

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

WT/DS344

**FIRST WRITTEN SUBMISSION OF
THE UNITED STATES OF AMERICA**

March 30, 2007

Table of Contents

Table of Reports iii

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 2

 A. The Article 5 Investigation Phase 2

 B. The Article 9 Assessment Phase 4

III. PROCEDURAL BACKGROUND 5

IV. GENERAL PRINCIPLES 5

 A. Burden of Proof 5

 B. Standard of Review 6

 1. The Applicable Standard of Review is Whether the Authority’s Measure Rests on a Permissible Interpretation of the AD Agreement 6

 2. The Panel Should Make an Objective Assessment of the Matter Before It and Not Add to or Diminish the Rights and Obligations Provided in the Covered Agreements 7

V. ARGUMENT 8

 A. Scope of “As Such” Claims 9

 1. Matters Referred to the DSB by Mexico 9

 2. Mexico Has Not Established that There is a “Single Zeroing Measure” Which May be Challenged “As Such” 11

 B. Claims Regarding Assessment Proceedings 14

 1. Article 2.4.2 15

 2. Article 2.1 of the AD Agreement and Article VI of the GATT 1994 ... 20

 3. Article 9.3 25

 4. Article 2.4 31

 5. Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement 33

 C. Mexico’s As Applied Claim with Respect to Investigations 33

 D. Mexico’s Request for a Suggestion 34

V. CONCLUSION 34

List of Exhibits

Table of Reports

| Short Form | Full Citation |
|--|--|
| <i>Argentina – Poultry</i> | Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003 |
| <i>EC – Audiocassettes</i> | GATT Panel Report, <i>European Communities – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan</i> , ADP/136, circulated 28 April 1995 (unadopted) |
| <i>EC – Bed Linen (Panel)</i> | Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R |
| <i>EC – Bed Linen (Article 21.5) (AB)</i> | Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003 |
| <i>EC – Cotton Yarn</i> | Committee on Anti-Dumping Practices, Panel Report, <i>EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil</i> , ADP/137, adopted 30 October 1995 |
| <i>Guatemala – Cement I (AB)</i> | Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998 |
| <i>Egypt – Rebar</i> | Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted October 1, 2002 |
| <i>India – Patents (AB)</i> | Appellate Body Report, <i>India – Patent Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998 |
| <i>Japan – Alcohol Taxes (AB)</i> | Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R adopted 1 November, 1996 |
| <i>US – Corrosion-Resistant Steel CVD (AB)</i> | Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002 |

| | |
|--|---|
| <i>US – Gambling (AB)</i> | Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005 |
| <i>US – Gasoline (AB)</i> | Appellate Body Report, <i>United States - Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996. |
| <i>US – OCTG from Mexico (AB)</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 |
| <i>US – Shrimp AD Measure (Ecuador)</i> | Panel Report, <i>United States – Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R, adopted 20 February 2007 |
| <i>US – Shrimp (Article 21.5) (AB)</i> | Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001 |
| <i>US – Softwood Lumber Dumping (Panel)</i> | Panel Report, <i>United States - Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/p, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R |
| <i>US – Softwood Lumber Dumping (AB)</i> | Appellate Body Report, <i>United States - Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004 |
| <i>US – Softwood Lumber Dumping (Article 21.5) (Panel)</i> | Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/RW, adopted 1 September 2006, as modified by the Appellate Body Report, WT/DS264/AB/RW |
| <i>US – Softwood Lumber Dumping (Article 21.5) (AB)</i> | Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006 |
| <i>US – Underwear (AB)</i> | Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997 |
| <i>US – Zeroing (EC) (Panel)</i> | Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R |

| | |
|-------------------------------------|---|
| <i>US – Zeroing (EC) (AB)</i> | Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/AB/R, adopted 9 May 2006 |
| <i>US – Zeroing (Japan) (Panel)</i> | Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R |
| <i>US – Zeroing (Japan) (AB)</i> | Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007 |

I. INTRODUCTION

1. It is a fundamental principle of customary rules of interpretation of public international law that any interpretation must address the text of the agreement and may not impute into the agreement words and obligations that are not there.¹ Further, in settling disputes among Members, WTO dispute settlement panels and the Appellate Body “cannot add to or diminish the rights and obligations provided in the covered agreements.”²

2. In this dispute, Mexico asks this Panel to read an obligation into the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”) and Article VI of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), notwithstanding the fact that there is no textual basis for the obligation that Mexico proposes. Namely, Mexico seeks to read into the agreements an obligation to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same assessment proceeding³ exceed normal value. Mexico does so, despite the absence of a textual basis for such an obligation and the fact that not providing such offsets is based on a permissible interpretation of the AD Agreement, consistent with the Appellate Body’s original reading of the relevant provisions.

3. In the disputes that have addressed the issue of offsets to date, consistent with the interpretation articulated in the Appellate Body report in *US – Softwood Lumber Dumping*, all five of the panels have found that the “all comparable export transactions” language in the text of Article 2.4.2 of the AD Agreement is the textual basis for an obligation to provide offsets.⁴ This language in Article 2.4.2 applies only to antidumping investigations and only when authorities use the average-to-average comparison method pursuant to Article 2.4.2. These panels, comprised mostly of trade remedies experts, have consistently found that the obligation to provide offsets does not apply in general, but applies only as a consequence of the text-based obligation to include all comparable export transactions when making weighted-average to weighted-average comparisons in an investigation.

4. Three panels of trade remedies experts have examined whether the obligation to provide offsets extends beyond the context of average-to-average comparisons in an investigation. In every case, the panel of experts determined that the customary rules of interpretation of public international law do not support a reading of the AD Agreement that extends a zeroing prohibition beyond the use of average-to-average comparisons in an investigation.⁵ Each panel found that there is no obligation to provide offsets outside of the context of the average-to-average comparison methodology in investigations.

¹ *India – Patents (AB)*, para. 45.

² Article 19.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

³ Mexico refers to assessment proceedings as “periodic reviews”.

⁴ *EC – Bed Linen (Panel)*, para. 6.117; *US – Softwood Lumber Dumping (Panel)*, para. 4.244; *US – Zeroing (EC) (Panel)*, paras. 7.27, 7.271; and *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.20, 5.21, 5.28-5.30; *US – Zeroing (Japan) (Panel)*, paras. 7.82, 7.271.

⁵ *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.65, 5.66, 5.77; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284.

