nowhere contains a reference to an importer's "margin of dumping." As shown above, such a term has no meaning: an importer as such cannot price its export sales below its "normal value" because the importer does not have a "normal value" and it is not the importer's prices that are at issue. Article 9.3.2 instead appropriately refers to "the margin of dumping" and "the actual margin of dumping" – a clear reference to the margin of dumping for each exporter or producer examined, the parties that may engage in "dumping."

53. The Panel also quoted with approval the discussion in the *US – Zeroing (Japan)* Panel Report with respect to Article 6.10. According to the Panel in that case, the mere fact that Article 6.10 refers to the calculation of "an individual margin of dumping for each known exporter or producer" for "the product under investigation" says nothing about whether the investigating authorities in calculating the exporter or producer's margin of dumping "must accord the same weight to transactions in which the export price is above the normal value as to transactions in which the export prices is below the normal value."[39]

54. This is also incorrect. As the Appellate Body has held, selectively giving less weight to transactions where the export price exceeds normal value, "distorts the prices of certain export transactions because 'the prices of [certain] export transaction [made] are artificially reduced."[40] "In this way," the Appellate Body continued, "'the use of zeroing under the [T-T] methodology artificially inflates the magnitude of dumping resulting in higher margins of dumping and making a positive determination of dumping more likely." The Appellate Body has further stated that "[t]his way of calculating cannot be described as impartial, even-handed, or unbiased."[41] As such, this methodology violates the "fair comparison" obligation contained in Article 2.4. Although these observations were made with respect to the transaction-to-transaction methodology, they clearly apply with equal force in the context of simple zeroing in periodic reviews where the average-to-transaction methodology is used.

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[39] Panel Report, *US- Zeroing (Japan)*, para. 7.111 (quoted in Panel Report, para. 7.127).

[40] Appellate Body Report, *US – Zeroing (Japan)*, para. 146 (quoting Appellate Body Report, *US –Softwood Lumber V (Article 21.5- Canada)*, para. 139).

[41] *Ibid*, para. 146 (quoting Appellate Body Report, *US –Softwood Lumber V (Article 21.5- Canada)*, para. 142).

## E. Contextual Arguments

55. The Panel has also asserted several contextual arguments in support of its decision in this case. As discussed below, the Panel erred with respect to each of these arguments.

### 1. Existence of Prospective Normal Value Systems

56. Raising yet another argument previously considered and rejected by the Appellate Body, the Panel asserted that the existence of a "prospective normal value" system under Article 9.4(ii) of the *Anti-Dumping Agreement* lends support to its view that "anti-dumping duties can be determined on a transaction-specific basis" under retrospective systems such as that employed by the United States.[42]

57. The Panel provided the following discussion of prospective normal value systems:

> 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.[43]

58. However, as the Panel acknowledged, the Appellate Body has previously rebutted this argument, noting that:

> 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

[42] Panel Report, paras. 7.130, 7.131.

[43] *Ibid*, para. 7.131.

> the exporter's margin of dumping. Whether a refund is due or not will depend on the margin of dumping established for that exporter.[44]

59. In response to this statement by the Appellate Body, the Panel acknowledged that duties collected under a prospective normal value system are subject to assessment proceedings under Article 9.3. However, the Panel stated that:

> 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.[45] (emphasis added)

60. The Panel's assertion that the "margin of dumping" in a duty assessment proceeding under Article 9.3 should be calculated on the "basis of the data pertaining to the importer seeking the

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[44] Appellate Body Report, *US – Zeroing (Japan)*, para. 160 (footnote omitted) (cited in Panel Report, para. 7.132).

[45] Panel Report, para. 7.133.

initiation of the proceeding"[46] is inconsistent with the legally correct interpretation of the Appellate Body. The Panel confused the amount of duty that is permitted to be collected under a prospective normal value system with the "margin of dumping" itself. Under the agreements, the two concepts are distinct. Although duty liability may be importer-specific, the "margin of dumping" may not because it is specific to the exporter or producer of the products at issue. Thus, the Panel was legally incorrect in referring to "an importer paying a duty above **its** margin of dumping" and "the margin of dumping of **individual importers**". Indeed, it is precisely because the amount of duties collected from importers under a prospective normal value system may differ from the actual "margin of dumping" of the exporter or producer, that Article 9.3.2 requires an opportunity for a review.[47] The purpose of such a review is to ensure that the amount collected does not exceed the margin of dumping established under Article 2. As the Appellate Body noted "[i]t 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."[48] Pursuant to the terms of Article 9.3, the exporter or producer's margin of dumping must, in turn, be established consistently with Article 2 -- that is to say, with respect to the product at issue taken as a whole -- and cannot selectively ignore or alter the results of any intermediate comparisons.

