

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

AB-2008-1

Report of the Appellate Body

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ANNEX I Notification of an Appeal by Mexico

CASES CITED IN THIS REPORT

Short Title	Full case title and citation
<i>EC – Audio Cassettes</i>	Panel Report, <i>EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan</i> , ADP/136, 28 April 1995, unadopted
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
<i>EC – Bed Linen</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 Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2077
<i>EC – Bed Linen (Article 21.5 – India)</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, DSR 2003:III, 965
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, adopted 27 September 2005, DSR 2005:XIX, 9157
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report, WT/DS219/AB/R, DSR 2003:VII, 2701
<i>EEC – Cotton Yarn</i>	Panel Report, <i>European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil</i> , ADP/137, adopted 30 October 1995, BISD 42S/17
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>Japan – Alcoholic Beverages II</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, DSR 1996:I, 97
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, 10127
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
<i>US – Shrimp (Ecuador)</i>	Panel Report, <i>United States – Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R, adopted on 20 February 2007

Short Title	Full case title and citation
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report, WT/DS264/AB/R, DSR 2004:V, 1937
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006
<i>US – Stainless Steel (Mexico)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, circulated to WTO Members 20 December 2007
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1
<i>US – Zeroing (EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report, WT/DS294/AB/R
<i>US – Zeroing (Japan)</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 (Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1960 Group of Experts Report	GATT Second Report of the Group of Experts, Anti-Dumping and Countervailing Duties, GATT Document L/1141, adopted 27 May 1960, BISD 9S/194
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
GATT 1947	<i>General Agreement on Tariffs and Trade 1947</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
<i>Kennedy Round Anti-Dumping Code</i>	<i>Kennedy Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade TN.64/98, 20 June 1967</i>
Panel	Panel in <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i>
Panel Report	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R
SAA	Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCAAN 3773, 4040 (Public Law No. 103-465, 108 Stat. 4809 (1994), <i>United States Code</i> , Title 19, Section 3501)
Tariff Act	United States Tariff Act of 1930, Public Law No. 1202-1527, 46 Stat. 741, <i>United States Code</i> , Title 19, as amended
<i>Tokyo Round Anti-Dumping Code</i>	<i>Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade</i> , BISD 26S/171, entered into force 1 January 1980
T-T	Transaction-to-transaction (comparison) in original investigations
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005
W-T	Weighted average-to-transaction (comparison) in original investigations
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>
W-W	Weighted average-to-weighted average (comparison) in original investigations

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

Mexico, *Appellant*
United States, *Appellee*

Chile, *Third Participant*
China, *Third Participant*
European Communities, *Third Participant*
Japan, *Third Participant*
Thailand, *Third Participant*

AB-2008-1

Present:

Ganesan, Presiding Member
Bautista, Member
Sacerdoti, Member

I. Introduction

1. Mexico appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (the "Panel Report").¹ The Panel was established to consider a complaint by Mexico concerning the calculation of margins of dumping by the United States Department of Commerce (the "USDOC") based on a methodology that does not fully reflect export prices that are above normal value.²

2. Before the Panel, Mexico claimed that:

- (a) "model zeroing in investigations"³ is, as such, inconsistent with Articles VI:1 and VI:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), Articles 2.1, 2.4, 2.4.2, and 18.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement"), and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement")⁴;

¹WT/DS344/R, 20 December 2007.

²Panel Report, para. 2.1.

³According to Mexico's description, "model zeroing in investigations" occurs when the investigating authorities compare the weighted average normal value and the weighted average export price for each model of the product under consideration and treat as zero the results of model-specific comparisons where the weighted average export price exceeds the weighted average normal value, when aggregating comparison results in order to calculate a margin of dumping for the product as a whole. (See *ibid.*, paras. 2.1 and 7.7)

⁴*Ibid.*, para. 3.1(2).

- (b) model zeroing, as applied in the original investigation at issue in this dispute⁵, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.1, 2.4, 2.4.2, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*⁶;
- (c) "simple zeroing in periodic reviews"⁷ is, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.1, 2.4, 9.3, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*⁸; and
- (d) simple zeroing, as applied in the five periodic reviews at issue in this dispute⁹, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.1, 2.4, 9.3, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.¹⁰

3. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 20 December 2007, the Panel found that "model zeroing in investigations" is, as such, inconsistent

⁵USDOC, Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Mexico, *United States Federal Register*, Vol. 64, No. 109 (8 June 1999) 30790, subsequently amended as Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Stainless Steel Sheet and Strip in Coils From Mexico, *United States Federal Register*, Vol. 64, No. 143 (27 July 1999) 40560 (Exhibit MEX-5.A submitted by Mexico to the Panel). See also Panel Report, para. 2.2.

⁶Panel Report, para. 3.1(1).

⁷According to Mexico's description, "simple zeroing in periodic reviews" occurs when the authorities compare the prices of individual export transactions against monthly weighted average normal values and treat as zero the results of comparisons where the export price exceeds the monthly weighted average normal value, when aggregating comparison results in order to calculate a margin of dumping for the product as a whole. (See *ibid.*, paras. 2.1 and 7.7)

In our discussion, we use the term "periodic review" to describe the "periodic review of the amount of [anti-dumping] duty" as required by Section 751(a) of the United States Tariff Act of 1930 (the "Tariff Act"). That provision requires the USDOC to review and determine the amount of any anti-dumping duty at least once during each 12-month period beginning on the anniversary of the date of publication of an anti-dumping duty order if a request for such a review has been received. However, in the case of the first assessment proceeding following the issuance of the Notice of Antidumping Duty Order, 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.

⁸Panel Report, para. 3.1(3).

⁹The five periodic reviews challenged by Mexico are listed in Exhibits MEX-5.B through MEX-5.F submitted by Mexico to the Panel; further details may be found in Panel Report, para. 2.2.

¹⁰Panel Report, para. 3.1(4).

with Article 2.4.2 of the *Anti-Dumping Agreement*¹¹, and that the USDOC acted inconsistently with this provision by using model zeroing in the original investigation at issue.¹² However, the Panel found that "simple zeroing in periodic reviews" is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*, and that, accordingly, the USDOC did not act inconsistently with these provisions by using simple zeroing in the five periodic reviews at issue.¹³

4. On 31 January 2008, Mexico notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal¹⁴ pursuant to Rule 20 of the *Working Procedures for Appellate Review*¹⁵ (the "*Working Procedures*"). On 7 February 2008, Mexico filed an appellant's submission.¹⁶ On 25 February 2008, the United States filed an appellee's submission¹⁷, and Chile, the European Communities, Japan, and Thailand each filed a third participant's submission.¹⁸ On the same day, China notified its intention to attend the oral hearing as a third participant.¹⁹

¹¹Panel Report, para. 8.1(a). However, the Panel did not recommend to the Dispute Settlement Body that it request the United States to bring its model zeroing procedures into conformity with its WTO obligations under the covered agreements because of its earlier finding that the United States had abandoned that practice as from 22 February 2007. (*Ibid.*, para. 7.45) The Panel explained that it "fail[ed] to see what purpose would be served by a recommendation relating to a measure that no longer exists." (*Ibid.*, para. 7.50) The Panel exercised judicial economy in relation to Mexico's claims under Articles VI:1 and VI:2 of the GATT 1994, Articles 2.1, 2.4, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement* regarding "model zeroing in investigations". (*Ibid.*, para. 8.2(a))

¹²*Ibid.*, para. 8.1(b).

¹³*Ibid.*, para. 8.1(c) and (d). The Panel exercised judicial economy in relation to Mexico's claims under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* regarding "simple zeroing in periodic reviews". (*Ibid.*, para. 8.2(b))

¹⁴WT/DS344/7 (attached as Annex I to this Report).

¹⁵WT/AB/WP/5, 4 January 2005.

¹⁶Pursuant to Rule 21 of the *Working Procedures*. Along with its appellant's submission, which it filed in Spanish, Mexico provided a courtesy English translation and an English executive summary of its appellant's submission. On 8 February 2008, Mexico provided an executive summary of its appellant's submission in Spanish to the Appellate Body and to the United States and the third participants. In view of the fact that Mexico filed the appellant's submission in Spanish and the executive summary in English on the due date, and that the Spanish executive summary was filed after the deadline for filing an appellant's submission, the Appellate Body Division hearing the appeal informed the participants and the third participants that it considered the Spanish version of the executive summary to be a courtesy translation.

¹⁷Pursuant to Rule 22 of the *Working Procedures*.

¹⁸Pursuant to Rule 24(1) and (3) of the *Working Procedures*. On 29 February 2008, the participants and the third participants were provided a courtesy English translation, prepared by the WTO Language Services and Documentation Division, of Chile's third participant's submission originally filed in Spanish on 25 February 2008.

¹⁹Pursuant to Rule 24(2) of the *Working Procedures*.

5. By letter dated 8 February 2008, Mexico requested authorization from the Appellate Body to correct a clerical error in its appellant's submission, and two clerical errors in the executive summary of that submission, pursuant to Rule 18(5) of the *Working Procedures*. On 12 February 2008, the Appellate Body Division hearing the appeal invited the United States and the third participants to comment on Mexico's request. No objections to Mexico's request were received and, on 14 February 2008, the Division authorized Mexico to correct the identified clerical errors.

6. The oral hearing in this appeal was held on 6 March 2008. The participants and the third participants, with the exception of China, made oral statements and responded to questions posed by the Members of the Division hearing the appeal.

7. During the course of the appeal, the Division received a request pertaining to a procedural matter. By letter dated 3 March 2008, the European Communities requested the Appellate Body to clarify whether the United States' appellee's submission was considered to be filed with the Appellate Body within the meaning of Rule 18(1) of the *Working Procedures*. The European Communities pointed out that the Working Schedule for this appeal, communicated to the parties on 1 February 2008, provided for the United States' appellee's submission to be filed by Monday, 25 February 2008, at 5:00 p.m. However, the electronic version of the United States' appellee's submission was sent to the Appellate Body by e-mail only at 7:56 p.m., and the European Communities presumes that printed copies were delivered to the Appellate Body after that time. As a result, the United States "had significant time to examine the filings of the Third Participants and eventually adjust its own submission prior to filing."²⁰ At the oral hearing, the European Communities reiterated its request that the Appellate Body clarify whether it considers the United States' appellee's submission to be filed within the meaning of Rule 18(1) of the *Working Procedures*, and what the consequences are, if any, of a late filing.²¹

²⁰Letter from the European Communities to the Appellate Body Secretariat, dated 3 March 2008, p. 2. (emphasis omitted)

²¹This issue is addressed at, *infra*, paras. 163 and 164.

II. Arguments of the Participants and the Third Participants

A. Claims of Error by Mexico – Appellant

1. Simple Zeroing, As Such, in Periodic Reviews

- (a) Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*

8. Mexico submits that the Panel erred in finding that simple zeroing in periodic reviews is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*. Mexico requests the Appellate Body to reverse this finding and to find, instead, that simple zeroing in periodic reviews is, as such, inconsistent with these provisions. Mexico's appeal is based on several arguments.

9. First, Mexico argues that, in any anti-dumping proceeding—including periodic reviews under Article 9.3 of the *Anti-Dumping Agreement*—"the margin of dumping must be calculated in respect of individual exporters or foreign producers subject to such proceeding and for the product under consideration taken as a whole."²² Once the authorities define the product under consideration, the scope of that definition also determines the scope of the authorities' dumping determination. Therefore, dumping as defined in the GATT 1994 and the *Anti-Dumping Agreement* cannot exist in relation to a specific type, model, or category of the product under consideration or in relation to individual export transactions. It follows that, when the calculation of dumping involves multiple comparisons between normal value and export price, the results of the intermediate comparisons are not "margins of dumping" but, rather, "inputs to be taken into account in the determination of the margin of dumping for the product under consideration as a whole for each known exporter or foreign producer."²³ This is also borne out by the context provided by Articles 6.10, 9.4, and 9.5 of the *Anti-Dumping Agreement*. On this basis, Mexico argues that Article 9.3 requires investigating authorities to aggregate the results of all the comparisons when calculating the overall margin of dumping, and that the results of intermediate comparisons cannot be selectively ignored or disregarded. By contrast, the Panel's "reasoning"²⁴ inappropriately permits margins of dumping to be

²²Mexico's appellant's submission, para. 31 ("*el margen de dumping debe calcularse con respecto a los exportadores individuales y productores extranjeros sujetos a dicho procedimiento y para el producto objeto a consideración tomado en su conjunto*").

²³*Ibid.*, para. 32 ("*insumos que deben tomarse en cuenta en la determinación de margen de dumping para el producto considerado tomado en su conjunto para cada exportador o productor extranjero identificado*").

²⁴*Ibid.*, para. 8 ("*el razonamiento*").

defined differently under different contexts or systems of administration, which is contrary to the uniform definition of "dumping" provided for in Article 2.1 of the *Anti-Dumping Agreement*.

10. Secondly, Mexico contends that the Panel erred by concluding that anti-dumping measures are concerned with the pricing behaviour of importers in relation to individual import transactions. For Mexico, there is no support for such a conclusion in the text or context of the relevant agreements. As the Appellate Body has confirmed, margins of dumping do not exist for individual importers or transactions but, rather, they are related to the pricing behaviour of exporters and foreign producers with respect to their exports of the product under consideration.²⁵ Mexico rejects the Panel's reliance on Article VII of the GATT 1994 in support of the proposition that the word "product" may be interpreted on a transaction-specific basis. That Article is concerned with the amount of customs duties to be applied on each import transaction, and therefore it provides an "entirely different"²⁶ context to the term "product" than the one provided for in Article VI, which is concerned with the pricing behaviour of exporters and foreign producers. Mexico also emphasizes that the Panel's interpretation of the term "product" cannot be reconciled with the investigating authority's duty to make an injury determination on the basis of all the sales made by an exporter or foreign producer of that product.

11. In addition, Mexico suggests that, by referring to an importer's margin of dumping, a concept for which there is no textual support in the *Anti-Dumping Agreement*, the Panel mistakenly equated the system for collection of anti-dumping duties from individual importers with the rules that must be followed for calculating margins of dumping for individual exporters. According to Mexico, liability to pay anti-dumping duties may be based on a specific transaction. However, the rate and amount of that payment is subject to the ceiling provided in Article 9.3, which is the margin of dumping calculated for the exporter or foreign producer under Article 2 of the *Anti-Dumping Agreement*. Mexico characterizes as "factually incorrect"²⁷ the Panel's assertion that the obligation to pay anti-dumping duties is not incurred on the basis of a comparison of an exporter's total sales but, rather, on the basis of an individual sale between the exporter and its importer.

12. Thirdly, Mexico argues that the Panel erred in concluding that the existence of a "prospective normal value" system under Article 9.4(ii) of the *Anti-Dumping Agreement* lends contextual support to the view that "'anti-dumping duties can be determined on a transaction-specific basis' under

²⁵See Mexico's appellant's submission, para. 47 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 111).

²⁶*Ibid.*, para. 44 ("*totalmente distintos*").

²⁷*Ibid.*, para. 50 ("*factualmente incorrecta*").

retrospective systems such as that employed by the United States."²⁸ The Panel's contextual arguments erroneously conflate the amount of duty that is permitted to be collected from the importer under a prospective normal value system and the exporter's "margin of dumping". The Appellate Body has consistently distinguished between these two distinct concepts.²⁹ According to Mexico, "it is precisely because the amount of duties collected from importers under a prospective normal value system may differ from the actual 'margin of dumping' of the exporter or producer, that Article 9.3.2 requires an opportunity for a review."³⁰ While the *Anti-Dumping Agreement* provides for flexibility in the structure of such collection systems, all such systems are subject to the limitation in Article 9.3 that anti-dumping duties collected from the importers "shall not exceed the margin of dumping established under Article 2", for the exporter or foreign producer concerned.

13. Fourthly, Mexico disputes the relevance to this proceeding of the Panel's findings concerning the purported "mathematical equivalence" in the results that would be obtained in the absence of zeroing under the weighted average-to-weighted average ("W-W") comparison methodology provided for in the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement* and the weighted average-to-transaction ("W-T") comparison methodology provided for in the second sentence of Article 2.4.2. The comparison methodology provided for in the second sentence of Article 2.4.2 represents an exceptional rule that is not at issue in this dispute. Mexico points out that the Appellate Body has consistently rejected the "mathematical equivalence" argument on the basis that it "is based on a set of assumptions that may not hold in all situations".³¹ The Appellate Body has also clarified that the comparison methodology provided for in the second sentence of Article 2.4.2 is an exception, and cannot therefore determine the interpretation of the two methodologies provided for in the first sentence of that provision.³² Mexico further submits that the Panel improperly dismissed Mexico's demonstration that W-T comparisons will not yield the same result as W-W comparisons if monthly normal values are used within the targeted pattern, as foreseen under the USDOC Regulations implementing Article 2.4.2.³³ For Mexico, there is no textual support for the Panel's conclusion that Article 2.4.2 precludes the use of different averaging periods between the W-W and W-T comparison

²⁸Mexico's appellant's submission, para. 56 ("*de valor normal prospectivo*"; "*los 'derechos antidumping puede[n] realizarse sobre la base de transacciones específicas' conforme a un sistema retrospectivo como tiene Estados Unidos*") (quoting Panel Report, para. 7.131).

²⁹See *ibid.*, para. 60 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 162).

³⁰*Ibid.* ("*es precisamente porque el monto de los derechos recaudados de los importadores conforme al sistema de valor normal prospectivo puede ser distinto del 'margen de dumping' real del exportador o productor, que el artículo 9.3.2 dispone una oportunidad para revisarlo*").

³¹*Ibid.*, para. 66 ("*el argumento de equivalencia matemática se basa en una serie de suposiciones que pudieran no ser aplicables en todas las situaciones*") (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 133; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99).

³²See *ibid.* (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 133; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97).

³³See *ibid.*, paras. 68 and 74.

methodologies. To the contrary, Article 2.4 of the *Anti-Dumping Agreement* requires the use of shorter averaging periods in W-T comparisons, by stipulating that the comparison between export price and normal value be made "at as nearly as possible the same time".

14. Finally, Mexico argues that the Panel improperly sought to justify its conclusions on the grounds of "undesirable results"³⁴ that would arise from a prohibition of simple zeroing. For example, the Panel asserted that a prohibition of simple zeroing would inappropriately "expand the scope of periodic reviews"³⁵ to cover all export shipments of an exporter or foreign producer. Mexico disputes this conclusion, arguing that the USDOC Regulations do not give investigating authorities the discretion to limit the scope of the reviews to only exports pertaining to the importer requesting the review. According to Mexico, importers may request the USDOC to initiate a periodic review of any exporter or foreign producer from which they have imported during the review period. However, "if an exporter is reviewed at all, the USDOC will examine *all* the export sales of that exporter or producer."³⁶ Mexico also argues that, under United States law, exporters or the domestic industry may request the initiation of a periodic review, and that in such cases the scope of the review will not be limited to sales made to specific importers. Mexico further dismisses as speculative the Panel's conclusion that a prohibition of simple zeroing will conflict with the remedial purposes of anti-dumping duties by creating a "competitive disincentive to engage in fair trade"³⁷ among individual importers. Even if such considerations were relevant to resolving this dispute, Mexico observes that, "[t]o the extent that the anti-dumping measures imposed are intended to create incentives for a change in pricing behaviour ..., the party to be encouraged logically is the exporter or producer."³⁸ In addition, Mexico argues that, whereas it is clear from the text of the *Anti-Dumping Agreement* that all imports from an exporter or foreign producer found to be dumping may be included in the volume of "dumped imports" for the purposes of determining injury, the Panel's reasoning implies that, for purposes of duty assessment, "the same transactions are treated as 'non-dumped' for one purpose, and as 'dumped' for another purpose."³⁹ Such reasoning runs contrary to "the requirement for consistent treatment of a product"⁴⁰ in determining dumping and its injurious effect on the domestic industry.

³⁴Mexico's appellant's submission, para. 75 (quoting Panel Report, para. 7.146).

³⁵*Ibid.*, para. 81 (quoting Panel Report, para. 7.146).

³⁶*Ibid.*, para. 83 ("*si examina a un exportador, el USDOC examinará todas las ventas de exportaciones del exportador o productor*"). (original emphasis)

³⁷*Ibid.*, para. 76 (quoting Panel Report, para. 7.146).