5. Nevertheless, in the disputes that have addressed this issue since *US – Softwood Lumber Dumping*, the Appellate Body has adopted an interpretation of the AD Agreement that includes a general prohibition of zeroing. These Appellate Body reports have found, despite the contrary interpretation offered by the panels, that a general prohibition of zeroing reflects the only permissible interpretation of the AD Agreement. Mexico’s claims in this dispute rely entirely on that conclusion in these Appellate Body reports. The United States respectfully disagrees with the reasoning in these Appellate Body reports that the only permissible interpretation of the AD Agreement includes a general prohibition of zeroing. Accordingly, the United States requests that this Panel refrain from adopting Mexico’s interpretation. Instead, the United States requests that this Panel remain faithful to the text of the AD Agreement by finding that the approach taken by the United States outside the context of average-to-average comparisons in investigations rests upon a permissible interpretation in accordance with the customary rules of interpretation of public international law and the standard of review under the AD Agreement, consistent with the interpretation offered by previous panels.

II. FACTUAL BACKGROUND

6. The U.S. antidumping duty law provides domestic producers with a remedy against injurious dumping. The U.S. statute governing antidumping proceedings is the Tariff Act of 1930, as amended (“the Tariff Act”). The Tariff Act provides for two distinct phases in antidumping proceedings that are relevant to this dispute. The first phase of an antidumping proceeding is the investigation phase. The U.S. Department of Commerce (“Commerce”) will determine whether dumping occurred during the period of investigation by calculating an overall weighted average dumping margin for each foreign producer/exporter investigated. Separately, the U.S. International Trade Commission (“ITC”) determines whether an industry in the United States is materially injured by reason of the dumped imports.

7. If Commerce finds that dumping existed during the period of investigation, and if the ITC determines that a U.S. industry was injured by reason of dumped imports, the investigation phase ends and the second phase of the antidumping proceeding – the assessment phase – begins. In the assessment phase, the focus is on the calculation and assessment of antidumping duties on specific entries by individual importers.

A. The Article 5 Investigation Phase

8. With respect to the investigation phase, U.S. law provides that Commerce will normally use the average-to-average method for comparable transactions during the period of investigation.⁶ U.S. law also provides for the use of transaction-to-transaction comparisons⁷ and,

⁶ 19 C.F.R. 351.414(c)(1) (Exhibit US-1).

⁷ 19 U.S.C. 1677f-1(d)(1)(A) (Exhibit US-2).

provided that there is a pattern of prices that differs significantly by region or time period, among other things,⁸ for use of the average-to-transaction method.⁹

9. In the investigation phase, Commerce must resolve the threshold question of whether dumping “exists” such that the imposition of an antidumping measure is warranted. Section 771(35)(A) of the Tariff Act defines “dumping margin,” for the purposes of U.S. law, as “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.”¹⁰ Thus, for purposes of U.S. law, the “dumping margin” is the result of a specific comparison between an export price (or constructed export price) and the normal value for comparable transactions. When average-to-average comparisons are used, similar export transactions¹¹ are grouped together and an average export price is calculated for the comparison group which is compared to a comparable normal value. Some of these comparisons could result in dumping margins while other comparisons might result in no dumping margin.

10. Section 771(35)(B) of the Tariff Act defines “weighted average dumping margin” as the “percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.”¹² Thus, to calculate a single weighted average dumping margin for each foreign exporter/producer individually examined in an investigation, Commerce has summed the total amount of dumping found for each comparison group for that exporter/producer in the United States during the period of investigation. From February 22, 2007, in making average-to-average comparisons in investigations, Commerce intends to provide offsets for non-dumped comparisons that reduce the total amount of dumping found by the amount by which any comparison reflected an average export price in excess of normal value.¹³ Although Mexico asserts that it is unaware of any final determination in an original investigation in which such offsets have been granted,¹⁴ Commerce did provide such offsets in the investigation of certain activated carbon from the People’s Republic of China.¹⁵

⁸ In antidumping circles, this pattern commonly is referred to as “targeted dumping.”

⁹ 19 U.S.C. 1677f-1(d)(1)(B) (Exhibit US-2).

¹⁰ 19 U.S.C. 1677(35)(A) (Exhibit US-2).

¹¹ Similarity of export transactions is generally determined on the basis of product characteristics. Therefore, comparison groups are commonly referred to as “models.” However, other factors affecting price comparability are taken into account, *e.g.* level of trade.

¹² 19 U.S.C. 1677(35)(B) (Exhibit US-2).

¹³ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (December 27, 2006); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3,783 (January 26, 2007). (Exhibits MEX-10 and MEX-11).

¹⁴ See Mexico First Submission, para. 78 and n. 62.

¹⁵ See *Final Determination of Sales for Less Than Fair Value: Certain Activated Carbon from the People’s Republic of China*, 72 Fed. Reg. 9,508 (March 2, 2007). (Exhibit US-3).

11. Commerce has divided the aggregate amount from the sum of the comparison groups by the aggregate export prices of *all* U.S. sales by the exporter/producer during the period of investigation to arrive at the “weighted average dumping margin”.¹⁶

12. If the overall weighted average dumping margin for a particular exporter/producer is *de minimis*, the exporter/producer is excluded from any antidumping measure.¹⁷ If the overall weighted average dumping margin for each exporter/producer is *de minimis*, the antidumping proceeding is terminated.¹⁸ If Commerce and the ITC make final affirmative determinations of dumping and injury, respectively, then Commerce orders the imposition of antidumping duties (an “antidumping duty order” or, simply “order” in U.S. parlance).¹⁹ The issuance of an antidumping duty order completes the investigation phase.

B. The Article 9 Assessment Phase

13. Unlike investigations, which are subject to a single set of rules, the AD Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment phase. There are two basic types of assessment systems – prospective and retrospective. In a prospective system, normal values or an *ad valorem* duty rate are established and applied to the merchandise subject to the antidumping measure upon importation on an entry by entry basis. While *ad valorem* systems apply duties to all subject imports, in prospective normal value systems, those imports for which the export price is greater than or equal to the normal value do not result in duty liability. However, no offset is provided on other transactions where the export price is below the normal value.