61. As is more clearly stated in later portions of the Panel's report, the Panel also appeared to be concerned that the interpretation of the Appellate Body would lead to a waste of administrative resources by requiring exporters or producers to provide export sales information relating to all importers in the importing country, even where only one importer actually requested an assessment review of its imports.[49]

62. However, such a concern is based on an erroneous premise. Mexico observes that the record of the Panel shows that the administrative review procedures at issue in this appeal require an examination of *all* of an exporter or producer's export sales whenever at least one importer has requested an administrative review of its imports of subject merchandise from the exporter or producer in question.[50] Thus, the Panel's stated concern is factually incorrect on the evidence before it and inapplicable. Moreover, the legal relevance of such a concern by the Panel, even if it were correct, is highly dubious. Mexico questions the authority of a dispute settlement panel to

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[46] *Ibid.*

[47] As the Appellate Body noted, "[u]nder any system of duty collection, the margin of dumping established n accordance with Article 2 operates as a ceiling for the amount of the anti-dumping duties that could be collected in respect of the sales made by an exporter. To the extent that duties are paid by an importer, it is open to that importer to claim a refund if such a ceiling is exceeded. Similarly, under its retrospective system of duty collection, the United States is free to assess duty liability on a transaction-specific basis, but the total amount of anti-dumping duties that are levied must not exceed the exporters' or foreign producers' margins of dumping." Appellate Body Report, *US – Zeroing (Japan)*, para 162.

[48] Appellate Body Report, *US – Zeroing (Japan)*, para 160.

[49] Panel Report, para. 7.146.

[50] Mexico's Responses to the Panel's Questions from the Second Substantive Meeting (31 July, 2007), paras. 17-19. The United States did not dispute these facts. See Comments of the United States on Mexico's Answers to the Panel's Questions in Connection with the Second Substantive Meeting, para. 9.

interpret a covered agreement based on the Panel's unsupported notions of administrative efficiency.

63. In summary, the Appellate Body has previously heard and correctly answered the Panel's contextual arguments based on Article 9.4(ii). There is no necessary inconsistency between the collection of anti-dumping duties on the basis of prospective normal values and the obligation to calculate and assess margins of dumping for exporters and producers on the basis of all export transactions of the product under consideration. If margins of dumping could be determined at the level of individual export transactions, the inflated duties collected could seriously distort trade beyond the impact of dumping and injury by exporters and producers, thereby producing a result that was clearly never intended by the negotiators.

### 2. "Mathematical Equivalence"

64. The Panel also resurfaced the notion of "mathematical equivalence" related to the average-to-transaction comparison methodology as set forth in the second sentence of Article 2.4.2 with the average-to-average methodology reflected in the first sentence of that Article. According to the Panel's argument, absent zeroing, the margin of dumping calculated for an individual exporter or producer will always and necessarily be the same (mathematically equivalent) using either the average-to-average comparison methodology under the first sentence of Article 2.4.2 or the average-to-transaction comparison methodology under the second sentence of Article 2.4.2. Eliminating zeroing from the average-to-transaction comparison methodology would therefore render the comparison methodology in the second sentence of Article 2.4.2 *inutile.* Thus, the argument goes, an interpretation of the agreement prohibiting zeroing is impermissible because it would render a portion of the agreement *inutile.*

65. Mexico in this case has not challenged the use of "simple zeroing" in "targeted dumping" investigations. The analysis of mathematical equivalence relates only to the issue of whether "targeted dumping" analysis is rendered *inutile* if zeroing is not permitted under the second sentence of Article 2.4.2. The Appellate Body need not rule on that issue. However, if the Appellate Body rules on this issue, it is clear for the reasons discussed above that the *inutility* argument fails. The Panel's rejection of Mexico's arguments on that basis are in error and should be reversed by the Appellate Body.