³⁸*Ibid.*, para. 78 ("*En la medida que las medidas antidumping impuestas pretenden crear incentivos para modificar el comportamiento en materia de precios ..., la parte que lógicamente recibe este incentivo es el exportador o productor*").

³⁹*Ibid.*, para. 87 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 128).

⁴⁰*Ibid.*, para. 88 ("*el requisito de trato consistente a un producto*") (referring to Appellate Body Report, *US – Softwood Lumber V*, para. 99). See also *ibid.*, para. 46.

(b) Article 2.4 of the *Anti-Dumping Agreement*

15. Mexico argues that the Panel erred in finding that simple zeroing in periodic reviews is not, as such, inconsistent with Article 2.4 of the *Anti-Dumping Agreement*. Mexico requests the Appellate Body to reverse the Panel's finding and to find, instead, that simple zeroing in periodic reviews is inconsistent with this provision.

16. Referring to the Appellate Body's decision in *US – Zeroing (Japan)*, Mexico contends that simple zeroing is "inherently biased"⁴¹ and hence violates the requirement in Article 2.4 to make a "fair comparison" between normal value and export price; it "artificially inflates"⁴² the margin of dumping because export prices that exceed the normal value are systematically ignored. Mexico also points out that, in reaching its finding that simple zeroing in periodic reviews is not inconsistent with Article 2.4, the Panel relied on its erroneous conclusion that simple zeroing is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*.

17. In addition, Mexico argues that the Panel failed to address certain arguments presented by Mexico in relation to Article 2.4. In particular, Mexico faults the Panel for failing to respond to its arguments that simple zeroing in periodic reviews "distorts the prices of certain export transactions by artificially reducing them, unjustifiably inflating the apparent magnitude of dumping", and that simple zeroing "is not impartial, even-handed, or unbiased".⁴³ Mexico submits that, by not considering these arguments, the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU.

2. Simple Zeroing As Applied in Periodic Reviews

18. For the same reasons as those set out above, Mexico submits that the Panel erred in finding that simple zeroing, as applied by the USDOC in the five periodic reviews at issue in this dispute, is not inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*. Mexico therefore requests the Appellate Body to reverse this finding and to find, instead, that the United States acted inconsistently with its obligations under these provisions.⁴⁴

⁴¹Mexico's appellant's submission, para. 90 ("*intrínsecamente parcial*").

⁴²*Ibid.* ("*infla de manera artificial*").

⁴³*Ibid.*, para. 92 ("*distorsiona los precios de ciertas transacciones al reducir de manera artificial e inflar, sin justificación, la magnitud del dumping*"; "*no es imparcial, equitativa ni justa*").

⁴⁴See *ibid.*, paras. 93 and 94.

3. Article 11 of the DSU

19. Finally, Mexico argues that the Panel acted inconsistently with Article 11 of the DSU by refusing to follow Appellate Body reports adopted by the DSB that address identical issues with respect to the same party—the United States. More specifically, Mexico asserts that, by making findings and reaching conclusions that are "identical" to those that have already been rejected or reversed by previous Appellate Body reports adopted by the DSB, the Panel has failed to comply with its duty under Article 11 of the DSU to assist the DSB in discharging its responsibilities under the DSU.⁴⁵

20. Mexico acknowledges that, in the WTO dispute settlement system, a panel is generally not bound by previous Appellate Body findings or conclusions. However, quoting the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*, Mexico asserts that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels [...] where the issues are the same."⁴⁶

21. Furthermore, Mexico emphasizes that a panel's duties under Article 11 are underpinned by Articles 3.2 and 3.3 of the DSU, which establish that the dispute settlement system is "a central element in providing security and predictability to the multilateral trading system", and that the "prompt settlement of situations", in which a Member considers that any benefits accruing to it are being impaired by measures taken by another Member, is "essential to the effective functioning of the WTO".⁴⁷ Mexico suggests that the Panel's failure to follow established Appellate Body precedent has forced it to appeal findings and conclusions of the Panel that are identical to those that have already been overturned by the Appellate Body in previous disputes that involved the same measures and the same responding party. According to Mexico, this is inconsistent with the Panel's function to assist the DSB in discharging its responsibilities under the DSU because it interferes with the prompt settlement of this dispute, thereby frustrating the effective functioning of the WTO dispute settlement system and undermining its security and predictability. The Panel's failure to follow previous Appellate Body reports, if left uncorrected, would diminish Mexico's rights under the covered agreements relative to other WTO Members.

⁴⁵See Mexico's appellant's submission, para. 97 ("*idénticas*").

⁴⁶*Ibid.* (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188).

⁴⁷See *ibid.*, para. 95.

B. *Arguments of the United States – Appellee*

1. Simple Zeroing, As Such, in Periodic Reviews

- (a) Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*

22. The United States argues that the Panel was correct in finding that simple zeroing in periodic reviews is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*. In the United States' view, Mexico's interpretation of these provisions contradicts, for several reasons, the ordinary meaning of the relevant treaty text.

23. First, the United States submits that the phrase "all comparable export transactions" in the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement* does not provide a basis for prohibiting zeroing in periodic reviews. According to the United States, that phrase and the rationale attached to it in previous Appellate Body reports are limited only to zeroing in W-W comparisons in investigations, and they do not extend to periodic reviews pursuant to Article 9 of the *Anti-Dumping Agreement*.⁴⁸

24. Secondly, the United States maintains that Mexico's claim rests 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'"⁴⁹, and that dumping cannot occur with respect to an individual transaction. According to the United States, this leads to "a broad[] prohibition on zeroing in all contexts [in which] 'multiple comparisons' are made"⁵⁰, and expands the prohibition of zeroing to transaction-to-transaction ("T-T") comparisons in investigations and in periodic reviews under Article 9 of the *Anti-Dumping Agreement*. Yet, according to the United States, the notion of "product as a whole" has no textual foundation in the covered agreements.

25. The United States submits that the term "product" is used in different ways in different contexts in different provisions, and that it does not exclusively refer to "product as a whole". The term "product" can have either a collective meaning or an individual meaning. Article 2.6 of the *Anti-Dumping Agreement* uses the term "product" in the collective sense; by contrast, according to the United States, 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

⁴⁸United States' appellee's submission, para. 39.

⁴⁹*Ibid.*, para. 40 (quoting Mexico's first written submission to the Panel, para. 171).

⁵⁰*Ibid.*

transaction".⁵¹ The United States maintains that neither the *Anti-Dumping Agreement*, nor the GATT 1994, provides a textual basis for requiring that a margin of dumping necessarily be established on an aggregate basis for the "product as a whole".

26. Thirdly, the United States maintains that the Appellate Body's interpretation of the term "margin of dumping" is at odds with long-standing GATT/WTO practice and the ordinary meaning of the term. The United States disagrees with the interpretation that any margins arising from individual transactions or individual importers are not "margins of dumping" *per se* but, instead, represent only inputs to be taken into account for calculating an aggregate margin of dumping for each exporter or foreign producer.⁵² According to the United States, the text and the context of the agreements lend support to a transaction-specific meaning for the term "margin of dumping".

27. The United States argues that the term "margin of dumping" forms part of "a series of special terms that many [negotiators] had ... negotiated, interpreted, applied, debated, fought over, and discussed for years"⁵³ under the *General Agreement on Tariffs and Trade 1947* (the "GATT 1947"), the *Kennedy Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*⁵⁴ (the "*Kennedy Round Anti-Dumping Code*"), and the *Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*⁵⁵ (the "*Tokyo Round Anti-Dumping Code*"). The United States further asserts that Article VI of the GATT 1947, the *Tokyo Round Anti-Dumping Code*, and GATT 1947 practice were part of the "surrounding circumstances"⁵⁶ of the Uruguay Round negotiations and that, therefore, they constitute an important interpretative tool for ascertaining the "ordinary meaning" of the term "margin of dumping". The United States submits that the term "margin of dumping" first appeared in Article VI:1 of the GATT 1947, and was subsequently incorporated into the *Kennedy Round Anti-Dumping Code*, the *Tokyo Round Anti-Dumping Code*, the GATT 1994, and the *Anti-Dumping Agreement*.⁵⁷ None of these agreements referred to a requirement to aggregate the results of various price comparisons for the "product as a whole" to arrive at a single margin of dumping. The United States maintains that, on the contrary, the 1960 Report of the Group of Experts on Anti-Dumping and Countervailing Duties⁵⁸ (the "1960 Group of Experts Report"), the practice of GATT Members with active anti-dumping programmes, and the

⁵¹United States' appellee's submission, para. 47.

⁵²See *ibid.*, para. 53.

⁵³*Ibid.*, para. 55.

⁵⁴TN.64/98, 20 June 1967.

⁵⁵BISD 26S/171, entered into force 1 January 1980.

⁵⁶United States' appellee's submission, para. 56 (referring to Appellate Body Report, *EC – Chicken Cuts*, paras. 175 and 176).

⁵⁷See United States' appellee's submission, para. 57.

⁵⁸GATT Second Report of the Group of Experts, Anti-Dumping and Countervailing Duties, GATT Document L/1141, adopted 27 May 1960, BISD 9S/194.

negotiating history of the *Anti-Dumping Agreement*, demonstrate that the concepts of "dumping" and "margin of dumping" had long been understood in GATT practice as referring to individual transactions.⁵⁹ In this respect, the United States argues that these terms had a "special meaning"⁶⁰ in the sense of Article 31(4) of the *Vienna Convention on the Law of Treaties*⁶¹ (the "*Vienna Convention*").

28. In this respect, the United States makes reference to two pre-WTO panels established in 1991 under Article 15 of the *Tokyo Round Anti-Dumping Code* to consider challenges by Japan and by Brazil to the European Communities' affirmative anti-dumping determinations in *EC – Audio Cassettes* and in *EEC – Cotton Yarn*, respectively. In both cases, the panels found that the European Communities' refusal to consider "negative dumping margins" arising from non-dumped sales was not a violation of the *Tokyo Round Anti-Dumping Code*. The United States claims that this demonstrates that "there was no 'common understanding' among the Contracting Parties at the time that the term 'margin of dumping' incorporated an implicit prohibition of zeroing."⁶²

29. Fourthly, the United States disagrees with Mexico that Article 9.3 of the *Anti-Dumping Agreement* requires investigating authorities to aggregate the results of all comparisons when calculating the overall "margin of dumping" in periodic reviews. The United States contends that neither Article 9.3 of the *Anti-Dumping Agreement*, nor Article VI of the GATT 1994, speaks to the aggregation of individual transactions in periodic reviews or contains an explicit or implicit prohibition of zeroing. The United States maintains that import duties are assessed on individual entries resulting from individual transactions. Consequently, the obligation set forth in Article 9.3, to assess no more in anti-dumping duties than the margin of dumping, is applicable at the level of individual transactions as well. The United States refers to the findings of the panels in *US – Zeroing (Japan)* and *US – Zeroing (EC)* in support of its contention that the actual liability for anti-dumping duties accrues to individual importers that seek to enter such goods into the market where there is an anti-dumping order.

30. Fifthly, the United States asserts that the relevant context speaks against Mexico's contention that Article VI of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* bar the calculation of duties on the basis of individual transactions. The United States finds contextual support in Article 9.2 of the *Anti-Dumping Agreement*, arguing that this provision recognizes that duties can vary on a case-by-case basis, and do not consist of broad aggregates. In the United States' view, Article 9.2

⁵⁹See United States' appellee's submission, para. 64.

⁶⁰*Ibid.*, para. 56.

⁶¹Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

⁶²United States' appellee's submission, para. 62.

also recognizes that such duty collection applies to the imported goods and not to the exporter or foreign producer, because it refers to the collection of duties on "imports", which necessarily encompasses individual transactions. Furthermore, prospective normal value systems referred to in Article 9.4(ii) of the *Anti-Dumping Agreement* also reflect the notion of transaction-based duty collection.

31. The United States further argues that a prohibition of zeroing that applies beyond the context of W-W comparisons in investigations would be inconsistent with the principle of effective treaty interpretation, because it would render useless and redundant the remaining text of Article 2.4.2 of the *Anti-Dumping Agreement*, which provides for an alternative targeted dumping comparison methodology. The targeted dumping methodology in the second sentence of Article 2.4.2 is a limited exception that was designed to address situations where a symmetrical comparison methodology would mask the existence of dumping.⁶³ Referring to the "mathematical equivalence" argument, the United States argues that "[i]t 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 [Anti-Dumping] Agreement".⁶⁴ Therefore, in the United States' view, a prohibition of zeroing that applies also to the targeted dumping comparison methodology "would do major violence to the text by rendering whole textual provisions of the agreement 'inutile'".⁶⁵

32. The United States maintains that, if the Appellate Body nonetheless concludes that the relevant legal terms of the *Anti-Dumping Agreement* are ambiguous, it would be appropriate and consistent with Article 32 of the *Vienna Convention* to rely on supplementary means of interpretation, such as the preparatory work and the circumstances of its conclusion.⁶⁶ The United States submits that the negotiating history of the Uruguay Round *Anti-Dumping Agreement* and panel reports in dispute settlement proceedings that were underway at the time the *Anti-Dumping Agreement* was negotiated shed light on the meaning of the terms and provisions at issue in the present appeal.⁶⁷

⁶³See United States' appellee's submission, para. 88.

⁶⁴*Ibid.*, para. 90.

⁶⁵*Ibid.*, para. 93.

⁶⁶See *ibid.*, para. 94.

⁶⁷See *ibid.*, paras. 94-97.

33. The United States argues that an examination of the historical background⁶⁸ of the *Anti-Dumping Agreement* demonstrates that the negotiators were not able to agree on a broad prohibition of zeroing or a requirement to aggregate individual transactions under Article 9.3.⁶⁹ According to the United States, "[n]o consensus could be reached because despite extensive efforts by Japan, Hong Kong, Singapore, and the Nordic Countries, their proposals were firmly opposed by the [European Communities], the United States and Canada".⁷⁰

34. The United States points out that its retrospective duty assessment system is designed to ensure that an individual importer's liability reflects the actual level of dumping involved in that importer's transactions. Accordingly, an importer should not have to pay duties because another importer bought dumped goods, or escape liability because another importer has not bought dumped goods.⁷¹ The United States argues that, if, following the Appellate Body's reasoning in *US – Zeroing (EC)* and *US – Zeroing (Japan)*, "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 [it] has no control."⁷² According to the United States, this would also mean that "the importer who is engaged in dumped transactions would receive a windfall, because [it] may escape antidumping duties, or have [its] liability sharply reduced through the actions of another importer who behaved responsibly by eliminating its dumping margin."⁷³ The United States further submits that Mexico's interpretation of Article 9.3 as requiring the reduction of duty liability to account for non-dumped transactions is also inconsistent with the treatment of equivalent situations in prospective normal value systems.⁷⁴

(b) Article 2.4 of the *Anti-Dumping Agreement*

35. The United States requests the Appellate Body to uphold the Panel's finding that the use of simple zeroing in periodic reviews is not inconsistent with Article 2.4 of the *Anti-Dumping*

⁶⁸The "historical background" that the United States invokes as support for its position consists of pre-WTO panel reports and certain proposals submitted by various delegations in the context of the negotiations on the *Anti-Dumping Agreement*. For instance: Panel Report, *EC – Audio Cassettes* (unadopted); Panel Report, *EEC – Cotton Yarn* (adopted); Communications from Japan, MTN.GNG/NG8/W/11 and MTN.GNG/NG8/W/30; Proposals by Hong Kong, China, MTN.GNG/NG8/W/51/Add.1 and MTN.GNG/NG8/W/46; Proposal by Singapore, MTN.GNG/NG8/W/55; and Proposal by the Nordic Countries, MTN.GNG/NG8/W/76. (See United States' appellee's submission, paras. 114-128)

⁶⁹See United States' appellee's submission, paras. 114, 126, and 128.

⁷⁰*Ibid.*, para. 128.

⁷¹See *ibid.*, para. 101.

⁷²*Ibid.*, para. 102.

⁷³*Ibid.*

⁷⁴See *ibid.*, para. 103.

Agreement. The United States submits that the Panel was correct in rejecting Mexico's claims under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*. The United States argues that, in doing so, the Panel rejected the premise underlying Mexico's claim under the "fair comparison" requirement in Article 2.4. In addition, the United States asserts that the "fair comparison" language in Article 2.4 encompasses only the specific requirements set forth in that provision and does not contain a broad-ranging mandate to determine whether all dumping calculations are "fair" or "unfair".⁷⁵

36. The United States further observes that the term "fair comparison" originated in the 1967 *Kennedy Round Anti-Dumping Code*, where the negotiators sought to clarify the use of the various adjustments in price comparisons as those listed in Article 2.4 of the *Anti-Dumping Agreement*. The United States maintains that this language was incorporated with only minor modifications into the *Tokyo Round Anti-Dumping Code*. Later, it was included in the Uruguay Round *Anti-Dumping Agreement* as a stand-alone sentence. However, the "fair comparison" requirement has always been understood to refer to the various adjustments listed in Article 2.4, and not as a freestanding obligation relating to all anti-dumping calculations.⁷⁶ In this context, the United States makes reference to the findings of the panels in *EC – Audio Cassettes* and *EEC – Cotton Yarn*.⁷⁷ According to the United States, these pre-WTO panel reports demonstrate that "fair comparison" refers only to allowances or adjustments to be made to calculate normal value and the export price, and not to zeroing.⁷⁸

2. Simple Zeroing As Applied in Periodic Reviews

37. The United States requests the Appellate Body to reject Mexico's "as applied" claims that simple zeroing in the five periodic reviews at issue is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*. In the United States' view, the Panel properly found that simple zeroing, as such, does not violate the GATT 1994 or the *Anti-Dumping Agreement*. The United States points out that Mexico's "as applied" claims are dependent upon the outcome of its appeal of the Panel's findings relating to its "as such" claims.⁷⁹

⁷⁵United States' appellee's submission, para. 69.

⁷⁶See *ibid.*, para. 67.

⁷⁷See *ibid.*, paras. 67 and 69.

⁷⁸See *ibid.*, paras. 109-113.

⁷⁹See *ibid.*, para. 129.

3. Article 11 of the DSU

38. The United States disagrees with Mexico that the Panel failed to fulfil its responsibilities under Article 11 of the DSU by not adhering to previous Appellate Body findings. The United States refers to the Appellate Body Report in *Japan – Alcoholic Beverages II*, stating that adopted reports "are not binding, except with respect to resolving the particular dispute between the parties".⁸⁰ In the case before it, the Panel "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."⁸¹ In the view of the United States, "treat[ing] 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".⁸²

4. Article 17.6(ii) of the *Anti-Dumping Agreement*

39. The United States submits that, because its approach to periodic reviews rests on a permissible interpretation of the GATT 1994 and the *Anti-Dumping Agreement*, under Article 17.6(ii) of the *Anti-Dumping Agreement*, the Panel was required to find this approach to be in conformity with the United States' WTO obligations. Article 17.6(ii) was added to the *Anti-Dumping Agreement* in the closing days of the Uruguay Round negotiations. This, in the United States' view, reflects the negotiators' recognition that they had left certain issues unresolved in the *Anti-Dumping Agreement* and that customary rules of interpretation of public international law would not always yield only one permissible reading of a given provision. For the United States, the absence of a similar provision in other WTO agreements demonstrates that WTO Members were aware that the anti-dumping text "would pose particular challenges and in many instances would permit more than one legitimate interpretation".⁸³

40. The United States requests the Appellate Body to reject Mexico's claims. For the United States, "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."⁸⁴ According to the United States, to read a new obligation into Article VI of the GATT 1994 and the *Anti-Dumping Agreement* "would only

⁸⁰United States' appellee's submission, para. 131 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14, DSR 1996:I, 97, at 108).

⁸¹*Ibid.*, para. 131.

⁸²*Ibid.*, footnote 9 to para. 11.

⁸³*Ibid.*, para. 137.

⁸⁴*Ibid.*, para. 140.

contribute to further uncertainty and unpredictability, and further diminish the vital role of the WTO negotiations in expanding world trade."⁸⁵

C. *Arguments of the Third Participants*

1. Chile

41. Chile notes that this appeal raises the critical questions of whether panels are required to follow previously adopted Appellate Body reports addressing the same issue, and whether the Appellate Body should follow its own prior interpretation when reviewing a panel report that disregards that interpretation. Chile suggests that the Appellate Body should exercise caution in relation to Mexico's claim that the Panel violated Article 11 of the DSU by not following previous Appellate Body findings on the same issue covered in this dispute. Chile agrees with Mexico that the Panel's conclusions undermine the security and predictability of the multilateral trading system and, if upheld by the Appellate Body, would prejudice Mexico in relation to other WTO Members. Nevertheless, the Panel's findings cannot be considered a failure to conduct an objective assessment of the matter pursuant to Article 11 of the DSU. Chile stresses that the Appellate Body itself has only suggested that it would be "appropriate" and is "expected"⁸⁶ that panels follow previous Appellate Body findings, but has not found that they are bound to do so.