14. The United States has a retrospective assessment system. Under the U.S. system, an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Instead, the United States collects a security in the form of a cash deposit at the time of entry. Once a year (during the anniversary month of the orders) interested parties may request a review to determine the final amount of duties owed on each entry made during the previous year.²⁰ Antidumping duties are calculated on a transaction-specific basis, and are paid by the importer of the transaction, as in prospective duty systems. If the final antidumping duty liability exceeds the amount of the cash deposit, the importer must pay the difference. If the final antidumping duty liability ends up being less than the cash deposit, the difference is refunded. If no review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties. To simplify the collection of duties calculated on a transaction-specific basis, the absolute amount of duties calculated for the transactions of

¹⁶ 19 U.S.C. 1677(35)(B) (Exhibit US-2).

¹⁷ 19 C.F.R. 351.204(e)(1) (Exhibit US-1).

¹⁸ 19 U.S.C. 1673d(c)(2) (Exhibit US-2).

¹⁹ 19 U.S.C. 1673e(a) (Exhibit US-2).

²⁰ The period of time covered by U.S. assessment proceedings is normally twelve months. However, in the case of the first assessment proceeding following the investigation, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures.

each importer are summed up and divided by the total entered value of that importer's transactions, including those for which no duties were calculated. U.S. customs authorities then apply that rate to the entered value of the imports to collect the correct total amount of duties owed.

III. PROCEDURAL BACKGROUND

15. This dispute began when Mexico requested consultations on May 26, 2006.²¹ Consultations in response to this request were held on June 15, 2006.

16. On October 12, 2006, Mexico requested the establishment of a panel.²² On October 26, 2006, the Dispute Settlement Body established a panel pursuant to Mexico's request.

IV. GENERAL PRINCIPLES

A. Burden of Proof

17. In WTO dispute settlement, the burden of proving that an obligation has not been satisfied is on the complaining party. In *US – Corrosion-Resistant Steel CVD*, the Appellate Body explained that the complaining party bears the burden of proof with respect to an "as such" claim as well as an "as applied" claim:

We note, first, that, in dispute settlement proceedings, Members may challenge the consistency with the covered agreements of another Member's laws, as such, as distinguished from any specific application of those laws. In both cases, the complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:

... it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.* (emphasis added)

Thus, a responding Member's law will be treated as WTO-consistent until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.²³

²¹ WT/DS344/1 (1 June 2006).

²² WT/DS344/4 (16 October 2006).

²³ *US – Corrosion-Resistant Steel CVD (AB)*, paras. 156-157 (emphasis in original) (footnote omitted).

18. Accordingly, the burden is on Mexico to prove that U.S. measures exist that are inconsistent with U.S. obligations under the relevant covered agreement. The burden is not on the United States.

B. Standard of Review

1. The Applicable Standard of Review is Whether the Authority's Measure Rests on a Permissible Interpretation of the AD Agreement

19. Article 11 of the DSU defines generally a panel's mandate in reviewing the consistency with the covered agreements of measures taken by a Member. In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) with respect to an investigating authority's interpretation of provisions of the AD Agreement.²⁴ Article 17.6(ii) states:

the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

20. The question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is a permissible interpretation. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.²⁵

21. The explicit confirmation that there are provisions of the AD Agreement that are susceptible to more than one permissible reading provides context for the interpretation of the AD Agreement. This provision reflects the negotiators' recognition that they had left a number of issues unresolved and that customary rules of interpretation would not always yield only one permissible reading of a given provision.

22. One recent panel report involved a situation in which Argentina's investigating authority interpreted the term "a major proportion" in Article 4.1 of the AD Agreement (concerning the definition of "domestic industry") as a proportion that may be less than 50 percent. The panel upheld that interpretation as permissible, even while acknowledging that it may not be the only permissible interpretation. The panel recalled that "in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it."²⁶ Similarly

²⁴ See *EC – Bed Linen (Article 21.5) (AB)*, paras. 108, 114, and 118.

²⁵ See *Argentina – Poultry*, para. 7.341 and n. 223.

²⁶ *Id.*

in this case, it is useful to bear in mind that Article 17.6(ii) applies and there may be multiple permissible interpretations of particular provisions in the AD Agreement.

2. The Panel Should Make an Objective Assessment of the Matter Before It and Not Add to or Diminish the Rights and Obligations Provided in the Covered Agreements

23. Article 11 of the DSU requires panels to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. The Appellate Body has explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised.²⁷ Articles 3.2 and 19.2 of the DSU contain the fundamental principle that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the DSB, cannot add to or diminish the rights and obligations provided in the covered agreements.

24. Mexico urges the Panel to follow prior Appellate Body findings in order to achieve the ‘security and predictability’ referred to in Article 3.2 of the DSU.²⁸ While prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members,²⁹ the Panel in this dispute is not bound to follow the reasoning set forth in any Appellate Body report. The rights and obligations of the Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. In this regard, the “security and predictability” referred to in the first sentence of Article 3.2 results from the application of the correct interpretive approach set forth in the second sentence of Article 3.2 - the customary rules of interpretation of public international law - to the provisions of the WTO Agreement. A result which adds to or diminishes the rights or obligations of Members is the antithesis of the “security and predictability” referred to in Article 3.2. This is clear from the language of Article 3.2, read in its entirety.

25. Appellate Body reports should be taken into account only to the extent that the reasoning is persuasive. The Appellate Body itself has stated that its reports are not binding on panels.³⁰ While the reasoning in such reports may be taken into account, Members are free to explain why any reasoning or findings should *not* be taken into account.³¹

26. The panel in *US - Zeroing (Japan)*, in explaining its reasons for not applying certain reasoning and findings of the Appellate Body on the zeroing issue, highlighted the obligation of the panels to make their own objective assessment, in accordance with Article 11, and the

²⁷ *Guatemala – Cement I (AB)*, para. 73.

²⁸ See Mexico’s First Submission, para. 148.

²⁹ *Japan – Alcohol Taxes (AB)*, para. 14.

³⁰ See *US – Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan – Alcohol Taxes (AB)* and *US – Shrimp (Article 21.5) (AB)*).

³¹ *US – Softwood Lumber Dumping (AB)*, n. 175.

requirement that recommendations and rulings of the DSB not add to or diminish the rights and obligations provided in covered agreements.³²

27. Likewise, recently in *US- Shrimp AD Measure (Ecuador)*, the panel correctly insisted that it had to satisfy itself that Ecuador had established a *prima facie* case by presenting evidence and arguments to identify the measure being challenged and explain the basis for the claimed inconsistency with a WTO provision, despite the fact that the responding party did not contest the claims made by Ecuador.³³ The panel stated that:

[T]he fact that the United States does not contest Ecuador’s claims is not sufficient basis for us to summarily conclude that Ecuador’s claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case.³⁴

28. Additionally, Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization* confers the authority to adopt interpretations of the covered agreements exclusively upon the Ministerial Conference and the General Council.³⁵ Therefore, while the dispute settlement system serves to resolve a particular dispute, and to clarify agreement provisions in the context of doing so, neither panels nor the Appellate Body can adopt authoritative interpretations that are binding with respect to another dispute.

