

**BEFORE THE  
WORLD TRADE ORGANIZATION  
APPELLATE BODY**

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

**(AB-2008- 1)**

**APPELLEE SUBMISSION OF  
THE UNITED STATES OF AMERICA**

**February 25, 2008**

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***Service List***

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<i>Argentina – Footwear Safeguard (AB)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000
<i>Canada – Patent Term (Panel)</i>	Panel Report, <i>Canada – Term of Patent Protection</i> , WT/DS170/R, adopted 12 October 2000, as modified by the Appellate Body Report, WT/DS170/AB/R
<i>EC – Audiocassettes</i>	GATT Panel Report, <i>EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan</i> , ADP/136, circulated 28 April 1995 (unadopted)
<i>EC – Bed Linen (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R
<i>EC – Bed Linen (Article 21.5) (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005
<i>EC – Computer Equipment (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998
<i>EC – Cotton Yarn</i>	GATT Panel Report, <i>EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil</i> , ADP/137, adopted 30 October 1995
<i>Egypt – Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002

<i>India – Patents (AB)</i>	Appellate Body Report, <i>India – Patent Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998
<i>Japan – Alcohol (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November, 1996
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States - Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996.
<i>US – Offset Act (Byrd Amendment ) (AB)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
<i>US – Section 301</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000
<i>US – Shrimp (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001
<i>US – Shrimp AD (Ecuador)</i>	Panel Report, <i>Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R, adopted 20 February 2007
<i>US – Softwood Lumber Dumping (Panel)</i>	Panel Report, <i>United States - Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/p, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R
<i>US – Softwood Lumber Dumping (AB)</i>	Appellate Body Report, <i>United States - Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Softwood Lumber Dumping (Article 21.5) (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/RW, adopted 1 September 2006, as modified by the Appellate Body Report, WT/DS264/AB/RW
<i>US – Softwood Lumber Dumping (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006

<i>US – Underwear (AB)</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997
<i>US – Zeroing (EC) (Panel)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
<i>US – Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/AB/R, adopted 9 May 2006
<i>US – Zeroing (Japan) (Panel)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R
<i>US – Zeroing (Japan) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007
<i>US – Zeroing (Mexico)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, notice of appeal 30 January 2008

## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States urges the Appellate Body to affirm the findings of the Panel in *United States – Final Anti-dumping Measures on Stainless Steel from Mexico* that simple zeroing in periodic assessment reviews<sup>1</sup> “as such” and “as applied” is not inconsistent with Article VI of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and Articles 2.1, 9.3, and 2.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”). While this dispute has focused on “zeroing” or, more precisely, on whether there is a requirement to aggregate individual transactions in a retrospective antidumping duty assessment review, this case raises broader, overarching issues about the role of the Dispute Settlement Body (“DSB”) in the WTO system.

2. The WTO’s dispute settlement procedures are one of the foundations of a rules-based global trading system. The role of panels and the Appellate Body in the WTO system is vital, but limited – to preserve the rights and obligations of WTO Members and to clarify the provisions of the WTO agreements. As Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) states: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” (Emphasis added).

3. Article 3.2 reflects that the longstanding principles of interpretation of public international law neither “require or condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.”<sup>2</sup> To go beyond the limited role spelled out in Article 3.2 would raise fundamental questions as to the legitimacy of the DSB’s rulings and the source of its authority. As a practical matter, it would lead to uncertainty and unpredictability, as WTO Members seek to achieve through clever lawyering what they could not achieve at the negotiating table, and as the role of WTO negotiations is diminished.

4. In this dispute, Mexico asks this Body to read an obligation into the AD Agreement and Article VI of the GATT 1994, notwithstanding the lack of any textual basis for the broad obligation that Mexico proposes. Mexico’s proposed approach, which relies on previous Appellate Body findings, is deeply troubling and has generated enormous controversy.<sup>3 4</sup>

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<sup>1</sup> Mexico refers to assessment proceedings as “periodic reviews.”

<sup>2</sup> *India – Patents (AB)*, para. 45.

<sup>3</sup> See e.g. Professor Chad P. Bown and Professor Alan O. Sykes, *The Zeroing Issue: A Critical Analysis of Softwood V*, revised version forthcoming in *World Trade Review*, (“[T]he legal foundation for the Appellate Body’s ruling is somewhat dubious, doubly so in the face of the standard of review applicable under the ADA ... . The danger of such decisions is that they will undermine confidence in the Appellate Review process and make it more difficult for WTO



5. In the disputes that have addressed the issue of offsets in the wake of the Appellate Body's report in *US – Softwood Lumber Dumping*, five panels have found that the “all comparable export transactions” language in the text of Article 2.4.2 of the AD Agreement provides a textual basis for an obligation to provide offsets in antidumping investigations.<sup>5</sup> This

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Members in the future to reach agreement on contentious issues.” (p. 30 ))  
<<http://people.brandeis.edu/~cbown/papers/Bown-Sykes-ALI.pdf>>; Terence P. Stewart, Amy S. Dwyer & Elizabeth Hein, “*Trends in the Last Decade of WTO Trade Remedy Decisions: Problems and Opportunities for the WTO Dispute Settlement System*,” 24 ARIZONA J. COMP. L. 251 (2007); Professor Roger P. Alford, “*Reflections on U.S.– Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*,” 45 COLUM. J. TRANSNAT'L L. 196 (2006-2007) (“The Appellate Body’s report in *US – Zeroing* crystallizes some of the concerns that have been expressed in the past regarding judicial excess in the WTO dispute settlement regime.” (p. 220 )); Professor Phoenix X.F. Cai, “*Between Intensive Care and Crematorium: Using Standard of Review to Restore Balance to the WTO*,” 15 TULANE J. INT'L & COMP. L. 465 (2006-2007); Professor Richard H. Steinberg, “*Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*,” 98 AM. J. INT'L L. 247 (2004); Professor Daniel K. Tarullo, “*Paved with good intentions: the dynamic effects of WTO review of anti-dumping action*,” 2 WORLD TRADE REVIEW 373 (2003); John Greenwald, “*WTO Dispute Settlement: An Exercise in Trade Law Legislation*,” 6 J. INT'L ECON. L. 113 (2003); John Ragosta, Navin Joneja, and Mikhail Zeldovich, “*WTO Dispute Settlement System Is Flawed and Must Be Fixed*,” 37 INT'L LAWYER 697(2003); Professor Daniel K. Tarullo, “*The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-dumping Decisions*,” 34 L. & POLICY INT'L BUS. 109 (2002-2003); Geert A. Zonnekeyn, “*The Bed Linen Case and its Aftermath*,” 36 J. WORLD TRADE 993 (2002); Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 U. CHI. J. OF INT'L L. 403 (2001).

<sup>4</sup> For journal articles generally sympathetic to the Appellate Body’s zeroing prohibition, see e.g. Edwin Vermulst and Daniel Ikenson, “*Zeroing Under the WTO Anti-Dumping Agreement: Where Do We Stand?*” 2 GLOBAL TRADE & CUSTOMS J. 231 (2007); Alberto Alvaro-Jimenez, *Emerging WTO Competition Jurisprudence and its Possibilities for Future Development*, 24 NW. J. INT'L L. & BUS. 442 (2003-04); James P. Durling, *Deference, But Only When Due: WTO Review of Anti-Dumping Measures*, 6 J. INT'L ECON. L. 125 (2003); Professor Jong Bum Kim, “*Fair Price Comparison in the WTO Anti-dumping Agreement*,” 36 J. WORLD TRADE 39 (2002); Professor Raj Bhala, “*New WTO Antidumping Precedents (Part One): The Dumping Margin Determination*,” 6 SINGAPORE J. INT'L & COMP. L. 335 (2002) (“It is difficult to think of two sub-fields of international trade law that have been the subject of decisions by the Appellate Body of the World Trade Organization (‘WTO’) that have generated more controversy than antidumping (‘AD’) and safeguards law.”).

<sup>5</sup> *US – Zeroing (Mexico)*, paras. 7.60 - 7.36; *US – Shrimp AD (Ecuador)*, para. 7.41; *US – Zeroing (EC) (Panel)*, paras. 7.27, 7.271; and *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.20, 5.21, 5.28-5.30; *US – Zeroing (Japan) (Panel)*, paras. 7.82, 7.271. Prior panels took the same approach. *EC – Bed Linen (Panel)*, para. 6.117; and *US – Softwood*

language in Article 2.4.2 applies only to antidumping investigations and only when authorities use the average-to-average comparison method set out in Article 2.4.2, and is not in issue here.

6. However, none of these panels, comprised mostly of trade remedies experts and current and former WTO/GATT negotiators, have expanded the requirement to provide offsets beyond Article 2.4.2 and the context of average-to-average comparisons in investigations. Instead, those panels that have confronted the issue have consistently found that the obligation to provide offsets does not apply broadly to any and all antidumping calculations, but instead is limited to the text-based obligation to include all comparable export transactions in weighted-average to weighted-average comparisons in investigations (“A-to-A”). The United States believes the phrase “all comparable export transactions” in Article 2.4.2 is at best ambiguous and certainly was never understood by the U.S. negotiators to prohibit zeroing, but the United States has nevertheless revised U.S. antidumping practice to eliminate zeroing in average-to-average comparisons in investigations. Accordingly, Article 2.4.2 is not in issue here.

7. Three WTO panels have examined whether the obligation to provide offsets extends beyond average-to-average comparisons in investigations. In each case, these panels of trade remedies experts and current and former WTO negotiators determined that the AD Agreement does not prohibit zeroing in reviews.<sup>6</sup>

8. Nevertheless, in the disputes that have explored this issue since *US – Softwood Lumber Dumping*, the Appellate Body has continued to expand Article VI of the GATT 1994 and certain provisions of the AD Agreement into a general prohibition of so-called “zeroing” in all contexts. Mexico’s claims in this dispute rely on these Appellate Body findings. In this dispute, while taking due account of the reports cited by Mexico and the third parties, the Panel noted that under *Japan – Alcohol (AB)*, such reports are “not binding except with respect to resolving the particular dispute between the parties to that dispute.”<sup>7</sup> Accordingly, after “careful consideration,” the Panel “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.”<sup>8</sup>

9. Like the panels that have declined to extend any prohibition against zeroing beyond average-to-average comparisons in investigations, the United States respectfully disagrees with the Appellate Body’s interpretation of the AD Agreement as prohibiting zeroing in periodic assessment reviews. As we now show, the Appellate Body’s findings – the rationales for which have varied from dispute to dispute – are at odds with the text, the “ordinary meaning” of key

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*Lumber Dumping (Panel)*, para. 4.244

<sup>6</sup> *US – Zeroing (Mexico)*, para. 8.1(c); *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284.

<sup>7</sup> *Japan – Alcohol (AB)*, p. 14.

<sup>8</sup> *US – Zeroing (Mexico)*, para. 7.106.

AD Agreement terms under prior WTO/GATT agreements, reports, and decisions as to the identical language of the Tokyo Round *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (“Tokyo Round Antidumping Code”) and the negotiating history of the AD Agreement. Indeed, the negotiating history demonstrates that during the Uruguay Round, Japan, Hong Kong, Singapore, and Norway, among others, repeatedly proposed textual changes to require antidumping authorities to consider “negative dumping” in antidumping calculations. Their proposals were flatly rejected by the European Communities, the United States, and Canada, and as a result were never incorporated into the final AD Agreement. As a result, the key textual provisions that are at issue in this case remained unchanged. Accordingly, the United States can discern no principled textual basis for the Appellate Body’s conclusion that the AD Agreement somehow includes a new zeroing prohibition.

10. If the new “zeroing” prohibition identified by the Appellate Body has no basis in the text of Article VI or the AD Agreement, and if it was never agreed to by the WTO Members in the Uruguay Round, it raises fundamental and deeply troubling questions about the Appellate Body’s role within the WTO system and the source of its authority to impose new non-textual obligations on WTO Members. Equally disturbing is the Appellate Body’s apparent refusal to address in any meaningful way the questions that have been raised regarding the various rationales it has put forward as a justification for its prohibition on zeroing. If these concerns cannot be satisfactorily resolved, they put the credibility of the WTO dispute settlement system at risk.

11. The United States fully recognizes that the reversal by any judicial body of an earlier ruling is a serious matter, and that it is not something to be done lightly. However, even in common law systems, where the doctrine of *stare decisis* applies, rulings can be overturned in exceptional circumstances.<sup>9</sup> The United States firmly believes that this dispute presents such a circumstance.

12. Accordingly, the United States respectfully requests that the Appellate Body reconsider its reasoning in *US – Zeroing (Japan) and US – Zeroing (EC)*, uphold the findings of the Panel in this case, and find that the approach taken by the United States to the assessment reviews at issue rests upon a valid interpretation of the AD Agreement and the GATT 1994, and complies with U.S. WTO obligations.

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<sup>9</sup> *Stare decisis*, of course, does not apply in WTO dispute settlement proceedings. *Japan – Alcohol (AB)*, p. 14 (rejecting the application of “aim and effect” test adopted by earlier GATT 1947 panel to Article III of GATT 1994). Accordingly, there is even more flexibility to depart from an earlier finding if the Appellate Body concludes that a mistake was made. In contrast, Mexico’s proposed approach, which would treat DSB rulings as fully binding and definitive, even in a situation where experts have openly and cogently disagreed, would only undermine the legitimacy of the system and this Body’s credibility.

## II. FACTUAL BACKGROUND

13. Unlike most WTO Members, the United States operates a retrospective system for collecting and assessing antidumping duties.

14. In contrast, so far as we are aware, every other WTO Member with an antidumping program operates a “prospective” system for collecting duties. In a prospective system, an antidumping order<sup>10</sup> results in an *ad valorem* rate or reference price (sometimes referred to as a “normal” value or a minimum import price), which is applied to future entries of the merchandise on an entry-by-entry basis.

15. There are two basic types of prospective assessment systems. In an *ad valorem* system, such as the EC’s an importer typically pays the *ad valorem* antidumping duty on each entry based on the rate found in the original investigation or sunset review, *e.g.* 10% *ad valorem*,. In a reference price (or prospective normal value) system, *e.g.* Canada or India, the importer pays an additional antidumping duty if the import price is below the reference price. Under prospective assessment systems, the *ad valorem* rate or reference price generally applies for the entire five-year period covered by an initial order or sunset review. Despite their protestations otherwise, in the EC, Canada, Brazil, India, China, South Africa, and Argentina, refunds under Article 9 of the AD Agreement are infrequent, and importers generally are strongly discouraged from requesting one. At the end of the five-year period covered by an order, the antidumping authority conducts a sunset review under Article 11.3, which, if the order is continued, serves to set a new *ad valorem* rate or reference price for the next five-year period.

16. In contrast, the United States, under Title VII of the Tariff Act of 1930,<sup>11</sup> as amended (“the Tariff Act”), uses a retrospective system for assessing and collecting duties. In the initial antidumping investigation, the U.S. Department of Commerce (“Commerce”) conducts an investigation to determine whether dumping occurred during the period of investigation by calculating an overall weighted average dumping margin for each foreign producer/exporter investigated. In a separate and parallel investigation, the U.S. International Trade Commission (“ITC”) independently conducts an investigation to determine whether an industry in the United States is materially injured, or threatened with material injury, by reason of the dumped imports.

17. If Commerce finds that dumping existed during the period of investigation, and the ITC determines that a U.S. industry was injured by reason of dumped imports, Commerce issues an antidumping “order” and imposes an “estimated antidumping duty deposit rate” based on the dumping margins found in the initial investigation for future imports. Thereafter, importers must

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<sup>10</sup> For ease of reference, the United States uses the term “antidumping order” as a shorthand expression for the imposition of a definitive duty.