42. Chile also maintains that the Appellate Body should interpret Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement* in accordance with the rules of treaty interpretation codified in the *Vienna Convention*. That there are previous Appellate Body findings on zeroing, and that this issue is being addressed under the Doha Round negotiations, are circumstances "which must be duly appreciated but must not serve as a justification for the Appellate Body to refrain from exercising the functions assigned to it."⁸⁷

43. Finally, Chile stresses that zeroing is designed to inflate artificially margins of dumping and to generate a finding of dumping even where no dumping exists. In Chile's view, zeroing is, therefore, inconsistent with the "fair comparison" requirement contained in Article 2.4 of the *Anti-Dumping Agreement*.

⁸⁵United States' appellee's submission, para. 140.

⁸⁶Chile's third participant's submission, p. 2 ("*apropiado*"; "*se espera que así lo hagan*").

⁸⁷*Ibid.* ("*que deben ser ponderadas en su debida dimensión pero no servir de justificación para que el [Órgano de Apelación] se abstenga de ejercer las funciones que le han sido encomendadas*").

2. European Communities

44. The European Communities agrees with Mexico that the Panel erred in finding that simple zeroing in periodic reviews is not, as such, and as applied in the five periodic reviews at issue in this dispute, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*. The European Communities requests the Appellate Body to reverse these findings, and to find, instead, that simple zeroing in periodic reviews is, as such, and as applied in the five periodic reviews at issue in this dispute, inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.1, 2.4, 2.4.2, 9.3, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.

45. The European Communities maintains that simple zeroing in periodic reviews is inconsistent with the requirements in Article VI of the GATT 1994 and Articles 2 and 9.3 of the *Anti-Dumping Agreement* to establish "dumping" and "margins of dumping" for the product as a whole. This requirement entails that "dumping" and "margins of dumping" cannot be found to exist only for a type, model, or category of that product, including "a 'category' of one or more relatively low priced export transactions".⁸⁸ Investigating authorities may undertake multiple comparisons of the weighted average normal value and individual export transactions in a periodic review; however, the results of all such multiple comparisons must be aggregated in order to establish the margin of dumping for the product as a whole. According to the European Communities, there is no textual basis in the *Anti-Dumping Agreement* for the Panel's conclusion that investigating authorities could take into account only certain comparison results, while disregarding others, when calculating margins of dumping in periodic reviews. Instead, the *Anti-Dumping Agreement* requires that investigating authorities establish "dumping" and "margins of dumping" for a product in all anti-dumping proceedings, including in periodic reviews. Moreover, the European Communities argues that Articles 2.2.1, 2.7, 9.4, and Annex II to the *Anti-Dumping Agreement* suggest that, where Members have sought to allow investigating authorities to disregard "certain matters", "they did so by way of express reservation."⁸⁹

46. In addition, the European Communities maintains that simple zeroing in periodic reviews is inconsistent with the "overarching and independent obligation"⁹⁰ in Article 2.4 of the *Anti-Dumping Agreement* to make a fair comparison between export price and normal value. According to the European Communities, simple zeroing in periodic reviews contravenes the "fair comparison"

⁸⁸European Communities' third participant's submission, para. 59. (emphasis omitted)

⁸⁹*Ibid.*, para. 66. (emphasis omitted)

⁹⁰*Ibid.*, para. 70.

requirement, because it precludes investigating authorities from taking equal account of all the data relating to normal value and export price, and because it is "inherently biased"⁹¹ against exporters, as it artificially inflates margins of dumping irrespective of any changes in the exporter's pricing behaviour. The European Communities also suggests that the use of simple zeroing in periodic reviews could result in "unjustified and unfair discrimination"⁹² between, on the one hand, exporters subject to those proceedings and, on the other hand, exporters whose margin was calculated on the basis of W-W comparisons in original investigations without zeroing.

47. Furthermore, the European Communities argues that simple zeroing in periodic reviews is inconsistent with the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. The USDOC applies the W-T comparison methodology in periodic reviews and calculates margins of dumping exclusively on the basis of so-called dumped transactions, even though the conditions set out in the second sentence of Article 2.4.2 for the application of that methodology are not fulfilled. The European Communities contests the United States' argument that the phrase "the existence of margins of dumping during the investigation phase" limits the scope of application of Article 2.4.2 to original investigations, and argues, instead, that the disciplines of Article 2.4.2 apply equally to periodic reviews conducted under Article 9.3 of the *Anti-Dumping Agreement*. According to the European Communities, the United States relies exclusively on contextual reasoning in support of the proposition that "the word 'phase' must be given a meaning that is different from the word 'period'; and that the term 'the investigation phase' must [be interpreted as referring to] the 'original' investigation phase."⁹³ The European Communities suggests, instead, that the term "during the investigation phase" in Article 2.4.2 refers to the "existence" and not to the "establishment" of margins of dumping. Therefore, "the [p]hrase refers to a distinct period in which margins of dumping *exist*, i.e. an investigation period; and not ... a period of time in which margins of dumping are *established*."⁹⁴ In addition, the European Communities argues that the word "investigation" in Article 2.4.2 is not synonymous with the term "an investigation to determine the existence, degree and effect of any alleged dumping" in Article 5.1 of the *Anti-Dumping Agreement*.⁹⁵ Rather, the ordinary meaning of the word "investigation" indicates "a systematic examination or inquiry or a careful study of or research into a particular subject"⁹⁶; in Article 2.4.2, that particular subject is "margins of dumping". The European Communities agrees with the United States that "the ordinary meaning of

⁹¹European Communities' third participant's submission, para. 85.

⁹²*Ibid.*, para. 89.

⁹³*Ibid.*, para. 113. (emphasis omitted)

⁹⁴*Ibid.*, para. 120. (original emphasis)

⁹⁵*Ibid.*, para. 130.

⁹⁶*Ibid.*, para. 131.

the term 'during ... phase' ... has a temporal aspect to it, and coincides with 'a distinct period'.⁹⁷ However, according to the European Communities, this does not support the view that "the 'distinct period' referred to is the period of time in which the 'margins of dumping' must be established, as the [United States argues], as opposed to the period of time in which the 'margins of dumping' must have existed".⁹⁸ For these reasons, the European Communities concludes that the disciplines of Article 2.4.2 apply to periodic reviews under Article 9.3 of the *Anti-Dumping Agreement*.

48. The European Communities also refers to several contextual arguments in support of this position. In the European Communities' view, the definition of the term "margin of dumping" contained in Article VI:2 of the GATT 1994 is of "general application in all anti-dumping proceedings"⁹⁹, including duty assessment proceedings under Article 9 of the *Anti-Dumping Agreement*. Moreover, the use of the word "normally" in the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement* and the exceptional nature of the second sentence of Article 2.4.2 suggest that the obligations and methodologies contained in the first sentence of Article 2.4.2 shall apply "in most situations".¹⁰⁰ This is further supported by the reference to the disciplines of Article 2.4 in the opening sentence of Article 2.4.2. The European Communities also maintains that the reference to Article 2 contained in Article 9.3 confirms that a margin of dumping in duty assessment proceedings is to be established "by reference to the whole of Article 2".¹⁰¹ The European Communities further argues that the phrase "to determine the existence, degree and effect of alleged dumping" in Article 5.1 of the *Anti-Dumping Agreement* suggests that the word "investigation" in Article 2 does not have the special meaning attributed to it by the United States. Finally, the European Communities suggests that the "preparatory work"¹⁰² of the *Anti-Dumping Agreement* also supports this conclusion, and that the United States has failed to demonstrate that the negotiators intended the word "investigation" in Article 2.4.2 to have a special meaning in accordance with Article 31(4) of the *Vienna Convention*.¹⁰³

49. In addition, the European Communities dismisses the Panel's reliance on the existence of "prospective normal value" systems under Article 9.4(ii) of the *Anti-Dumping Agreement* as context supporting its conclusion that simple zeroing in periodic reviews is not inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*. The collection

⁹⁷European Communities' third participant's submission, para. 144.

⁹⁸*Ibid.*, para. 145.

⁹⁹*Ibid.*, para. 159.

¹⁰⁰*Ibid.*, para. 162.

¹⁰¹*Ibid.*, para. 169. (emphasis omitted)

¹⁰²*Ibid.*, para. 221. The "preparatory work" the European Communities refers to is set out in detail in *ibid.*, paras. 222-228 and footnotes thereto.

¹⁰³See *ibid.*, paras. 212-216.

of duties on the basis of a prospective normal value under that provision corresponds to an intermediate stage of duty collection, because importers can request a refund of duties collected on the basis of a prospective normal value when those duties exceed the exporter's contemporaneous margin of dumping.

50. In relation to the "mathematical equivalence" between the results of the W-W and W-T comparison methodologies absent zeroing, the European Communities maintains that the W-T comparison methodology in the second sentence of Article 2.4.2 is an exceptional methodology with no relevance for the interpretation of the other two methodologies provided for in the first sentence of Article 2.4.2. Thus, according to the European Communities, "something can perfectly well be fair as a response to targeted dumping, but unfair absent targeted dumping."¹⁰⁴ The European Communities also stresses that the results of these comparisons will not coincide if the universe of export transactions taken into account in the W-T comparison methodology is limited to the targeted pattern. The European Communities further takes issue with the Panel's concern that the prohibition of simple zeroing in periodic reviews would create an "incentive to dump" and cause "administrative inconvenience".¹⁰⁵ The European Communities points out that it is exporters, not importers, that engage in the practice of dumping, and any administrative inconvenience related to the collection of data from all importers is of no legal relevance to this dispute.

51. The European Communities argues that the Panel erred by not following previous Appellate Body findings on the same issues of law and legal interpretations involved in this dispute. In so doing, the Panel attributed to previous Appellate Body findings that have been adopted by the DSB the same legal significance as it attributed to previous panel findings that have been reversed by the Appellate Body. This subverts the hierarchical structure provided in the DSU, which confers to the Appellate Body the "final say"¹⁰⁶ on issues of law and legal interpretations developed by a panel. For the European Communities, panels are not only "expected" to follow Appellate Body conclusions in earlier disputes, "especially where the issues are the same"¹⁰⁷, but are also "*de jure*"¹⁰⁸ obliged to follow the findings of the Appellate Body where the Appellate Body has interpreted the same legal questions. This is consistent with the need to provide security and predictability to the multilateral trading system, as well as the need for prompt settlement of disputes. Moreover, the Panel's view on the value of precedent defeats the object and purpose of the appeal mechanism provided in the DSU,

¹⁰⁴European Communities' third participant's submission, para. 25. See also *ibid.*, para. 239.

¹⁰⁵*Ibid.*, para. 243 (referring to Panel Report, para. 7.146). See also *ibid.*, para. 241.

¹⁰⁶*Ibid.*, para. 39.

¹⁰⁷*Ibid.*, para. 33 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188). (emphasis added by the European Communities omitted)

¹⁰⁸*Ibid.*, para. 35.

because panels would be entitled to examine all legal issues "afresh"¹⁰⁹ in every dispute. The European Communities suggests that, in performing its treaty interpretation task under the DSU, the Appellate Body seeks to ascertain the common intent of all WTO Members in relation to the provisions of the covered agreements. For this reason, the Appellate Body's interpretation "necessarily transcends the particular facts of one case, and is not confined to the Members who are parties to a particular dispute."¹¹⁰ A rule whereby panels must follow Appellate Body findings on legal questions would not prevent panels from departing from earlier decisions, provided there are "cogent reasons"¹¹¹ for doing so. In this dispute, however, such departure on the part of the Panel was not justified, because it was grounded solely on the Panel's disagreement with previous Appellate Body findings. While panelists might not always agree with the findings of the Appellate Body on particular legal issues, the role of the Appellate Body is "to definitively settle such disagreements over points of law".¹¹² Therefore, the Appellate Body should reaffirm that all panels are not only expected, but are "obliged"¹¹³ to follow its findings in relation to the issue of zeroing.

3. Japan

52. Japan agrees with Mexico that the Panel erred in finding that simple zeroing in periodic reviews is not, as such, and as applied in the five periodic reviews at issue in this dispute, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*. Japan requests the Appellate Body to reverse these findings, and to find, instead, that simple zeroing in periodic reviews is, as such, and as applied in the five periodic reviews at issue in this dispute, inconsistent with these provisions.

53. Japan charges the Panel with ignoring the "overarching principles" of the *Anti-Dumping Agreement*, namely, that: "dumping" and "margins of dumping" are defined in relation to the "product" as a whole; dumping determinations are made in respect of each exporter or foreign producer; and the GATT 1994 and the *Anti-Dumping Agreement* are concerned with dumping that causes or threatens to cause material injury to the domestic industry.¹¹⁴ Japan argues that Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* define "dumping" and "margins of dumping" in relation to a "product *as a whole*, and not to a sub-part of the product".¹¹⁵ Therefore,

¹⁰⁹European Communities' third participant's submission, para. 42.

¹¹⁰*Ibid.*, para. 46.

¹¹¹*Ibid.*, para. 50.

¹¹²*Ibid.*, para. 55.

¹¹³*Ibid.*, para. 56. (emphasis omitted)

¹¹⁴Japan's third participant's submission, para. 26.

¹¹⁵*Ibid.*, para. 36 (referring to Appellate Body Report, *US – Zeroing (Japan)*, paras. 108-110, 115, and 189). (original emphasis)

neither "dumping", nor "margins of dumping", can be found to exist at the model-specific or transaction-specific level. Japan recognizes that the words "product as a whole" do not appear in the text of the *Anti-Dumping Agreement*. However, it is clear that the concepts of "dumping" and "margins of dumping" relate to the pricing behaviour of exporters and foreign producers, and cannot be established on an importer-specific basis.¹¹⁶ While liability for payment of anti-dumping duties may be calculated transaction-wise, the rate and amount of that payment, by virtue of Article 9.3 of the *Anti-Dumping Agreement*, is limited to the margin of dumping calculated for the exporter or foreign producer under Article 2. Japan further agrees with Mexico that "the obligation to levy anti-dumping duties only if the dumped imports cause or threaten to cause material injury to the domestic industry producing the like product ... cannot be fulfilled if the investigating authorities are free to disregard some or most of the sales comparisons for an exporter."¹¹⁷

54. Turning to the contextual arguments developed by the Panel, Japan argues that the Panel incorrectly found that the reference to the word "product" in Articles VI:6 and VII:3 of the GATT 1994 should be read to suggest that the word "product" in Article VI:1 may be interpreted on a transaction-specific basis. Japan submits that the term "product" in the context of Article VI:6 also refers to the "product" "as a whole". Article VII:3, in turn, deals with customs valuation of goods, which is typically performed on a transaction-specific basis. The "significant differences"¹¹⁸ in text, context, and object and purpose of Articles VI:1 and VII:3 of the GATT 1994 imply that the words "product" and "products" have different meanings in these provisions. In addition, Japan argues that the existence of prospective normal value systems provided for in Article 9.4(ii) of the *Anti-Dumping Agreement* does not indicate that simple zeroing in periodic reviews is permitted. While Article 9.4(ii) permits the imposition and collection of dumping duties on the basis of a prospective normal value, margins of dumping must still be established in accordance with Article 2, which prohibits zeroing.¹¹⁹

55. Japan further contests the Panel's conclusion that, absent zeroing, the W-T and W-W comparison methodologies would yield "mathematically equivalent" results and points out that the

¹¹⁶See Japan's third participant's submission, para. 49. Japan finds contextual support for its arguments in Article 6.10 of the *Anti-Dumping Agreement*.

¹¹⁷*Ibid.*, para. 55 (quoting Mexico's appellant's submission, para. 42 ("*la obligación de percibir derechos sólo si las importaciones que incurren en dumping causan o amenazan causar daño a la rama de producción nacional que produce el producto similar ... tampoco puede cumplirse si las autoridades investigadoras pueden libremente ignorar algunas o la mayoría de las comparaciones de ventas para un exportador*")).

¹¹⁸*Ibid.*, para. 71.

¹¹⁹See *ibid.*, para. 74.

Appellate Body has "consistently rejected"¹²⁰ the "mathematical equivalence" argument in past appeals. Japan submits that, "all that the Panel has shown is that, *in one set of circumstances*, an authority can 'permissibly' elect to develop methodologies that generate mathematical equivalence by relying on identical time periods."¹²¹ According to Japan, "[t]here is nothing novel in this position because the Appellate Body has already acknowledged that under certain conditions, equivalent outcomes are possible."¹²² Japan agrees with Mexico that "the United States' own anti-dumping legislation provides for the use of ... differential time periods in the calculation of weighted average normal values using the [W-W] methodology in investigations and the [W-T] methodology in periodic reviews, thus ensuring that different outcomes will occur."¹²³ In addition, Japan maintains that the W-T comparison methodology provided in the second sentence of Article 2.4.2 applies exclusively to situations of targeted dumping, and cannot be determinative of the question of whether simple zeroing in periodic reviews is permitted.

56. Japan submits that the "undesirable results"¹²⁴ the Panel considers would arise from a prohibition of zeroing fall under "neither text, context, object, nor purpose"¹²⁵ and are therefore irrelevant to the legal interpretation of the *Anti-Dumping Agreement*. Japan disagrees with the concerns expressed by the Panel that a prohibition of simple zeroing in periodic reviews would create a "competitive disincentive to engage in fair trade" among different importers.¹²⁶ According to Japan, authorities are not required to allocate anti-dumping duties evenly among all importers of a given exporter's merchandise. However, any allocation of anti-dumping duties is subject to the requirement under WTO law that the total amount of duties levied shall not exceed the exporter's margin of dumping. Furthermore, Japan argues that a prohibition of simple zeroing in periodic reviews would not, as the Panel found, expand the scope of periodic reviews and thus cause "administrative inconvenience"¹²⁷ to investigating authorities. Regardless of which interested party requests a periodic review, it is the exporter that is required to provide data on all sales made to the United States because importers do not have a "normal value".¹²⁸ Japan also argues that a prohibition of simple zeroing in periodic reviews would not, as the Panel found, preclude anti-dumping duties from

¹²⁰Japan's third participant's submission, para. 77 (referring to Appellate Body Report, *US – Zeroing (Japan)*, paras. 133-135; and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 97-100).

¹²¹*Ibid.*, para. 90. (original emphasis)

¹²²*Ibid.*

¹²³See *ibid.*, para. 85 and footnote 89 thereto. See also Mexico's appellant's submission, para. 83 and footnotes 64 and 65 thereto.

¹²⁴Japan's third participant's submission, para. 93 (quoting Panel Report, para. 7.146).

¹²⁵*Ibid.*, para. 94.

¹²⁶*Ibid.*, para. 95 (quoting Panel Report, para. 7.146).

¹²⁷*Ibid.*, para. 98 (quoting Panel Report, para. 7.146).

¹²⁸*Ibid.*, para. 99.

removing the injurious effects of dumping. It is only by including all export transactions in a periodic review that investigating authorities can levy dumping duties at a level no greater than that necessary to remove the injurious effect of dumping.

57. Japan argues that the Panel erred in rejecting Mexico's claim that simple zeroing in periodic reviews is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*. Japan refers to previous Appellate Body reports that have made it clear that the use of zeroing in periodic reviews is not "impartial, even-handed, or unbiased" and is therefore inconsistent with the "fair comparison" requirement contained in Article 2.4.¹²⁹

58. Finally, Japan submits that the Panel's refusal to follow previous Appellate Body reports addressing "exactly the same measures and claims"¹³⁰ amounts to a failure to conduct an objective assessment of the matter as required by Article 11 of the DSU. The adoption of Appellate Body reports by the DSB creates "legitimate expectations among WTO Members"¹³¹, and reflects a clarification of all WTO Members' rights and obligations with respect to the matter addressed in those reports. By setting aside adopted Appellate Body findings on the same matter, the Panel "d[id] not bring the required degree of objectivity to its work, substituting its subjective assessment of the matter for one that carries the approval of the DSB."¹³² In addition, Japan asserts that the Panel's assessment of the matter compromised the objectives of the WTO dispute settlement system under Articles 3.2, 3.3, and 3.7 of the DSU, because it "introduce[d] uncertainty and unpredictability into the law, disturbing the stability of the rules-based system"¹³³, and prevented the prompt resolution of this dispute.