V. ARGUMENT

29. The U.S. argument in this submission is structured in the following manner. First, in Section A, the United States addresses the scope of Mexico’s “as such” claims. Mexico’s request for the establishment of a panel clearly outlined two distinct methodologies it was challenging “as such” - the use of “zeroing” in average-to-average comparisons in antidumping investigations and the use of “zeroing” in assessment proceedings. Nonetheless, in its First Submission Mexico alleges that the scope of its “as such” claims encompasses “a single zeroing measure, the Zeroing Procedures” and requests findings with respect to those procedures “regardless of comparison methodology.” There is no basis for any findings with respect to the use of “zeroing” in any circumstance other than the two included in Mexico’s request for establishment of a panel, as any such findings would be beyond the Panel’s terms of reference. In addition, from February 22, 2007, the United States is providing offsets when calculating

³² *US- Zeroing (Japan) (Panel)*, para. 7.99 and n. 733.

³³ *US – Shrimp AD Measure (Ecuador)*, para. 7.11, quoting from *US - Gambling (AB)*, para. 141.

³⁴ *US – Shrimp AD Measure (Ecuador)*, para. 7.9.

³⁵ The Appellate Body recognized this point in one of its earliest reports, when it noted that “Article IX:2 of the WTO Agreement provides: ‘The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements’. Article IX:2 provides further that such decisions ‘shall be taken by a three-fourths majority of the Members’. The fact that such an ‘exclusive authority’ in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.” *Japan – Alcohol Taxes (AB)*, p. 13.

margins of dumping on the basis of average-to-average comparisons in antidumping investigations. Thus, even under the theory underlying previous findings that a single U.S. “zeroing” measure exists which can be challenged “as such,” there cannot be any measure maintained by the United States that is “as such” inconsistent with any obligation under the AD Agreement to provide offsets. Therefore, Mexico’s “as such” claim fails with respect to the calculation of the margins of dumping in investigations.

30. In Section B, the United States responds to Mexico’s claims that the AD Agreement requires a Member to provide an offset for transactions exceeding normal value in assessment proceedings. In this regard, the Appellate Body found in *US – Softwood Lumber Dumping (AB)* and three subsequent panels of trade remedies experts have found that the obligation to provide offsets has a textual basis in the phrase “all comparable export transactions” when interpreted in an integrated manner with the term “margins of dumping” in Article 2.4.2. Each of the panels also found that just as the textual basis for the obligation to provide offsets was limited to the context of average-to-average comparisons in the investigation phase, the obligation to provide offsets is also limited to the context in which the phrase applies. With respect to Mexico’s arguments that a general prohibition of zeroing can be derived from Article VI of the GATT 1994 and Articles 2.1 and 2.4 of the AD Agreement, Mexico’s interpretation is not consistent with the text and context of these provisions and other provisions of the AD Agreement. Moreover, the U.S. decision not to provide offsets for non-dumped transactions in particular assessment reviews is based on a permissible interpretation of the relevant provisions of the AD Agreement. Mexico is challenging the denial of offsets “as such” and in assessment proceedings “as applied” to five specific proceedings regarding stainless steel from Mexico. Therefore, the Panel should reject both Mexico’s “as applied and “as such” claims with respect to assessment proceedings.

31. In Section C, the United States addresses Mexico’s “as applied” claim with respect to the original investigation regarding Stainless Steel from Mexico.

32. Finally, in Section D, the United States will address Mexico’s request for a suggestion.

A. Scope of “As Such” Claims

1. Matters Referred to the DSB by Mexico

33. In its First Submission, Mexico asserts that “there exists in reality a single zeroing measure, the Zeroing Procedures, that is being challenged by Mexico ‘as such.’”³⁶ Mexico claims that the “Zeroing Procedures at issue...are as such inconsistent with the United States’ obligations, regardless of procedural setting or the comparison methodology employed by the United States authorities.”³⁷

³⁶ Mexico First Submission, para. 37.

³⁷ *Id.*, para. 41.

34. Yet, in both its request for consultations and its request for the establishment of a panel, Mexico clearly and specifically identified two distinct methodologies being challenged “as such” - the use of “zeroing” in average-to-average comparisons in original investigations, which Mexico calls “model zeroing” and the use of “zeroing” in assessment proceedings, which Mexico calls “simple zeroing”.³⁸

35. Article 6.2 of the DSU requires that in its request for the establishment of a panel, a Member “identify the specific measures at issue.” In its request for the establishment of a panel, under the heading “B. Measures”, Mexico clearly identified what it considered to be two distinct “methodologies.” Mexico stated that these methodologies are “measures of general and prospective application” which the United States implements pursuant to a number of specific provisions of law and other instruments.³⁹

36. The United States notes that the Panel’s terms of reference are to “examine, in the light of the relevant provisions of the covered agreements cited by Mexico in document WT/DS344/4, the matters referred to the DSB by Mexico in that document.”⁴⁰ It is clear from reading “that document” that Mexico was challenging the use of zeroing in two very distinct circumstances which it describes in great detail. Mexico’s reason for attempting to expand the scope of its “as such” claims is that in the time that transpired between the establishment of this Panel and the time Mexico was required to make its First Submission, the Appellate Body issued its report in *US - Zeroing (Japan)*. In that report, the Appellate Body concluded that there was one single rule it called the “zeroing procedures” which it found to be inconsistent with U.S. obligations. However, the prerequisite to the Appellate Body’s finding was that “zeroing” in all contexts and with respect to all comparison methodologies was in Japan’s request for the establishment of a panel and request for consultations, and therefore within the panel’s terms of reference.⁴¹ This situation is not present here. Mexico’s “as such” claim against a “single zeroing measure” must fail on this basis alone. In light of its terms of reference and Article 7 of the DSU, the Panel may only address those matters identified in Mexico’s request for establishment of a panel.⁴² That is,

³⁸ See WT/DS344/1 at paragraph 1 and WT/DS344/4, section B. Measures. We note that “model zeroing” and “simple zeroing” are not terms used in U.S. law. These are terms that have been used in other WTO disputes and Mexico adopts them here. The Panel should not infer anything from the use of these terms.