<sup>11</sup> 19 U.S. 1671 *et seq.*

post a duty deposit in the amount of anticipated antidumping duties to U.S. Customs and Border Protection when they enter goods covered by the order into the United States. No final duties, however, are imposed at the time of the order or entry.

#### **A. Article 5 Investigation Phase**

18. In the investigation phase, U.S. law provides that Commerce will normally use the average-to-average method for comparing transactions during the period of investigation.<sup>12</sup> U.S. law also authorizes the use of transaction-to-transaction comparisons<sup>13</sup> and, provided that there is a pattern of prices that differs significantly by region or time period,<sup>14</sup> among other things, the average-to-transaction method.

19. Commerce has announced that, from February 22, 2007, in making average-to-average comparisons in investigations, it will provide offsets for non-dumped comparisons that reduce the total amount of dumping found by the amount by which any comparison reflected an average export price in excess of normal value.<sup>15</sup> This is consistent with the Appellate Body's findings in *U.S. – Softwood Lumber Dumping* with respect to the term "all comparable export transactions" in Article 2.4.2 of the AD Agreement.

#### **B. Article 9 Assessment Phase**

20. In the second phase of a U.S. antidumping proceeding – the "assessment phase"<sup>16</sup> – Commerce's focus is on the retrospective calculation and assessment of antidumping duties on individual customs entries covered by an antidumping order. While an antidumping investigation typically covers a broad range of exporters, foreign producers, and U.S. importers, antidumping duties are paid by U.S. importers, who become liable when they enter goods into the United States. Thus, the U.S. retrospective assessment system seeks to calculate the duty based on specific entries by importers during the period covered by the review.

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<sup>12</sup> 19 C.F.R. 351.414(c)(1) (Exhibit US-1).

<sup>13</sup> 19 U.S.C. 1677f-1(d)(1)(A) (Exhibit US-2).

<sup>14</sup> In antidumping circles, this pattern commonly is referred to as "targeted dumping."

<sup>15</sup> See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (December 27, 2006); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3,783 (January 26, 2007). (Exhibits MEX-10 and MEX-11). While the United States respectfully disagrees with these Appellate Body findings, it nevertheless has complied, and is not challenging them in this appeal.

<sup>16</sup> 19 U.S.C. 1675.

21. In the U.S. system,<sup>17</sup> while an antidumping duty liability attaches at the time of entry, duties are not actually assessed at that time. Instead, the United States collects a security in the form of a cash deposit at the time of entry. Once a year (during the anniversary month of the orders) interested parties may request a “periodic review” to determine the final amount of duties owed on each entry made during the previous year.<sup>18</sup> Antidumping duties are calculated on a transaction-specific basis, and are paid by the importer of the transaction.<sup>19</sup> If the final antidumping duty liability exceeds the amount of the cash deposit, the importer must pay the difference. If the final antidumping duty liability is less than the cash deposit, the difference is refunded. If no periodic review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties. To simplify the collection of duties calculated on a transaction-specific basis, the absolute amount of duties calculated for the transactions of each importer are summed up and divided by the total entered value of that importer’s transactions, including those for which no duties were calculated. U.S. customs authorities then apply that rate to the entered value of the imports to collect the correct total amount of duties owed. A similar calculation is performed for each exporter to derive a new estimated antidumping duty deposit rate.

22. The U.S. retrospective duty assessment system is more complex to operate, and requires a larger expenditure of administrative resources and personnel. However, it allows U.S. authorities to closely calibrate the imposition of antidumping duties to the actual levels of dumping during the period covered by a periodic review. In addition, it encourages exporters and importers to adjust prices on their own – either through the exporter reducing prices in their home market to bring down the “normal value,” the importer and exporter agreeing to a higher “export price,” or in the case of a related importer, if the importer raises its U.S. sales price – in order to eliminate dumping margins and avoid paying antidumping duties. Thus, in the United States the level of antidumping duties actually collected from importers typically declines sharply during the period covered by an order.<sup>20</sup> This means that prices in the marketplace can adjust without the actual collection of duties.

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<sup>17</sup> See *US – Zeroing (Mexico)*, paras. 7.98-7.100. The parties generally agreed with the Panel’s description of how the U.S. periodic assessment system operates.

<sup>18</sup> The period of time covered by U.S. assessment proceedings is normally twelve months. However, in the case of the first assessment proceeding following the investigation, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures during the investigation.

<sup>19</sup> Contrary to the finding of the Appellate Body in *US – Offset Act (Byrd Amendment) (AB)*, para. 255, that antidumping duties are “paid by foreign producers/exporters,” it is importers that actually pay the duties.

<sup>20</sup> On average, margins in the U.S. system decline by approximately 75-80%. This, of course, varies by case, and there are exceptions, such as where the respondents do not cooperate and margins must be calculated on the basis of the facts available.

23. In contrast, while a prospective assessment system is more predictable (because the duty does not change),<sup>21</sup> it is also more punitive and inflexible because an importer generally is subject to the original *ad valorem* rate or reference price found in an original investigation or sunset review for the next five-year period, regardless of price fluctuations or changing competitive conditions in the market. While refunds are theoretically available under Article 9 in such systems, antidumping authorities often tend to strongly “discourage” requests for a refund, and most sophisticated importers are well aware of the “risks” of seeking one (or simply discover that no refund procedure exists under the antidumping law, e.g. India.) A prospective *ad valorem* system also typically results in the collection of much higher amounts of duties from a revenue standpoint, since the antidumping duty effectively serves as an additional tariff for the five-year period, as opposed to being adjusted annually as in the United States.

### III. GENERAL PRINCIPLES

24. Article 3.2 of the DSU directs the Appellate Body to “clarify the existing provisions of [WTO] agreements in accordance with customary rules of interpretation of public international law.” In *US – Gasoline*, the Appellate Body noted that the rules of the Vienna Convention on the Law of Treaties constitute “public international law” for purposes of interpreting the WTO Agreements under the DSU.<sup>22</sup> The Appellate Body has repeatedly emphasized in numerous reports that Articles 31 and 32 of the Vienna Convention reflect such customary rules of interpretation. In this case, the application of key Vienna Convention principles provides important insights into the context for interpreting the AD Agreement’s text.

25. Articles 31 and 32 of the Vienna Convention provide:

#### **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 in light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes

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<sup>21</sup> The main advantage of the prospective assessment system is that an importer knows its maximum antidumping liability in advance – for better or worse.

<sup>22</sup> *US – Gasoline (AB)*, p. 15.

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if its is established that the parties so intended.

### **Article 32 Supplementary means of interpretation**

Recourse may be had to supplemental means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

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- (a) leaves the meaning ambiguous or obscure; or
  - (b) leads to a result which is manifestly absurd or unreasonable.
- (Emphasis added)

26. The International Law Commission made the following observation in its report on the Draft Articles on the Law of Treaties, which formed the basis for the Vienna Convention:<sup>23</sup>

The Commission, by heading the article “General rule of interpretation” in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single

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<sup>23</sup> *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, vol. II, pp. 219-220 (emphasis added). Articles 27 and 28 of the Draft Articles were adopted *verbatim* as Articles 31 and 32 of the Vienna Convention, and the article numbers in this quotation have been changed to reflect the Vienna Convention numbering.



combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article [31] is entitled “General rule of interpretation” in the singular, not “General rules” in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.

In short, all of the elements of Article 31 – ordinary meaning, object and purpose, concurrent instruments, supplemental agreements, and “special meaning” – are part of a single unitary “general rule” of interpretation for ascertaining common intent, not a hierarchy.

27. As the Appellate Body emphasized in *EC – Computer Equipment*: “The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the common intentions of the parties.”<sup>24</sup> Accordingly, treaty terms should not be evaluated in isolation, but instead in light of the “surrounding circumstances” in order to ascertain their meaning to the negotiators. In *EC – Chicken Cuts*, the Appellate Body reiterated:

The Appellate Body has observed that dictionaries are a "useful starting point" for the analysis of "ordinary meaning" of a treaty term, but they are not necessarily dispositive. The ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case. Importantly, the ordinary meaning of a treaty term must be seen in the light of the intention of the parties "as expressed in the words used by them against the light of the surrounding circumstances." . . . [W]e do not believe that the Panel was incorrect to consider elements such as the "products covered by the concession contained in heading 02.10", "flavour, texture, [and] other physical properties" of the products falling under heading 02.10, and "preservation" when interpreting the term "salted" as it appears in heading 02.10. The Panel's consideration of these elements under "ordinary meaning" of the term "salted" complemented its analysis of the dictionary definitions of that term. In any event, even if we were to agree with the European Communities that these elements are not to be considered under "ordinary meaning", they certainly could be considered under "context". Interpretation pursuant to the customary rules codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components. Considering particular surrounding circumstances under the rubric of ‘ordinary meaning’ or "in the light of its context" would not, in our view, change the outcome of treaty interpretation.<sup>25</sup>

28. Such a holistic and circumstantial approach is vital in this case. The AD Agreement was drafted by trade remedy experts from the various GATT Contracting Parties, not inexperienced laymen. When these veteran antidumping negotiators and practitioners sat down in the Centre

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<sup>24</sup> *EC – Computer Equipment (AB)*, para. 84.

<sup>25</sup> *EC – Chicken Cuts (AB)*, paras. 175-176 (emphasis added; footnote omitted).

William Rappard to negotiate and draft the provisions of the AD Agreement, they relied, not on the *New Shorter Oxford English Dictionary*, but on a contextual tradition built up over the years with respect to the “ordinary meaning” of terms that they had previously interpreted, applied, debated, disputed, and discussed under the GATT 1947, the 1967 *Agreement on the Interpretation of Article VI* (“Kennedy Round Antidumping Code”), and the 1979 Tokyo Round Antidumping Code.<sup>26</sup> In most cases, the key negotiators had personally participated in GATT 1947 and Tokyo Round Antidumping Code meetings, litigated GATT and Tokyo Round Code disputes, served on panels, and/or participated in drafting various experts committee reports.

29. Accordingly, in this case, for purposes of the Vienna Convention, the GATT 1947, GATT 1947 reports, GATT 1947 practice, and the Tokyo Round Antidumping Code represent important interpretative “context” for ascertaining the “ordinary meaning” of the WTO AD Agreement. The “ordinary meaning” of key WTO AD Agreement terms was not the province of inexperienced laymen, but instead their meaning within a small, specialized community of highly-experienced antidumping and trade remedy experts from the various GATT Contracting Parties and signatories to the Tokyo Round Antidumping Code, who participated in drafting the WTO AD Agreement. As Lord McNair, a noted authority on treaty law, once observed: “In short, it is submitted that while a term may be ‘plain’ absolutely, what a tribunal adjudicating upon the meaning of a treaty wants to ascertain is the meaning of the term relatively, that is, in relation to the circumstances in which the treaty was made, and in which the language was used.”<sup>27</sup>

30. This unitary approach to interpreting the AD Agreement is supported by the WTO Agreement itself. As Article XVI of the WTO Agreement explains: “Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947.” In other words, WTO Members clearly recognized that the WTO Agreement built on the corresponding provisions and practice of the GATT 1947.

31. In the context of antidumping, the close inter-relationship between the GATT 1994 and the WTO AD Agreement is further emphasized by Article 1 of the AD Agreement, which references GATT 1994 Article VI as follows: “An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to an investigation initiated and conducted in accordance with the provisions of this Agreement.”

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<sup>26</sup> See, e.g., *Note by the Secretariat*, MTN.GNG/NC8/W/7/Rev. 1 (Dec. 4, 1987). The paper provides factual background for the Negotiating Group on aspects of the Tokyo Round Code that had been previously discussed in the Committee on Antidumping Practice and the Ad-Hoc Group on the Implementation of the Anti-dumping Code.

<sup>27</sup> Lord McNair, *The Law of Treaties*, p. 367 (Oxford Clarendon Press 1961) (emphasis added).

Thus, the GATT 1994 was accepted by the WTO Members as a closely related corollary instrument to the AD Agreement. In construing a similar provision of the WTO *Agreement on Safeguards in Argentina – Footwear Safeguard (AB)*, the Appellate Body stated that “Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an inseparable package of rights and disciplines which must be considered in conjunction.”<sup>28</sup>

32. In short, the WTO Agreement, the Vienna Convention, and common sense all make clear that the GATT 1947, and its related instruments, such as the Tokyo Round Antidumping Code, represent important contextual tools for ascertaining the “ordinary” and in some cases “special” meanings of key WTO AD Agreement and GATT 1994 terms. In effect, the WTO AD Agreement built on earlier work in the GATT 1947 and the Tokyo Round Code. Many, if not most, of the textual terms that are at issue in this case are identical to or derived from GATT 1947 or the Tokyo Round Code. In a similar situation, in *US – Underwear*,<sup>29</sup> the Appellate Body recognized that the MFA provides important “context” for interpreting the WTO *Agreement on Textiles and Clothing*. Thus, from the standpoint of customary international law (and common sense), GATT 1947 and the Tokyo Round Code provide vital contextual insights into the meaning of key AD Agreement terms.

33. The United States respectfully submits that, when properly interpreted in its full context under the Vienna Convention, the “ordinary meaning” of the texts of the AD Agreement and GATT 1994 Article VI does not support a prohibition on zeroing in assessment reviews, particularly in light of the surrounding circumstances. We urge the Appellate Body to find that the AD Agreement and GATT 1994 Article VI are clear on their face, and reject Mexico’s efforts to construct a requirement to aggregate individual transactions in U.S. duty assessment proceedings from the texts.

34. If, however, in the wake of the various and conflicting struggles by panels and the Appellate Body to confirm the meaning of key provisions of the AD Agreement, and the fundamental differences of interpretation that have emerged in this process, the Appellate Body nevertheless concludes that the texts’ terms are at best ambiguous or unclear, then it is necessary to turn to supplemental means of interpretation under Article 32 of the Vienna Convention, such as the negotiating history of the Uruguay Round AD Agreement. This negotiating history shows beyond a doubt that the various proposals by Japan, Hong Kong, Singapore, and Norway for a broad-based prohibition on “negative dumping” in all contexts were not incorporated in the Uruguay Round AD Agreement or GATT 1994, and that such an obligation does not exist.

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<sup>28</sup> *Argentina – Footwear Safeguard (AB)*, para. 82.

<sup>29</sup> *US – Underwear*, pp. 13-14.

#### IV. ARGUMENT

35. The Panel found that a measure described by Mexico as “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 AD Agreement, and that Commerce did not act inconsistently with those provisions by using “simple zeroing” in five particular periodic assessment reviews of *Stainless Steel Sheet and Strip in Coils from Mexico*. Mexico claims in this appeal that the Panel erred because Articles 9.3 and 2.4 of the AD Agreement, in conjunction with Article 2.1 of the AD Agreement and Article VI:1 and VI:2 of the GATT 1994, impose an obligation to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same periodic review exceed normal value. Mexico asserts this claim despite acknowledging the absence of key terms from the AD Agreement, terms upon which both it and the Appellate Body rely in support of that interpretation.<sup>30</sup> Instead, Mexico’s claim relies entirely on prior Appellate Body reports finding that a general prohibition of zeroing reflects the only permissible interpretation of the AD Agreement.