66. Mexico further notes that the Appellate Body has now had several occasions to consider the "mathematical equivalence" argument and has consistently rejected the position advocated by the United States and adopted by the Panel. [51] Mexico recalls that the Appellate Body, considering zeroing in the context of the transaction-to-transaction comparison methodology described in the first sentence of Article 2.4.2, has twice rejected the mathematical equivalence argument noting, *inter alia*, that: (1) the mathematical equivalence argument is based on a set of assumptions that may not hold in all situations and "[o]ne part of a provision setting forth a methodology is not rendered *inutile* simply because, *in a specific set of circumstances*, its application would produce

[51] See Appellate Body, *US – Zeroing (Japan)*, paras. 133-136; Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 97-100.

results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision";[52] and (2) the second sentence of Article 2.4.2 provides for an "exception", and as such, "the comparison methodology in the second sentence of Article 2.4.2 ([W-T]) alone cannot determine the interpretation of the two methodologies provided in the first sentence, that is, [T-T] and [W-W]";[53] that even if the W-W and T-T methodologies were to yield equivalent results in certain situations, "this would not be sufficient to compel a finding that zeroing is permissible under the T-T comparison methodology, because the mathematical equivalence argument does not relate to this methodology.[54]

67. As it has done in the past, the United States offered hypothetical calculations as examples in an attempt to establish mathematical equivalence. In response, Mexico showed that the U.S. example works only because it is based on particular assumptions, including that the calculation of normal values in the average-to-transaction methodology is based on period-long averages. Mexico pointed out that the assumption of using period-long average normal values is not required by the *Anti-Dumping Agreement* and, in fact, is contrary to the methodology for average-to-transaction comparisons that is actually called for in the USDOC regulations. Those regulations call for the use of contemporaneous *monthly* average normal values in "targeted dumping" situations, while mandating period-long normal value averages (normally one year) for average-to-average comparisons. Mexico provided examples that showed that mathematical equivalence fails if monthly normal values are used. Indeed, Mexico demonstrated that applying the comparison methodologies called for in the U.S. regulations would yield non-equivalent results in the majority of cases. The United States did not dispute this fact.[55]

68. The Panel rejected Mexico's demonstration, stating as follows:

> Mexico has shown no support in the text of Article 2.4.2 for the proposition that the normal value figures used under the [average-to-average] and the [average-to-transaction] 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". 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

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[52] Appellate Body, *US – Zeroing (Japan)*, para. 133 (quoting Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 99).

[53] *Ibid*, para. 133 (quoting Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 97).

[54] Appellate Body, *US – Zeroing (Japan)*, paras. 133. The Appellate Body noted, in fact, that it could be argued in reverse that the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting "targeted dumping", thus rendering the third methodology *inutile*. *Ibid.*, para. 133.

[55] Panel Report, para. 7.142.

> 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.[56] (footnotes omitted).

69. Mexico also noted before the Panel that there was no textual support for the proposition that using different normal value averaging periods was prohibited as between average-to-average and average-to-transaction methodologies were used. Mexico pointed out that the terminology used in the first and second sentences of Article 2.4.2 are in fact not identical and that the framers of the provision would be expected to have used the same language or made cross-references between the sentences had they intended the same meaning in both sentences with respect to time periods. The Panel rejected this argument, stating:

> While Mexico is right that the phrases used in Article 2.4.2 to refer to the [weighted average] normal 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).[57]

70. Again, the Panel erred. First, the difference in language speaks for itself. The fact that different language is used in the two sentences suggests strongly that the averaging periods in the two methodologies are not compelled to be identical in all cases. Second, there is no textual basis in the agreements, and the Panel has identified none, for concluding that the use of monthly averages is prohibited when using the average-to-transaction comparison methodology under the second sentence of Article 2.4.2. In order for a methodology of determining normal values to be prohibited in *all* cases (as it must be for mathematical equivalence to be proven) such a prohibition must be found in the terms of the Agreement interpreted consistently with Articles 31 and 32 of the *Vienna Convention* which is not the case here.

71. Moreover, there is not only a textual basis, but arguably an affirmative obligation, to use shorter averaging periods (such as monthly averages) when using the average-to-transaction methodology, at least in some circumstances. The second sentence of Article 2.4 requires that comparison between export price and normal value must be made "at as nearly as possible the same time." This contemporaneity requirement is clearly met in the case of average-to-average comparisons because normal values and export prices are averaged over the same periods. In the

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56 *Ibid*, para. 7.140.