³⁹ Mexico lists the following items: Sections 736, 751, 771(35)(A) and (B), and 777(a)(c) and (d) of the Tariff Act of 1930, as amended; the United States Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. I; USDOC regulations codified at Title 19 of the United States Code of Federal Regulations, sections 351.212(b), 351.414(c), (d), and (e); and, the Import Administration Antidumping Manual (1997 edition), including the computer program(s) to which it refers.

⁴⁰ WT/DS344/5 (22 December 2006).

⁴¹ *US - Zeroing (Japan) (AB)*, paras. 91 - 96.

⁴² We note that in its request for consultations Mexico listed specific sections of the Tariff Act of 1930, as amended, and Commerce regulations, the Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, and the Import Administration Antidumping Manual as part of the list of “measures” it was challenging “as such”. In its request for establishment of a panel, it states that the “Zeroing Procedures” are “implemented through” these specific provisions and other items. We understand that Mexico has abandoned any pretense to be challenging these specific provisions and documents as Mexico has not presented any arguments with respect to them.

the Panel can only consider Mexico’s claim regarding zeroing in investigations using average-to-average comparisons and zeroing in assessment proceedings, based on the evidence and argumentation Mexico presents with respect to those “measures.”

2. Mexico Has Not Established that There is a “Single Zeroing Measure” Which May be Challenged “As Such”

37. Mexico argues in its First Submission that it is challenging a “single zeroing measure ... that is a rule or norm, of general and prospective application.” Leaving aside the fact that, for the reasons described above, no such measure is in the Panel’s terms of reference, there is simply no such measure, as a factual matter.

38. The Appellate Body has identified several criteria in evaluating whether a measure exists that can be challenged as such: whether the rule or norm embodied in that measure is attributable to the responding Member; the precise content of the rule or norm; and whether the rule or norm has general and prospective application.⁴³ In addition, the Appellate Body has explained that “particular rigour is required on the part of a panel to support a conclusion as to the existence of a ‘rule or norm’ that is *not* expressed in the form of a written document.”⁴⁴

39. The Appellate Body further explained in a footnote that its statement “did not mean that a mere abstract principle would qualify as a ‘rule or norm’ that can be challenged as such.”⁴⁵ This follows from the fact that the alleged measure must be “attributable to” the responding Member. Article 3.3 and Article 4.2 of the DSU both help to illustrate the required degree of relationship between an alleged measure and a Member in order for that alleged measure to be subject to WTO dispute settlement. Article 3.3 refers to a measure “taken” by a Member and Article 4.2 refers to a measure “taken” within the territory of a Member. Accordingly, “attributable to” means “taken” by a Member within its territory.⁴⁶ In *US – Zeroing (EC) (AB)*, the Appellate Body explained that the starting point of its analysis was Article 3.3 of the DSU. The Appellate Body quoted Article 3.3’s explanation that the dispute settlement system deals with impairment of benefits under covered agreements “by measures taken by another Member.”⁴⁷ Were a panel to opine on an “abstract principle,” and not a measure taken by the responding party, it would be issuing an advisory opinion, which is not provided for in the DSU.⁴⁸ Hence, in carrying out its

⁴³ *US – Zeroing (EC) (AB)*, para. 198.

⁴⁴ *US – Zeroing (EC) (AB)*, para. 198 (emphasis in original).

⁴⁵ *US – Zeroing (EC) (AB)*, n. 342.

⁴⁶ It is not necessary to explore the full contours of the term “taken” since, as discussed in this submission, there was no evidence at all that “zeroing procedures” as they relate to the two types of comparisons in investigations could be attributed to the United States in any manner.

⁴⁷ *US – Zeroing (EC) (AB)*, para. 187.

⁴⁸ By contrast to the DSU, in other WTO agreements, when the drafters sought to confer authority on institutions to provide advisory opinions, they made this intention clear. See *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) (Articles 24.3 and 24.4 concerning the Permanent Group of Experts); *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*, Annex II (paragraphs 2(a) concerning the Technical Committee on Customs Valuation); and *Agreement on Rules of Origin*,

mandate under its terms of reference to examine the matter referred to the DSB in the complaining Member's panel request⁴⁹ – the matter consisting of the measures identified in the request and the claims set forth therein⁵⁰ – a panel must in the course of the proceedings determine whether the measure actually exists.

40. Mexico has not established that a “single zeroing measure” exists. Mexico's basic argument is that there “can be no legitimate disagreement that the Zeroing Procedures at issue in this case are attributable to the United States” because the Appellate Body in *US – Zeroing (Japan)* has already “affirmed” that there is only one single measure.⁵¹ Mexico states that the findings concerning the precise content of zeroing procedures in the panel reports in *US – Zeroing (Japan)* and *US – Zeroing (EC)* “themselves constitute conclusive evidence as to the precise content of the measure challenged by Mexico in this case.”⁵² However, as a general matter, a separate panel's findings are not evidence, but conclusions based on evidence. Further, the specific evidence before that separate panel, cited now by Mexico, does not support the Panel repeating those findings here. In this regard, the United States notes that the Appellate Body viewed the U.S. appeal in *US – Zeroing (Japan)* as involving a challenge to the Panel's appreciation and weighing of the evidence, regarding which panels enjoy a certain margin of discretion.⁵³ While the Appellate Body did not consider the panel in that dispute to have abused its discretion, this Panel has an obligation under DSU Article 11 to exercise its discretion as a fact-finder to make an objective assessment of the matter before it, and must itself be satisfied that the evidence before it supports its conclusions.⁵⁴

41. Among the arguments Mexico offers for the existence of “single zeroing measure” is that Commerce has always “zeroed,” and that Commerce can't point to a case in which it did not.⁵⁵ However, it is entirely to be expected that an administering authority will seek not to act arbitrarily by treating the same circumstances differently. Mexico does not explain exactly what circumstances would have justified Commerce providing offsets in some proceedings while not providing them in others. Mexico seems to expect that if an administering authority is not acting in an arbitrary and inconsistent manner, there must be a separate measure requiring the consistent approach. This assumption is not only baseless, but it is very troubling that the consequence of good administrative practice would be to subject a Member to a finding that it is somehow maintaining a separate measure subject to dispute settlement.