4. Thailand

59. Thailand agrees with Mexico that the Panel erred in finding that simple zeroing in periodic reviews is not inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*. Thailand also submits that the Panel's failure to follow previous Appellate Body findings on the issue of zeroing raises systemic concerns in relation to the functioning and credibility of the WTO dispute settlement system. Although strictly speaking not

¹²⁹Japan's third participant's submission, paras. 108 and 109 (referring to Appellate Body Report, *EC – Bed Linen*, para. 55; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 140-142; and Appellate Body Report, *US – Zeroing (Japan)*, para. 146).

¹³⁰*Ibid.*, para. 13.

¹³¹*Ibid.*, para. 15 (quoting Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 108, in turn quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14, DSR 1996:I, 97, at 108). (emphasis added by Japan omitted)

¹³²*Ibid.*, para. 18.

¹³³*Ibid.*, para. 24.

binding, previous Appellate Body findings "create legitimate expectations among WTO Members"¹³⁴, and therefore panels are "expected" to follow previous Appellate Body conclusions, "especially when the issues are the same".¹³⁵ Thailand emphasizes that a panel's failure to observe the hierarchy between panels and the Appellate Body, especially where the Appellate Body has repeatedly decided on the same issue, impairs the effective functioning of the WTO dispute settlement system, and undermines its security and predictability. Moreover, if WTO Members cannot be reasonably confident that the decisions of panels will be consistent with the jurisprudence of the Appellate Body, they "will begin to see the dispute settlement process as requiring *both* panel and Appellate Body proceedings in order to obtain an objective assessment of the matter at issue."¹³⁶ According to Thailand, "[t]his will increase the costs of using the system and decrease the efficiency of the system in promptly resolving disputes between Members"¹³⁷ and discourage participation by developing country Members.¹³⁸

60. Thailand further argues that "[i]t is beyond dispute that the Appellate Body's rulings on zeroing gave rise to legitimate expectations among Members."¹³⁹ According to Thailand, "[t]hese legitimate expectations have been undermined by the recent panels that have declined to follow the Appellate Body's jurisprudence, most notably the Panel in this case."¹⁴⁰ Thailand submits that the Appellate Body's findings on the zeroing issue "have been both clear and correct", and urges the Appellate Body to reverse the Panel's findings on zeroing and to "clarif[y] the importance to the credibility of the WTO dispute settlement system that panels follow unambiguous Appellate Body rulings."¹⁴¹

61. Thailand further notes that, in rejecting the Appellate Body's interpretation that the word "product" in Article 2.1 of the *Anti-Dumping Agreement* refers to the product under investigation "as a whole", and not to a specific transaction, the Panel failed to consider the broader ramifications of its interpretation. Thailand points out that, with the exception of panels that have addressed the issue of zeroing, panels that have considered the concept of dumping in other contexts have adopted the interpretation that dumping must be defined in relation to a product, and not in relation to individual transactions. Therefore, a departure from this interpretation would affect Members' obligations in

¹³⁴Thailand's third participant's submission, para. 13 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14, DSR 1996:I, 97, at 108).

¹³⁵*Ibid.* (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188).

¹³⁶*Ibid.*, para. 15. (original emphasis)

¹³⁷*Ibid.*

¹³⁸See *ibid.*

¹³⁹*Ibid.*, para. 16.

¹⁴⁰*Ibid.*

¹⁴¹*Ibid.*, para. 17.

relation to other stages of dumping proceedings, such as the initiation phase, injury determination, and the imposition of anti-dumping duties. Thailand argues that systemic concerns call for an interpretation pursuant to which dumping is uniformly defined in relation to a product in all stages of anti-dumping proceedings.

62. Thailand adds that, until a WTO panel or the Appellate Body decides that WTO Members must use the same weighted average normal value in W-W and W-T comparisons in original investigations, the targeted dumping provision in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement* "is simply not relevant to the issue of whether zeroing is permissible"¹⁴², and that, therefore, the "mathematical equivalence" argument does not hold.

63. Thailand also maintains that the second sentence of Article 2.4.2 is neither at issue in this dispute, nor determinative of whether simple zeroing in periodic reviews is consistent with Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*. Thailand also dismisses the Panel's suggestion that a prohibition of zeroing would expand the scope of periodic reviews, because, in USDOC periodic review proceedings, including those at issue in this dispute, "exporters are *already* required to 'submit information pertaining to all of their export transactions rather than those pertaining to the importer requesting the review.'"¹⁴³

64. Finally, Thailand rejects the Panel's assumption that, "even if some transactions are not dumped, the domestic industry is injured by the dumped imports."¹⁴⁴ According to Thailand, "this simply begs the question of the basis on which the determination of injury was made."¹⁴⁵ If the determination of injury were made only on the basis of the effects of individual transactions, the Panel's position might have some merit. However, the volume of dumped imports, for the purpose of determining injury, includes both "dumped" and "non-dumped" transactions.¹⁴⁶ In these circumstances, according to Thailand, "it makes no sense to distinguish between the injurious effects of individual transactions."¹⁴⁷

¹⁴²Thailand's third participant's submission, para. 35.

¹⁴³*Ibid.*, para. 36 (referring to Panel Report, para. 7.146).

¹⁴⁴*Ibid.*, para. 37 (referring to Panel Report, para. 7.147).

¹⁴⁵*Ibid.*

¹⁴⁶See *ibid.* (referring to Panel Report, *EC – Bed Linen*, paras. 6.135-6.142).

¹⁴⁷*Ibid.*, para. 37.

III. Issues Raised in This Appeal

65. The following issues are raised in this appeal:

- (a) whether the Panel erred in finding that "simple zeroing in periodic reviews" is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*;
- (b) whether the Panel erred in finding that the United States Department of Commerce (the "USDOC") did not act inconsistently with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* by using simple zeroing in the five periodic reviews at issue in this dispute;
- (c) whether the Panel erred in finding that "simple zeroing in periodic reviews" is not, as such, inconsistent with Article 2.4 of the *Anti-Dumping Agreement* and, consequently, in finding that the USDOC did not act inconsistently with that provision in the five periodic reviews at issue in this dispute; and
- (d) whether the Panel failed to fulfil its obligations under Article 11 of the DSU by making findings that contradict those in previous Appellate Body reports adopted by the DSB.

IV. Introduction

66. The issue of "zeroing" has been raised on appeal on numerous occasions in different contexts. The Appellate Body has examined the WTO-consistency of the zeroing methodology in original investigations, periodic reviews¹⁴⁸, new shipper reviews¹⁴⁹, and sunset reviews.¹⁵⁰ In each context, the Appellate Body has held that zeroing is inconsistent with the relevant provisions of the GATT 1994

¹⁴⁸The term "periodic review" applies to the "periodic review of amount of anti-dumping duty" under Section 751(a) of the United States Tariff Act of 1930 (the "Tariff Act"). That provision requires the USDOC to review and determine the final liability for anti-dumping duty at least once during each 12-month period beginning on the anniversary of the date of publication of an anti-dumping duty order, if a request for such a review has been received. However, in the case of the first assessment proceeding following the issuance of the Notice of Antidumping Duty Order, the period of time may extend up to 18 months in order to cover all entries that may have been subject to provisional measures.

¹⁴⁹The term "new shipper review" applies to the review to establish an individual weighted average dumping margin for the exporter or foreign producer under Section 751(a)(2)(B) of the Tariff Act. That provision requires the USDOC to review and determine the individual dumping margin for an exporter or foreign producer that did not export the product at issue during the original period of investigation.

¹⁵⁰The term "sunset review" applies to the review of an anti-dumping duty order at the end of five years, as required by Section 751(c) of the Tariff Act. That provision requires the USDOC to conduct a review, five years after the date of publication of an anti-dumping duty order, to determine whether revocation of the anti-dumping duty order would be likely to lead to continuation or recurrence of dumping and of material injury.

and the *Anti-Dumping Agreement*. More specifically, the Appellate Body has found zeroing to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* in the *original investigations* in five disputes.¹⁵¹ The Appellate Body has also found zeroing in *periodic reviews* to be inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* in two disputes.¹⁵² In one of those disputes, the Appellate Body further found zeroing in new shipper reviews to be inconsistent with Article 9.5 of the *Anti-Dumping Agreement*.¹⁵³ Moreover, in that same dispute, the Appellate Body found that the United States had acted inconsistently with Article 11 of the *Anti-Dumping Agreement* because it relied on margins of dumping calculated in previous proceedings in using zeroing in two sunset review determinations.¹⁵⁴

67. Before the Panel, Mexico distinguished between two types of zeroing: "model zeroing in investigations" and "simple zeroing in periodic reviews". By "model zeroing in investigations", Mexico meant the method under which the USDOC, in original investigations, makes a weighted average-to-weighted average ("W-W") comparison of export price and normal value for each "model" of the product under investigation, and disregards the amount by which the weighted average export price exceeds the weighted average normal value for any model, when aggregating the results of model-specific comparisons to calculate a weighted average margin of dumping for the exporter or foreign producer¹⁵⁵ investigated.¹⁵⁶ By "simple zeroing in periodic reviews", Mexico meant the method under which the USDOC, in periodic reviews for assessment of final liability for payment of anti-dumping duties, compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amount by which the export price exceeds the monthly

¹⁵¹See Appellate Body Report, *EC – Bed Linen*, para. 66; Appellate Body Report, *US – Softwood Lumber V*, para. 117; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 124; Appellate Body Report, *US – Zeroing (Japan)*, para. 138; and Appellate Body Report, *US – Zeroing (EC)*, para. 222. In addition, we note that model zeroing in original investigations has been found to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* by all panels that have examined that practice, including the panels in *EC – Bed Linen*, *EC – Tube or Pipe Fittings*, *US – Softwood Lumber V*, *US – Zeroing (EC)*, *US – Zeroing (Japan)*, and *US – Shrimp (Ecuador)*, as well as the Panel in this dispute. (See Panel Report, paras. 7.55, 7.61, and 8.1(a))

¹⁵²See Appellate Body Report, *US – Zeroing (EC)*, paras. 132-135; and Appellate Body Report, *US – Zeroing (Japan)*, para. 166.

¹⁵³See Appellate Body Report, *US – Zeroing (Japan)*, paras. 165 and 166.

¹⁵⁴See *ibid.*, paras. 185 and 186. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated that it saw "no obligation under Article 11.3 [of the *Anti-Dumping Agreement*] for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping". (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127) However, if the investigating authorities choose to rely on dumping margins in making their likelihood determination in a sunset review, "the calculation of these margins must conform to the disciplines of Article 2.4." (*Ibid.*) The Appellate Body was, however, unable to complete the analysis and rule on the use of zeroing in that particular case because it did not have a sufficient factual basis to do so. (See *Ibid.*, paras. 133-138) See also Appellate Body Report, *US – Zeroing (Japan)*, paras. 165 and 166.

¹⁵⁵In our discussion, we hereinafter use the term "exporter(s)" to refer to exporter(s) and/or foreign producer(s).

¹⁵⁶See Panel Report, paras. 7.7-7.9.

weighted average normal value for each model, when aggregating the results of the comparisons to calculate the margin of dumping for the exporter and the duty assessment rate for the importer concerned.¹⁵⁷

68. The Panel agreed with Mexico that "model zeroing in investigations" is, as such, inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.¹⁵⁸ As a result, the Panel found that the USDOC also acted inconsistently with Article 2.4.2 by applying model zeroing in the original anti-dumping investigation at issue in this dispute.¹⁵⁹ The Panel, however, rejected Mexico's claim that "simple zeroing in periodic reviews" is, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*.¹⁶⁰ As a result, the Panel found that the USDOC did not act inconsistently with those provisions by using simple zeroing in the five periodic reviews at issue in this dispute.¹⁶¹ In reaching this conclusion, the Panel disagreed with the jurisprudence and conclusions of the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*.

69. Mexico appeals the Panel's findings regarding the WTO-consistency of simple zeroing in periodic reviews and requests the Appellate Body to find, instead, that simple zeroing in periodic reviews is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*. In addition, Mexico claims that the Panel acted inconsistently with its obligations under Article 11 of the DSU by making findings that "directly contradict"¹⁶² those in adopted Appellate Body reports.

70. By contrast, the United States asserts that the Appellate Body should dismiss Mexico's appeal. The United States requests the Appellate Body to uphold the Panel's finding that simple zeroing in periodic reviews is allowed under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*, because it is a permissible interpretation of these provisions in accordance with Article 17.6(ii) of the *Anti-Dumping Agreement*.

¹⁵⁷See Panel Report, paras. 7.7-7.9 and 7.99.

¹⁵⁸*Ibid.*, para. 8.1(a). However, the Panel did not recommend to the DSB that it request the United States to bring its model zeroing procedures into conformity with its obligations under the *Anti-Dumping Agreement* and Article VI of the GATT 1994 because of its earlier finding that the United States had abandoned that practice as from 22 February 2007. (*Ibid.*, para. 7.45) The Panel explained that it "fail[ed] to see what purpose would be served by a recommendation relating to a measure that no longer exists." (*Ibid.*, para. 7.50)

¹⁵⁹*Ibid.*, para. 8.1(b); USDOC, Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Mexico, *United States Federal Register*, Vol. 64, No. 109 (8 June 1999) 30790, subsequently amended as Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Stainless Steel Sheet and Strip in Coils from Mexico, *United States Federal Register*, Vol. 64, No. 143 (27 July 1999) 40560 (Exhibit MEX-5.A submitted by Mexico to the Panel).

¹⁶⁰Panel Report, para. 8.1(c).

¹⁶¹*Ibid.*, para. 8.1(d). The five periodic reviews challenged by Mexico are listed in Exhibits MEX-5.B through MEX-5.F submitted by Mexico to the Panel; further details may be found in Panel Report, para. 2.2.

¹⁶²Notification of an Appeal by Mexico, WT/DS344/7 (attached as Annex I to this Report), para. 4 ("*contradicen directamente*").

A. *The United States' System for the Imposition and Assessment of Anti-dumping Duties*

71. Before addressing the issues raised by the participants in this appeal, we consider it useful to provide a brief overview of the United States' system for the imposition and assessment of anti-dumping duties. This overview is based on the explanations provided by the participants in their written submissions and at the oral hearing in the course of these appellate proceedings.

72. The first stage of the system is the original investigation for the imposition of anti-dumping duties. The USDOC conducts an investigation to determine whether dumping by an exporter occurred during the period of investigation. This is done by calculating an "overall weighted average dumping margin for each foreign producer/exporter investigated".¹⁶³ This determination is published in a Notice of Final Determination of Sales at Less Than Fair Value. The USDOC communicates its determination of the existence and level of dumping to the United States International Trade Commission (the "USITC"). The USITC conducts an investigation to determine whether the relevant United States industry is materially injured or threatened with material injury by reason of the dumped imports. If the USDOC finds that dumping existed during the period of investigation, and the USITC finds that the domestic industry was materially injured, or threatened with material injury, by reason of dumped imports, the USDOC issues a Notice of Antidumping Duty Order and imposes an "estimated anti-dumping duty deposit rate"¹⁶⁴ (also referred to as a "cash deposit rate"), equivalent to the "overall weighted average dumping margin", for each exporter individually examined. In addition, the Notice of Antidumping Duty Order sets out an "all-others" rate applicable to exporters that were not individually examined.

73. In order to determine the existence of dumping and the "overall weighted average dumping margin" for each exporter investigated, the USDOC normally uses the W-W comparison methodology under which the weighted average normal value is compared with the weighted average export price.¹⁶⁵ In doing so, the USDOC takes into consideration all of the export transactions of each exporter investigated. The Panel found, as a factual matter, that "the United States [had] abandoned the practice of model zeroing in investigations as from 22 February 2007".¹⁶⁶ In other words, the USDOC currently takes into account the results of all model-specific comparisons, regardless of whether the weighted average export price is above or below the weighted average normal value for

¹⁶³United States' appellee's submission, para. 16.

¹⁶⁴*Ibid.*, para. 17.

¹⁶⁵The United States stated at the oral hearing that, in investigations, it "almost universally" uses the W-W comparison methodology and that it rarely uses the transaction-to-transaction ("T-T") comparison methodology, because the latter methodology is a "very burdensome procedure" and is appropriate only in limited circumstances.

¹⁶⁶See Panel Report, para. 7.50. This was also confirmed by the United States at the oral hearing.

each model. If the "overall weighted average dumping margin" for a particular exporter thus calculated is zero, or below *de minimis* levels, that exporter is not found to be dumping and the investigation is terminated in relation to it. On the other hand, if the "overall weighted average dumping margin" is above *de minimis* levels, the exporter is found to be dumping, and the *entire volume of sales* made by that exporter is considered to be "dumped imports" for purposes of the injury determination.¹⁶⁷

74. The second stage of the United States' system is the assessment of the final liability for anti-dumping duties. For assessing anti-dumping duties, the United States follows a "retrospective" assessment system under which final liability for anti-dumping duties is determined after the merchandise is imported. Under this system, the United States initially collects cash deposits at the time of each entry of the subject merchandise at the estimated anti-dumping duty deposit rate of the relevant exporter. Subsequently, once a year, during the anniversary month of the anti-dumping duty order, interested parties—including importers, domestic interested parties, foreign producers, and exporters¹⁶⁸—may request the USDOC to conduct a periodic review to determine the final amount of anti-dumping duties owed on entries that occurred during the previous year. If a request for a periodic review is made by any party, the USDOC will review *all* sales made by the relevant exporter in order to calculate a going-forward cash deposit rate that will apply to all future entries of the subject merchandise from that exporter. Simultaneously, the USDOC will calculate a duty assessment rate applicable to each importer that imports from that exporter and determine the final liability for payment of anti-dumping duties by that importer on the basis of its duty assessment rate. If no periodic review is requested, the cash deposits made on entries during the previous year are automatically assessed as the final duties.

75. In a periodic review, the USDOC determines the final liability for anti-dumping duties of an individual importer—that is, the duty assessment rate applicable to that importer—on the basis of a methodology that compares monthly weighted average normal value with prices of individual export transactions.¹⁶⁹ Under this methodology, the product under consideration is broken down into models, and a monthly weighted average normal value is determined for each model.¹⁷⁰ When comparing the monthly weighted average normal value with the price of each individual export transaction, the USDOC considers the amount by which the normal value exceeds the export price to be the "dumping

¹⁶⁷United States' response to questioning at the oral hearing.

¹⁶⁸See Panel Report, footnote 74 to para. 7.98. See also United States' appellee's submission, para. 21; and USDOC Regulations, Section 351.213(b).

¹⁶⁹See *supra*, para. 67. See also USDOC Regulations, Section 351.414(c)(2); and USDOC Antidumping Manual, chapter 6, p. 7.

¹⁷⁰See Panel Report, para. 7.99.

margin" for that export transaction.¹⁷¹ If, however, the export price exceeds the normal value, the USDOC considers the "dumping margin" for that export transaction to be zero. For each importer, the USDOC expresses the total of the "dumping margins" as a percentage of the total entered value of its imports of the subject merchandise from the relevant exporter, including the value of those transactions for which the dumping margin was considered to be zero.¹⁷² This percentage becomes the "duty assessment rate" for that importer, and it is applied to the total entered value of its imports from the relevant exporter during the period reviewed in order to determine the final anti-dumping liability of that importer. The same zeroing methodology is also applied to determine the going-forward cash deposit rate for all future entries of the subject merchandise from the exporter concerned.

B. *Standard of Review: Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement*

76. Before turning to the issues raised on appeal, we recall that the standard of review applicable to disputes under the *Anti-Dumping Agreement* is set out in both Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*.¹⁷³ As regards issues of legal interpretation, Article 17.6(ii) provides that:

[a] 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.

The Appellate Body has noted that the customary rules of interpretation of public international law as codified in Articles 31 and 32 of the *Vienna Convention* apply to the interpretation of the *Anti-Dumping Agreement*.¹⁷⁴ The Appellate Body has recognized that the second sentence of Article 17.6(ii):

¹⁷¹See Tariff Act, Section 751(a)(2)(A)(ii).