36. In this case, the Panel carefully considered the reasoning that led to the conclusions in the Appellate Body reports upon which Mexico relies. It then explained in detail why it disagreed with the reasoning that led the Appellate Body to its conclusions. It is a fundamental principle of the customary rules of interpretation of public international law that any interpretation must address the text of the agreement and may not impute into the agreement words and obligations that are not there.<sup>31</sup> Further, in settling disputes among Members, WTO dispute settlement panels and the DSB “cannot add to or diminish the rights and obligations provided in the covered agreements.”<sup>32</sup> The Panel explained with particularity the reasons that it could not, consistent with those principles and its obligation under Article 11 of the DSU to make an objective assessment of the matter referred to it by the DSB, follow the prior Appellate Body reports on this issue. As demonstrated in the Panel Report, the relevant provisions of the AD Agreement, interpreted in accordance with customary rules of interpretation of public international law, do not support a general prohibition against zeroing.

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<sup>30</sup> Appellant Submission of Mexico, para. 41.

<sup>31</sup> *India – Patents (AB)*, para. 45.

<sup>32</sup> Article 19.2 of the DSU.

**A. There Is No Basis for Prohibiting Zeroing in Periodic Assessment Proceedings in the Texts of the WTO AD Agreement or GATT 1994 Article VI**

37. As the Panel found, the texts and context of the relevant provisions of the AD Agreement and GATT 1994 Article VI, interpreted in accordance with customary rules of interpretation of public international law, do not support a general prohibition against zeroing in U.S. assessment proceedings.

38. GATT 1994 Article VI and the AD Agreement impose 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. The only textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in the first sentence of Article 2.4.2 of the AD Agreement, which provides 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 . . .*”<sup>33</sup> This particular provision of Article 2.4.2 applies only in the limited context of determining whether dumping margins exist in the investigation phase when using the average-to-average comparison methodology.<sup>34</sup> Accordingly, there is no textual basis for the far-reaching obligations that Mexico would have the Appellate Body impose in assessment reviews under other provisions of the AD Agreement or GATT 1994.

**1. The Phrase “All Comparable Export Transactions” in Article 2.4.2 Applies to Average-to-Average Comparisons in Investigations, Not the Imposition and Collection of Duties Under Article 9**

39. The repeated assertions by Mexico that there is a general prohibition of “zeroing,” or more precisely a requirement to aggregate individual transactions specifically applicable to the particular context of assessment proceedings, cannot be reconciled with the Appellate Body’s rationale in *US – Softwood Lumber Dumping* and *EC – Bed Linens*, because the phrase “all comparable export transactions” in Article 2.4.2 is limited to zeroing in average-to-average comparisons in investigations.<sup>35</sup> Seeking to impute the meaning ascribed to the words “all

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<sup>33</sup> Emphasis added. See *US – Softwood Lumber Dumping (AB)*, paras. 82, 86, and 98.

<sup>34</sup> *US – Zeroing (Japan) (Panel)*, para. 7.213; *US – Zeroing (EC) (Panel)*, para. 7.197; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.65-5.66 and 5.77.

<sup>35</sup> While the United States respectfully disagrees with previous findings that the phrase “all comparable export transactions” in Article 2.4.2 was intended to prohibit zeroing, we have nevertheless complied with the Appellate Body’s interpretation and eliminated zeroing in average-to-average comparisons in investigations. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (December 27, 2006); *Antidumping Proceedings: Calculation*

comparable export transactions” to other provisions of the AD Agreement in the absence of any textual basis would fly in the face of DSU Article 3.2 and the Appellate Body’s repeated admonition that:

The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended ... . These rules must be respected and applied in interpreting the *TRIPS Agreement* and any other covered agreements.<sup>36</sup>

## 2. The Term “Product as a Whole” Does Not Appear Anywhere in the AD Agreement or GATT 1994 Article VI

40. Mexico’s claims in this dispute rest largely on a series of Appellate Body findings that “dumping” and “margins of dumping” relate “solely, and exclusively, to the ‘product’ under consideration taken ‘as a whole’ ” in the AD Agreement.<sup>37</sup> In *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*, the Appellate Body found a zeroing prohibition to exist for the average-to-average comparison methodology in investigations based on the term “all comparable export transactions” in Article 2.4.2. While “all comparable export transactions” arguably provided a textual basis for an obligation to provide offsets in investigations, *US – Zeroing (Japan) (AB)*,<sup>38</sup> *US – Zeroing (EC) (AB)* and *US – Softwood Lumber Dumping (21.5)(AB)* adopted a much more expansive approach, finding that the concept of “product as a whole” – a phrase that does not appear in the text of the AD Agreement or Article VI – leads to a broader prohibition on zeroing in all contexts whenever and wherever “multiple comparisons” are made. Thus, Mexico’s appeal here ultimately depends on the Appellate Body’s subsequent reports in *US – Zeroing (EC)* and *US – Zeroing (Japan)*, which rejected the notion that dumping may occur

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*of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3,783 (January 26, 2007). (Exhibits MEX-10 and MEX-11).

<sup>36</sup> *India – Patents (AB)*, paras. 45-46.

<sup>37</sup> Mexico First Submission, para. 171.

<sup>38</sup> The Appellate Body stated: “Thus, ‘dumping’ and ‘margins of dumping’ can be found to exist only at the level of the ‘product’: they cannot be found to exist at the level of a type, model, or category of product under consideration: nor can they be found to exist at the level of an individual transaction. Rather, “if a margin of dumping is calculated on the basis of multiple comparisons made at an intermediate stage, it is only on the basis of aggregating all these intermediate results that the investigating authority can establish margins of dumping for the product as a whole.” *US – Zeroing (Japan) (AB)*, para. 151 (quoting *U.S. – Zeroing (EC) (AB)*, para. 132.)

with respect to an individual transaction, and which expanded the ban on zeroing to transaction-to-transaction comparisons in investigations and assessment reviews under Article 9. As we now show, the notion of “product as a whole” has no textual foundation and is inconsistent with longstanding principles of public international law regarding text-based treaty interpretation, as well as the Appellate Body’s application of those principles.

41. The *Softwood Lumber Dumping* case involved so-called “model zeroing,” in which Commerce divided the product under investigation into sub-groups of identical, or similar products, then aggregated the results in order to calculate a dumping margin. Commerce did not zero within sub-groups, but instead treated as zero, the results of sub-groups in which the weighted average normal value was equal to or less than the weighted average export price. The Appellate Body found that “[i]f an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.”<sup>39</sup> This conclusion was based on an interpretation of the terms “margins of dumping” and “all comparable export transactions” in Article 2.4.2 in an “integrated manner.”<sup>40</sup> In other words, the term “all comparable export transactions” was integral to the finding that the multiple comparisons of average normal value and average export price did not constitute an average-to-average comparison of all comparable export transactions unless the results of all such comparisons were aggregated. The obligation to provide offsets, therefore, was tied to text of the provision dealing with the use of the average-to-average comparison methodology in an investigation, and did not arise out of any independent obligation to provide an offset for non-dumped prices.

42. Mexico’s assertion 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 rationale articulated in *US – Softwood Lumber Dumping (AB)*, where the phrase “all comparable export transactions” in Article 2.4.2 meant that zeroing was prohibited in the context of average-to-average comparisons in investigations. If, instead, 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 negated.

43. The need to reinterpret the phrase “all comparable export transactions” in order to adopt a general prohibition of zeroing 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

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<sup>39</sup> *US – Softwood Lumber Dumping (AB)*, para. 122.

<sup>40</sup> *US – Softwood Lumber Dumping (AB)*, paras. 86-103.

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.<sup>41</sup> In doing so, the Appellate Body abandoned the only textual basis for its finding in *US – Softwood Lumber Dumping (AB)*.<sup>42</sup>

44. Thus, while the term “product as a whole” was used in *US – Softwood Lumber Dumping (AB)* to help explain why the phrase “all comparable export transactions” bars zeroing in average-to-average comparisons in investigations, *US – Zeroing (EC)* and *US – Zeroing (Japan)* expanded this concept into an autonomous obligation that applies throughout the AD Agreement. As *US – Zeroing (Japan) (AB)* explained: “The Appellate Body held that dumping and the margins of dumping can to be found to exist only for the product under investigation as a whole, and that they cannot be found to exist for a type, model, or category of that product.”<sup>43</sup>

45. The problem with the expanded importance of the phrase “product as a whole,” however, is that the phrase does not appear anywhere in the AD Agreement or GATT 1994 Article VI, and its invention thus contradicts DSU Article 3.2 and the Appellate Body’s express admonition in *India – Patents (AB)* that the DSU does not “require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.”<sup>44</sup> As the Panel explained in this case,

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

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<sup>41</sup> *US – Zeroing (Japan) (AB)*, para. 124 (“[T]he phrase ‘all comparable export transactions’ requires that each group include only transactions that are comparable and that no other transaction may be left out when determining margins of dumping under [the average-to-average comparison] methodology.”).

<sup>42</sup> The United States raised these points in its DSB statement and communication of February 20, 2007 (Exhibit US-4). *See also, Communication from the United States*, WT/DS294/16 (May 17, 2006), and *Communication from the United States*, WT/DS294/18 (June 19, 2006).

<sup>43</sup> *US – Zeroing (Japan) (AB)*. Para. 122.

<sup>44</sup> *India – Patents (AB)*, paras. 45-46.



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.<sup>45</sup>

While the AD Agreement and GATT 1994 Article VI are replete with references to such terms as “product,” “like product,” “products,” “imports of a product,” and “domestic producers as a whole of the like products,” the phrase “product as a whole” does not appear anywhere in either text. Furthermore, there is no principled basis to infer the concept of “product as a whole” from the various references to “products” in the AD Agreement or GATT 1994.

46. Instead, the terms “product as a whole” and “multiple comparisons” as described above were derived from Appellate Body interpretations of the phrase “all comparable export transactions” in *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*, which dealt with average-to-average comparisons in investigations under Article 2.4.2. As the Panel in *US – Zeroing (Japan)* observed:

In this regard, we note, in particular, that the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms ‘dumping’ and ‘margins of dumping’ cannot apply to some *sub-groups* of a product logically leads to the broader conclusion that Members may not distinguish between *transactions* in which export prices are less than normal value and *transactions* in which export prices exceed normal value.<sup>46</sup>

47. Careful examination of the AD Agreement and the GATT 1994 shows 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. For example, Article 2.6 of the AD Agreement – which defines the term “like product” in relation to “the product under consideration” – plainly uses the term “product” in the collective sense. By contrast, Article VII:3 of the GATT 1994 – which refers to “[t]he value for customs purposes of any imported product” – uses the term “product” in the individual sense of the object of a particular transaction (*i.e.*, a sale involving a specific quantity of merchandise that matches the criteria for the “product” at a particular price).

48. As the panel in *US - Softwood Lumber Dumping (Article 21.5)* explained, “an analysis of the use of the words product and products throughout the GATT 1994, indicates that there is no basis to equate product with ‘product as a whole’. . . Thus, for example, when Article VII:3 of the GATT refers to ‘the value for customs purposes of any imported product’, this can only be

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<sup>45</sup> *US – Zeroing (Mexico)*, para. 7.119.

<sup>46</sup> *US – Zeroing (Japan) (Panel)*, para. 7.101.

interpreted to refer to the value of a product in a particular import transaction.”<sup>47</sup> As the panel in *US – Zeroing (Japan)* observed:

[T]he phrase ‘importation of any product’ used in Article VI:6 and other provisions of the GATT 1994 or the Anti-Dumping Agreement 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 of 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 the word in Article VI:1 and VI:2.

49. In other words, the GATT 1994 often uses the word “product” in different ways in different contexts in different provisions. As the Appellate Body famously observed in *Japan – Alcohol*, the term “like product,” which also appears in various contexts throughout GATT 1994, can be analogized to an “accordion” that “stretches and squeezes in different places as different provisions of the WTO Agreement are applied.”<sup>48</sup> As such, it strains credulity for Mexico to assert that a single uniform and inflexible concept of “product as a whole” can be inferred from the various cryptic references to ‘product’ and ‘products’ in Article VI and the AD Agreement.

50. As the Panel found in this case: “The fact that these words may be interpreted in a significantly 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 the individual transactions when they are used in the context of antidumping determinations.”<sup>49</sup> In short, the multiple references to the words “product” and “products” as they appear in Article 2.1 of the AD Agreement, Article VI of the GATT 1994, and throughout the rest of the GATT 1994 do not provide any principled textual basis for requiring that margins of dumping must necessarily be established on an aggregate basis for the “product as a whole.” There is nothing to suggest that the terms “product” and “products” must be interpreted so as to deprive them of one of their common and ordinary meanings, in particular as referring to the “product” or “products” that are the subject of individual transactions, as had been the practice under GATT 1947 Article VI and the Tokyo Round Antidumping Code.

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<sup>47</sup> *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23, n. 36.

<sup>48</sup> *Japan – Alcohol (AB)*, p. 21.

<sup>49</sup> *US – Zeroing (Mexico)*, para. 7.121.

51. On the contrary, these terms are defined using other terms that are most naturally understood as relating to individual transactions. The Panel agreed with the following reasoning of the panel in *US – Zeroing (Japan)*:

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 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.<sup>50</sup>

52. Indeed, when Article VI:1 refers broadly to injurious dumping, it uses the plural “products,” presumably because the imposition of duties requires a finding that imports in the aggregate are causing or threatening material injury. However, when it refers to “dumping,” it uses the singular “product” so that: “a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another. . . .” This wording provides strong contextual support for an interpretation that permits an antidumping authority to examine dumping in relation to the particular conduct described, i.e., individual import transactions. 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.”<sup>51</sup>

### **3. The Appellate Body’s Interpretation of the Term “Margin of Dumping” Is at Odds with WTO/GATT Practice and the Ordinary Meaning of the Term**

53. Mexico also asserts that zeroing in assessment reviews is prohibited by the phrase “margin of dumping,” citing *US – Zeroing (EC)* and *US – Zeroing (Japan)*. In those disputes, the Appellate Body found that under GATT 1994 Article VI and Articles 2.1 and 9.3 of the WTO AD Agreement, the “margin of dumping” must be established for the “product as a whole.” Further, in both *US – Zeroing (EC)* and *US – Zeroing (Japan)*, the Appellate Body reasoned that because under Article 6.10 of the AD Agreement, a margin must be calculated with respect to each exporter or foreign producer subject to the proceeding, the margin for each individual

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<sup>50</sup> *US – Zeroing (Japan) (Panel)*, 7.106; *US – Zeroing (Mexico)*, para. 7.117.

<sup>51</sup> *US – Zeroing (Japan) (Panel)*, para. 7.106.

exporter or foreign producer serves as a “ceiling” on liability for individual importers. Extrapolating further, the Appellate Body found that any margins arising from individual transactions or individual importers are not “margins of dumping” *per se* but instead represent inputs to be taken into account in calculating the aggregate margin of dumping for each exporter or foreign producer. This “margin of dumping” then operates as a ceiling in assessment proceedings under Article 9.3.

54. As the Panel found, these additional embellishments have no textual basis in the phrase “margin of dumping.” Careful analysis of the texts and contexts of the agreements and reference to the *New Shorter Oxford English Dictionary* provide no support for imputing these concepts into these terms. The text contains a straightforward reference to the “price difference” between export price and normal value as broadly described in Article VI of the GATT 1994 in terms that are entirely consistent with, and lend support to, a transaction-specific meaning. Indeed, the expansive and inflexible interpretation urged by Mexico would be at odds with Vienna Convention principles and DSU Article 3.2, which counsels against adding new words and obligations to the treaty text.