42. Furthermore, as Mexico acknowledges, Commerce has never “zeroed” in a targeted dumping context and only once in a transaction-to-transaction comparison,⁵⁶ nor has Commerce

Annex I (paragraph 1(a) concerning the Technical Committee on Rules of Origin).

⁴⁹ DSU Article 7.1.

⁵⁰ DSU Article 6.2.

⁵¹ Mexico First Submission, para. 156 and n.154.

⁵² Mexico First Submission, para. 162.

⁵³ *US – Zeroing (Japan) (AB)*, para. 82.

⁵⁴ See, *US – Shrimp AD Measure (Ecuador)*, para. 7.9.

⁵⁵ Mexico First Submission, para. 59

⁵⁶ Mexico First Submission, n. 31.

ever made statements about its intentions with respect to zeroing in these contexts. This begs the question of exactly what evidence Mexico can present that there is a “single zeroing measure.” Mexico cites to nothing in U.S. law and no act by Commerce, whether in a statement or otherwise, that would permit the conclusion that Commerce will, as a matter of general and prospective application, “zero” in these contexts. Absent such evidence, it is not possible to conclude that there is a “single zeroing measure” covering all comparison methodologies and all contexts. The fact that finding the existence of such a measure must be based on a “rigorous analysis” only reinforces this fact.

43. Mexico also cites to Commerce’s use of standard computer programs that incorporate USDOC’s dumping margin calculation methodology and containing a so-called “standard zeroing line.”⁵⁷ Mexico refers to a so-called expert’s statement to the effect that the “standard zeroing line” is always included. However, this is nothing more than yet another description of what Commerce has done in the past, without any indication that it will do so as a matter of general and prospective application. Commerce officials adjust the programs based on policy decisions in individual proceedings; the programs are not their masters.

44. Finally, Mexico purports to refer to “concessions made by the United States” before other panels.⁵⁸ However, a cursory examination of these “concessions” demonstrates that they are neither concessions nor do they support Mexico’s position. For example, in paragraph 12 of its First Submission Mexico states that “[t]he evidence of the existence and precise content of this measure has not been reasonably disputed by the United States.” Inasmuch as this submission is the first opportunity the United States has had to “dispute” anything in this particular dispute, the Mexican statement is unsurprising. To the extent that it purports to suggest that the United States did not contest these matters in other disputes, this is patently false, even if it were relevant.⁵⁹ We would be happy to submit our submissions from other disputes, should the Panel consider this helpful.

45. In addition, Mexico’s own argumentation contradicts its assertion that there is a “single zeroing measure.” Mexico divides its presentation into two separate sections. One deals with “USDOC Zeroing Procedures in Original Investigations”⁶⁰ and another deals with “USDOC Zeroing Procedures in Periodic Reviews.”⁶¹ This division, and the use of the plural, is in itself probative that there is no one single measure.

⁵⁷ Mexico First Submission, para. 85 and 164.

⁵⁸ See Mexico First Submission, paras. 12, 67 - 69, and 107.

⁵⁹ In para. 107, where Mexico purports to provide evidence that the United States has made concessions with respect to assessment proceedings, Mexico cites back to its discussion in paragraphs 67- 69, which in turn cite back to the Panel Report in *US - Zeroing (Japan)* with respect to statements by Commerce officials and officials of the U.S. Department of Justice. The statements at issue, were statements with respect to the use of “zeroing” in average-to-average comparisons in investigations. Mexico fails to recognize that evidence with respect to one proceeding is not evidence with respect to another proceeding. This particular issue regarding this very same evidence was contested by the United States in its appeal in that dispute.

⁶⁰ Mexico First Submission, section III.B.2.

⁶¹ Mexico First Submission, section III.B.3.

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

47. For these reasons, the United States respectfully requests that the Panel reject Mexico’s “as such” claims against a “single zeroing measure” in their entirety.

B. Claims Regarding Assessment Proceedings

48. As demonstrated below, the text and context of the relevant provisions of the AD Agreement, interpreted in accordance with customary rules of interpretation of public international law, do not support a general prohibition against zeroing that would apply in the context of assessment proceedings.

49. The AD Agreement provides no general obligation to consider transactions for which the export price exceeds normal value as an offset to the amount of dumping found in relation to other transactions at less than normal value. The exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation found in Article 2.4.2 that “the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a *weighted average normal value with a weighted average of prices of all comparable export transactions . . .*”⁶² This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation phase when using the average-to-average comparison methodology in Article 2.4.2.⁶³ There is no textual basis for the additional obligations that Mexico would have this Panel impose.

50. Subsequent to *US – Softwood Lumber Dumping (AB)*, three panels comprising trade remedies experts and experienced panelists and WTO negotiators, examined whether the obligation not to “zero” when making average-to-average comparisons in an investigation extended beyond that defined context. In every case, consistent with their obligation to make an objective assessment of the matter, these panels determined that the customary rules of interpretation of public international law do not support a reading of the AD Agreement that expands the zeroing prohibition beyond average-to-average comparisons in an investigation.⁶⁴

51. In making an objective assessment of the matter before it in this dispute, the Panel should recognize that the prior panels — each operating under the same obligation to make an objective assessment, examining the same AD Agreement, applying the same customary rules of

⁶² Emphasis added. See *US – Softwood Lumber Dumping (AB)*, paras. 82, 86, and 98.

⁶³ *US – Zeroing (Japan) (Panel)*, para. 7.213; *US – Zeroing (EC) (Panel)*, para. 7.197; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.65-5.66 and 5.77.

⁶⁴ *US – Zeroing (Japan) (Panel)*, para. 7.213; *US – Zeroing (EC) (Panel)*, para. 7.197; and *US – Softwood Lumber Dumping (Article 21.5)(Panel)*, para. 5.65.

interpretation of public international law and special standard of review found in Article 17.6(ii) of the AD Agreement — have consistently found that a general prohibition against zeroing has no basis in the text of the AD Agreement. The analysis offered by the prior panels is persuasive and correct. For the reasons set forth below, the Panel should reach the same conclusion in the present dispute. This Panel, like the prior panels, should find that, at a minimum, it is permissible to interpret the AD Agreement as not prohibiting zeroing outside the context where the interpretation of “all comparable export transactions” articulated in the Appellate Body report in *US – Softwood Lumber Dumping* is applicable.