57 *Ibid*, para. 7.141.

case of average-to-transaction comparisons, however, this contemporaneity requirement would likely not be met if individual export transactions at a single point in time are compared to prices averaged over a period of twelve or more months. It may be for this reason that the United States statute and regulations require the use of contemporaneous *monthly* average normal values when making average-to-transaction comparisons, even though *annual* normal value averaging periods are required for average-to-average comparisons. Given the total absence of any textual or logical basis for prohibiting different averaging periods for normal values used in the average-to-average and average-to-transaction comparison methods, there is simply no support for the Panel's conclusion that averaging periods in these two methods may never differ within a proceeding.

72. A second error in the Panel's analysis of this issue is the Panel's assertion that prohibiting the use of different averaging periods under the average-to-transaction comparison methodology is "at least one of the permissible interpretations of Article 2.4.2."[58]

73. In this instance, the Panel erroneously invoked the principles of Article 17.6(ii) of the *Anti-Dumping Agreement*. Even if the United States had articulated an interpretation that the *Anti-Dumping Agreement* always prohibits the use of shorter normal value averaging periods in the average-to-transaction comparison methodology than in the average-to-average methodology, under the Panel's logic Mexico's interpretation is equally permissible. If an interpretation that different averaging periods may be used is permissible, then any claim of mathematical equivalence and inutility is necessarily defeated. That is plainly the case here.

74. In addition, the Panel improperly dismissed as "irrelevant" Mexico's proof that the methodology demonstrating the lack of mathematical equivalence is the same methodology prescribed in the U.S. regulations for comparisons implementing the second sentence of Article 2.4.2. While Mexico has not challenged the consistency of those US regulations with the relevant agreements, it is certainly not "irrelevant" that the United States, which is now disputing the consistency with the agreements of the use of monthly average normal values, prescribes exactly the same methodology in the USDOC regulations implementing Article 2.4.2, and asserted at the time that those regulations comply with WTO objectives. At a minimum, Mexico's evidence demonstrates that the United States has not, outside the context of arguments in this dispute settlement proceeding, previously interpreted the Agreements to preclude in all cases the use of different time periods for averaging normal values.

### 3. "Potential Consequences" of a Prohibition on Zeroing

75. Lastly, the Panel attempted to justify its rejection of the Appellate Body's previous interpretations of the Agreements on the grounds that the prohibition on simple zeroing "would lead to undesirable results." The Panel identified three such results: (1) "competitive disincentives"; (2) that an end to zeroing would "unnecessarily expand the scope of periodic reviews"; and (3) that ending zeroing would inhibit the removal of injury to the affected domestic industry. As discussed below, these arguments cannot be squared with the reality of how antidumping

[58] *Ibid*, para. 7.141.

proceedings are actually structured and conducted. The Panel's arguments on these points are completely without merit and should be rejected by the Appellate Body.

### a) "Competitive Disincentives"

76. With regard to alleged "competitive disincentives," the Panel stated:

> 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".[59] (footnote omitted)

77. As a preliminary matter, the glaring legal error in the Panel's pronouncements on this issue is its assumption that importers have "margins of dumping". As noted above, and as clearly confirmed by the Appellate Body, margins of dumping exist only in relation to exporters or producers. Thus, the Panel's premise is incorrect, and must assume the conclusion in order to work. Importers may, of course, purchase products that are priced below normal value by exporters or producers; but there is no such thing under the WTO agreements as "importers with high margins of dumping," "importers who do not dump or who dump at a lower margin," or an importer's "true margin of dumping." The only "true" margin of dumping that is legally relevant to an importer is the margin of dumping of the exporter or producer of the articles it imported and that margin of dumping must reflect all of the export transactions by the producer or exporter.

78. Moreover, to the extent that the Panel's conception of the "incentives" created through the application of dumping measures are legally relevant at all, the Panel has conflated two separate concepts: (1) calculation of margins of dumping and (2) assessment and collection of anti-dumping duties from importers. Margins of dumping relate to the behaviour of exporters or producers, not importers.[60] If dumping is to be eliminated, exporters or producers will have to raise their export prices or lower their normal values. Importers cannot do either on their own; therefore, they cannot eliminate dumping. To the extent that the anti-dumping measures imposed are intended to create incentives for a change in pricing behaviour (rather than merely to offset dumping), the party to be encouraged logically is the exporter or producer. None of the criticisms

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59 *Ibid*, para. 7.146.