55. As discussed, the Uruguay Round AD Agreement was drafted by a group of experienced trade remedy experts from the various GATT 1947 Contracting Parties, not inexperienced laypersons. Indeed, it would have been foolish for any Contracting Party with a serious stake in the outcome of the negotiations on antidumping to send a negotiator who was not familiar with GATT antidumping practice and the “special meaning” of key terms, because they would have found the discussions incomprehensible and, thus, would have been ineffective at advancing their government’s interests. Instead, when these negotiators sat down to draft the provisions of the AD Agreement, they relied on a series of special terms that many of them had previously negotiated, interpreted, applied, debated, fought over, and discussed for years under the GATT 1947, the Kennedy Round Antidumping Code, and the Tokyo Round Antidumping Code. They were also well aware of various GATT decisions, reports, and interpretative rulings, because many of them had been involved in dispute settlement cases either as litigants or panelists, or drafting various reports or papers as part of the Tokyo Round Committee of Antidumping Experts.

56. Likewise, the Tokyo Round Antidumping Code is vital to understanding the ordinary meaning of the AD Agreement’s text. The Uruguay Round negotiations focused on revisions to the text of the Tokyo Round Antidumping Code. As a result, GATT 1947 Article VI, the Tokyo Round Antidumping Code, and GATT 1947 practice are part of the “surrounding circumstances” (as that term was used in *EC – Chicken Cuts (AB)*), and thus are important interpretative tools for ascertaining the “ordinary meaning” of key provisions of the Uruguay Round AD Agreement. For purposes of Article 31(4) of the Vienna Convention, key GATT Article VI terms, including “margin of dumping,” had meanings in GATT and Tokyo Round Antidumping Code practice and decisions that were understood by the negotiators when they drafted the Uruguay Round AD Agreement.

57. The term “margin of dumping” first appeared in GATT 1947 Article VI:1, and was subsequently incorporated in the Kennedy Round Antidumping Code, the Tokyo Round Antidumping Code, GATT 1994, and the WTO AD Agreement. The panel in *US- Softwood Lumber Dumping (Article 21.5)* observed:

Article VI:2 of the GATT 1994 provides that, for the purposes of Article VI, "the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1" of Article VI. Paragraph 1 of Article VI defines dumping as a practice "by which products of one country are introduced into the commerce of another country at less than the normal value of the products" (emphasis supplied). . . Article VI:1 provides that "a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product in the exporting country" (emphasis supplied). In other words, there 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".<sup>52</sup>

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.”<sup>53</sup> .

58. As the term “margin of dumping” was used in the GATT 1947, it nowhere referred to a broad requirement to aggregate the results of various price comparisons for the “product as a whole.” Indeed, in the Note Ad Article VI:1, it referred to price comparisons based on the resale price charged by the importer rather than the price agreed between the importer and exporter. As the panel in *US – Zeroing (Japan)* noted, “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.”<sup>54</sup>

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<sup>52</sup> *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.27.

<sup>53</sup> *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.28. Although the panel was examining margins of dumping in the context of the transaction-to-transaction comparison method in investigations under Article 2.4.2, its reasoning is equally applicable to margins of dumping established on a transaction-specific basis in an assessment proceeding under Article 9.3

<sup>54</sup> *US – Zeroing (Japan) (Panel)*, para. 7.107 and n.743.

59. In 1959 and 1960, the GATT convened a Group of Experts to consider numerous issues arising in connection with the application of Article VI of the GATT 1947. In its 1960 report, the Group of Experts considered that the “imposition of antidumping duties was justified only: (i) where a product was in fact found to be dumped, and, (ii) where the dumping caused or threatened material injury to a domestic industry – the judgment of which rested with the governmental authorities of the importing country.” It concluded:

The Group considered that the ideal method of fulfilling these principles was to make a determination of both dumping and material injury in respect of each single importation of the product concerned.”<sup>55</sup>

60. In other words, far from condemning the assessment of duties based on individual transactions, the Group of Experts concluded that this was the preferred methodology for dealing with injurious dumping. The report by the Group of Experts was adopted by consensus by the GATT Contracting Parties under the procedures prevailing at the time, and for purposes of Article 31(3) of the Vienna Convention therefore offers clear guidance on the understood ordinary meaning of the term “margin of dumping” and the “context” of the same words in Article 2.1 of the WTO AD agreement. As the panel in *US - Softwood Lumber Dumping (Article 21.5)* observed:

In referring to a "determination ... of ... dumping ... in respect of each single importation of the product concerned", the Group of Experts clearly envisaged the calculation of transaction-specific margins of dumping. This would suggest that the Group of Experts did not consider that there was anything in the definition of dumping set forth in Article VI of the GATT that would preclude the calculation of such transaction-specific margins.<sup>56</sup>

61. The interpretation of “margin of dumping” under the Tokyo Round Antidumping Code is equally instructive. The Antidumping Code was adopted by certain GATT Contracting Parties in 1979 as part of the Multilateral Trade Negotiations (MTN). In a similar context, the Appellate Body recognized that the Multi-Fiber Agreement, which had a similarly limited membership, provided “context” for interpreting the WTO *Agreement on Textiles and Clothing*.<sup>57</sup>

62. In 1991, the Committee on Anti-Dumping Practices established dispute settlement panels under Article 15 of the Tokyo Round Antidumping Code to consider challenges by Japan and Brazil to the EC’s affirmative antidumping determinations in *EC – Audiocassette* and *EC – Cotton Yarn*, respectively. In both cases, the panels found that the EC’s refusal to consider

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<sup>55</sup> *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, L/1141, adopted on 27 May 1960, BISD 9S/194, para. 7.

<sup>56</sup> *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.64.

<sup>57</sup> *US – Underwear (AB)*, pp. 13-14.

“negative dumping margins” arising from non-dumped sales was not a violation of the Tokyo Round Antidumping Code.<sup>58</sup> These determinations show clearly that there was no “common understanding” among the Contracting Parties at the time that the term “margin of dumping” incorporated an implicit prohibition on zeroing.

63. In short, there is nothing in the GATT 1947, the Tokyo Round Antidumping Code, or any other antecedents to the AD Agreement that suggests that dumping with respect to one transaction must be offset by the occurrence of another transaction at a non-dumped price, or that the margin of dumping referenced in Article 9.3 necessarily must relate to an aggregation of the transaction-specific margins of dumping for the product “as a whole” considered on an exporter-specific basis. Indeed, requiring such offsets would have the highly counterintuitive effect of allowing importers who enter into transactions at dumped prices to reap the benefit of a competing importer’s decision to avoid entering into transactions at dumped prices, while potentially subjecting the importer who avoided entering into dumped transactions to liability for antidumping duties.

64. Instead, the concepts of dumping and margin of dumping had long been understood in GATT practice as referring to individual transactions, as evidenced by the report of the Group of Experts, the reports of the GATT panels, the well-established practice of GATT Contracting Parties and WTO Members with active antidumping programs, and the negotiating history of the AD Agreement. The term “margin of dumping” had a well-established meaning to the Uruguay Round negotiators, who were highly familiar with the use of “margin of dumping” and other key textual terms because of their experiences with the GATT 1947, Kennedy Round Antidumping Code, the Tokyo Round Antidumping Code, and the GATT 1994. Contrary to Mexico’s protestations, Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define the terms “dumping” and “margin of dumping” such that they incorporate an implicit requirement that export transactions must necessarily be examined exclusively at an aggregate level and on an exporter- or foreign producer-specific basis, in order to calculate a margin of dumping that operates as a “ceiling” on the liability of individual importers under Article 9.3.

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<sup>58</sup> *EC – Audiocassettes*, para. 360; *EC – Cotton Yarn*, para. 502.

#### 4. The “Ordinary Meaning” of “Fair Comparison” in GATT Practice Does Not Support a Prohibition on Zeroing

65. The text of Article 2.4 requires that a “fair comparison” shall be made between the export price and normal value. Mexico has argued that the “fair comparison” provision of Article 2.4 provides a broad mandate for panels and the Appellate Body to strike down antidumping calculations that appear “unfair.”<sup>59</sup>

66. A contextual analysis of “fair comparison” for purposes of Article 31(4) of the Vienna Convention shows that it has a narrow and specialized meaning. The term “fair comparison” originated in the 1967 Kennedy Round Antidumping Code,<sup>60</sup> where the negotiators sought to clarify the use of certain adjustments in making price comparisons.<sup>61</sup> Because prices in the home market and export market can reflect fundamental differences in levels of distribution, terms of sale, sales volume, physical characteristics of the product, taxes, etc., the agreement was designed to clarify the role of adjustments in order to avoid artificial findings of dumping, when no dumping in fact exists. Accordingly, Article 2(f) of the Kennedy Round Antidumping Code specified that: “In order to affect a fair comparison between the export price and the domestic price in the exporting country . . . the two prices shall be compared at the same level of trade, normally at the ex factory level, and in respect of sales made as nearly as possible at the same time. . . Due allowance shall be in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for other differences affecting price comparability.” This language was incorporated practically verbatim into Article 2.6 of the Tokyo Round Antidumping Code. The Uruguay Round AD Agreement adopted the original Kennedy and Tokyo Round language with minor modifications in Article 2.4; the reference to “fair comparison” was broken out as a stand-alone sentence; the list of potential adjustments was expanded; and two sentences were added regarding levels of trade and burdens of proof.

67. Thus, a “contextual” analysis for purposes of Article 31 of the Vienna Convention shows that the term “fair comparison” has always been understood to refer to the various adjustments listed in Article 2.4, and not as a freestanding obligation that covers any and all antidumping calculations. Thus, in *EC – Audiocassettes*, a Tokyo Round Antidumping Code panel rejected Japan’s argument that the term “fair comparison” in Article 2.6 of the Tokyo Round Antidumping Code provided a basis to strike down the EC’s zeroing practices. The panel interpreted Article 2.6 as relating solely to the “actual comparison of prices at the same level of trade and in respect of sales made as nearly as possible at the same time.” The same interpretation should be adopted here. As the panel in *US – Zeroing (Japan)* noted, “the ‘fair

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<sup>59</sup> Appellant Submission of Mexico, p. 24.

<sup>60</sup> Article 2(f).

<sup>61</sup> These issues had been discussed by a Group of Experts, who submitted a report to the Contracting Parties. BISD 8/S, pp. 146-47. The experts did not use the term “fair comparison”, but instead referred to an “effective comparison.”



comparison’ requirement cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context.”<sup>62</sup>

68. In this case, the Panel noted that Mexico’s contention that the failure to aggregate individual import transactions is “inherently unfair” is “premised on an assumption that Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 and 9.3 of the Anti-Dumping Agreement prohibit simple zeroing in reviews.”<sup>63</sup> Having rejected Mexico’s underlying premise that assessing duties based on individual dumped transactions is inconsistent with GATT 1994 Articles VI:1 and VI:2 and Articles 2.1 and 9.3 of the AD Agreement, the Panel also rejected Mexico’s claim under Article 2.4: “[W]e disagreed with Mexico’s assertion that these provisions require investigating authorities in a periodic review to base their dumping determinations on an aggregation of export transactions from each exporter. We therefore also reject Mexico’s claim that simple zeroing in periodic reviews is inherently inconsistent with an 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.” We urge the Appellate Body to affirm the Panel’s finding.

69. Finally, we urge the Appellate Body to reject Mexico’s proposal to convert “fair comparison” into a broad-ranging mandate to determine whether any and all dumping calculations are “fair” or “unfair.” Previous panels have applied the “fair comparison” language according to the specific requirements of Article 2.4 relating to adjustments, level of trade, currency conversions, price comparisons, etc. As the panel report in *EC – Cotton Yarn*, which was adopted by the Tokyo Round Antidumping Committee, stated regarding the corresponding provision of the Tokyo Round Code: “The Panel was of the view that although the object and purpose of Article 2.6 is to effect a fair comparison, the wording of Article 2.6 ‘in order to effect a fair comparison’ made clear that if the requirements of that Article were met, any comparison thus undertaken was deemed to be ‘fair.’”<sup>64</sup>

70. In contrast, Mexico would have the Appellate Body use Article 2.4 to examine any and all antidumping calculations to determine whether they are “not impartial, even-handed, or unbiased.”<sup>65</sup> Such an open-ended approach would mean that the Appellate Body would be inundated with disputes that are virtually impossible to resolve in any principled, text-based way, and open itself up to even more criticism that it is “legislating” in the trade remedies area. The term “fair” is highly subjective and its meaning varies widely depending on one’s interests and perspective. What seems “fair” to a domestic producer who is being injured by dumped imports may seem profoundly “unfair” to an exporter who must pay a higher duty. Conversely, what

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<sup>62</sup> *US- Zeroing (Japan) (Panel)*, para. 7.158, quoting *US - Zeroing (EC) (Panel)*, para. 7.261.

<sup>63</sup> *US – Zeroing (Mexico)*, para. 7.145.

<sup>64</sup> *EC – Cotton Yarn*, para. 492.

<sup>65</sup> Appellant Submission of Mexico, para. 92.

seems eminently “fair” to a Chinese exporter who is seeking to export steel or textiles to the United States or the EC may seem deeply “unfair” to a U.S. or European domestic industry manufacturing a “like product.” The *New Shorter Oxford English Dictionary* provides little help. It defines “fair” as “just, unbiased, equitable, impartial, legitimate, in accordance with the rules or standards.”<sup>66</sup> In short, the absence of any principled basis for resolving such disputes, the Appellate Body would be required to apply a vague, subjective, and ill-defined legal standard to factual situations where “fairness” turns on the eye of the beholder and outcomes could appear to be based largely on personal whim. We respectfully submit that the Appellate Body should not adopt an expansive interpretation that leads to it being flooded with antidumping disputes that are virtually impossible to resolve in any credible way.<sup>67</sup> Accordingly, the United States respectfully urges the Appellate Body to reject Mexico’s proposed interpretation as ill-advised.<sup>68</sup>

##### **5. The Texts of Article 9.3 and GATT 1994 Article VI Say Nothing About Aggregating Individual Transactions in Periodic Assessment Reviews**

71. Article 9 of the AD Agreement relates to the imposition and collection of antidumping duties. In particular, Article 9.3 states that the “amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.” For the reasons set forth above, the term “margin of dumping,” as defined in Article 2 of the AD Agreement and Article VI of the GATT 1994, does not incorporate an explicit or implicit prohibition on zeroing. As the Panel noted in this case:

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

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<sup>66</sup> *New Shorter Oxford English Dictionary*, p. 907 (1993).

<sup>67</sup> As discussed below, an interpretation of Article 2.4 that gives rise to a general prohibition of zeroing in any and all contexts would also render the second sentence of Article 2.4.2, the “targeted dumping provision,” useless. See, e.g., *US – Zeroing (EC) (Panel)*, para. 7.266; *US – Zeroing (Japan) (Panel)*, para. 7.159.

<sup>68</sup> We note that, in introducing legislation in the U.S. Senate authorizing Commerce to correct antidumping comparisons for a “misaligned exchange rate,” the sponsors of the bill cited the Appellate Body’s findings in *US – Zeroing (EC)* and *US – Zeroing (Japan)* regarding “fair comparison,” and noted that because exchange rate manipulation is inherently “unfair,” the bill represents a WTO-consistent basis to deal with unfair imports from China and Japan. In other words, such an approach to “fair comparison” could also be used to increase margins, e.g. by adjusting normal value to take into account undervalued exchange rates, lower wage rates or unfair working conditions, or the longstanding discrepancy between the WTO’s treatment of direct and indirect taxes.