¹⁷²See USDOC Regulations, Section 351.212(b)(1). See also Panel Report, para. 7.99: "The numerator for the importer-specific assessment rate reflects the results of comparisons where the normal value exceeds the export price within the universe of the imports made by that particular importer, and the denominator is the total value of all imports by the importer."

¹⁷³See Appellate Body Report, *US – Hot-Rolled Steel*, para. 62.

¹⁷⁴See *ibid.*, para. 59; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 118; and Appellate Body Report, *US – Softwood Lumber V*, para. 116.

... *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be "*permissible* interpretations". In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations."¹⁷⁵ (original emphasis)

In our analysis, we therefore bear in mind that there could be more than one permissible interpretation of a provision of the *Anti-Dumping Agreement*.

V. Simple Zeroing, As Such, in Periodic Reviews

77. The Panel found that "simple zeroing in periodic reviews" is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*.¹⁷⁶ The Panel reasoned that Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* do not "compel a definition of 'dumping' based on an aggregation of all export transactions"¹⁷⁷ and that those provisions do not "exclude an interpretation that allows the concept of dumping to exist on a transaction-specific basis".¹⁷⁸ The Panel further reasoned that anti-dumping duties are paid by importers and that, therefore, the importer- or transaction-specific character of the payment of anti-dumping duties must be taken into consideration in interpreting Article 9.3 of the *Anti-Dumping Agreement*.¹⁷⁹ The Panel emphasized 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"¹⁸⁰ and that Articles 9.3.1 and 9.3.2 must be interpreted in this light "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)."¹⁸¹ For the Panel, "[t]he fact that final duties or refunds in duty assessment proceedings are calculated for individual importers ... leads to the conclusion that Article 9.3 does not exclude an importer and import-specific calculation [of margin of dumping], and does not necessarily require a calculation on the basis of all sales made by an exporter."¹⁸² The Panel considered that "the fact that other importers do not dump, or dump at a lower margin, does not affect the liability of an

¹⁷⁵Appellate Body Report, *US – Hot-Rolled Steel*, para. 59.

¹⁷⁶Panel Report, paras. 7.143 and 8.1(c).

¹⁷⁷*Ibid.*, para. 7.117.

¹⁷⁸*Ibid.*, para. 7.119.

¹⁷⁹See *ibid.*, para. 7.124.

¹⁸⁰*Ibid.*, para. 7.126.

¹⁸¹*Ibid.* (original underlining) The *Anti-Dumping Agreement* gives WTO Members the discretion to assess duties either retrospectively or prospectively.

¹⁸²*Ibid.*

importer who imports at dumped prices".¹⁸³ The Panel expressed its concern that, "[i]f ... the authorities have to take into account the export prices paid by other importers importing from the same exporter or foreign producer, ... importers with high margins of dumping would be favoured at the expense of importers who do not dump or who dump at a lower margin."¹⁸⁴ In essence, the Panel adopted an importer- and transaction-specific approach to the concepts of "dumping" and "margin of dumping" and concluded that simple zeroing in periodic reviews is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*.¹⁸⁵

78. Mexico challenges this legal interpretation by the Panel. Mexico argues that, once the investigating authorities define the product under consideration, the scope of that definition determines the scope of the authorities' dumping determination. Therefore, dumping cannot exist in relation to a specific type, model, or category of the product under consideration, "or *in relation to individual import transactions*".¹⁸⁶ Instead, in any anti-dumping proceeding—including periodic reviews under Article 9.3 of the *Anti-Dumping Agreement*—"the margin of dumping must be calculated in respect of the individual exporters or foreign producers subject to such proceeding and for the product under consideration taken as a whole"¹⁸⁷, without disregarding any export transaction. According to Mexico, this interpretation is consistent with the "necessary relationship"¹⁸⁸ between dumping and injury, and with the fact that the purpose of anti-dumping duties is to offset dumping and injury to the domestic industry caused by exporters. Mexico emphasizes that the Panel's analysis is based on the erroneous assumption that importers have margins of dumping and that such margins can be calculated for each individual transaction. According to Mexico, "[i]mporters may, of course, purchase products that are priced below normal value ... but there is no such thing under the WTO agreements as 'importers with high margins of dumping'".¹⁸⁹

79. Chile, the European Communities, Japan, and Thailand support Mexico's appeal and submit that the Appellate Body should find that simple zeroing in periodic reviews is, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping*

¹⁸³Panel Report, para. 7.131.

¹⁸⁴*Ibid.*, para. 7.146.

¹⁸⁵*Ibid.*, para. 8.1(c).

¹⁸⁶Mexico's appellant's submission, para. 31 ("*o en relación con transacciones individuales de importación*"). (emphasis added)

¹⁸⁷*Ibid.* ("*el margen de dumping debe calcularse con respecto a los exportadores individuales y productores extranjeros sujetos a dicho procedimiento y para el producto objeto a consideración tomado en su conjunto*") (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 156).

¹⁸⁸*Ibid.*, para. 46 ("*relación necesaria*").

¹⁸⁹*Ibid.*, para. 77 ("*Desde luego que los importadores pueden comprar productos cuyo precio es menor que el valor normal ... Sin embargo, en los Acuerdos de la OMC no existen conceptos tales como 'los importadores con altos márgenes de dumping'*").

Agreement.¹⁹⁰ The thrust of their arguments is that these provisions establish a requirement that "dumping" and "margins of dumping" be established by reference to a product under consideration as a whole and to individual exporters, and not in relation to specific models or subsets of low-priced transactions. They also argue that there must be a consistent treatment of dumping and margins of dumping for all purposes and stages of anti-dumping proceedings, including injury determinations, as these terms have the same meaning throughout the *Anti-Dumping Agreement*.

80. By contrast, the United States argues that the findings of the Panel should be upheld. According to the United States, Article VI of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* do not require that margins of dumping necessarily be established on an aggregate basis for the "product as a whole".¹⁹¹ Rather, for the United States, "dumping" can be found to exist each time that a weighted average normal value exceeds the export price in a particular export transaction, and "margins of dumping" can be calculated for individual import transactions.¹⁹² The United States argues that Article 9.3 deals with only transaction-specific comparisons, and that it does not require the aggregation of the results of such comparisons in order to determine a margin of dumping for the relevant exporter. The United States submits that, once an anti-dumping investigation has been completed and an anti-dumping duty has been imposed, in all systems, "the focus in the duty assessment phase then shifts to individual import transactions"¹⁹³, because duties are assessed on individual import transactions. Thus, under its retrospective assessment system, final liability for payment of anti-dumping duties by each importer is determined on the basis of a comparison of a contemporaneous monthly weighted average normal value with the export price in each individual import transaction. At the oral hearing, the United States acknowledged that the USDOC aggregates the results of transaction-specific comparisons in periodic reviews, but explained that such aggregation is not done for the purpose of establishing a margin of dumping under Article 9.3. Rather, it is done in order to determine the going-forward cash deposit rate for future entries of the subject merchandise from a given exporter and, for the sake of practical convenience, to determine the importer-specific duty assessment rate applicable to all sales made to a particular importer. The United States further explained that, under its retrospective assessment system, neither the cash deposit rate of an exporter, nor the duty assessment rate of an importer, constitutes a "margin of dumping" within the meaning of Article 9.3 of the *Anti-Dumping Agreement*. Under its system, the "dumping margin" calculated for each individual import transaction is the "margin of dumping" envisaged under Article 9.3 of the *Anti-Dumping Agreement*. According to the United States, there

¹⁹⁰Chile's third participant's submission, p. 2; European Communities' third participant's submission, para. 69; Japan's third participant's submission, para 110; Thailand's third participant's submission, para. 38.

¹⁹¹United States' appellee's submission, para. 50.

¹⁹²United States' response to questioning at the oral hearing.

¹⁹³United States' appellee's submission, para. 85.

can be multiple "margins of dumping" for each importer. Moreover, at the oral hearing, the United States suggested that the terms "dumping" and "dumping margin" may have different meanings in different parts of the *Anti-Dumping Agreement*, and that a major flaw in previous Appellate Body jurisprudence is the interpretation that these terms have the same unitary meaning throughout the *Anti-Dumping Agreement*.¹⁹⁴

81. The United States finds contextual support for its position in the text of Article VI:1 of the GATT 1994. Since this Article uses the plural "products" when it refers to "injurious dumping" and the singular "product" when it refers to "dumping", it suggests that dumping can be found at the level of individual *export* transactions.¹⁹⁵ The United States points out that, in the context of the GATT, the concept of dumping has historically been understood to be applicable at the level of individual *export* transactions.¹⁹⁶

82. In our view, the reasoning of the Panel and the arguments advanced in this appeal raise, in essence, three questions for our consideration. First, are the terms "dumping" and "margin of dumping" exporter- or importer-related concepts for the purpose of Article 9.3 of the *Anti-Dumping Agreement*? Secondly, can "dumping" and "margin of dumping" be found to exist at the transaction- and importer-specific level for the purpose of Article 9.3 of the *Anti-Dumping Agreement*? Thirdly, in duty assessment proceedings under Article 9.3 of the *Anti-Dumping Agreement*, is it permissible to disregard the amount by which the export price exceeds the normal value in any export transaction? We examine these questions in turn below, recognizing that they are interconnected.

A. *Are "Dumping" and "Margin of Dumping" Exporter- or Importer-related Concepts?*

83. We begin with an examination of the concepts of "dumping" and "margin of dumping" under Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. "Dumping" is defined in Article VI:1 of the GATT 1994 as occurring when a product of one country is introduced into the commerce of another country at less than its normal value. Article VI:1 further states that dumping is to be "condemned" if it causes or threatens to cause material injury to the domestic industry producing a like product. In turn, Article VI:2 lays down that, "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Article VI:6(a) also stipulates that no anti-dumping duty shall be levied unless the importing Member "determines that the effect of the dumping ... is such

¹⁹⁴United States' response to questioning at the oral hearing.

¹⁹⁵See United States' appellee's submission, para. 52.

¹⁹⁶See *ibid.*, para. 58.

as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."

84. This definition of "dumping" is carried over into the *Anti-Dumping Agreement* by Article 2.1, which states that a product is to be considered as being "dumped" if the "export price" of the product "exported" from one country to another is less than the comparable price for the "like" product when destined for consumption in the "exporting" country. Furthermore, and significantly, the opening phrase of Article 2.1—"For the purpose of this Agreement"—makes it clear that this definition of "dumping" applies throughout the *Anti-Dumping Agreement*.¹⁹⁷

85. The term "margin of dumping" is defined in Article VI:2 of the GATT 1994 as the difference between the "export price" and the "normal value" (that is, "the domestic price" of the like product in the exporting country) determined in accordance with Article VI:1. Article VI:2 further clarifies that the "margin of dumping" is in respect of the dumped "product". The "margin of dumping" thus measures the "degree"—as used in Article 5.1 of the *Anti-Dumping Agreement*—or the "magnitude"—as used in Article 3.4 of the *Anti-Dumping Agreement*—of dumping.¹⁹⁸ As the "margin of dumping" is only a measure of dumping, it also has the same meaning throughout the *Anti-Dumping Agreement* by virtue of Article 2.1.

86. The elements of the definition of "dumping" contained in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*—namely, that "dumping" occurs when a product is "introduced into the commerce of another country" at an "export price" that is less than the "comparable price for the like product in the exporting country"¹⁹⁹—suggest to us that Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* address the pricing practice of an exporter. Article 2.2 of the *Anti-Dumping Agreement* as well as Article VI:1(b) of the GATT 1994 also point in the same direction because they indicate that, if sales of the like product in the domestic market of the exporting country do not permit a proper comparison, the comparison may be made with the price at which the product is exported to an appropriate third country. Similarly, Article 2.3 of the *Anti-Dumping Agreement* allows the "export price" to be constructed in cases where it appears to the authorities that the *export price* is unreliable.

87. The context found in various other provisions of the *Anti-Dumping Agreement* confirms that "dumping" and "margin of dumping" are exporter-specific concepts. Articles 5.2(ii), 6.1.1, and 6.7 indicate that the focus of an anti-dumping investigation to determine the existence and degree of

¹⁹⁷See Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

¹⁹⁸See *ibid.*, para. 110.

¹⁹⁹Emphasis added.

dumping is the known exporters of the product under investigation. Furthermore, Article 5.8 provides that there shall be "immediate termination" of an anti-dumping investigation against an exporter where the authorities determine that the margin of dumping of that exporter is *de minimis*, that is, if the margin is less than 2 per cent, expressed as a percentage of the export price. A plain reading of Article 5.8 indicates that the term "margin of dumping" as used in that provision refers to a single margin established for each exporter by aggregation of its export transactions. The same Article provides that, if *the volume of exports* originating from an *exporting country* is "negligible" according to the criteria stated therein, the anti-dumping investigation against that country must be terminated.

88. Articles 6.10 and 9.5 of the *Anti-Dumping Agreement* also reveal that "dumping" and "margin of dumping" are exporter-specific concepts. Thus, the first sentence of Article 6.10 requires, "as a rule", that authorities determine "an individual margin of dumping for each known exporter or producer concerned of the product under investigation".²⁰⁰ Similar language appears in Article 6.10.2, which provides that, in cases where the authorities have limited their examination in accordance with Article 6.10, "they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation". Likewise, Article 9.5, dealing with new shipper reviews, requires the authorities to determine an individual margin of dumping for any exporter that had not exported the product during the period of investigation.

89. There is nothing in Articles 5.8, 6.10, and 9.5 of the *Anti-Dumping Agreement* to suggest that it is permissible to interpret the term "margin of dumping" under those provisions as referring to multiple "dumping margins" occurring at the level of individual importers. Instead, these provisions reinforce the notion that a single margin of dumping is to be established for each individual exporter investigated.

90. Other provisions of the *Anti-Dumping Agreement* also confirm that "dumping" and "margin of dumping" are exporter-specific concepts. Article 8.1 refers to the "receipt of satisfactory voluntary undertakings from *any exporter* to revise its prices or to cease exports to the area in question at

²⁰⁰We recall that, in accordance with the rules of treaty interpretation codified in Article 33(3) of the *Vienna Convention*, the terms of a treaty authenticated in more than one language "are presumed to have the same meaning in each authentic text". It follows that the treaty interpreter should seek the meaning that gives effect, simultaneously, to the terms of the treaty as they are used in each authentic language. We find support for our reading in the French version of Article 6.10 of the *Anti-Dumping Agreement*, which requires the determination of "*une marge de dumping individuelle*", that is, "one" single margin of dumping, for "each exporter" for "the product" under investigation. Similarly, the Spanish version requires the determination of a single margin ("*el margen*") for each exporter, not multiple margins ("*márgenes*").

dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated."²⁰¹ Article 8.2 enjoins that price undertakings "shall not be sought or accepted *from exporters* unless the authorities of the importing country have made a preliminary affirmative determination of dumping and injury caused by such dumping."²⁰² In addition, Article 8.5 indicates that "[p]rice undertakings may be suggested by the authorities of the importing Member, but no *exporter* shall be forced to enter into such undertakings."²⁰³ Article 8.1 further requires that, when price undertakings are taken, price increases thereunder shall not be higher than necessary to eliminate the margin of dumping. Since price undertakings are taken from individual exporters, this also shows that the margin of dumping is related to individual exporters.

91. We further note that Article 9.4 and subparagraph (i) of the *Anti-Dumping Agreement* lays down that, "[w]hen the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from *exporters or producers* not included in the examination shall not exceed ... the weighted average dumping margin established with respect to the *selected exporters or producers*".²⁰⁴ Where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, Article 9.4(ii) specifies that any anti-dumping duty applied to such imports shall not exceed "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."²⁰⁵

92. We note, moreover, that Article VI of the GATT 1994 and the *Anti-Dumping Agreement* deal not with dumping *per se*, but with dumping that causes or threatens to cause material injury to the domestic industry producing a "like" product.²⁰⁶ Indeed, the very purpose of an anti-dumping duty, at a level not higher than the margin of dumping of each exporter, is to counteract the injury caused to the domestic industry by dumping. Article 3.1 of the *Anti-Dumping Agreement* stipulates that a determination of injury shall be based on an objective examination of both the volume of the *dumped* imports and the effect of the *dumped* imports on prices in the domestic market for like products, and of the consequent impact of the *dumped* imports on domestic producers of such like products.

²⁰¹Emphasis added.

²⁰²Emphasis added.

²⁰³Emphasis added.

²⁰⁴Emphasis added.

²⁰⁵Emphasis added.

²⁰⁶In this regard, Article VI:1 of the GATT 1994 itself states that dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry". Articles 5.2 and 5.6 of the *Anti-Dumping Agreement* also show that an anti-dumping investigation can be initiated or can proceed only if the investigating authorities have evidence of dumping, injury, and a causal link between the two.

Furthermore, Article 3.5 lays down that "[t]he authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry and the injuries caused by these other factors must not be attributed to dumped imports." Among such non-attribution factors listed in this Article are "the volume and prices of imports not sold at dumping prices". Furthermore, Article 9.1 exhorts levy of anti-dumping duty at less than the full margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry.

93. The review provisions contained under Article 11 of the *Anti-Dumping Agreement* also reveal the crucial link between dumping and injury. Article 11.1 sets out the overarching principle that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." Article 11.2 allows a request for review to examine whether the injury would continue or recur if the duty were removed or varied. Article 11.3 requires an examination as to whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

94. To sum up the above analysis, it is clear from Articles VI:1 and VI:2 of the GATT 1994 and the various provisions of the *Anti-Dumping Agreement* that: (a) "dumping" and "margin of dumping" are exporter-specific concepts; "dumping" is product-related as well, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped; (b) "dumping" and "margin of dumping" have the same meaning throughout the *Anti-Dumping Agreement*; (c) an individual margin of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied *in respect of* an exporter shall not exceed its margin of dumping²⁰⁷; and (d) the purpose of an anti-dumping duty is to counteract "injurious dumping" and not "dumping" *per se*. It must be stressed that, under the *Anti-Dumping Agreement*, the concepts of "dumping", "injury", and "margin of dumping" are interlinked and that, therefore, these terms should

²⁰⁷This does not mean that anti-dumping duties are levied upon or collected from exporters. The duties may be levied upon or collected from the importers, but, under Article 9.3, the margin of dumping established for an exporter operates as the ceiling for such levy and collection of duties from the importers who import from that exporter.

be considered and interpreted in a coherent and consistent manner for all parts of the *Anti-Dumping Agreement*.²⁰⁸

95. Based on the above analysis, we disagree with the proposition that importers "dump" and can have "margins of dumping".²⁰⁹ Dumping arises from the pricing practices of exporters as both normal values and export prices reflect their pricing strategies in home and foreign markets.²¹⁰ The fact that "dumping" and "margin of dumping" are exporter-specific concepts under the *Anti-Dumping Agreement* is not altered by the fact that the export price may be the result of negotiation between the

²⁰⁸It is well recognized in international economic and trade literature that "dumping" is "international price discrimination" reflecting the pricing practice of an exporting firm to charge a lower price for exported goods than it does for the same goods sold domestically. Some examples of the definition of "dumping" in international economic literature are as follows: "The most common form of price discrimination in international trade is dumping, a pricing practice in which a firm charges a lower price for exported goods than it does for the same goods sold domestically." (Paul R. Krugman and Maurice Obstfeld, *International Economics: Theory and Policy*, 6th edn (Pearson Education, 2007), p. 174); "Dumping is international price discrimination in which an exporting firm sells at a lower price in a foreign market than it charges in other (usually its home-country) markets." (Peter H. Lindert and Thomas A. Pugel, *International Economics*, 10th edn (Irwin, 1996), p. 174); "dumping: In international trade, the practice of selling a commodity at a lower price in the export market than in the domestic market for reasons unrelated to differences in costs of servicing the two markets" and "Dumping is a form of price discrimination studied in the theory of monopoly." (Richard G. Lipsey, Paul N. Courant, and Christopher T.S. Ragan, *Economics*, 12th edn (Addison-Wesley, 1999), p. G-5 and p. 788); "Broadly defined, "dumping" is international price discrimination. Dumping occurs when an exporter sells merchandise in an importing country at a price below that at which it sells like merchandise in its home country A more restrictive definition of "dumping" is that it occurs when an exporter sells merchandise in an importing country at below the cost of production of that exporter." (Raj Bhala, *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade*, International Trade Law Series (Sweet & Maxwell, 2005), p. 685) See also Martyn Taylor, *International Competition Law: A New Dimension for the WTO?* (Cambridge University Press, 2006), pp. 264 ff.