60 Appellate Body Report, *US – Zeroing (Japan)*, para. 156.

levelled by the Panel suggests that the elimination of zeroing would encourage foreign producers and exporters to continue "dumping" as defined in the agreements.

79. Mexico has not argued, and it is not implied in its position, that individual importers must be assessed anti-dumping duties at the identical rate as all other importers or that it is not permissible to assess antidumping duties on an importer- or transaction-specific basis. As the Appellate Body has made clear:

> a reading of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994* does not suggest that final anti-dumping duty liability cannot be assessed on a transaction- or importer-specific basis, or that the investigating authorities may not use specific methodologies that reflect the distinct nature and purpose of proceedings governed by these provisions, for purposes of assessing final anti-dumping duty liability, provided that the total amount of anti-dumping duties that are levied does not exceed the exporters' or foreign producers' margins of dumping.[61]

80. Accordingly, although the assessment of anti-dumping duties upon an individual importer is, by operation of Article 9.3, necessarily capped by the margin of dumping for each exporter or producer from which purchases were made,[62] no party has argued that within that overall limitation assessments may not be made on individual importers or transactions.

### b) Administrative Burdens

81. The Panel also argued that the interpretation advanced by the Appellate Body creates administrative problems. In particular, the Panel asserted that setting a limit on assessment of anti-dumping duties:

> [. . .] 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.[63] (footnote omitted)

82. This comment by the Panel reveals a fundamental lack of understanding of how periodic reviews are conducted under the retrospective system employed by the United States. As the Appellate Body has held, exporters and producers have margins of dumping. Therefore, the Anti-Dumping

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61 *Ibid*, para. 155 (quoting Appellate Body Report, *US – Zeroing (EC1)*, para. 131).

62 *Ibid*, para. 156.

63 Panel Report, para. 7.146.

Agreement requires that exports of the "product" by an exporter or producer must be examined in order to calculate a "margin of dumping."

83. Consistent with this obligation. under the U.S. system of conducting periodic reviews, if an exporter is reviewed at all, the USDOC will examine *all* the export sales of that exporter or producer. As the evidence before the Panel demonstrates, USDOC regulations permit periodic reviews to be requested by foreign producers, their domestic competitors, and by importers (among others).[64] Foreign producers or exporters are permitted to request periodic reviews covering their own exports. Domestic interested parties may request periodic reviews of any foreign producer or exporter of the product concerned. Neither the domestic producer nor the exporter or producer may limit a review to specific importers of a product covered by an anti-dumping duty order. While importers may request periodic reviews of any exporter or producer of the product *they themselves imported from that exporter or producer*, such a review must cover *all* exports by each reviewed exporter or producer.[65] There is, in fact, no option under the U.S. regulations to limit the scope of the review only to exports "pertaining to the importer requesting the review," as the Panel erroneously assumed.

84. The Panel's assumption that requiring margins of dumping to be calculated for each exporter or producer with regard to all its exports in the period would be an added administrative burden is thus utterly without basis. Because periodic reviews in the United States are conducted precisely in the manner over which the Panel expressed concern about imposing additional burdens, there is on the record of this dispute no evidence that conducting periodic reviews in this manner would hinder timely completion of reviews, place heavy burdens on the administering authorities, or inhibit the cooperation of exporters or producers. This is precisely how the United States conducts its periodic reviews under current law.

### c) Removal of Injury

85. Lastly, the Panel asserted that the Appellate Body's reading of the Agreements would preclude the achievement of a core function of anti-dumping duties, i.e., removing the injurious effect of dumping. In particular, the Panel stated:

> 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

[64] Mexico's Responses to the Panel's Questions from the Second Substantive Meeting (31 July, 2007), para. 17 (referencing section 351.213(b) of the USDOC Regulations, 19 C.F.R. § 351.213(b)).

[65] See *ibid*. para. 18 (referencing *Automotive Replacement Glass Windshields from the People's Republic of China*, 69 FR 61790 (21 October, 2004), Issues and Decision Memorandum at 10-11 (Comment 4), Exhibit MEX-13) ("The regulation limits an importer's ability to request an administrative review to its own producers or exporters. The purpose of this limitation is to allow only those companies with a stake in the outcome to request an administrative review of the producers relevant to them. Once the Department decides to conduct its review, however, any such review covers that producer's or exporter's sales to all importers."). See also references in footnote 49 of this submission.