52. In each case in which a panel found that the AD Agreement did not contain a general prohibition against zeroing, the matter was referred to the Appellate Body. In each case, the Appellate Body reports have disagreed with the analyses set forth in the panel reports in favor of an interpretation that infers the existence of an obligation that generally prohibits zeroing.

53. In making its own “objective assessment,” this Panel must give particular consideration to the special standard of review for matters arising under the AD Agreement – that a Member’s measures may not be found inconsistent with the obligations set forth in the AD Agreement if the measure is based on a permissible interpretation of the AD Agreement. Accordingly, for the reasons set forth below, the Panel should not adopt reasoning and conclusions from Appellate Body reports that reject a permissible interpretation of the AD Agreement.

1. Article 2.4.2

54. In *US – Softwood Lumber Dumping (AB)*, the Appellate Body specifically recognized that the issue before it was whether so-called “zeroing” was prohibited under the average-to-average comparison methodology found in Article 2.4.2.⁶⁵ Thus, the report found only that “zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology.”⁶⁶ The Appellate Body reached this conclusion by interpreting the terms “margins of dumping” and “all comparable export transactions” as they are used in Article 2.4.2 in an “integrated manner.”⁶⁷ In other words, the term “all comparable export transactions” was integral to the interpretation that the multiple comparisons of average normal value and average export price for averaging groups did not constitute an average-to-average comparison of all comparable export transactions unless the results of all such comparisons were aggregated. The obligation to provide offsets, therefore, was tied to text of the provision addressing the use of the average-to-average comparison methodology in an investigation, and did not arise out of any independent obligation to offset prices.

55. Any assertion by Mexico that there is a general prohibition of “zeroing”, or one specifically applicable to the more particular context of assessment proceedings, cannot be

⁶⁵ *US – Softwood Lumber Dumping (AB)*, paras. 104, 105, and 108.

⁶⁶ *US – Softwood Lumber Dumping (AB)*, para. 108.

⁶⁷ *US – Softwood Lumber Dumping (AB)*, paras. 86 - 103.

reconciled with the interpretation articulated in *US – Softwood Lumber Dumping (AB)*, wherein the phrase “all comparable export transactions” in Article 2.4.2 meant that zeroing was prohibited in the context of average-to-average comparisons in investigations. If, as Mexico claims, there is a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the meaning ascribed to “all comparable export transactions” by the Appellate Body in that dispute would be redundant of the general prohibition of zeroing and therefore “inutile.”

56. The need to avoid such redundancy was recognized in *US – Zeroing (Japan) (AB)* when the Appellate Body changed its interpretation of this phrase. In *US – Softwood Lumber Dumping (AB)*, “margins of dumping” and “all comparable export transactions” were interpreted in an integrated manner. The Appellate Body found that in aggregating the results of the model-specific comparisons, “all” comparable export transactions must be accounted for. Thus, the phrase necessarily referred to all transactions across all models of the product under investigation, i.e. the product “as a whole.” The textual reference “all comparable export transactions” was the basis for the Appellate Body to conclude that “product” must mean “product as whole” and margins of dumping may not be based on individual averaging group comparisons. The Appellate Body subsequently relied on this “product as a whole” concept, although in a manner detached from its underlying textual basis, in concluding that margins of dumping cannot be calculated for individual transactions.⁶⁸

57. However, in *US – Zeroing (Japan) (AB)*, the Appellate Body reinterpreted “all comparable export transactions” to relate solely to all transactions within a model, and not across models of the product under investigation.⁶⁹ In doing so, the Appellate Body abandoned the only textual basis for its reasoning in *US – Softwood Lumber Dumping (AB)*.⁷⁰

58. In addition, a general prohibition of zeroing that applies beyond the context of average-to-average comparisons in investigations, would be inconsistent with the remaining text of Article 2.4.2, which provides for an alternative “targeted dumping” methodology that may be utilized in certain circumstances. The “targeted dumping” methodology was drafted as an exception to the obligation to engage in symmetrical comparisons in an investigation. By the terms of Article 2.4.2, it may be used “if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods” When the investigating authority provides an explanation as to why these “differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-

⁶⁸ *US – Zeroing (EC)*, paras. 126, 127; *US – Softwood Lumber Dumping (21.5)(AB)*, paras. 89, 114; *US – Zeroing (Japan)*, paras. 121, 122, 151.

⁶⁹ *US – Zeroing (Japan) (AB)*, para. 124 (“[T]he phrase ‘all comparable export transactions’ requires that each group include only transactions that are comparable and that no other transaction may be left out when determining margins of dumping under [the average-to-average comparison] methodology.”)

⁷⁰ The United States raised these points in its DSB statement and communication of February 20, 2007 (Exhibit US-4). See also, Communication from the United States, WT/DS294/16, and Communication from the United States, WT/DS294/18.

transaction comparison,” it may then use the asymmetrical average-to-transaction comparison to establish the existence of margins of dumping during the investigation phase.

59. The mathematical implication of a general prohibition of zeroing, however, is that the targeted dumping clause would be reduced to inutility. That is because the targeted dumping methodology, provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons.⁷¹ In this respect, a general zeroing prohibition would render the targeted dumping exception in Article 2.4.2 a complete nullity. Such an interpretation would be disfavored under a key tenet of customary rules of treaty interpretation, namely that an “interpretation must give meaning and effect to all the terms of a treaty.”⁷²

60. In *US – Zeroing (EC)*, *US – Softwood Lumber Dumping (Article 21.5)* and *US – Zeroing (Japan)*, each of the panels recognized that the customary rules of interpretation of public international law precluded an interpretation that rendered the targeted dumping provision of Article 2.4.2 redundant.⁷³ The panel in *US – Zeroing (EC)* found that a general prohibition of zeroing that applied to the targeted dumping methodology “would deny the second sentence [of Article 2.4.2] the very function for which it was created.”⁷⁴ The fact that, under a general zeroing prohibition, the average-to-average comparison method and the average-to-transaction comparison method would yield identical results was recognized by each of the panels.⁷⁵ Mexico’s claims in this case, therefore, depend on avoiding this defect that results from a general zeroing prohibition, however derived. Mexico has declined to offer any explanation as to how this defect is avoided under its interpretation of the AD Agreement.

⁷¹ The reason for this is that, if offsetting is required, then all non-dumped sales (i.e., negative values) will offset the margins on all of the dumped sales (i.e., positive values). It makes no difference mathematically whether the calculation of the final overall dumping margin is based on comparing weighted-average export prices to weighted-average normal values or on comparing transaction-specific export prices to weighted-average normal values. In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.