²⁰⁹See Panel Report, para. 7.146.

²¹⁰As the Appellate Body has previously explained: "The concept of dumping relates to the pricing behaviour of exporters or foreign producers; it is the exporter, not the importer, that engages in practices that result in situations of dumping." (Appellate Body Report, *US – Zeroing (Japan)*, para. 156 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 129))

In this regard, we note that the United States' Statement of Administrative Action (the "SAA") states that, if foreign "companies continue to dump with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed", and that, "[i]f imports cease after the order is issued, it is reasonable to assume that the *exporters could not sell* in the United States without dumping and that, to reenter the U.S. market, they would have to resume dumping." (Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCAAN 3773, 4040 (Public Law No. 103-465, 108 Stat. 4809 (1994), *United States Code*, Title 19, Section 3501, pp. 889-890) (emphasis added)) The SAA further provides that "declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the *exporter needs to dump* to sell at pre-order volumes." (*Ibid.* (emphasis added)) In addition, the SAA states that "[d]eclining (or no) dumping margins accompanied by steady or increasing imports may indicate that *foreign companies do not have to dump* to maintain market share in the United States". (*Ibid.* (emphasis added)) These passages are quoted in Sections II.A.3 and II.A.4 of the USDOC's Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, *United States Federal Register*, Vol. 63, No. 73 (16 April 1998) 18871 and 18872) As we see it, these and other similar passages in the SAA support the notion that "dumping" is an exporter-related concept, and that dumping reflects the pricing behaviour of exporters.

importer and the exporter.²¹¹ Nor is it altered by the fact that it is the importer that incurs the liability to pay anti-dumping duties.²¹²

96. We also disagree with the proposition that the term "margin of dumping" has a different or special meaning in the context of Article 9.3 of the *Anti-Dumping Agreement*. As we stated earlier, a margin of dumping measures only the degree or magnitude of dumping. Article 9.3 refers to the margin of dumping as established in Article 2 of the *Anti-Dumping Agreement*. Article 2.1 of the *Anti-Dumping Agreement* defines "dumping", and the opening phrase of that Article makes it clear that the definition applies "[f]or the purpose of this Agreement". Therefore, "dumping" and "margin of dumping" have the same meaning throughout the *Anti-Dumping Agreement*. Article 9.3 does not indicate, either expressly or by implication, that "margin of dumping" has a different meaning in the context of duty assessment proceedings than it does under Article 2. Nor does any other provision of the *Anti-Dumping Agreement* suggest a special or particular meaning for this term for any stated purpose.²¹³ Although transaction-based multiple comparisons may be necessary in periodic reviews to calculate an importer's liability for payment of anti-dumping duties, this cannot impart a different or special meaning to the term "margin of dumping" in Article 9.3.

B. *Can "Dumping" and "Margin of Dumping" Be Found to Exist at the Level of a Transaction?*

97. We turn next to address the question of whether "dumping" and "margin of dumping" can be found to exist at the transaction- and importer-specific level for the purpose of Article 9.3 of the *Anti-Dumping Agreement*.

98. First, as we noted earlier, dumping arises from the pricing behaviour of an exporter. A proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transactions over a period of time. Contrary to what the Panel indicates²¹⁴, the notion that "a product is introduced into the commerce of another country at less than its normal value" in Article VI:1 of the GATT 1994 suggests to us that the determination of dumping with respect to an exporter is properly made not at the level of individual export transactions, but on the basis of the totality of an exporter's transactions

²¹¹See United States' appellee's submission, para. 99.

²¹²See Panel Report, para. 7.124; and United States' appellee's submission, para. 99.

²¹³See Appellate Body Report, *US – Zeroing (Japan)*, para. 114.

²¹⁴See Panel Report, para. 7.117.

of the subject merchandise over the period of investigation.²¹⁵ Furthermore, as we emphasized earlier, the *Anti-Dumping Agreement* deals with "injurious dumping", and the very purpose of an anti-dumping duty is to counteract the injury caused or threatened to be caused by "dumped imports" to the domestic industry. The notion that dumping and margin of dumping can exist at the level of an individual transaction runs counter to these basic principles of the *Anti-Dumping Agreement*.²¹⁶

99. Secondly, if it were permissible to determine a separate margin of dumping for each individual transaction, several margins of dumping would exist for each exporter and for the product under consideration.²¹⁷ However, the existence of "dumping" and several "margins of dumping" at the transaction-specific level cannot be reconciled with a proper interpretation and application of several provisions of the *Anti-Dumping Agreement*. We do not see how, for example: the determination of injury under Article 3; the establishment of an individual margin of dumping for each exporter under Articles 5.8, 6.10, 6.10.2, 9.4, and 9.5; the acceptance of voluntary undertakings from an exporter under Article 8; and a review under Article 11.2 or 11.3 for continuation or revocation of an anti-dumping duty order, can be done at the transaction- or importer-specific level. The Panel's interpretation appears to us to be premised on the notion that the concept of transaction- and importer-specific dumping and margin of dumping could be confined to the stage of duty assessment and collection under Article 9.3. However, we find no textual or contextual basis for such an interpretation.

C. *Is It Permissible to Disregard the Amount By Which the Export Price Exceeds the Normal Value?*

100. We now turn to the question whether it is permissible, in duty assessment proceedings under Article 9.3 of the *Anti-Dumping Agreement*, to disregard the amount by which the export price exceeds the normal value in any transaction; in other words, whether it is permissible to use "simple zeroing" in duty assessment proceedings.

²¹⁵We note that the 1960 Group of Experts Report, to which the United States referred in its appellee's submission, suggests that, in order to fulfil the principles that imposition of anti-dumping duties is justified only where "a product was in fact found to be dumped" and where material injury is thereby caused to a domestic industry, "the ideal method ... was to make a determination in respect of ... *each single importation of the product concerned*". (*Supra*, footnote 58, para. 8 (emphasis added)) Such a method would avoid the need of aggregation. The Group of Experts, itself, recognized that "[t]his however, was *clearly impracticable, particularly as regards injury*". (*Ibid.* (emphasis added)) Such a method of anti-dumping determination is not before us in this appeal, nor has it been referred to by the participants or third participants in these appellate proceedings.

²¹⁶We are not dealing here with a hypothetical case where there may be just one large import transaction at a price below normal value, which, by itself, is causing injury to the domestic industry.

²¹⁷See also Appellate Body Report, *US – Zeroing (Japan)*, para. 126.

101. As we understand it, the United States' position that simple zeroing is permitted in periodic reviews is premised on the argument that "dumping" and "dumping margins" can be found to exist at the level of individual transactions and for individual importers when assessing the anti-dumping duty liability for each importer. Under this argument, individual transactions where the export price exceeds the normal value are "non-dumped" transactions and can be disregarded for the purpose of determining importer-specific duty assessment rates. Furthermore, the United States argues that Article 9.3 deals with only transaction-specific comparisons, and that it does not require the aggregation of the results of such comparisons in order to determine a margin of dumping for the relevant exporter.²¹⁸ The United States points out that, in the calculation of a duty assessment rate for a particular importer, the value of *all* sales made to that importer is included in the denominator merely for the sake of convenience to enable the customs authorities to apply a single duty assessment rate to all such sales.²¹⁹

102. Article 9.3.1 of the *Anti-Dumping Agreement* is subject to the overarching requirement in Article 9.3 that the amount of anti-dumping duty "shall not exceed the margin of dumping as established under Article 2" of that Agreement. We recall that our examination of the context of Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* confirmed that the term "margin of dumping", as used in those provisions, relates to the "exporter" of the "product" under consideration and not to individual "importers" or "import transactions", and, furthermore, that the concepts of "dumping" and "dumping margin" apply in the same manner throughout the *Anti-Dumping Agreement* and do not vary under the various provisions of the Agreement.²²⁰ Thus, under Article VI:2 and Article 9.3, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter.

103. We see no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the *Anti-Dumping Agreement* for disregarding the results of comparisons where the export price exceeds the normal value when calculating the margin of dumping for an exporter. The Appellate Body has previously noted that other provisions of the *Anti-Dumping Agreement* are explicit regarding the permissibility of disregarding certain matters. For example, Article 9.4 of the *Anti-Dumping Agreement* expressly directs investigating authorities to disregard "any zero and *de minimis* margins"

²¹⁸See *supra*, para. 80.

²¹⁹At the oral hearing, the United States argued that the definition of dumping applies at a transaction-specific level in a periodic review, and that the margin of dumping therefore relates to an individual transaction. Any transaction obviously is specific to both an exporter and an importer, and so, in that sense, dumping is importer-specific and also exporter-specific. (United States' response to questioning at the oral hearing)

²²⁰See also Appellate Body Report, *US – Zeroing (Japan)*, para. 114.

under certain circumstances, when calculating the weighted average margin of dumping to be applied to exporters that have not been individually investigated. Similarly, Article 2.2.1, which deals with the calculation of normal value, sets forth the only circumstances under which sales of the like product in the exporting country can be disregarded. Thus, when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly.²²¹

104. We further recall that, based on its analysis of Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*, the Appellate Body emphasized, in *US – Softwood Lumber V*, that:

[i]t is clear that an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation. ... [T]he results of the multiple comparisons at the sub-group level are, however, not "margins of dumping" within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole.²²²
(original emphasis)

105. In that appeal, the Appellate Body upheld the panel's finding that the use of zeroing under the W-W comparison methodology in an original investigation was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.²²³ In *US – Zeroing (EC)* and in *US – Zeroing (Japan)*, the Appellate Body confirmed its interpretation of Article VI:1 and Article 2.1 and found that the use of zeroing was also prohibited in the context of duty assessment proceedings under Article 9.3 of the *Anti-Dumping Agreement*.²²⁴ The Appellate Body further emphasized that:

[i]f, as a consequence of zeroing, the results of certain comparisons are disregarded only for purposes of calculating margins of dumping, but taken into consideration for determining injury, this would mean that the same transactions are treated as "non-dumped" for one purpose, and as "dumped" for another purpose. This is not in

²²¹See Appellate Body Report, *US – Softwood Lumber V*, para. 100.

²²²*Ibid.*, para. 97.

²²³*Ibid.*, para. 117.

²²⁴See Appellate Body Report, *US – Zeroing (EC)*, paras. 125 and 135; and Appellate Body Report, *US – Zeroing (Japan)*, paras. 166 and 176. The issue of zeroing also arose in *US – Corrosion-Resistant Steel Sunset Review*, where the Appellate Body reversed the panel's finding that the use of zeroing in a sunset review was not inconsistent with Articles 2.4 and 11.3 of the *Anti-Dumping Agreement*. The Appellate Body did not, however, complete the analysis because of insufficient factual panel findings and facts undisputed by the parties. (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 133-138)

consonance with the need for consistent treatment of a product in an anti-dumping investigation.²²⁵ (footnote omitted)

106. We also note that, while investigating authorities may define the scope of a product for an anti-dumping investigation, that definition applies throughout the investigation. "Dumping", within the meaning of the *Anti-Dumping Agreement*, can "be found to exist only for the product under investigation as a whole"²²⁶, by fully taking into account all the transactions pertaining to that product.²²⁷ That definition of the product has implications for subsequent stages of an anti-dumping proceeding as well. In particular, we consider that the application of simple zeroing in periodic reviews may result in certain models of the product under investigation not being fully taken into account at the duty assessment stage.

107. We fail to see a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as "dumped" for purposes of determining the existence and magnitude of dumping in the original investigation and as "non-dumped" for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review. Such treatment brings about the following inconsistencies. First, as noted above, the transactions that are disregarded may well pertain to a model, type, or class that fell within the definition of the product under investigation and were treated as "dumped" in the original investigation. By excluding these transactions at the duty assessment stage, a mismatch is created between the product considered "dumped" and the product as defined by the investigating authority.

108. Secondly, and more importantly, this treatment is inconsistent with the manner in which injury was determined in the original investigation, where transactions that occurred at above the normal value were taken into account in order to calculate the volume of dumped imports for purposes of injury determination.²²⁸ Obviously, we do not suggest that there need be a fresh injury determination at the duty assessment stage; rather, we wish to point to the contradiction that arises when the same type of transactions are treated as "dumped" for purposes of injury determination in the original investigation and as "non-dumped" in periodic reviews for duty assessment.

109. In addition, as we see it, a reading of Article 9.3 of the *Anti-Dumping Agreement* that permits simple zeroing in periodic reviews would allow WTO Members to circumvent the prohibition of zeroing in original investigations that applies under the first sentence of Article 2.4.2 of the *Anti-*

²²⁵ Appellate Body Report, *US – Zeroing (Japan)*, para. 128.

²²⁶ Appellate Body Report, *US – Softwood Lumber V*, para. 93.

²²⁷ *Ibid.* See also Appellate Body Report, *US – Zeroing (Japan)*, para. 115. See also Appellate Body Report, *US – Zeroing (EC)*, para. 127.

²²⁸ See also *supra*, para. 73.

Dumping Agreement. This is because, in the first periodic review after an original investigation, the duty assessment rate for each importer will take effect from the date of the original imposition of anti-dumping duties. Consequently, zeroing would be introduced although it is not permissible in original investigations. We further note that, if no periodic review is requested, the final anti-dumping duty liability for all importers will be assessed at the cash deposit rate applicable to the relevant exporter. When the initial cash deposit rate is calculated in the original investigation without using zeroing, this means that the mere act of conducting a periodic review would introduce zeroing following imposition of the anti-dumping duty order.

110. We also wish to draw attention to certain other aspects of the United States' duty assessment system, which are relevant for our analysis. First, if all sales made by an exporter to a particular importer are found to have occurred at above normal value, the duty assessment rate applicable to that importer will be zero for the period under review. However, the importer concerned will still be liable to pay a cash deposit for its future imports at the rate applicable to the relevant exporter if that exporter has made sales at below normal value to some other importers.²²⁹ Secondly, in a periodic review, a going-forward cash deposit rate is calculated in respect of the relevant exporter, and all importers importing from that exporter will pay cash deposits at that rate for future entries of the subject merchandise, regardless of the importer-specific duty assessment rates calculated for each importer for the previous period. These aspects indicate that the duty assessment and collection system of the United States is not entirely importer-driven, but depends as well on exporter-related determinations. The fact that the final liability of all importers would be assessed at the exporter's cash deposit rate, if no periodic review is requested, also confirms this conclusion.

D. *Periodic Reviews and Importer-specific Duty Assessment*

111. The United States and the Panel have expressed certain concerns regarding the implications for importer-specific duty assessment in periodic reviews that flow from the Appellate Body's interpretation of Article 9.3 of the *Anti-Dumping Agreement* in previous disputes. The United States argues that, if, under *US – Zeroing (EC)* and *US – Zeroing (Japan)*, "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 [it] has no control."²³⁰ According to the United States, this would also mean that "the importer who is

²²⁹At the oral hearing, the United States explained that the rationale for this approach is that the exporter's pricing behaviour is unpredictable.

²³⁰United States' appellee's submission, para. 102.

engaged in dumped transactions would receive a windfall, because [it] may escape antidumping duties, or have [its] liability sharply reduced through the actions of another importer who behaved responsibly by eliminating its dumping margin."²³¹ In the same vein, the Panel expressed the concern that "importers with high margins of dumping would be favoured at the expense of importers who do not dump or who dump at a lower margin."²³²

112. It appears to us that the United States and the Panel have not correctly understood the Appellate Body's interpretation of Article 9.3 in previous disputes. First, the Appellate Body has not recognized the notion of "an importer's dumping margin" and has not held that "an importer's dumping margin must be averaged out".²³³ Rather, the Appellate Body has consistently held that "margin of dumping" is an exporter-specific concept, and that, whatever methodology is followed for assessment and collection of anti-dumping duties, the total amount of anti-dumping duties assessed and collected from all importers must not exceed the total amount of dumping found in all the sales made by the exporter concerned, calculated according to the margin of dumping established for that exporter without zeroing.²³⁴ Secondly, the Appellate Body has also consistently held that "dumping" and "margin of dumping" do not exist at the level of individual transactions, and that, therefore, the terms "dumping" and "margin of dumping" cannot be interpreted as applying at an individual transaction level, as the United States suggests.²³⁵ Thirdly, with respect to *assessment* of anti-dumping duty, however, the Appellate Body has recognized that, under Article 9.3, anti-dumping duty liability can be assessed in relation to a specific importer on the basis of its transactions from the relevant exporter.

113. We do not agree that the Appellate Body's interpretation of Article 9.3 would favour "importers with high margins of dumping ... at the expense of importers who do not dump or who dump at a lower margin", as the Panel suggests.²³⁶ In our view, it is not correct to say that, under the Appellate Body's interpretation, an "offset" is provided for the so-called "non-dumped" transactions.

²³¹United States' appellee's submission, para. 102.

²³²Panel Report, para. 7.146.

²³³The Appellate Body stated, in *US – Zeroing (EC)*, that:

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

(Appellate Body Report, *US – Zeroing (EC)*, para. 131 (original emphasis; footnote omitted))

²³⁴See Appellate Body Report, *US – Zeroing (Japan)*, para. 156.

²³⁵See *ibid.*, paras. 115 and 151; and Appellate Body Report, *US – Zeroing (EC)*, paras. 126 and 128.

²³⁶Panel Report, para. 7.146. We reiterate our view that importers do not "dump" and do not have "dumping margins".

A margin of dumping is properly calculated under the *Anti-Dumping Agreement* only if all transactions are taken into account, including those where the export prices exceed the normal value. Moreover, our interpretation does not preclude a WTO Member applying a retrospective system from assessing an importer's final anti-dumping duty liability on the basis of its own transactions, subject, however, to the legal requirement that the prescribed overall margin of dumping for the exporter is respected.²³⁷

114. In sum, the Appellate Body has ruled on the amount of anti-dumping duty that can be levied in accordance with Article 9.3 of the *Anti-Dumping Agreement*, and not on how this amount is to be collected from the importers. In addition, the Appellate Body has recognized that WTO Members have flexibility in choosing their duty assessment and collection system within the parameters highlighted above.

E. *The Panel's Arguments Relating to Alleged Administrative Burden*

115. The Panel stated that a prohibition of zeroing in periodic reviews "would unnecessarily expand the scope of periodic reviews because the exporters would have to submit information pertaining to all of their export transactions rather than those pertaining to the importer requesting the review."²³⁸ According to the Panel, this would "also cause administrative inconvenience because the investigating authorities would have to analyze all that information and be unable to complete the review in a timely manner."²³⁹

116. It appears that the Panel has misunderstood a procedural aspect of the United States' duty assessment system. As Mexico points out, the USDOC Regulations do not give the USDOC the discretion to limit the scope of a periodic review to only exports pertaining to the importer requesting the review.²⁴⁰ As we have explained earlier²⁴¹, a periodic review under the United States' system can be requested by any interested party. However, once a periodic review is conducted, the USDOC examines contemporaneous data pertaining to an exporter's sales to all of the importers of the subject merchandise and determines simultaneously a going-forward cash deposit rate to be applied to all

²³⁷The Appellate Body has previously stated that, if aggregation of the results of multiple comparisons yields a negative value for a particular importer, "this would not mean that the authorities would be required ... to compensate an importer for the amount of that negative value (that is, when export prices exceed normal value)." (Appellate Body Report, *US – Zeroing (Japan)*, footnote 363 to para. 155 (quoting Appellate Body Report, *US – Zeroing (EC)*, footnote 234 to para. 131)) We further note, as stated in paragraph 110 of this Report, that, in the case of such an exporter, under the United States' system, cash deposits will continue to be collected at the going-forward cash deposit rate applicable to the exporter concerned.

²³⁸Panel Report, para. 7.146.

²³⁹*Ibid.*

²⁴⁰See Mexico's appellant's submission, para. 83 and footnotes 64 and 65 thereto.

²⁴¹*Supra*, para. 74.

future entries of that product from that exporter and an individual duty assessment rate for each importer in order to assess the final liability for payment of anti-dumping duties by that importer for the period under review.²⁴² The Panel's concern over additional administrative burden or inconvenience is therefore misplaced.