> suffered by the domestic industry because of dumped imports would not be removed by imports at non-dumped prices.[66]

86. This view is incorrect and highlights the failure of the Panel to give meaning to the terms of the *Anti-Dumping Agreement* in their appropriate context and in a manner that gives harmonious meaning to all of the terms of the Agreement. The Panel essentially assumes that "dumped imports" encompass only those import transactions that are made at below normal value. It also ignores the proper relationship between "dumped imports" and "injury".

87. "Dumped imports" must be treated in the same manner in both dumping and injury determinations.[67] If a producer or exporter is found to be dumping with a margin of dumping greater than *de minimis*, *all* imports from that producer or exporter may be included in the volume of "dumped imports" for purposes of determining whether injury by reason of such imports has occurred.[68] Thus, the "dumped imports" that are the focus of the injury determination include import transactions that are made below normal value as well as those made at or above normal value. In the absence of zeroing, the comparison between dumped imports and consequent injury necessarily takes into account imports from a particular exporter priced both above and below the corresponding normal value. As the Appellate Body noted in *US – Zeroing (Japan)*:

> If as a consequence of zeroing, the results of certain comparisons are disregarded only for purposes of calculating margins of dumping, but taken into consideration for determining injury, this would mean that the same transactions are treated as "non-dumped" for one purpose, and as "dumped" for another purpose. This is not in consonance with the need for consistent treatment of a product in an anti-dumping investigation."[69]

88. Contrary to the view of the Panel, therefore, it is entirely appropriate and consistent with the concept of injury - indeed necessary - to prohibit simple zeroing in periodic reviews. To do otherwise would not comply with the requirement for consistent treatment of a product in calculating the margin of dumping and its effect on the domestic industry in an anti-dumping

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[66] Panel Report, para. 7.147.

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

[68] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 115. See also Panel Report, *Argentina – Poultry AD Duties*, para. 7.303 ("We agree with the findings of the *EC – Bed Linen* and the *EC – Bed Linen (Article 21.5)* panels, and with the abovementioned observation by the *EC – Bed Linen* panel. On the basis of the ordinary meaning of the text, we find that the term "dumped imports" refers to all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* has been calculated."). The Appellate Body in *US – Zeroing (Japan)*, noted that this is also consistent with its understanding of U.S. law. See *US – Zeroing (Japan)*, para. 128.

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

proceeding[70] and would systematically overstate the margin of dumping and distort the analysis of the potential injurious impact of the dumped imports.

## V. CONSISTENCY WITH ARTICLE 2.4

89. In its written submissions before the Panel, Mexico has observed that Article 2.4, first sentence, contains an overarching obligation requiring the authorities to make a "fair comparison" between the normal value and export price while comparing them for purposes of calculating a margin of dumping.[71] Mexico recalls that any determination of dumping must be made for the product under consideration taken as a whole for each exporter or producer. 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."[72] A comparison that disregards selected export transactions because the export price is above the normal value cannot result in a determination of a margin 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.

90. In Mexico's view, zeroing is also inherently biased and hence in violation of the fair comparison requirement of Article 2.4 because it artificially inflates the margin of dumping by ignoring relevant export transactions. The same finding was reached with respect to zeroing in transaction-to-transaction comparisons in *US –Zeroing (Japan)*, where the Appellate Body found that zeroing "distorts the prices of certain export transactions because the 'prices of [certain] export transactions [made] are artificially reduced.'"[73] The Appellate Body further concluded that the use of zeroing in transaction-to-transaction comparisons "artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely."[74] The Appellate Body found: "[t]his way of calculating cannot be described as impartial, even-handed, or unbiased."[75] All of these conclusions apply with equal force to simple zeroing in periodic reviews, which the Appellate Body has found inconsistent with the Agreement in two recent cases brought by the EC and Japan. The Dispute Settlement Body has adopted each of these Appellate Body Reports.

91. While the Panel rejected Mexico's arguments, Mexico has shown above that the Panel's conclusion is incorrect. Mexico observes two errors in the Panel's conclusions on this issue. First, the Panel erred in rejecting Mexico's arguments concerning the consistency 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*. As Mexico has demonstrated above, the Panel has

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70 See Appellate Body Report, *US – Softwood Lumber V*, para. 99.