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.<sup>69</sup>

72. A clear understanding of the term “margin of dumping” is particularly useful in the context of antidumping duty assessment. In the real world of administering an antidumping system, the individual transactions are both the means by which less than normal 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, in both retrospective and prospective antidumping regimes, import duties are assessed on individual entries resulting from individual transactions. Therefore, it follows 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.

73. The United States notes that the expansive and inflexible meanings upon which Mexico relies are conspicuously absent from the actual texts of Articles 2.1 and 9.3. 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, whereby, if an average normal value is calculated for a particular review period, the amount of anti-dumping duty payable on a particular transaction is determined by whether the overall average of the export prices of all sales made by an exporter during that period is below the average normal value.”<sup>70</sup> Mexico’s interpretation is also at odds with practical reality, because importers, as well as exporters, are parties to the transaction that determines the export price and thus the actual margin of dumping. Hence, the margins of dumping necessarily vary by importer. It thus strains reality for Mexico to read into a term like “margin of dumping,” which is used throughout the AD Agreement as a shorthand reference to the “price difference” between export price and normal value, a broad-based prohibition on zeroing in all contexts. On the contrary, where terms like “dumping” and “margin of dumping” are defined in the AD Agreement in a manner that incorporates some flexibility in how the term can be applied in a variety of contexts and

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<sup>69</sup> *US – Zeroing (Mexico)*, para. 7.126.

<sup>70</sup> *US – Zeroing (EC) (Panel)*, para. 7.204 (“In our view, if the drafters of the AD Agreement had wanted to impose a uniform requirement to adopt an exporter oriented-method of duty assessment, which would have entailed a significant change to the practice and legislation of some participants in the negotiations, they might have been expected to have indicated this more clearly.”).

antidumping systems, it is essential that this flexibility be maintained to permit the terms to have their intended meaning.

74. As the panel in *US – Zeroing (Japan)* explained:

In the context of Article 9.3, a margin of dumping is calculated for the purpose of determining the *final liability for payment of anti-dumping duties* under Article 9.3.1 or for the purpose of determining *the amount of anti-dumping duty* that must be *refunded* under Article 9.3.2. An anti-dumping duty is paid by an importer in respect of a particular import of the product on which an anti-dumping duty has been imposed. An importer does not incur liability for payment of an anti-dumping duty in respect of the totality of sales of a product made by an exporter to the country in question but only in respect of sales made by that exporter to that particular importer. Thus, the obligation to pay an anti-dumping duty is incurred on an *importer-and import-specific* basis. Since the calculation of a margin of dumping in the context of Article 9.3 is part of a process of assessing the amount of duty that must be paid or that must be refunded, this importer- and import-specific character of the payment of anti-dumping duties must be taken into account in interpreting the meaning of “margin of dumping.”<sup>71 72</sup>

In short, while a finding of antidumping may cover goods produced by a particular exporter or foreign producer, the actual liability for antidumping duties accrues to individual importers who seek to enter such goods into the market of a WTO Member where there is an antidumping order.

75. For the reasons set forth above, the United States respectfully requests that the Appellate Body uphold the Panel’s rejection of Mexico’s “as such” and “as applied”<sup>73</sup> claims regarding antidumping assessment proceedings by finding that those claims have no basis in the text of the AD Agreement or Article VI.

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<sup>71</sup> *US – Zeroing (Japan) (Panel)*, para. 7.198 - 7.199 (emphasis in the original).

<sup>72</sup> Similarly, the panel in *US – Zeroing (EC)* explained: “In our view, the fact that in an assessment proceeding in Article 9.3 the margin of dumping must be related to the liability incurred in respect of particular import transactions is an important element that distinguishes Article 9.3 proceedings from investigations within the meaning of Article 5. ... [I]n an Article 9.3 context the extent of dumping found with respect to a particular exporter must be translated into an amount of liability for payment of antidumping duties by importers in respect of specific import transactions.” *US – Zeroing (EC) (Panel)*, para. 7.201.

<sup>73</sup> In paragraph 255 of its First Submission, Mexico refers to six periodic reviews. We note that only five of those proceedings were identified in Mexico’s panel request. We also note that Mexico requests findings with respect to “five listed period reviews”. See paragraph 264. Therefore, the sixth period review identified by Mexico is not within the Panel’s terms of reference.

## 6. Read in Context, the AD Agreement Supports the U.S. Methodology for Calculating Antidumping Duties Based on Individual Transactions

76. As the Panel noted, the relevant context casts further doubt on Mexico's contention that GATT 1994 Article VI and Article 9.3 of the AD Agreement bar the calculation of duties on the basis of individual transactions. Article 9(4)(ii) of the AD Agreement provides that

“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 investigation shall not exceed . . .

- (ii) where liability for payment of antidumping duties is calculated on the basis of 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.

As the Panel noted:

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 a retrospective duty assessment system under Article 9.3.2.<sup>74</sup>

The Panel observed further:

“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.”<sup>75</sup>

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<sup>74</sup> *US – Stainless Steel (Mexico)*, para. 7.131.

<sup>75</sup> *US – Zeroing (Mexico)*, para. 7.133.

77. In *US – Zeroing (Japan)*, the Appellate Body responded to this analysis by asserting that the duty paid in a prospective normal value system does not represent the calculation of a “margin of dumping.” Instead, the Appellate Body stated: “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.”<sup>76</sup>

78. This finding is at odds with reality. In a prospective normal value system, such as the systems maintained by Canada and India, the importer’s liability is determined by comparing the price paid by the importer in a given transaction and the prospective normal value. The prospective normal value functions as a reference price. Under this system, the prices paid in other export transactions have no bearing on the importer’s liability. Thus, despite its outspoken public criticism of zeroing, Canada recently informed the WTO as part of its annual Trade Policy Review that it considers only an importer’s individual transaction data as part of its refund procedures.:

Question 2(c): Are all entries from a particular exporter during the relevant period addressed in an Article 9.3 proceeding, regardless of importer.

ANSWER: As noted above, article 9.3.2 duty refund proceedings for prospective duty enforcement systems are based on an importer’s request for re-determination. Therefore, each Article 9.3 proceeding addresses the goods identified in an importer’s request for re-determination, regardless of exporter.<sup>77</sup>

In other words, Canada applies duties in its prospective normal value system on the basis of an importer’s individual transactions. Similarly, on its face, India’s antidumping law does not even contain a refund procedure for purposes of Article 9.3.<sup>78</sup> The only refund procedure in the Indian law relates to provisional duties where the final dumping margin calculated in the investigation is lower than the provisional duties previously applied,<sup>79</sup> and corresponds to Article 10.3, not Article 9.3.2. Thus, it is unclear what, if any, mechanism exists in India’s antidumping law for importers to request a refund of antidumping duties.

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<sup>76</sup> *US – Zeroing (Japan) (AB)*, para. 160, n.38.

<sup>77</sup> *Trade Policy Review*, WT/TPR/M/49/Add. 1 (1 June 2007).

<sup>78</sup> *Notification of Laws and Regulations Under Article 18.5 and 32.6 of the Agreements: India*, G/ADP/N/1/IND/2 (15 August 1995).

<sup>79</sup> See paragraph 21 of Customs Tariff (Amendment) act 1995 (25 March 1995). See also “Replies to Questions Posted by Hong Kong Concerning the Notifications by the Government of India of Laws and Regulations under Article 18.5 and 32.6 of the Agreements, G/ADP/W/292, p. 2 (26 Feb. 1996).

79. In the EC, Article 11.8 of Council Regulation (EC) No. 384/96 allows importers to request a refund for reimbursement of duties collected if the importer can establish that the dumping margin has been eliminated or reduced.<sup>80</sup> From 1996 to 2003, the EC published only 5 refund decisions, of which 3 granted a partial refund.<sup>81</sup> The number has increased somewhat since that time, but remains extraordinarily low. In its 2007 WTO Trade Policy Review,<sup>82</sup> the EC reported 'that from January 1, 2004 to September 30, 2006 – nearly a three-year period – only 33 requests for refunds were received, of which 19 had been finalized.

80. An examination of the EC's refund procedures helps explain why the EC's approach, which closely tracks the Appellate Body's findings in *US – Zeroing (Japan)* and *US – Zeroing (EC)*, acts to discourage importer's from requesting a refund and effectively turns Article 9.3 into a nullity. According to a paper that the EC submitted to the WTO Committee on Anti-Dumping Practice, Ad Hoc Group on Implementation,<sup>83</sup> "Article 11.9 of the Basic Regulation requires that refund investigations carried out in order to determine the dumping margin in the representative period use the same methodology as the investigation which led to the duty, as long as the circumstances have not changed." In other words, the EC calculates exporter-specific aggregate margins in refund proceedings, as opposed to relying on individual transactions like the United States and Canada – exactly what the Appellate Body blessed in *US – Zeroing (Japan)* and *US – Zeroing (EC)*. Let us assume that there are two importers: Importer A is not engaging in dumped transactions and in fact has engaged in transactions where the goods were priced at 50% above normal value. In contrast, Importer B has entered goods into the EC which were priced at 50% below normal value. In this situation, Importer A is effectively precluded from requesting a refund because Importer B's dumped transactions would cancel out his own, and deprive him of a refund. While Importer B has every incentive to seek a refund, this would require cooperation from Importer A, who has no reason to assist a competitor who has been unfairly importing goods at dumped prices.

81. The EC has also indicated that it also handles refund requests at a member State level, which may help explain the relatively low number of EC-wide refund procedures. However, it is not readily apparent how an individual member State would have access to EC-wide data on all of an exporter's entries into the EC, and thus be in a position to calculate an aggregate EC-wide "ceiling" for that exporter under the Appellate Body's rationale in *US – Zeroing (Japan)* and

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<sup>80</sup> Commission Notice Concerning Reimbursement of Anti-Dumping Duties, Official Journal 2002, C 127/10.

<sup>81</sup> During the same period, the EC conducted approximately 200 interim reviews. However, our understanding is that any changes in the *ad valorem* rate found in such reviews apply prospectively only; they do not lead to a refund.

<sup>82</sup> Trade Policy Review: European Communities, WT/TPA/M/177/Add. 1 (30 April 2007).

<sup>83</sup> G/ADP/AHG/W/37, p. 7 (19 March 1998).

*US – Zeroing (EC)*. In other words, it would appear that, contrary to the Appellate Body’s findings, the EC is collecting duties based on individual import transactions.

82. In this case, the Panel’s interpretation that Article 9.3 permits the assessment of duties on individual dumped transactions is borne out by a contextual analysis. Article 9.2 provides: “When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such products from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted.”<sup>84</sup> This sentence implicitly recognizes that duties can vary on a case-by-case basis, and do not consist of broad aggregates. It also recognizes that such duty collection applies *in rem* to the imported goods, not *in personam* to the exporter or foreign producer, because it refers to the collection of duties on “imports,” which necessarily encompasses individual transactions.

83. This interpretation is further supported by Article 9.3.2 which provides for the refund of duties within 18 months after the date that “a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty.”<sup>85</sup> This provision clearly recognizes that importers, not exporters or foreign producers, are the ones who pay the duties, and, more importantly, are interested in establishing their right to a refund, in particular, where the basis of the refund is the correction or updating of export price information for the importer’s transactions. It further implies that such a refund finding is necessarily specific to a particular importer; in contrast, if such a finding were to be based on an average of transactions involving multiple competing importers, there would be no such language. Indeed, as discussed above in connection with the EC’s refund procedures, there is a major practical administrative problem if refunds are calculated on the basis of exporter-wide aggregates. In this situation, all of the importers necessary to conduct such an expansive refund analysis may not necessarily have an interest in participating, putting at risk an individual importer’s ability to secure a refund to which it would otherwise be entitled. For example, Importer A is unlikely to be willing to participate in a refund request by a competitor, Importer B, particularly if Importer B, is seeking to escape liability because its dumped sales are offset by the non-dumped transactions of Importer A. Even if an individual importer is prepared to file because its transactions were not dumped, it would not be in a position to submit information about the normal value and prices charged to other importers, which would be required under the EC’s regulations. As a result, the Appellate Body’s reasoning in *US – Zeroing (Japan)* and *US – Zeroing (EC)* would effectively render refund proceedings inutile, while punishing importers who do not engage in dumping by depriving them of their right to seek a refund.<sup>86</sup>

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<sup>84</sup> AD Agreement, Article 9.2 (emphasis added).

<sup>85</sup> AD Agreement, Article 9.3.2 (emphasis added).

<sup>86</sup> The interpretative problem does not disappear if a Member – through legislation or administrative action by its antidumping authority – unilaterally relieves an importer of the obligation to support its request for a refund with evidence.



84. In *US – Zeroing (Japan)* and *US – Zeroing (EC)*, the Appellate Body put great weight on a sentence in Article 6.10, which states that: “The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation.” Article 6, however, deals primarily with investigations and reviews, not refunds. In all antidumping systems – prospective or retrospective – the initial investigation under WTO rules requires a determination that various exporters or foreign producers have engaged in dumping. This finding of dumping serves to identify the set of imports from another country which must be examined to determine whether there is material injury. Thus, this sentence merely serves to set out a general rule that a finding shall be made for each exporter or foreign producer, subject to the exception set out in the following sentence of Article 6.10 for situations where the number of exporters is too large, and some form of sampling is required.

85. If there is an affirmative finding of injury in the investigative phase, the findings with respect to specific exporters then serve to set a duty deposit rate for imported goods from each exporter in the U.S. retrospective assessment system, and a prospective *ad valorem* rate or reference price/prospective normal value for each exporter in a prospective assessment system. Regardless, in all systems, the focus in the duty assessment phase then shifts to individual import transactions, since duties are assessed on individual import transactions – through annual reviews in the United States or by applying the *ad valorem* rate or reference price to specific import transactions in the EC, Canada, or India. This helps explain why Article 9.3 states that: “The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.” Such a provision is particularly important in a prospective assessment system, since a WTO Member should not be collecting duties in excess of the various margins of dumping found in the underlying order. This also explains why Article 9.3 does not contain a provision corresponding to the first sentence of Article 6.10. This reflects the basic reality that the practice in both retrospective and prospective systems is to collect duties on the basis of individual import transactions, contrary to this Body’s findings in *US – Zeroing (Japan)* and *US – Zeroing (EC)*. The only exception would be if this Body actually intended to effectively endorse the EC’s refund procedures and, in effect, require other WTO Members to copy such a system. Such an approach, of course, would do nothing to enhance the WTO’s credibility.

## **7. A General Prohibition on Simple Zeroing In All Contexts Would Contradict Basic Principles of Treaty Interpretation**

86. In *US – Gasoline*, the Appellate Body recognized the international law principle of “*ut res magis valeat quam pereat*” as a core principle of WTO interpretation: “One of the corollaries of the ‘general role of interpretation’ in the Vienna Convention is 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.<sup>87</sup>

87. As the Panel noted in this case, a general prohibition of zeroing that applies beyond the context of average-to-average comparisons in investigations would contradict this principle, because it would render useless and redundant the remaining text of Article 2.4.2, which provides for an alternative “targeted dumping” methodology. Three prior panels also concluded that under a general zeroing prohibition, the average-to-average comparison method and the average-to-transaction comparison method would yield identical results.<sup>88</sup> This is because the targeted dumping methodology, in Article 2.4.2, mathematically would yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset all dumped comparisons.<sup>89</sup> This would nullify the very purpose of the targeted dumping exception, which was designed to address situations where an average-to-average or transaction-to-transaction methodology would mask the existence of dumping.