F. *Arguments Relating to Prospective Normal Value Systems*

117. We turn next to examine the Panel's analysis relating to "prospective normal value" systems referred to in Article 9.4(ii) of the *Anti-Dumping Agreement*.²⁴³

118. The Panel stated that Article 9.4(ii) "clearly provides for a prospective normal value system".²⁴⁴ The Panel observed that, "[i]n a prospective normal value system, the importer's liability is determined through the comparison of the price paid by the importer in a given transaction and the prospective normal value."²⁴⁵ According to the Panel, under such a system, "prices paid in other export transactions have no bearing on this importer's liability."²⁴⁶ The Panel added that, "[i]n 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."²⁴⁷

119. For the Panel, it would have been "quite illogical"²⁴⁸ if the drafters of the *Anti-Dumping Agreement* 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."²⁴⁹ According to the Panel, "[t]he prospective

²⁴²See Mexico's appellant's submission, para. 83 (referring to Issues and Decision Memorandum for the Final Results of Review in the 2001/2003 Administrative Review of Automotive Replacement Glass ("ARG") Windshield from the People's Republic of China, A-570-867, 69 FR 61790, 21 October 2004 (Exhibit MEX-13.1 submitted by Mexico to the Panel), pp. 10-11: "The regulation limits an importer's ability to request an administrative review to its own producers or exporters. The purpose of this limitation is to allow only those companies with a stake in the outcome to request an administrative review of the producers relevant to them. Once the [USDOC] decides to conduct its review, however, any such review covers that producer's or exporter's sales to all importers").

²⁴³Article 9.4(ii) provides that an anti-dumping duty applied to imports from exporters not examined individually and not included in the examination shall not exceed "where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined".

²⁴⁴Panel Report, para. 7.131.

²⁴⁵*Ibid.*

²⁴⁶*Ibid.*

²⁴⁷*Ibid.*

²⁴⁸*Ibid.*, para. 7.133.

²⁴⁹*Ibid.*

normal value system is based on the notion of transaction-based duty collection."²⁵⁰ For the Panel, "[t]he Appellate Body's reasoning that duties collected under such a system are nevertheless subject to duty assessment proceedings just like other duties assessed on a prospective basis is, therefore, far from being convincing."²⁵¹

120. As Mexico, the European Communities, and Japan point out, the Panel has failed to distinguish between duty "collection" at the time of importation, on the one hand, and determinations of the final duty liability of an importer and the margin of dumping for an exporter, on the other hand.²⁵² The anti-dumping duty collected from each importer at the time of importation, under a prospective normal value system, does not represent the "margin of dumping" under Article 9.3, which, as the Appellate Body has found, is the margin of dumping for an exporter for all of its sales of the subject merchandise into the country concerned. As the Panel itself observed, under Article 9.3.2, the amount of duties collected on a prospective basis also is subject to review. Under a prospective normal value system, a review can be triggered as well if the prospective normal value has been improperly determined and thereby the ceiling prescribed under Article 9.3 is breached. Article 9.4(ii) does not exempt prospective normal value systems from the requirement set out in Article 9.3.

121. The Panel stated that, if "liability for anti-dumping duties can be determined on a transaction-specific basis in a prospective normal value system, there is no reason why the same cannot be the case in the context of the retrospective duty assessment system under Article 9.3.2."²⁵³ It is true that, in a prospective normal value system, anti-dumping duties are "collected" on only the individual export transactions where the prices are less than the prospective normal value, regardless of whether prices of other export transactions are above the prospective normal value. However, as we have stated above, a review can be requested if the prospective normal value has been improperly determined so as to result in collection of anti-dumping duties in excess of the ceiling prescribed in Article 9.3. As the Appellate Body has stated, the *Anti-Dumping Agreement* is neutral as to the different systems for levy and collection of anti-dumping duties.²⁵⁴

²⁵⁰Panel Report, para. 7.133.

²⁵¹*Ibid.*

²⁵²See Mexico's appellant's submission, paras. 49-51; European Communities' third participant's submission, para. 68; and Japan's third participant's submission, para. 51.

²⁵³Panel Report, para. 7.131.

²⁵⁴See Appellate Body Report, *US – Zeroing (Japan)*, paras. 162 and 163.

G. *The Panel's Contextual Arguments Relating to the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement*

122. The Panel relied on the second sentence of Article 2.4.2 as context to justify its decision not to follow the legal interpretation of the Appellate Body in *US – Zeroing (Japan)*. The second sentence of Article 2.4.2 reads:

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

We recall that, under the first sentence of Article 2.4.2, an investigating authority is "normally" required to use one of the two symmetrical comparison methodologies provided for in that sentence. The second sentence of Article 2.4.2 provides an asymmetrical comparison methodology to address a so-called pattern of "targeted" dumping found among certain purchasers, in certain regions, or during certain time periods.

123. The Panel stated that an interpretation that prohibits zeroing in all contexts would be contrary to the principle of effective treaty interpretation, because it would mean that the application of the second sentence of Article 2.4.2 would always yield the same mathematical result as that obtained by applying the W-W comparison methodology of the first sentence, thereby rendering the second sentence of Article 2.4.2 *inutile*.²⁵⁵

124. Mexico responds to the Panel's interpretation of the second sentence of Article 2.4.2 in two ways. First, it points out that the asymmetrical comparison methodology in Article 2.4.2 (which is meant to be used against "targeted dumping") was not an issue before the Panel and that, therefore, the Appellate Body need not rule on whether zeroing is permitted under that provision.²⁵⁶ Secondly, the "mathematical equivalence" argument works only under the assumption that the weighted average normal value used in the weighted average-to-transaction ("W-T") comparison methodology is identical to that used in the W-W comparison methodology. According to Mexico, this is not the case under the United States' system. Instead, the USDOC's Regulations "call for the use of

²⁵⁵See Panel Report, para. 7.136. The United States generally supports the Panel's interpretation of Article 2.4.2. (See United States' appellee's submission, paras. 87-93).

²⁵⁶See Mexico's appellant's submission, para. 65.

contemporaneous monthly normal values in 'targeted dumping' [W-T] situations, while mandating period-long normal value averages (normally one year) for [W-W] comparisons."²⁵⁷

125. The European Communities, Japan, and Thailand generally agree with Mexico.²⁵⁸ In addition, Japan and Thailand argue that the second sentence of Article 2.4.2 is not relevant to the issue of whether simple zeroing is permitted in periodic reviews.

126. We note that the United States did not contest before the Panel Mexico's assertion that, if the determination of weighted average normal values was based on *different time periods*, dumping margin calculations under these two methodologies would yield different mathematical results.²⁵⁹ We further note the Panel's statement that a methodology based on a comparison of "monthly normal values with individual export transactions is the same methodology prescribed in US Regulations for investigations where targeted dumping is identified and the third comparison methodology is used"²⁶⁰, and that the United States did not dispute this statement.²⁶¹ In our view, this suggests that the "mathematical equivalence" argument works only under a specific set of assumptions, and that there is uncertainty as to how the W-T comparison methodology would be applied in practice.²⁶²

127. In any event, the Appellate Body has explained that, "[b]eing an exception, the comparison methodology in the second sentence of Article 2.4.2 (weighted average-to-transaction) alone cannot determine the interpretation of the two methodologies provided in the first sentence".²⁶³ As the Appellate Body has also said, it could be argued, in reverse, that permitting zeroing under the first sentence of Article 2.4.2 "would enable investigating authorities to capture pricing patterns constituting 'targeted dumping', thus rendering the third methodology *inutile*."²⁶⁴ The Appellate Body has also observed, in *US – Zeroing (Japan)*, that, "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern."²⁶⁵ The Appellate Body has so far not ruled on the question of whether or not zeroing is permissible under the comparison methodology in the second

²⁵⁷Mexico's appellant's submission, para. 67 ("*obligan a usar el valor normal promedio mensual más contemporáneo en situaciones de 'dumping dirigido', y obligar usar valores normales de periodos completos (normalmente un año) cuando se trata de comparaciones promedio-contra-promedio*").

²⁵⁸See European Communities' third participant's submission, paras. 239 and 240; Japan's third participant's submission, paras. 80-83; and Thailand's third participant's submission, paras. 32-35.

²⁵⁹Panel Report, para. 7.140. (emphasis added)

²⁶⁰*Ibid.*, para. 7.142. (footnote omitted)

²⁶¹See *ibid.* and footnote 105 thereto (referring to United States' response to Question 5 posed by the Panel at the second panel meeting).

²⁶²See also Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

²⁶³*Ibid.*, para. 97.

²⁶⁴Appellate Body Report, *US – Zeroing (Japan)*, para. 133 (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 100 (original emphasis)).

²⁶⁵*Ibid.*, para. 135.

sentence of Article 2.4.2. Nor is it an issue before us in this appeal. As in *US – Zeroing (Japan)*, our analysis here of the second sentence of Article 2.4.2 is therefore confined to addressing the contextual arguments of the Panel based on that provision.²⁶⁶

H. *Historical Background*

128. We do not consider it strictly necessary in this case to have recourse to the supplementary means of interpretation identified in Article 32 of the *Vienna Convention* because our analysis under Article 31 has not left the meaning of the relevant provisions of the *Anti-Dumping Agreement* "ambiguous or obscure", nor has it led to a "manifestly absurd or unreasonable" result. Nevertheless, we turn to examine the United States' arguments relating to the historical background of the *Anti-Dumping Agreement*.

129. The United States argues that recourse to the circumstances of the conclusion of the *Anti-Dumping Agreement* is appropriate in this case as a supplementary means of interpretation under Article 32 of the *Vienna Convention*. The United States refers to various historical materials, including the 1960 Group of Experts Report, two pre-WTO panel reports²⁶⁷ that dealt with the issue of zeroing in the context of the *Tokyo Round Anti-Dumping Code*, and several proposals submitted during the Uruguay Round.²⁶⁸ According to the United States, the historical materials demonstrate that the negotiators were not able to agree on a general prohibition of zeroing or on a requirement to aggregate individual transactions under Article 9.3 of the *Anti-Dumping Agreement*.²⁶⁹ The United States submits that, throughout the history of the GATT, it was recognized that zeroing was allowed under Article VI of the GATT 1947, and adds that this Article was not modified during the Uruguay Round.²⁷⁰ According to the United States, "[n]o consensus could be reached because despite extensive efforts by Japan, Hong Kong, Singapore, and the Nordic Countries, their proposals [for prohibiting zeroing] were firmly opposed by the [European Communities], the United States and Canada."²⁷¹

²⁶⁶See Appellate Body Report, *US – Zeroing (Japan)*, para. 136. Accordingly, the inferences that the Panel seeks to draw as to the Appellate Body's interpretation of the second sentence of Article 2.4.2 are misguided. (See Panel Report, paras. 7.138 and 7.139)

²⁶⁷Panel Report, *EC – Audio Cassettes*, circulated 28 April 1995, unadopted; Panel Report, *EEC – Cotton Yarn*, adopted 30 October 1995.

²⁶⁸See United States' appellee's submission, paras. 59-64.

²⁶⁹See *ibid.*, paras. 114, 126, and 128.

²⁷⁰See *ibid.*, paras. 126 and 127.

²⁷¹*Ibid.*, para. 128 (referring to Communications from Japan, MTN.GNG/NG8/W/11 and MTN.GNG/NG8/W/30; Proposals by Hong Kong, China, MTN.GNG/NG8/W/51/Add.1 and MTN.GNG/NG8/W/46; Proposal by Singapore, MTN.GNG/NG8/W/55; and Proposal by the Nordic Countries, MTN.GNG/NG8/W/76). See also *ibid.*, paras. 114-128.

130. We are not persuaded that the aforementioned historical materials provide guidance as to whether simple zeroing is permissible under Article 9.3 of the *Anti-Dumping Agreement*. First, as we see it, the negotiating proposals referred to by the United States reflect the positions of only some of the negotiating parties. Japan argued at the oral hearing that, contrary to what the United States suggests, if certain proposals on zeroing were not expressly included in the text, it is because the negotiators considered that the new Uruguay Round *Anti-Dumping Agreement* prohibited zeroing. The European Communities, in turn, suggests that there is a "strong indication of consensus that the interests of both parties in the asymmetry and zeroing debate could be accommodated in the targeted dumping provisions that eventually became the second sentence of Article 2.4.2".²⁷²

131. Secondly, we note that the same historical materials referenced by the United States were examined by the Appellate Body in *US – Softwood Lumber V*²⁷³, where the Appellate Body concluded that these materials did not resolve the issue of whether the negotiators of the *Anti-Dumping Agreement* intended to prohibit zeroing. Although the 1960 Group of Experts Report concluded that making an injurious dumping determination based on individual transactions was the "ideal method", it also regarded such method as "clearly impracticable".²⁷⁴ This report is of little relevance to our analysis and does not shed light on the determination of a margin of dumping under Article 9.3 of the *Anti-Dumping Agreement*. In addition, even if we were to assume that zeroing was permitted under Article VI of the GATT 1947, Article VI of the GATT 1994 has to be interpreted now in conjunction with the relevant provisions of the *Anti-Dumping Agreement*, such as Articles 2.1, 2.4, 2.4.2, and 9.3.

132. Thirdly, the *Anti-Dumping Agreement* entered into force in 1995, as part of the results of the Uruguay Round negotiations, long after the 1960 Group of Experts Report. The Panel Reports in *EC – Audio Cassettes* (unadopted) and *EEC – Cotton Yarn* (adopted), referred to by the United States, examined the issue of zeroing under the provisions of the *Tokyo Round Anti-Dumping Code*. The relevance of these panel reports is diminished by the fact that the plurilateral *Tokyo Round Anti-Dumping Code* was legally separate from the GATT 1947 and has, in any event, been terminated. This Code was not incorporated into the WTO covered agreements and, furthermore, it contained provisions that were less detailed than those in the *Anti-Dumping Agreement*. In its arguments on the permissibility of zeroing, the United States relies specifically on Article 2.6 of the *Tokyo Round Anti-*

²⁷²European Communities' third participant's submission, para. 226. (emphasis omitted) In response to questioning at the oral hearing, the European Communities argued that the negotiating history of the second sentence of Article 2.4.2 suggests further that investigating authorities are permitted to select low-priced export transactions, in order to calculate a margin of dumping, only where a pattern of export prices for different purchasers, regions, or time periods exists.

²⁷³See Appellate Body Report, *US – Softwood Lumber V*, para. 108.

²⁷⁴*Supra*, footnote 58, para. 8.

Dumping Code. We note that the corresponding provision in the *Anti-Dumping Agreement*, namely, Article 2.4, has a different wording in that it contains a new first sentence. Moreover, the *Tokyo Round Anti-Dumping Code* contained no provision similar to Article 2.4.2 of the *Anti-Dumping Agreement*. Therefore, whatever the legal status of zeroing under the *Tokyo Round Anti-Dumping Code*, it is of little relevance for the interpretation of differently phrased or new provisions of the *Anti-Dumping Agreement*.

I. *Conclusion*

133. As noted above, when applying "simple zeroing" in periodic reviews, the USDOC compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amounts by which the export prices exceed the monthly weighted average normal values, when aggregating the results of the comparisons to calculate the going-forward cash deposit rate for the exporter and the duty assessment rate for the importer concerned. Simple zeroing thus results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping, which, as we have explained above, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by an exporter. Therefore, simple zeroing is, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*.

134. For these reasons, we *reverse* the Panel's finding, in paragraphs 7.143 and 8.1(c) of the Panel Report, that simple zeroing in periodic reviews is not, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, and *find*, instead, that simple zeroing in periodic reviews is, as such, inconsistent with the United States' obligations under those provisions. As a consequence, we also *reverse* the Panel's findings, in paragraphs 7.143 and 8.1(c) of the Panel Report, that simple zeroing in periodic reviews is not, as such, inconsistent with Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. The Panel offers no additional reasoning that could independently support its findings under those provisions.

135. We note that Mexico requests the Appellate Body not only to reverse the Panel's findings of consistency, but also to find that simple zeroing in periodic reviews is, as such, inconsistent with the United States' obligations under Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.²⁷⁵ As we have found that simple zeroing in periodic reviews is, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, we do not consider it

²⁷⁵Mexico confirmed at the oral hearing that, in making its claim under Article VI:1 of the GATT 1994, it does not rely on the last sentence of that Article dealing with price comparability.

necessary to make an additional finding on Mexico's claim under Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.²⁷⁶

136. In our analysis, we have been mindful of the standard of review provided in Article 17.6(ii) of the *Anti-Dumping Agreement*. However, we consider that Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, when interpreted in accordance with the customary rules of interpretation of public international law as required by the first sentence of Article 17.6(ii) of the *Anti-Dumping Agreement*, do not admit of another interpretation as far as the issue of zeroing raised in this appeal is concerned.

VI. Simple Zeroing As Applied in Periodic Reviews

137. The Panel found that zeroing, as applied by the USDOC in the five periodic reviews at issue in this dispute, is not inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*.²⁷⁷ In support of its findings, the Panel referred to the reasoning that led it to conclude that simple zeroing in periodic reviews is not inconsistent with those provisions.²⁷⁸

138. On appeal, Mexico requests the Appellate Body to reverse the Panel's findings under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* and to find, instead, that the United States acted inconsistently with its obligations under these provisions.

139. We have found²⁷⁹ that simple zeroing in periodic reviews is, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*.²⁸⁰ For the same reasons, we *reverse* the Panel's finding, in paragraphs 7.149 and 8.1(d) of the Panel Report, that zeroing, as applied by the USDOC in the five periodic reviews at issue in this dispute, is not inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*, and *find*, instead, that the United States acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* in the five periodic reviews at issue in this dispute.

²⁷⁶See also Appellate Body Report, *US – Zeroing (Japan)*, para. 140.

²⁷⁷Panel Report, paras. 7.149 and 8.1(d).

²⁷⁸*Ibid.*, para. 7.149.

²⁷⁹See *supra*, para. 134.

²⁸⁰See also Appellate Body Report, *US – Zeroing (EC)*, para. 133; and Appellate Body Report, *US – Zeroing (Japan)*, paras. 174-176.

140. In relation to Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*, we note that Mexico requests the Appellate Body not only to reverse the Panel's findings, but also to find that the United States acted inconsistently with these provisions.²⁸¹ However, having found that zeroing, as applied by the USDOC in the five periodic reviews at issue in this dispute, is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, we do not consider it necessary to make an additional finding on Mexico's claim under Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.²⁸²

VII. Article 2.4 of the *Anti-Dumping Agreement*

141. Before the Panel, Mexico argued that simple zeroing in periodic reviews is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*, because "a comparison that fails to take into account certain export transactions cannot result in a determination of dumping for the product under consideration as a whole and cannot be considered as a 'fair comparison' within the meaning of Article 2.4."²⁸³ The Panel viewed Mexico's claim as being "premised on the assumption that Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* prohibit simple zeroing in periodic reviews."²⁸⁴ Having disagreed with Mexico's assertion that these provisions "require investigating authorities in a periodic review to base their dumping determinations on an aggregation of all export transactions from each exporter", the Panel found that simple zeroing in periodic reviews is not, as such, inconsistent with the obligation to make a "fair comparison" between the normal value and the export price as stipulated in Article 2.4 of the *Anti-Dumping Agreement*.²⁸⁵ The Panel further found that the United States did not, therefore, act inconsistently with Article 2.4 in the five periodic reviews at issue in this dispute.

142. Mexico challenges the Panel's findings on appeal. Mexico argues that the Panel erred in rejecting Mexico's arguments concerning the consistency of simple zeroing in periodic reviews with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*.²⁸⁶ In addition, Mexico argues that the Panel failed to conduct an "objective assessment of the matter", as required under Article 11 of the DSU, by failing to address other "independent arguments" put forward by Mexico that simple zeroing in periodic reviews is inconsistent with the "fair comparison" requirement in Article 2.4 because it "distorts the prices of certain export transactions by artificially

²⁸¹ See Mexico's appellant's submission, para. 101.

²⁸² See, *supra*, para. 133.

²⁸³ Panel Report, para. 7.144.

²⁸⁴ *Ibid.*, para. 7.145.

²⁸⁵ See *ibid.* (referring to para. 7.123) and para. 7.149.

²⁸⁶ Mexico's appellant's submission, para. 91.

reducing them, [thus] inflating the apparent magnitude of dumping" and because "calculating margins of dumping [through the use of zeroing] is not impartial, even-handed, or unbiased."²⁸⁷

143. The Panel's finding that simple zeroing in periodic reviews is not inconsistent with Article 2.4 of the *Anti-Dumping Agreement* is based on the Panel's reasoning and findings relating to Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*, which we have reversed. The Panel offers no additional reasoning that could independently support its finding under Article 2.4. As a consequence, we *reverse* the Panel's findings, in paragraphs 7.145 and 8.1(c) of the Panel Report, that simple zeroing in periodic reviews is not, as such, inconsistent with Article 2.4 of the *Anti-Dumping Agreement*. We also *reverse* the Panel's findings, in paragraphs 7.149 and 8.1(d) of the Panel Report, that the United States did not act inconsistently with Article 2.4 in the five periodic reviews at issue in this dispute.