71 See, e.g., First Written Submission of Mexico before the panel, para. 245.

72 *Ibid*.

73 Appellate Body Report, *US – Zeroing (Japan)*, para. 146 (citing Appellate Body Report, *US – Softwood Lumber V (Article 21.5)*, para. 139).

74 *Ibid*., para. 146 (citing Appellate Body Report, *US – Softwood Lumber V (Article 21.5)*, para. 142).

75 *Ibid*.

incorrectly interpreted the text of the agreements on that issue and has improperly rejected the legal findings of the Appellate Body in at least two previous cases.

92. Second, the Panel erred by failing to address the other, independent arguments presented by Mexico that simple zeroing in periodic reviews is inconsistent with Article 2.4's "fair comparison" requirement because the methodology distorts the prices of certain export transactions by artificially reducing them, unjustifiably inflating the apparent magnitude of dumping. Further, the Panel failed to respond to the claim that calculating margins of dumping in this manner is not impartial, even-handed, or unbiased. By failing to consider these arguments, the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU.

## VI. MEXICO'S "AS APPLIED" CLAIMS

93. The Panel rejected all of Mexico's "as applied" claims regarding simple zeroing as applied in the five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico* carried out by the USDOC based entirely upon the Panel's finding that 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, 2.4, and 9.3 of the *Anti-Dumping Agreement*.

94. For the reasons described above, the Panel's finding that 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, 2.4, and 9.3 of the *Anti-Dumping Agreement* is erroneous. Accordingly, the Panel's consequential rejection of Mexico's "as applied" claims with respect to the five periodic reviews of *Stainless Steel Sheet and Strip in Coils from Mexico* is erroneous and should be reversed by the Appellate Body.

## VII. THE PANEL HAS NOT FULFILLED ITS FUNCTION UNDER ARTICLE 11 OF THE DSU

95. The DSB was established to administer the rules and procedures in the DSU.[76] Underlying these rules and procedures are Articles 3.2 and 3.3 of the DSU which establish that the dispute settlement system is "a central element in providing security and predictability to the multilateral trading system" and that the "prompt settlement of situations" is "essential to the effective functioning of the WTO". Furthering these overarching objectives is part of the DSB's responsibilities.

96. Under Article 11 of the DSU, the function of a panel is to assist the DSB in discharging its responsibilities under the DSU. In this dispute, the Panel has failed to fulfil this function.

97. The Panel's failure to comply with Article 11 of the DSU relates to its refusal to follow a consistent line of adopted Appellate Body reports that address identical issues with respect to the same responding party (the United States) and, more specifically, its consequent issuance of findings and conclusions that are identical to those that have already been expressly overturned

[76] DSU, Article 2.1.

by the Appellate Body. Mexico acknowledges that, in the WTO dispute settlement system, a panel is not generally considered to be bound by previous Appellate Body reports. However, as the Appellate Body clearly stated in *US – Oil Country Tubular Goods Sunset Reviews*, "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels where the issues are the same."[77]

98. In the circumstances of this dispute, Mexico has been forced to appeal findings and conclusions that are identical to those that have already been overturned in previous dispute settlement proceedings involving "as such" challenges of the same measures and involving the United States as the responding party. We consider that this is inconsistent with the Panel's function to assist the DSB in discharging its responsibilities because it interferes with the prompt settlement of this dispute and, thereby, frustrates the effective functioning of the WTO dispute settlement system and it diminishes the system's security and predictability.

99. The Panel's failure to fulfil its functions in this dispute has broader implications for the WTO dispute settlement system. These implications are aptly illustrated in the zeroing disputes which have degenerated into a seemingly endless circular dispute settlement process over the same measure. This situation is completely at odds with the prompt settlement of disputes, with the effective functioning of the dispute settlement system, and with security and predictability.

## VIII. CONCLUSION

100. Mexico considers that the Panel erred in law in the interpretation and application 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*.

101. Mexico requests that, upon reversal of the Panel's erroneous findings and conclusions identified above, the Appellate Body resolve this dispute promptly by finding that simple zeroing is "as such" and "as applied" in the five named periodic reviews 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*.

[77] *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.