88. The “targeted dumping” methodology was negotiated as a limited exception to the general obligation to engage in symmetrical comparisons in an investigation. By the terms of Article 2.4.2, it may be used only “if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods . . . .” When the investigating authority provides an explanation as to why these “differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison,” it may then use the asymmetrical average-to-transaction comparison methodology to establish the existence of margins of dumping during the investigation phase. This provision

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<sup>87</sup> *US – Gasoline (AB)*, pp. 20-21.

<sup>88</sup> *US – Zeroing (EC) (Panel)*, para. 7.266 (“In fact, under such an interpretation the alternative asymmetrical comparison methodology would as a matter of mathematics produce a result that was identical to that of the first average-to-average methodology.”); *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.76 (“[A] prohibition of zeroing under the targeted dumping comparison methodology ... would result in a margin of dumping mathematically equivalent to that established under W-W comparison methodology.”); *US – Zeroing (Japan) (Panel)*, para. 7.127, n.763 (“Mathematically, if zeroing is prohibited under the average-to-transaction method, the sum total of amount by which export prices are above normal value will offset the sum total of the amounts by which export prices are less than normal value.”).

<sup>89</sup> The reason for this is that, if offsetting is required, then all non-dumped sales (*i.e.*, negative values) will offset the margins on all of the dumped sales (*i.e.*, positive values). It makes no difference mathematically whether the calculation of the final overall dumping margin is based on comparing weighted-average export prices to weighted-average normal values or on comparing transaction-specific export prices to weighted-average normal values. In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.

was added to address concerns that other methodologies could mask some forms of hidden dumping, particularly in isolated markets or to specific customers.

89. In this regard, Mexico argued that nullification of the second sentence of Article 2.4.2 need not be addressed because it is an exception to the methodologies provided for in the first sentence of Article 2.4.2.<sup>90</sup> As the Panel found, Mexico’s interpretation would cause the second sentence of Article 2.4.2 to cease to function, and thus contradict basic rules of treaty interpretation and WTO practice by rendering the second sentence inutile. Similarly, the panel in *US – Zeroing (EC)* noted that a general prohibition of zeroing that applied to the targeted dumping methodology “would deny the second sentence [of Article 2.4.2] the very function for which it was created.”<sup>91</sup> A treaty interpreter must seek to give meaning to all the provisions of a treaty.<sup>92</sup> Such an interpretation also would allow some forms of targeted dumping in specific markets or types of transactions to escape duties arising from injurious dumping.

90. The Appellate Body has responded that mathematical equivalence will occur only in “certain situations”<sup>93</sup> and represents “a non-tested hypothesis.”<sup>94</sup> We note that the panels including recognized trade remedy experts of various nationalities have specifically addressed all of the situations under which it was argued that mathematical equivalence would not obtain and found these situations involved methodologies that violated the AD Agreement.<sup>95</sup> It is hard to see how the targeted dumping provision could have “utility” if the only alternative methodologies that would provide it utility are, themselves, inconsistent with the AD Agreement and subject to WTO challenge. Mexico relies on one of these alternative methodologies to argue that it has found an exception to mathematical equivalence. In particular, Mexico posits that under the targeted dumping methodology, the basis for normal value could differ from the normal value used under the average-to-average methodology. The Panel carefully examined the scenario Mexico posits and concluded that it did not constitute an exception to the nullification caused by mathematical equivalence. The Panel explained:

Mexico argues that this disproves the mathematical equivalence argument presented by the United States. We disagree. Mexico has shown no support in

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<sup>90</sup> Appellant Submission of Mexico, para. 66.

<sup>91</sup> *US – Zeroing (EC) (Panel)*, para. 7.266, see also *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.52 (“[A] general prohibition of zeroing ... would deprive the second sentence of Article 2.4.2 of effect.”); *US – Zeroing (Japan) (Panel)*, para. 7.127 (“If zeroing is prohibited in the case of the average-to-transaction comparison, the use of this method will necessarily always yield a result identical to that of an average-to-average comparison.”).

<sup>92</sup> *US – Gasoline (AB)*, p. 23.

<sup>93</sup> *US – Zeroing (Japan) (AB)*, para. 133.

<sup>94</sup> *US – Softwood Lumber Dumping (Article 21.5) (AB)*, para. 97.

<sup>95</sup> See, *US – Zeroing (Japan) (Panel)*, paras. 7.127-7.137; *US – Zeroing (EC) (Panel)*, para. 7.266; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.33-5.52.

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". 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.<sup>96</sup>

91. The Panel also carefully considered the Appellate Body's prior reasoning in rejecting the mathematical equivalence inutility by concluding that it may be permissible to apply the targeted dumping methodology to only a subset of export transactions.<sup>97</sup> The Panel explored this possibility in detail and found that this view of the targeted dumping methodology was either not permitted under the Appellate Body's own interpretation, or did not lead to a result that was mathematically different from the average-to-average comparison methodology.<sup>98</sup>

92. The claim that "mathematical equivalence" represents a "non-tested hypothesis" is not a credible justification to dismiss the apparent violation of a core interpretative principle, particularly in light of the Panel's factual findings. As the Council of the European Union argued before the European Court of First Instance:

[T]he asymmetrical method, as compared with the first symmetrical method, makes sense only if the zeroing technique is applied. Without that mechanism, that method would mathematically lead to the same result as the first symmetrical method and it would be impossible to prevent the non-dumped exports from disguising the dumping of the dumped exports.<sup>99</sup>

The Court agreed with the EC Council's antidumping authorities, finding that

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<sup>96</sup> *US – Zeroing (Mexico)*, para. 7.140.

<sup>97</sup> *US – Zeroing (Japan) (AB)*, para. 135.

<sup>98</sup> *US – Zeroing (Mexico)*, para. 7.139.

<sup>99</sup> Case T-274/02, *Ritek Corp. v. Council of the European Union*, 24 October 2006, para. 94 (Exhibit US-5). Notwithstanding making this argument before its municipal tribunals, the EC has taken a contrary position in WTO dispute proceedings. *See, e.g. Softwood Lumber Dumping (Article 21.5) (AB)*, para. 49 ("The European Communities rejects the 'mathematical equivalence' argument...")

[A]s the Council pointed out in its written proceedings, the zeroing technique has proved to be mathematically necessary in order to distinguish, in terms of its results, the asymmetrical method from the first symmetrical method. In the absence of that reduction, the asymmetrical method will always yield the same result as the first symmetrical method . . . .<sup>100</sup>

93. In short, imputing a general prohibition on zeroing in all contexts into the AD Agreement would do major violence to the text by rendering whole textual provisions of the agreement “inutile.” Such an approach contradicts the Appellate Body’s express admonition in *US – Gasoline* that “interpretation must give meaning and effect to all the terms of a treaty.”<sup>101</sup> Accordingly, Mexico’s arguments in this regard should be rejected by the Appellate Body.

**B. If the Appellate Body Nonetheless Concludes that Key Terms of the AD Agreement Are Ambiguous, It Is Appropriate to Use Supplementary Tools of Interpretation**

94. Article 32 of the Vienna Convention indicates that resort to supplemental means of interpretation is necessary to confirm the interpretation reached under Article 31 or if analysis of the text (1) “leaves the meaning ambiguous or obscure” or (2) leads to a result which is manifestly absurd or unreasonable.” Such supplementary means of interpretation include a treaty’s preparatory work and circumstances of its conclusion.

95. The fundamental differences between the Appellate Body and panels of trade remedy experts suggests that some of the key terms of the AD Agreement lack ideal clarity. Given the number of expert panelists that have disagreed with the Appellate Body’s previous findings on zeroing, many of whom have had recognized expertise in antidumping or served previously as WTO/GATT negotiators, it is simply not credible to maintain that the AD Agreement and GATT 1994 Article VI contains a clear broad-based prohibition on zeroing. We respectfully submit that the text of the AD Agreement, when analyzed in “context” and in light of its “surrounding circumstances” as required by Article 31 of the Vienna Convention, shows conclusively that such a prohibition or requirement simply does not exist. At best, the text of the AD Agreement is ambiguous.

96. Since the text of the AD Agreement is at best “ambiguous or obscure,” Article 32 of the Vienna Convention requires the examination of supplementary means to interpretation, such as the negotiating history, to determine whether these tools can shed light on the meaning of key textual provisions. In *EC – Computer Equipment*, the Appellate Body noted that WTO interpretation may appropriately “include examination of the historical background against which

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<sup>100</sup> Ritek Corp., para. 109.

<sup>101</sup> *US – Gasoline (AB)*, p. 23.

the treaty was negotiated.”<sup>102</sup> Similarly, in *US – Underwear*, the Appellate Body cited a comparison between the *Agreement on Textiles and Clothing* (“ATC”) and its predecessor, the *Multifibre Arrangement* (“MFA”) as important “context” for purposes of interpreting the meaning of the ATC. Such use of supplementary tools of interpretation is also appropriate if, as demonstrated below, Mexico’s interpretation of key textual terms would lead to manifestly absurd and unreasonable results that are at odds with the agreement’s purpose and object.

97. As we now show, the negotiating history of the Uruguay Round AD Agreement and panel reports in dispute settlement proceedings that were underway at the time the AD Agreement was negotiated provide important insights into the meaning of key AD Agreement terms and the “common understanding” (or lack thereof) of the GATT Contracting Parties as to offsets for non-dumped transactions in retrospective assessment reviews.

### **1. Mexico’s Interpretation of Article 9.3 Would Lead to “Manifestly Absurd and Unreasonable Results”**

98. Article 32 of the Vienna Convention cautions against adoption of any text-based interpretation which would lead to “a result which is manifestly absurd or unreasonable,” and indicates that in this situation resort to supplementary tools of interpretation is appropriate. As the Panel found, Mexico’s interpretation of “margin of dumping” as used in Article 9.3 would lead to absurd, unreasonable, and counter-productive results that would be wholly contrary to the text of the AD Agreement and its underlying purpose and objectives.

99. Although, as stated by the Appellate Body in *US - Zeroing (Japan)*, dumping involves differential pricing behavior of exporters or producers between its export market and its normal value,<sup>103</sup> in the real world dumping occurs at the level of an importer’s individual transactions. It is the importer who negotiates the “export price” when purchasing a product from a foreign producer or exporter, or, in a related party transaction, when selling to an unrelated purchaser in the United States. Thus, while the foreign producer may control the “normal value” by virtue of its sales prices in its home market, it is the importer who actually helps determine whether a product is “dumped” in the United States by agreeing on an “export” price and thus becoming liable for any resulting antidumping duties.

100. Moreover, under both prospective and retrospective assessment systems, the remedy for dumping in Article VI:2 of GATT 1994, *i.e.*, antidumping duties, is applied at the level of individual customs entries and paid by importers who thereby incur liability for the additional duties.<sup>104</sup>

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<sup>102</sup> *EC – Computer Equipment (AB)*, para. 86

<sup>103</sup> *US – Zeroing (Japan) (AB)*, para. 156.

<sup>104</sup> The Appellate Body’s finding in *US – Offset Act (Byrd Amendment) (AB)*, para 255, that antidumping duties are “paid by foreign producers/exporters” notwithstanding, so far as the

101. As discussed, the U.S. retrospective assessment system is designed to ensure that an individual importer's liability reflects the actual level of dumping associated with its transactions. Put another way, an importer should not pay duties because another importer has bought dumped goods, or escape liability because another importer has not bought dumped goods. Nor should an importer who has ceased engaging in dumped transactions under the U.S. law be forced to pay duties simply because dumping occurred in a past "period of investigation," which may be years ago. In addition, one of the underlying goals of the U.S. retrospective assessment system is not to collect large amounts of antidumping duties from importers, but to encourage exporters and importers to adjust prices on their own to bring them in line with fair market value. Thus, upon issuance of a U.S. order, sophisticated exporters and importers typically will work together to adjust either the home market price or U.S. export price to eliminate the dumping margins and avoid future liability for antidumping duties. Thus, the U.S. system encourages importers to raise resale prices (or exporters to reduce prices in their home market) to cover the amount of the antidumping duty liability, thereby eliminating injurious dumping. This achieves the goals of the U.S. antidumping law (and GATT Article VI) of preventing injurious dumping, while avoiding subjecting importers to additional duties.

102. If under *US – Zeroing (EC) (AB)* and *US – Zeroing (Japan) (AB)*, the amount of one importer's antidumping margin must be averaged to account for the amount by which some other transaction involving an entirely different importer was sold at above normal value, and *vice versa*, then an importer could be subjected to liability for dumped imports made by another importer over whom he or she has no control. This also means the importer who is engaged in dumped transactions would receive a windfall, because he or she may escape antidumping duties, or have his or her liability sharply reduced through the actions of another importer who behaved responsibly by eliminating its dumping margin. As the panel in *US – Zeroing (Japan)* observed, the interpretation of Article 9.3 adopted by Mexico in this case means WTO Members with retrospective assessment systems "may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value."<sup>105</sup> This result, as the panel in *US – Softwood Lumber Dumping (Article 21.5)* noted, this would lead to perverse and unreasonable incentives in the context of retrospective 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, they would benefit from the lower price

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United States is aware, nothing in the WTO permits the extra-territorial application of antidumping liability to a foreign producer or exporter.

<sup>105</sup> *US – Zeroing (Japan) (Panel)*, para. 7.199.

inherent in a dumped transaction; second, they would benefit from offsets, or credits, "financed" by the higher prices paid by other importers clearing non-dumped, or even less-dumped, transactions. . .

Again, this makes no sense in the context of a prospective normal value duty assessment system, because (as even Canada has acknowledged) the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. And if other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers.<sup>106</sup>

103. Mexico's interpretation of Article 9.3 to require that antidumping duty liability must be reduced to account for non-dumped transactions, is also fundamentally inconsistent with Article 9's treatment of equivalent situations when they arise in prospective normal value systems of assessment. Under Article 9.4(ii), in a prospective normal value system,<sup>107</sup> the importer's liability for payment of antidumping duties must be 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.<sup>108</sup> As a result, an importer who imports a product, the export price of which is equal to or higher than the prospective normal value, cannot be subjected to liability for payments of antidumping duties.

104. As the Panel noted, it would be manifestly absurd to interpret Article 9 as requiring offsets between importers in a retrospective assessment system while capping the importer's liability based on individual transactions in a prospective system. As 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."<sup>109</sup> If in a prospective normal value system individual export transactions at prices less than normal value can lead to liability for antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, the clear implication is that liability for payment of

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<sup>106</sup> *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.54-5.57.

<sup>107</sup> *US – Zeroing (Japan) (Panel)*, para. 7.201.

<sup>108</sup> *US – Zeroing (Japan) (Panel)*, para. 7.201; *See also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53.

<sup>109</sup> *US – Zeroing (Japan) (Panel)*, para. 7.205; *see also US – Zeroing (EC) (Panel)*, para. 7.206.



antidumping duties can be similarly assessed on the basis of individual export prices for less than normal value in the retrospective system applied by the United States.<sup>110</sup>

105. The Vienna Convention makes clear that a treaty should be interpreted in light of its “object and purpose,” which represents part of the overall “context” for interpreting specific treaty provisions. In GATT 1994 Article 1:1, the Contracting Parties expressly recognized that injurious dumping is a practice that is to be “condemned.” We note that the aggregate economic effect of Mexico’s proposal to require offsets in retrospective assessment systems would be to create a perverse incentive for importers that are subject to an antidumping order to enter into dumped transactions, particularly if they have reason to believe that other importers’ non-dumped transactions could be used to offset their dumping. In a prospective assessment system, there would be much less incentive for importers to refrain from “less than normal value” transactions, because such sales could still result in antidumping liability because of the purchasing practices of another importer over which they have no control. At the same time, an importer could benefit substantially if it enters into transactions at dumped prices when all of its competitors have eliminated their dumped transactions since it would be able to dump but avoid or mitigate its liability. We respectfully submit that any interpretation that would lead to a counter-intuitive outcome should be approached with extreme caution, since it would be manifestly absurd and unreasonable under Article 32 of the Vienna Convention, as well as inconsistent with the “object and purpose” of GATT Article 1:1.