144. We note that Mexico requests the Appellate Body not only to reverse the Panel's finding of consistency, but also to find that simple zeroing in periodic reviews is inconsistent with the United States' obligations under Article 2.4. As we have found that simple zeroing in periodic reviews is, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, we *find* it unnecessary to make an additional finding in relation to Mexico's "as such" and "as applied" claims under Article 2.4.²⁸⁸ For the same reason, we *find* it unnecessary to make an additional finding on Mexico's claim that the Panel acted inconsistently with Article 11 of the DSU by failing to address certain "independent" arguments put forward by Mexico in support of its claim under Article 2.4.

²⁸⁷Mexico's appellant's submission, para. 92 ("*argumentos independientes*"; "*distorsiona los precios de ciertas transacciones al reducir de manera artificial e inflar ... la magnitud del dumping*"; "*cálculo de los márgenes de dumping [por la utilización de la reducción a cero] no es imparcial, equitativa ni justa*").

²⁸⁸We recall that, in *US – Zeroing (EC)*, the Appellate Body considered that, in the light of its earlier finding that zeroing as applied in the periodic reviews at issue was inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, additional findings under Article 2.4 of the *Anti-Dumping Agreement* were not necessary to resolve that dispute. (Appellate Body Report, *US – Zeroing (EC)*, para. 147) In that same appeal, the Appellate Body was unable to complete the analysis and determine whether zeroing in periodic reviews was, as such, inconsistent with the "fair comparison" requirement in Article 2.4. (*Ibid.*, para. 228) In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body found that the use of zeroing in calculating the margins of dumping under the T-T comparison methodology in the original investigation at issue in that dispute was inconsistent with the "fair comparison" requirement in Article 2.4 of the *Anti-Dumping Agreement*. (Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 146) In *US – Zeroing (Japan)*, the Appellate Body found that zeroing in periodic reviews is, as such, inconsistent with Article 2.4 of the *Anti-Dumping Agreement*. (Appellate Body Report, *US – Zeroing (Japan)*, para. 169)

VIII. Mexico's Claim under Article 11 of the DSU Concerning the Panel's Failure to Follow Previous Adopted Appellate Body Reports Addressing the Same Issues

145. We turn next to address Mexico's claim that the Panel acted inconsistently with Article 11 of the DSU because, by making findings and conclusions that are identical to those that have been reversed by the Appellate Body in previous disputes, it failed to assist the DSB in discharging its responsibilities under the DSU and the covered agreements.

A. *The Panel's Findings and Mexico's Appeal*

146. At the outset of its analysis, the Panel recalled previous Appellate Body jurisprudence regarding the relevance of adopted panel and Appellate Body reports for future panels addressing the same issues. The Panel referred to the Appellate Body Report in *Japan – Alcoholic Beverages II*, where the Appellate Body said that, although adopted panel reports are not binding, except with respect to resolving the particular dispute between the parties, they should be taken into account where they are relevant to any dispute.²⁸⁹ The Panel also referred to the Appellate Body's statement in *US – Oil Country Tubular Goods Sunset Reviews*, that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, [it] is what would be expected from panels, especially where the issues are the same."²⁹⁰ Nevertheless, the Panel decided not to follow the legal interpretation of the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*, where the Appellate Body found that simple zeroing in periodic reviews is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*.²⁹¹ Instead, the Panel relied on findings in panel reports that the Appellate Body has reversed.

147. On appeal, Mexico argues that the Panel's approach was inconsistent with the first sentence of Article 11 of the DSU, which stipulates that the function of panels is to assist the DSB in discharging its responsibilities under the DSU. In support of its claim, Mexico refers to Articles 3.2 and 3.3 of the DSU, which state that the dispute settlement system is a "central element in providing security and predictability to the multilateral trading system" and that the "prompt settlement of situations" is "essential to the effective functioning of the WTO". Mexico emphasizes that the Panel acted inconsistently with Article 11 of the DSU by failing "to follow a consistent line of adopted Appellate Body reports that address identical issues with respect to the same responding party"²⁹² and, as a

²⁸⁹Panel Report, para. 7.103 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14, DSR 1996:I, 97, at 108.

²⁹⁰*Ibid.*, para. 7.104 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188).

²⁹¹See *ibid.*, para. 7.106.

²⁹²Mexico's appellant's submission, para. 97 ("*la negativa de seguir los informes del Órgano de Apelación que abordaron las mismas cuestiones con respecto a la misma parte demandada*").

result, by making findings that are identical to those that have been expressly reversed by the Appellate Body in previous cases. Mexico maintains that it was compelled to appeal because of the Panel's departure from previous Appellate Body reports. In Mexico's view, this "interfere[d] with the prompt settlement of this dispute and, thereby, frustrate[d] the effective functioning of the WTO dispute settlement system".²⁹³

148. The United States requests the Appellate Body to reject Mexico's claim. According to the United States, the Panel made an objective assessment of the matter by "conduct[ing] its own, objective review of the applicable facts and law to come up with findings to assist the DSB."²⁹⁴ The United States further submits that the Panel "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."²⁹⁵ With respect to the "expectation" that panels follow adopted panel and Appellate Body reports, the United States disagrees with Mexico that a failure to meet this expectation could constitute a violation of Article 11 of the DSU. The United States also refers to the last sentence of Article 3.2 of the DSU, which states that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

149. The European Communities, Japan, and Thailand support Mexico's claim that the Panel acted inconsistently with its obligations under Article 11 of the DSU.²⁹⁶ The European Communities submits that the legal questions that the Panel had to deal with are the same as those that were before the Appellate Body in previous cases. The European Communities underlines that the Panel did not "distinguish"²⁹⁷ the legal issues raised by Mexico in the present case from those addressed by the Appellate Body in previous cases. Although the European Communities acknowledges that case law can change if there are cogent reasons for such a change²⁹⁸, such a change could not be justified solely on the basis of a disagreement by the hierarchically lower body with the reasoning of the hierarchically higher body in the WTO dispute settlement system.²⁹⁹ The European Communities therefore requests the Appellate Body to make it unambiguous that panels are not only expected, but also obliged, to follow Appellate Body findings.

²⁹³Mexico's appellant's submission, para. 98 ("*interfirió con la solución pronta de esta controversia y, por ende, frustró el funcionamiento eficaz del mecanismo de solución de diferencias de la OMC*").

²⁹⁴United States' appellee's submission, para. 130.

²⁹⁵*Ibid.*, para. 131.

²⁹⁶See European Communities' third participant's submission, para. 35; Japan's third participant's submission, para. 13; and Thailand's third participant's submission, paras. 14 and 15.

²⁹⁷European Communities' third participant's submission, para. 53.

²⁹⁸See *ibid.*, para. 50; and European Communities' first written submission to the Panel, paras. 141-144.

²⁹⁹See European Communities' third participant's submission, para. 51.

150. Japan contends that, where a subsequent dispute involves the same matter as an adopted report, the adopted report "clarifies" the respondent's obligations with respect to the specific matter and creates expectations among other WTO Members of their rights with respect to that matter.³⁰⁰ Japan adds that "a panel that sets aside adopted rulings on the same 'matter'"³⁰¹ acts inconsistently with its obligations under Article 11 of the DSU, because it substitutes its own "subjective assessment of the matter for one that carries the approval of the DSB".³⁰²

151. Thailand maintains that, for a multi-tiered system of adjudication to function effectively and to provide "security and predictability", the hierarchy between the two tiers in the system must be respected. Thailand further maintains that, if WTO Members cannot be confident that the decisions of panels will be consistent with the jurisprudence of the Appellate Body, they will lose confidence in the WTO dispute settlement process; they will see WTO dispute settlement proceedings as requiring an appeal in every dispute in order to obtain an objective assessment of the matter.³⁰³ According to Thailand, this would increase the cost of using the system, diminish efficiency, and be particularly harmful for developing countries.³⁰⁴

152. According to Chile, the Panel's findings may create a "vicious circle"³⁰⁵ that would not provide security and predictability to the dispute settlement system. Nonetheless, Chile argues that, while panels are expected to follow Appellate Body jurisprudence, they are under no obligation to do so. Therefore, the fact that a panel did not do what was expected of it cannot, in and of itself, constitute a violation of Article 11 of the DSU.³⁰⁶

153. Having recalled the participants' arguments on appeal, we turn to an examination of Article 11 of the DSU.

³⁰⁰See Japan's third participant's submission, paras. 15 and 19.

³⁰¹*Ibid.*, para. 18.

³⁰²*Ibid.*

³⁰³See Thailand's third participant's submission, para. 14.

³⁰⁴See *ibid.*, para. 15.

³⁰⁵Chile's third participant's submission, p. 1 ("*círculo vicioso*").

³⁰⁶See *ibid.*, p. 2.

B. *Analysis*

154. On appeal, Mexico argues that the Panel acted inconsistently with Article 11 of the DSU by failing to follow well-established Appellate Body jurisprudence. In support of its claim, Mexico refers to Articles 3.2 and 3.3 of the DSU.

155. We begin our consideration with the text of Article 11 of the DSU, which sets forth the function of panels in the WTO dispute settlement system. The first sentence stipulates that "[t]he function of panels is to assist the DSB in discharging its responsibilities" under the DSU and the covered agreements. The second sentence states that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

156. Mexico stated at the oral hearing that its claim focuses on the first sentence of Article 11 of the DSU. However, we observe that the second sentence of Article 11 begins with the term "Accordingly". This term creates a link between the first and the second sentence of Article 11³⁰⁷; it ties the second sentence to the general description contained in the first sentence. The second sentence enunciates two specific "functions" of panels, namely, the duty "to make an objective assessment of the matter before it" and "to make such other findings as will assist the DSB in making the recommendations or in giving the rulings" under the covered agreements.

157. We consider the meaning of "[t]he function of panels" in the first sentence of Article 11 is informed by the general provisions contained in Article 3 of the DSU, which sets out the basic principles of the WTO dispute settlement system. Article 3.2 provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system"; 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."

³⁰⁷The word "accordingly" is used in a similar way in Article 2 of the DSU. There, the first sentence establishes the DSB. In the second sentence, starting with the word "accordingly", the DSB is provided with "the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements."

158. It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties.³⁰⁸ This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB.³⁰⁹ In *Japan – Alcoholic Beverages II*, the Appellate Body found that:

[a]dopted 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.³¹⁰

159. In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body clarified that this reasoning applies to adopted Appellate Body reports as well.³¹¹ In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body held that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."³¹²

160. Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body

³⁰⁸See Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 12-15, DSR 1996:I, 97, at 106-108. In that case, the Appellate Body stated:

It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.

(*Ibid.*, p. 14, footnote 30, DSR 1996:I, 97, at 108) See also Appellate Body Report, *US – Softwood Lumber V*, paras. 109-112; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 109.

While Appellate Body reports adopted by the DSB shall be accepted unconditionally by the parties to the dispute, it is the exclusive authority of the Ministerial Conference and the General Council to adopt, pursuant to Article IX:2 of the *WTO Agreement*, interpretations that are binding upon the WTO membership.

³⁰⁹We note that the mandate of an Article 21.5 panel includes the task of assessing whether the measures taken to comply with the rulings and recommendations adopted by the DSB in the original proceedings achieve compliance with those rulings. Therefore, panels established under that provision are bound to follow the legal interpretation contained in the original panel and Appellate Body reports that were adopted by the DSB.

³¹⁰Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14, DSR 1996:I, 97, at 108.

³¹¹See Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 109.

³¹²Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.³¹³

161. In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play. In order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body. Pursuant to Article 17.6 of the DSU, the Appellate Body is vested with the authority to review "issues of law covered in the panel report and legal interpretations developed by the panel". Accordingly, Article 17.13 provides that the Appellate Body may "uphold, modify or reverse" the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU. Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.

³¹³See H. Lauterpacht, "The so-called Anglo-American and Continental Schools of Thought in International Law" (1931) 12 *British Yearbook of International Law* 53, who points out that adherence to legal decisions "is imperative if the law is to fulfil one of its primary functions, i.e. the maintenance of security and stability". Consistency of jurisprudence is valued also in dispute settlement in other international fora. In this respect we note the Decision of the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14/1-A, *Prosecutor v. Aleksovski*, Judgement of 24 March 2000, para. 113, which states that "the right of appeal is ... a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike. This will not be achieved if each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and decide the law as it sees fit." Furthermore, we note the Decision of 21 March 2007 of the ICSID (International Centre for Settlement of Investment Disputes) Arbitration Tribunal, Case No. ARB/05/07, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID IIC 280 (2007), p. 20, para. 67, which states that "[t]he Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."

162. We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above. Nevertheless, we consider that the Panel's failure flowed, in essence, from its misguided understanding of the legal provisions at issue. Since we have corrected the Panel's erroneous legal interpretation and have reversed all of the Panel's findings and conclusions that have been appealed, we do not, in this case, make an additional finding that the Panel also failed to discharge its duties under Article 11 of the DSU.

IX. Time-limits for Filing Submissions

163. In a letter dated 3 March 2008, the European Communities complained that the United States' appellee's submission was submitted almost three hours after the time-limit set out by the Appellate Body in the Working Schedule for this appeal, communicated to the participants and third participants on 1 February 2008. The European Communities submits that the United States "had significant time to examine the filings of the Third Participants and eventually adjust its own submission prior to filing."³¹⁴ At the oral hearing, the European Communities reiterated its request that the Appellate Body clarify whether it considers the United States' appellee's submission to be filed within the meaning of Rule 18(1) of the *Working Procedures*, and what the consequences are, if any, of a late filing.

164. We share the concerns raised by the European Communities. Compliance with established time periods by all participants regarding the filing of submissions is an important element of due process of law. The Appellate Body clarified in *India – Patents (US)* that due process requirements are implicit in the DSU.³¹⁵ This is particularly important, given that, according to Rules 22(1) and 24(1) of the *Working Procedures*, the appellee's submission(s) and the third participant's submission(s) are filed contemporaneously. The late filing of a participant's submission could have implications for the other participants. Compliance with the procedural requirements relating to the timely filing of submissions is a matter of fairness and orderly procedure, which are referred to in Rule 16(1) of the *Working Procedures*. In the circumstances of this appeal, we nevertheless consider the United States' appellee's submission as filed.

³¹⁴Letter from the European Communities to the Appellate Body Secretariat, dated 3 March 2008, p. 2. (emphasis omitted)

³¹⁵See Appellate Body Report, *India – Patents (US)*, para. 94.

X. Findings and Conclusions

165. For the reasons set out in this Report, the Appellate Body:

- (a) reverses the Panel's finding, in paragraphs 7.143, 7.145, and 8.1(c) of the Panel Report, that simple zeroing in periodic reviews is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*; and finds, instead, that simple zeroing in periodic reviews is, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*;
- (b) reverses the Panel's finding, in paragraphs 7.149 and 8.1(d) of the Panel Report, that the United States did not act inconsistently with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*; and finds, instead, that the United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by applying simple zeroing in the five periodic reviews at issue in this dispute;
- (c) finds it unnecessary, for purposes of resolving this dispute, to make an additional finding on Mexico's claim that simple zeroing in periodic reviews is, as such, and as applied in the five periodic reviews at issue in this dispute, inconsistent with Article 2.4 of the *Anti-Dumping Agreement*, and on Mexico's related claim under Article 11 of the DSU; and
- (d) does not make an additional finding that the Panel failed to discharge its duties under Article 11 of the DSU by making findings that contradict those in previous Appellate Body reports adopted by the DSB.

166. The Appellate Body recommends that the DSB request the United States to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994 and with the *Anti-Dumping Agreement*, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 4th day of April 2008 by:

A.V. Ganesan
Presiding Member

Lilia R. Bautista
Member

Giorgio Sacerdoti
Member

ANNEX I

**WORLD TRADE
ORGANIZATION**

WT/DS344/7
4 February 2008

(08-0497)

Original: Spanish

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

Notification of an Appeal by Mexico under Article 16.4 and Article 17 of the Understanding
on Rules and Procedures Governing the Settlement of Disputes (DSU) and
Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification dated 31 January 2008, from the delegation of Mexico, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 20(1) of the *Working Procedures for Appellate Review*, Mexico hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report on *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (WT/DS344/R) (Panel Report), and certain legal interpretations developed by the Panel in this dispute.

At issue is "simple zeroing," whereby the United States investigating authorities, in a periodic review, compare individual export transactions against average normal values and do not fully take into account the results of comparisons where the export price exceeds the average normal value when such results are aggregated in order to calculate the exporter's or producer's margin of dumping for the product under consideration.¹

In making its findings and conclusions regarding simple zeroing, the Panel failed to interpret the relevant provisions of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (*Anti-Dumping Agreement*) in accordance with the customary rules of interpretation of public international law as required by Articles 3.2 and 11 of the DSU and Article 17.6(ii) of the *Anti-Dumping Agreement*. In particular, the relevant interpretations set out in the Panel Report are at odds with the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.

¹ See Panel Report, paragraphs 7.7 and 7.84-7.97.

Mexico seeks review by the Appellate Body of the following:

1. The Panel's findings and conclusions that "simple zeroing" in periodic reviews is "as such" not inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 9.3 of the *Anti-Dumping Agreement*.² These findings and conclusions are based on an erroneous interpretation and application of these provisions. In particular, the Panel erred in finding that:
 - (i) Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* do not require, for purposes of periodic reviews, that "dumping" and "margins of dumping" be determined for the "product" under investigation as a whole and, instead, permit a determination of dumping for individual export transactions³;
 - (ii) Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*, do not require, for the purposes of periodic reviews, that "dumping" and "margins of dumping" be determined for each exporter and producer subject to the proceeding and, instead, permit a determination of dumping for individual importers or import transactions⁴; and
 - (iii) Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*, do not prohibit simple zeroing in periodic reviews.⁵
2. The Panel's findings and conclusions that "simple zeroing" in periodic reviews is "as such" not inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.⁶ This conclusion is based on an erroneous interpretation and application of Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*, as described in paragraph 1.⁷
3. The Panel's findings and conclusions that by applying simple zeroing in the five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico* identified by Mexico in its request for establishment of a panel, the U.S. Department of Commerce (USDOC), did not act inconsistently with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 9.3 of the *Anti-Dumping Agreement*.⁸ This conclusion is based on an erroneous interpretation and application of these provisions, as described in the above paragraphs.
4. The Panel's findings and conclusions that directly contradict those in adopted Appellate Body reports and force a WTO Member to appeal findings and conclusions that have already been specifically overturned on appeal. In the particular circumstances of this dispute, such findings and conclusions are inconsistent with the function of the Panel which, under Article 11 of the DSU, is to assist the Dispute Settlement Body (DSB) in discharging its responsibilities under the DSU. Underlying those responsibilities are Articles 3.2 and 3.3 of the DSU which establish that the WTO dispute settlement system is a "central element in providing security and predictability" and that the "prompt settlement of situations" is "essential to the effective functioning of the WTO".

² See Panel Report, paragraphs 7.145, 7.149, and 8.1(c).

³ See, for example, Panel Report, paragraphs 7.117 to 7.123.

⁴ See, for example, Panel Report, paragraphs 7.124 to 7.128.

⁵ See Panel Report, paragraphs 7.129-7.143 and 7.146-7.148.

⁶ See Panel Report, paragraphs 7.145 and 8.1(c).

⁷ See Panel Report, paragraph 7.145.

⁸ See, for example, Panel Report, paragraphs 7.149 and 8.1(d).

5. The Panel's failure to consider in their entirety the claims presented by Mexico relating to the inconsistency of zeroing with Article 2.4 of the *Anti-Dumping Agreement*. By failing to fully address these claims the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU.

Mexico considers that the Panel erred in law in the interpretation and application of Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement* and acted inconsistently with Article 11 of the DSU. Mexico requests that, upon reversal of the Panel's erroneous findings and conclusions identified above, the Appellate Body resolve this dispute promptly by finding that simple zeroing is "as such" inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*, and that the United States violated these provisions by applying simple zeroing in the five periodic reviews identified by Mexico.