106. The practical effect of *US – Zeroing (EC) (AB)* and *US – Zeroing (Japan) (AB)* would be to encourage even wider adoption of prospective assessment systems along the lines of the EC. Such a system would be significantly more punitive for importers, since as discussed above, they would almost always be subject to the original *ad valorem* rate or reference price set in the original investigation for the five-year period, instead of having their liability for dumping duties and future duty deposit rate reduced in annual reviews. This would also effectively nullify Article 9.3, which recognizes the legitimacy of retrospective systems.

107. In sum, Article 32 of the Vienna Convention cautions against interpretations of treaties which are “manifestly nonsensical and absurd.” Article 31(1) of the Vienna Convention makes clear that the “object and purpose” of a treaty represent part of the “context” for purpose of determining the meaning of particular provisions of the text. For its part, the Appellate Body has repeatedly indicated that a core principle of WTO interpretation is to give meaning to all provisions of an agreement, and that interpretations that would render certain key provisions “inutile” are to be avoided at all costs. Mexico’s interpretation of Article 9.3 flies in the face of

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<sup>110</sup> *US – Zeroing (Japan) (Panel)*, para. 7.208 (“We see no textual basis in Articles 9.3 and 9.4 for the view that if an authority assesses the amount of the anti-dumping duty on a retrospective basis by examining export transaction that have occurred during a certain period, it is obligated to take into account export prices above the normal value that it would not have been required to take into account if it had applied a prospective normal value system.”).

basic rules of international treaty interpretation and common sense. It would disrupt the careful balance struck by the Uruguay Round negotiators in the AD Agreement, and therefore should be rejected by this body.

108. For the above reasons, the United States respectfully requests that the Appellate Body uphold the Panel's decision to reject Mexico's "as such" and "as applied" claims regarding antidumping assessment proceedings.

**2. The Tokyo Round Antidumping Code Shows That "Fair Comparison" Refers Only to Allowances or Adjustments Used to Calculate Normal Value and the Export Price, Not "Zeroing"**

109. Zeroing is not a new subject for the GATT/WTO system. It was discussed extensively during the Uruguay Round. It was also the subject of two major disputes under the Tokyo Round Antidumping Code. On July 8, 1991, Japan initiated a dispute settlement proceeding challenging an EC antidumping decision in *EC – Audiocassettes*.<sup>111</sup> A short time later, in November 1991, Brazil requested consultations regarding an EC antidumping decision in *EC – Cotton Yarn*.<sup>112</sup> Both cases challenged numerous aspects of the EC's antidumping methodology, including zeroing. Both Japan's and Brazil's zeroing claims turned on a now familiar argument that zeroing violated the "fair comparison" requirement of Article 2.6 of the Tokyo Round Antidumping Code, the predecessor to Article 2.4 of the AD Agreement. In both cases, the panels rejected Japan's and Brazil's claims. The panels found no basis in Article 2.6 of the Tokyo Round Antidumping Code to support an expansive reading of "fair comparison." As a result, they concluded that the EC's zeroing practices were not a violation of the Code. As the *EC – Cotton Yarn* panel stated:

In the view of the Panel the argument of Brazil was that the requirement to make due allowance for differences affecting price comparability had to be interpreted in light of the object and purpose of Article 2.6, which was to effect a fair comparison. However Brazil had not made any independent arguments designed to establish that apart from the requirements of the first sentence, and the allowances required by the second sentence of Article 2.6, there was a further requirement that any comparison of normal value and export price must be "fair." The Panel was of the view that although the object and purpose of Article 2.6 is to effect a fair comparison, the wording of Article 2.6 "[i]n order to effect a fair comparison" made clear that if the requirements of that Article were to be met, any comparison thus undertaken was deemed to be "fair".

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<sup>111</sup> *EC – Audiocassettes*, para. 360.

<sup>112</sup> *EC – Cotton Yarn*, para. 502.

110. In this regard, Brazil noted at the outset that it “was not arguing against zeroing per se.”<sup>113</sup> Instead, Brazil conceded that “zeroing” is normally permissible, but argued that in an environment of high inflation like Brazil the EC’s zeroing methodology had an especially prejudicial effect on the calculation of dumping margins.<sup>114</sup>

111. The Panel, however, rejected Brazil’s expansive reading of “fair comparison.” Instead, it read “fair comparison” narrowly as relating strictly to allowances and adjustments:

The Panel noted that the first sentence of Article 2.6 concerned the actual comparison of prices at the same level of trade and in respect of sales made as nearly as possible the same time. The Panel considered that the second sentence of Article 2.6 concerned allowances to be made for the relevant differences in the factors that affected price determination in the respective markets sufficient to ensure the required comparability of prices. The Panel took the view that the second sentence of Article 2.6 required that allowances necessary to eliminate price comparability be made prior to the actual comparison of the prices, in order to eliminate the differences which could affect the subsequent comparison. The Panel considered that “zeroing” did not arise at the points at which the actual determination of the relevant prices was undertaken pursuant to the second sentence of Article 2.6. In the Panel’s view, “zeroing” was undertaken subsequently to the making of allowances necessary to ensure price comparability in accordance with the obligation contained in the second sentence of Article 2.6. It related to the subsequent stage of comparison of prices; a stage which was not governed by the second sentence of Article 2.6. Therefore, the Panel dismissed Brazil’s argument that the EC had failed to make due allowances for the effects of its so-called “zeroing” methodology.<sup>115</sup>

112. In other words, the *EC – Cotton Yarn* panel did not agree with Brazil’s contention that the term “fair comparison” in Article 2.6 of Tokyo Round Antidumping Code <sup>116</sup> incorporates a broad prohibition zeroing. Instead, the panel interpreted “fair comparison” as referring only to the use of adjustments or allowances for purposes of facilitating price comparability.

113. In sum, these panel decisions provide important context on the meaning of the term “fair comparison” in the Tokyo Round Code. In these disputes, Tokyo Round Antidumping Code

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<sup>113</sup> *EC – Cotton Yarn*, para. 486.

<sup>114</sup> The Panel noted: “Brazil argued that even if so-called “zeroing” could be defended in most circumstances, it could not be defended in cases where due to high inflation very high fluctuations in positive and negative dumping margins occurred.” *EC – Cotton Yarn*, para. 498.

<sup>115</sup> *EC – Cotton Yarn*, para. 500.

<sup>116</sup> This provision was incorporated in Article 2.4 of the AD Agreement, which deals with adjustments.

panels did not interpret identical language in the Code as a prohibition on zeroing or a requirement to average negative antidumping margins. Both panels rejected Japan's and Brazil's attempts to give this term the expansive meanings sought by Mexico in this case. It is also noteworthy that Brazil was prepared to admit at the outset that zeroing is permissible in "most" cases, and thus did not challenge zeroing *per se*. In short, a prohibition on zeroing, if it exists, must have come into being in the Uruguay Round, since it did not exist in the Tokyo Round Antidumping Code. This would have required a textual change, but where is that change? As we now show, the Uruguay Round did not result in any new "common understanding" on a broad-based zeroing prohibition. Instead, the key textual provisions that have been cited by the Appellate Body in its previous findings remained virtually unchanged from GATT 1947 Article VI, the Kennedy Round Antidumping Code, and the Tokyo Round Antidumping Code, including such phrases as "product," "products," "margin of dumping," and "fair comparison."

### **3. The Negotiating History of the Uruguay Round AD Agreement Demonstrates That No Common Understanding Was Reached on "Zeroing"**

114. During the Uruguay Round negotiations, Japan, Norway, Hong Kong, and Singapore repeatedly sought to add a ban on "zeroing" to the draft AD Agreement text. They argued vehemently that zeroing is inherently unfair; provided lengthy negotiating proposals discussing the treatment of "negative dumping" and "non-dumped sales" under GATT Article VI and the Tokyo Round Antidumping Code; and submitted detailed textual proposals to ban zeroing or require consideration of non-dumped sales. Their proposals, however, were strongly opposed at that time by the EC, the United States, and Canada, and were not incorporated into the final AD Agreement. As a result, as we now show, careful analysis of the negotiating history pursuant to Article 32 of the Vienna Convention demonstrates conclusively that the AD Agreement does not incorporate a broad ban on zeroing or a requirement to aggregate individual transactions under Article 9.3.

115. In September 1987, Japan submitted an initial proposal to the Uruguay Round Negotiating Group on MTN Agreements and Arrangements ("MTN Negotiating Group"), which had jurisdiction over the Tokyo Round Antidumping Code. The Japanese proposal called attention to the need to build a "common understanding" to address the role of "non-dumped" sales in calculating the "export price," as follows:

Although the Code states that, in order to effect a fair comparison between export price and domestic price, two prices are to be compared at the same level of trade and due allowance be made for the differences in conditions of sale, it is still susceptible of authority's subjective discretion. To clarify elements to be counted for adjustment in order to assure the same level of trade and to enumerate the content of the differences in conditions of sale would help the authorities to assure a fair comparison.

Certain Signatories use the weighted average of prices in all transactions in calculating the “normal value” whereas they use the weighted average of dumped prices exclusively in calculating the “export price”. There is a need, therefore, to build a common understanding on the calculation of dumping margin in order to eliminate such an arbitrary calculation.<sup>117</sup>

116. The Japanese submission is noteworthy because it underscores that at that time Japan fully recognized that: (1) there was no “common understanding” on zeroing and (2) the Tokyo Round language on “fair comparison” did not incorporate a “common understanding” to prohibit “zeroing” or to require the inclusion of “non-dumped sales” in the export price.

117. Japan submitted a second “zeroing” proposal to the Uruguay Round Negotiating Group on MTN Agreements and Arrangements in June 1988:

In cases where sales prices vary among many transactions, certain signatories, using the weighted-average of domestic sales price as the normal value with which each export price is compared, calculate the average dumping margin in such a way that the sum of the dumping margins of transactions the export prices of which are lower than normal value is divided by total amount of export prices. In this method, however, negative dumping margins, i.e., the amount by which export price exceeds normal value, are ignored.

Consequently, dumping margins occur in cases where export prices vary over time ... or where export prices vary due to different routes of sale ..., even if the average level of export prices is equal to that of domestic sales prices.<sup>118</sup>

Accordingly, the second Japanese proposal explicitly referenced the role of “negative dumping margins.”

118. In July 1989, Hong Kong submitted a competing proposal to address “zeroing” in what was then Article 2.6 of the “Carlisle draft”<sup>119</sup> (and would later become Article 2.4 of the AD Agreement) as follows:<sup>120</sup>

Negative dumping margin (Article 2.6)

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<sup>117</sup> *Communication From Japan*, MTN.GNG/NG8/W/11, at item II.1(4) (Sept. 18, 1987) (emphasis added).

<sup>118</sup> *Communication From Japan*, MTN.GNG/NG8/W/30, at item I.4(3) (June 20, 1988) (emphasis added).

<sup>119</sup> Referring to the then Deputy Director General of the GATT, Charles Carlisle.

<sup>120</sup> MTN.GNG/NG8/W/51/Add. 1, p. 3 (22 Dec. 1989) (emphasis added)

14. In calculating the overall dumping margin of the producer under investigation, certain investigating authorities compare the normal value (calculated on a weighted average basis) with the export price on a transaction by transaction basis. For transactions where normal value is higher than the export price (i.e. dumping occurs), the dumping margin by which the normal value exceeds the export price of each transaction in value terms will be added up. The grand total will then be expressed as a percentage of the total value of the transactions under investigation. This will then represent the overall dumping margin in percentage terms. For transactions where normal value is lower than the export price (i.e. no dumping occurs) the “negative” dumping margin by which the normal value falls below the export price in value terms will be treated as zero instead of being added to the other transactions to offset the dumping margin. As a result, it would be technically easy to find dumping with an inflated overall dumping margin in percentage terms.

119. In a separate communication entitled “Principles and Purposes of Anti-Dumping Provisions,” Hong Kong discussed the imposition of duties on an individual transaction basis:

The second way in which anti-dumping duties are imposed on goods which are not dumped, arises out of the tendency to apply an anti-dumping duty as though it were an import levy on all imports from a named country because certain suppliers from that country have been found to have dumped at some time in the past. This ignores the fact that under Article VI, an anti-dumping duty is a levy on dumped imports of products, not on all such products from a named source which may be found to be dumping such products in the past. *By a strict interpretation, it would appear that only an entry-by-entry system is fully consistent with Article VI; and any variations to such a system to address administrative difficulties must be carefully assessed as to whether this basic requirement of Article VI is still met.*<sup>121</sup>

120. Similar concerns about “negative dumping” were expressed by Singapore in a paper regarding “Proposed Elements for a Framework for Negotiations, Principles and Objectives for Antidumping Rules.”<sup>122</sup> Singapore argued that: “In calculating dumping margins, “negative”“

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<sup>121</sup> MTN.GNG/NG8/W/46, p.8 (underlining in original; italics added). This communication represents the view not just of one participant in the MTN Agreements negotiations, but the statement by a skilled and sophisticated WTO Member. This Member’s view that ideally the imposition of dumping should apply at an individual importer level based on individual entries suggests that the findings in *US – Zeroing (EC) (AB)* and *US – Zeroing (Japan) (AB)* that the calculation of a dumping margin must be done on the basis of the “product as a whole” are misplaced.

<sup>122</sup> MTN.GNG/NG8/W/55, p.7 (13 Oct. 1989).

dumping should be taken into account i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value.”

121. On November 15, 1989, the GATT Secretariat summarized the status of discussions in the Negotiating Group as follows:<sup>123</sup>

13. Use of weighted averages in the comparison of export price and normal value

29. The following were among comments made:

- the problem arose from practices where the normal value, established on a weighted-average basis, was compared to the export price on a transaction-by-transaction basis. Thereby, dumping might be found merely because a company’s export price varied in the same way as its own domestic price. Even when domestic profit margin was the same as in the export market, any variations in the export price would, due to the disregard of negative dumping margins, cause dumping to be found, or a dumping margin to be increased;

- if negative margins were included in the calculation, one would not deal with instances in which dumping was targeted to a particular portion of a product line or to a particular region; sales at fair value in one region or in one portion of a product line did not offset injury caused in the other;

- given the definition of like products in Article 2:2, it was difficult to see the relevance of the product line argument. Injury to producers in certain areas presupposed market segmentation which was dealt with in Article 4:1(ii);

- the issue at stake was masked, selective dumping, the effects of which could be considerable;

- an important question was whether non-dumped imports should also have to be included in the examination of injury.

122. In short, there was no consensus. The Secretariat’s report underscores the lack of agreement within the Negotiating Group on modifying Article 2.6 to prohibit “zeroing.” While some participants, e.g. Japan, Hong Kong, Singapore, and the Nordics strongly supported such a

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<sup>123</sup> *Meeting of 16-18 October 1989 of the Negotiating Group on MTN Arrangements*, MTN.GNG/NG8/13, at para. 29 (Nov. 15, 1989) (emphasis added)

proposal, others were concerned that it would facilitate “selective dumping” into specific markets or for specific product lines.

123. When the negotiations shifted to the drafting of a proposed text, the Nordic Countries submitted proposed amendments to the Code as follows:<sup>123</sup>

Due allowances and fair comparison

Amend present Article 2.6 (i.e. new Article 2.7) to read as follows and add a footnote: In order to effect a fair comparison between the normal value, as determined in accordance with paragraphs 4 and 5 above and the export price, both prices shall be calculated in a uniform and consistent manner\*

...

(Footnote) \* A uniform and consistent manner of calculation implies that when normal value is determined, e.g. by calculating the weighted or arithmetical averages, the export price shall also be determined by similar weighted or arithmetical average calculations. . .

Nothing even vaguely resembling the Nordic footnote appears in the final text of the AD Agreement.

124. An alternative proposal to revise Article 2.6 of the Tokyo Round Antidumping Code was offered by Singapore, as follows:

- E. Determination of normal value and comparison between normal value and export price
  - (a) [T]here should be no asymmetrical adjustment. Comparisons between the export price and the normal value should be conducted on a fair and symmetrical basis in determining the dumping margin.
  - (b) Normal value should reflect the normal costs in the country of origin or exportation, plus profits which are commercially acceptable.
  - (c) If Normal Value is to be constructed, the investigating authorities should reflect as closely as possible the real conditions in the country of export. In particular, they should reflect the actual production costs and the commercially accepted profit margin in that exporting country. Cost

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<sup>123</sup> MTN.GNG/NG8/W/76 (11 April 1990) (underlining in original).



allocation rules should follow the generally-accepted accounting practices in the country of export. Furthermore, the cost-of-production provisions should recognize the need to amortize “start-up” costs and extraordinary costs, such as R&D development costs.

(d) In calculating dumping margins, “negative” dumping should be taken into account i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value. . . .

Again, none of the language in Singapore’s proposed text appears in the final Uruguay Round AD Agreement.

125. Finally, in December 1989, Hong Kong submitted a textual proposal to address “negative dumping.” Like Japan’s and Singapore’s, the Hong Kong proposal was framed as a revision to Article 2.6 of the Tokyo Round Antidumping Code, which became Article 2.4 of the AD Agreement, as follows:

In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provision of Article VI:1(b) of the General Agreement, the prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. The investigating authorities shall give due allowance [shall be made] in each case [, on the merits] for the differences in conditions and terms of sale, for the differences in taxation, and for [the] all other differences affecting price comparability in order to put normal value and the export price on a comparable basis and effect a fair comparison. In the cases referred to in paragraph 5 of Article 2 allowance for costs, including duties and taxes, incurred between importation and sale, and for profits accruing, should also be made. Normal value and export price shall be established on a weighted average basis of all sales on the relevant markets for purposes of determining the dumping margin.

(Explanatory note – To ensure that comparison between the normal value and export price be made on an equal basis. Please refer to paragraphs 15 and 15 of paper W/51/Add.1.)

*Underlined text is new language proposed by Hong Kong. Bracketed language reflects deletions from Article 2.6 of the Tokyo Round Antidumping Code.*

Accordingly, like Japan and Singapore, Hong Kong did not view the existing Tokyo Round Antidumping Code provisions regarding “fair comparison” or “margin of dumping” as incorporating a ban on zeroing, but instead sought to introduce new obligations to the text

through the addition of new language. Again, Hong Kong’s language did not appear in the final AD Agreement text.

126. In sum, the negotiating history of the Uruguay Round shows that the negotiators were well aware of zeroing. Japan and Brazil had already initiated GATT disputes challenging the EC’s zeroing practices under the Tokyo Round Antidumping Code. Japan, Singapore, Hong Kong, and the Nordic Countries had submitted negotiating proposals to prohibit zeroing, and Japan, Singapore, and the Nordic Countries had submitted textual language to implement such a ban. The negotiators from Japan, Singapore, Hong Kong, Brazil, and the Nordic Countries were some of the most skilled and sophisticated in the GATT. Given past practice, they were also well aware that they needed to secure major changes in the existing language of GATT 1947 Article VI and the Tokyo Round Antidumping Code in order to achieve their objective of banning zeroing. It was no secret that there was no “common understanding” under GATT 1947 Article VI and the Tokyo Round Antidumping Code of such terms as “fair comparison,” “margin of dumping,” “product,” or “products.” As a result, they sought to introduce new obligations to the WTO Agreement through the addition of new textual provisions to mandate A-to-T comparisons and require averaging in all contexts. Unfortunately, none of the language cited above appeared in the final WTO AD Agreement. Instead, the key terms of the WTO text (apart from the “all comparable export transactions” provision which is limited to A-to-A comparisons in investigations and is not at issue here) were virtually identical to GATT 1947 Article VI and the Tokyo Round Antidumping Code. Accordingly, an analysis of the “preparatory work of the treaty and the circumstances of its conclusion” for purposes of Article 32 of the Vienna Convention shows beyond doubt that there was no common understanding in the Uruguay Round to bar zeroing.

127. While the panel reports in *EC – Cassettes* and *EC – Cotton Yarn* were issued after the conclusion of the Uruguay Round, Japan, Brazil, Singapore, Hong Kong, and the Nordics were well aware that the EC was contesting Japan and Brazil’s claims that the Tokyo Round Code prohibited zeroing, because they, like other Members of the Antidumping Code Committee, participated in discussions of the consultation request and the decisions to establish Antidumping Code Panels. In other words, it would have been foolish for Japan, Brazil, Singapore, Hong Kong, and the Nordics to count on some “hidden meaning” in the text being carried over to the WTO AD Agreement from the same terms in its GATT 1947/Tokyo Round predecessors, when they knew the meaning of these terms was cloudy and in dispute. To the extent that they made a bet that they would succeed in inserting a zeroing prohibition into the existing “fair comparison” language of the Tokyo Round Code through the dispute settlement process, the panel reports in *EC – Audiocassettes* and *EC – Cotton Yarn* indicate that this was a wager that they lost. Indeed, the *EC – Cotton Yarn* panel report, upon its adoption by the Antidumping Committee, represented an important interpretation of the Tokyo Round Antidumping Code under the dispute settlement procedures in effect at that time. This phrase, as discussed above, did not change in any material way when it was carried over to the WTO AD Agreement.

128. In short, the lack of any explicit textual reference in the Uruguay Round AD Agreement to prohibiting zeroing, or any meaningful elaboration on the longstanding GATT 1947 and Tokyo Round Antidumping Code terms relating to the “margin of dumping,” “fair comparison,” “product,” or “products,” speaks for itself. No common understanding was reached on zeroing in the Uruguay Round. No consensus could be reached because despite extensive efforts by Japan, Hong Kong, Singapore, and the Nordic Countries, their proposals were firmly opposed by the EC, the United States and Canada,<sup>124</sup> who had long used zeroing in their antidumping programs under GATT Article VI and the Tokyo Round Code, and continued to use zeroing after the WTO entered into force (and in the case of the EC and Canada continue to use zeroing today, despite their protestations otherwise). Any effort by Mexico to read a “zeroing” prohibition into the WTO AD Agreement, therefore flies in the face of reality.

### C. The Appellate Body Should Reject Mexico’s Other Claims in This Dispute

129. The Appellate Body should reject Mexico’s “as applied” claims that simple zeroing in five periodic assessment reviews involving *Stainless Steel Sheet and Strip in Coils from Mexico* violates GATT 1994 Article VI:1 and VI:2 and Articles 2.1, 2.4, and 9.3 of the WTO AD Agreement. Since, as the Panel correctly determined, simple zeroing as such does not violate the GATT 1994 or WTO AD Agreement, it properly dismissed Mexico’s “as applied” claims. These claims depend upon an accompanying finding of inconsistency with other provisions of the AD Agreement and the GATT 1994.

130. Mexico also charges that the Panel failed to fulfil its responsibilities under Article 11 of the DSU because it did not adhere to previous Appellate Body rulings.<sup>125</sup> Mexico’s approach is extremely ironic. Mexico claims that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU because the Panel failed to do exactly the opposite of what is required by an objective assessment. An objective assessment would mean that a panel would conduct its own, objective review of the applicable facts and law to come up with findings to assist the DSB. Yet Mexico castigates the Panel for doing just that. Rather, according to Mexico, panels are prohibited from making their own assessment of a matter where the DSB has adopted findings in a separate, different dispute involving different parties and different facts as long as the complaining party alleges that the disputes involve the same legal issues.

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<sup>124</sup> See e.g. “Meetings of 31 January - 2 February and 19-20 February 1990, MTN/GNG/NG8/15, p. 19 (March 15, 1990) (discussing problem of targeted dumping); Meeting of 23 July 1990 MTN/GNG/NG8/19, p. 5 (U.S. delegation expresses concern regarding “the use of average export values”); Meeting of 16-18 October 1989, pp. 13-14, MTN/GNG/NG8/13 (Nov. 15, 1989) (noting that negative comments included “if negative margins were included in the calculation, one could not deal with instances in which dumping was targeted to a particular portion of a product line or to a particular region” and another delegation commented that “the issue at stake was masked, selective dumping”).

<sup>125</sup> Appellant Submission of Mexico, paras. 95-99.

131. As the Appellate Body noted in *Japan – Alcohol*:

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.<sup>126</sup>

In *US – Shrimp (Article 21:5 - Malaysia)*, the Appellate Body, after quoting the above passage from *Japan – Alcoholic*, stated: “This reasoning applies to Appellate Body Reports as well.”<sup>127</sup> As should be apparent from the Panel’s report in this case, it carefully considered and took into account the Appellate Body’s previous rulings on zeroing and explained in detail why it did not believe they should apply in this case. Accordingly, Mexico’s criticisms of the Panel are misguided.

132. Mexico accepts that Appellate Body reports are not binding, but then converts an “expectation” into a requirement for panels such that a failure to meet this expectation becomes a breach by the panel of its duties Article 11 of the DSU.<sup>128</sup> Furthermore, Mexico’s approach is that a panel is required to follow findings in different disputes even where the panel considers that those findings would not be in conformity with the agreed text of a covered agreement. Accordingly, Mexico would have this non-textual “expectation” override the explicit requirement in the DSU that panel and Appellate Body reports can neither add to nor diminish Members’ rights and obligations under the covered agreements.

133. Finally, Mexico’s claim misstates the provisions of Article 11. Mexico claims that the Panel failed to follow Article 11 of the DSU. In particular, Mexico states:

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.<sup>129</sup>

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<sup>126</sup> *Japan – Alcoholic (AB)*, para. 14 (emphasis added).

<sup>127</sup> *US – Shrimp (Article 21.5) (AB)*, paras. 108-109.

<sup>128</sup> Mexico cites to *US – Oil Country Tubular Goods Sunset Reviews*, para. 188, as the basis for the expectation. That citation however does not explain the source of the expectation nor does it explain whose expectation it is – this expectation does not appear in the DSU, and there is nothing in the text of the DSU that indicates that the Members hold such an expectation nor that the expectation is based on any agreement of the Members.

<sup>129</sup> Appellant Submission of Mexico, para. 98.

134. However, Article 11 provides that panels are to make such findings “as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” Accordingly, a panel’s findings are to be provided for in the covered agreements. Mexico errs therefore in arguing that under Article 11 a panel is to make a finding that it considers to be contrary to the covered agreements simply to provide the complaining party with faster (albeit erroneous) findings. The United States can understand of course why Mexico might choose to take this approach in this particular dispute, but this is neither the appropriate legal approach nor in the best interests of the WTO dispute settlement system.

135. Finally, Mexico argues that a prohibition on simple zeroing in periodic reviews is required because otherwise, the U.S. assessment procedures “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 proceeding”<sup>130</sup> This claim appears to rest on Mexico’s misguided notion that an injury test is required in periodic assessment reviews. As the AD Agreement makes clear, however, a finding of injury is only required in investigations. Article 9 makes no reference to an injury test. To the extent that Mexico is also complaining that the goods subject to a periodic assessment review may not have been subject to an affirmative injury finding in the underlying investigation, the U.S. International Trade Commission must make an affirmative finding of material injury or threat in all antidumping investigations for an order to be issued. Finally, we respectfully refer the Appellate Body to Commerce’s announcements that the United States would no longer zero in average-to-average comparisons in antidumping investigations, which Mexico helpfully appended to its submissions.<sup>131</sup>

**D. Because the U.S. Approach to Periodic Assessment Reviews Rests on a Permissible Interpretation of the AD Agreement and GATT 1994, Article 17.6(ii) of the AD Agreement Requires that It Be Found to Be in Conformity**

136. Article 17.6(ii) of the AD Agreement provides as follows:

[T]he 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.

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<sup>130</sup> Appellant Submission of Mexico, para. 88.

<sup>131</sup> See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (December 27, 2006); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3,783 (January 26, 2007). (Exhibits MEX-10 and MEX-11).

137. This provision was added to the AD Agreement in the closing days of the Uruguay Round. It reflects the negotiators' recognition that they had left a number of issues unresolved in the AD Agreement and that customary rules of interpretation would not always yield only one permissible reading of a given provision – otherwise the provision would be inutile. The existence of such a provision in the AD Agreement, but nowhere else in the WTO Agreements, indicates that the WTO Members were aware that the antidumping text would pose particular challenges and in many instances would permit more than one legitimate interpretation, because of the need to draft the agreement to cover multiple antidumping systems around the world and longstanding methodological differences, *e.g.* prospective *v.* retrospective.

138. The role of panels and the Appellate Body within the WTO system is vital, but limited. It is to interpret agreements negotiated by the WTO Members. As Article 3.2 of the Dispute Settlement Understanding (DSU) provides: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”.<sup>132</sup>

139. Article 3.2 is consistent with the longstanding principle of public international law that treaty interpretation must address the text of the agreement and may not impute words and obligations that are not there.<sup>133</sup> As the Appellate Body has repeatedly emphasized, to go beyond the limited role spelled out in Article 3.2 would raise fundamental questions as to the legitimacy of the DSB's rulings and the source of its authority. Given the number of expert panelists that have disagreed with the Appellate Body's previous rulings on zeroing, the caliber of those panelists, and their manifest expertise in antidumping, it is simply not credible for Mexico to maintain that the AD Agreement and GATT 1994 Article VI admit of only a single interpretation.

140. In this dispute, Mexico has asked the Appellate Body to read a new obligation into the AD Agreement and Article VI of the GATT 1994, notwithstanding the lack of any textual basis for the obligation that Mexico proposes. The United States respectfully urges the Appellate Body to reject Mexico's claims. Whatever one's personal views on zeroing, it is plain that Mexico and others are trying to get through the Appellate Body what they did not achieve at the negotiating table in the Uruguay Round. For the Appellate Body to do so would only contribute to further uncertainty and unpredictability, and further diminish the vital role of WTO negotiations in expanding world trade. The Appellate Body plays a vital role in the WTO system, but it cannot and should not seek to substitute for the WTO Members, who bear the final responsibility for negotiating agreements to further open markets and strengthen the global trading system. If WTO Members left out certain words, rules, or provisions for lack of

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<sup>132</sup> Article 3.2 of the DSU.

<sup>133</sup> *India – Patents (AB)*, para. 45.

consensus, Article 3.2 makes it plain that it is not the job of panels or the Appellate Body to put them back in.

## **V. CONCLUSION**

141. For the foregoing reasons, the United States respectfully requests that the Appellate Body find that the U.S. measures at issue in this dispute are fully consistent with U.S. obligations under the WTO AD Agreement and GATT 1994 Article VI, and that it dismiss Mexico's appeal.