⁷² *US – Gasoline (AB)*, p. 23.

⁷³ *US – Zeroing (EC) (Panel)*, para. 7.266, *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.52, *US – Zeroing (Japan) (Panel)*, para. 7.127.

⁷⁴ *US – Zeroing (EC) (Panel)*, para. 7.266, *see also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.52 (“[A] general prohibition of zeroing ... would deprive the second sentence of Article 2.4.2 of effect.”); *US – Zeroing (Japan) (Panel)*, para. 7.127 (“If zeroing is prohibited in the case of the average-to-transaction comparison, the use of this method will necessarily always yield a result identical to that of an average-to-average comparison.”).

⁷⁵ *US – Zeroing (EC) (Panel)*, para. 7.266 (“In fact, under such an interpretation the alternative asymmetrical comparison methodology would as a matter of mathematics produce a result that was identical to that of the first average-to-average methodology.”); *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.76 (“[A] prohibition of zeroing under the targeted dumping comparison methodology ... would result in a margin of dumping mathematically equivalent to that established under W-W comparison methodology.”); *US – Zeroing (Japan) (Panel)*, para. 7.127 n. 763 (“Mathematically, if zeroing is prohibited under the average-to-transaction method, the sum total of amount by which export prices are above normal value will offset the sum total of the amounts by which export prices are less than normal value.”).

61. Despite the findings *of fact* of the panels that the results of the targeted dumping methodology “will necessarily always yield a result identical to that of an average-to-average comparison,”⁷⁶ under a general prohibition of zeroing, the Appellate Body has found this concern to be “overstated.”⁷⁷ The Appellate Body has asserted that mathematical equivalence will occur only in “certain situations”⁷⁸ and represents “a non-tested hypothesis”⁷⁹ because “[the United States] has never applied the [targeted dumping] methodology, nor provided examples of how other WTO Members have applied this methodology.”⁸⁰ These objections, however, are not persuasive. First, the panels have specifically addressed all of the situations under which it was argued that mathematical equivalence would not obtain and found these situations did not represent methodologies consistent with the AD Agreement.⁸¹ The targeted dumping provision is rendered inutile if the only alternative methodologies that do not result in mathematical equivalence are, themselves, not consistent with the AD Agreement. Second, mathematical equivalence is not a “non-tested hypothesis” because a WTO Member that actively utilizes this methodology is actually faced with this problem in administering its antidumping duty regime, as described in detail below.

62. In its most recent report to address this issue, the Appellate Body dismissed the redundancy caused by mathematical equivalence by concluding that it may be permissible to apply the targeted dumping methodology to a subset of export transactions.⁸² The United States is unaware of any Member ever having done this, nor has any Member ever suggested it would administer its antidumping regime in this manner. The language of the AD Agreement says nothing about selecting a subset of transactions when conducting a targeted dumping analysis. The Appellate Body has drawn its conclusions about “zeroing” from its interpretation of “dumping” as relating to a “product,” *i.e.*, a “product as a whole.” The targeted dumping provision provides that when certain conditions are met, Members are permitted to compare average normal values to transaction-specific export prices. If the Appellate Body is correct that dumping may only be determined for the product as a whole (which the United States does not concede), there is no textual basis for inferring that the targeted dumping comparison methodology is an exception to that provision (which, as Article 2.1 provides, applies throughout the AD Agreement). The targeted dumping provision simply provides an exception to the average-to-average or transaction-to-transaction comparison requirement of the first sentence of Article 2.4.2. Consequently, the use of a subset of export transactions as a means of avoiding mathematical equivalency would also appear to be inconsistent with the AD Agreement.

63. This mathematical equivalency problem with Mexico’s interpretation cannot be ignored, particularly when Members are actively involved in administering antidumping duty regimes

⁷⁶ *US – Zeroing (Japan) (Panel)*, para. 7.127.

⁷⁷ *US – Softwood Lumber Dumping (Article 21.5) (AB)*, para. 100.

⁷⁸ *US – Zeroing (Japan) (AB)*, para. 133.

⁷⁹ *US – Softwood Lumber Dumping (Article 21.5) (AB)*, para. 97.

⁸⁰ *US – Softwood Lumber Dumping (Article 21.5) (AB)*, para. 97.

⁸¹ *See, US – Zeroing (Japan) (Panel)*, paras. 7.127-7.137; *US – Zeroing (EC) (Panel)*, para. 7.266; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.33-5.52.

⁸² *US – Zeroing (Japan) (AB)*, para. 135.

that apply the targeted dumping provision. The redundancy that results from this mathematical equivalence appears to have already led one Member, attempting to reconcile the issue before its municipal tribunals, to advance an interpretation of the AD Agreement that is contrary to the interpretation Mexico relies on in this dispute. Specifically, the Council of the European Union has argued before the Court of First Instance that

the asymmetrical method, as compared with the first symmetrical method, makes sense only if the zeroing technique is applied. Without that mechanism, that method would mathematically lead to the same result as the first symmetrical method and it would be impossible to prevent the non-dumped exports from disguising the dumping of the dumped exports.⁸³

The Court agreed, finding that

as the Council pointed out in its written proceedings, the zeroing technique has proved to be mathematically necessary in order to distinguish, in terms of its results, the asymmetrical method from the first symmetrical method. In the absence of that reduction, the asymmetrical method will always yield the same result as the first symmetrical method⁸⁴

Thus, a Member that has used the average-to-transaction comparison in investigations agrees with the United States, and the panel reports cited above, that a general prohibition of zeroing would render the average-to-transaction comparison inutile.

64. The redundancy of the targeted dumping provision of Article 2.4.2 occurs as a consequence of any interpretation that results in a general prohibition of zeroing, whether derived from the definitional language of Article 2.1 of the AD Agreement and Article VI of the GATT 1994 or from the “fair comparison” requirement of Article 2.4 of the AD Agreement, or otherwise. Accordingly, the Panel should reject Mexico’s claim that zeroing is necessarily prohibited in all contexts under all comparison methodologies, including with respect to assessment proceedings. “An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”⁸⁵

⁸³ Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006, para. 94 (Exhibit US-5). Notwithstanding making this argument before its municipal tribunals, the EC has taken a contrary position in WTO dispute proceedings. See, e.g. *Softwood Lumber Dumping (Article 21.5) (AB)*, para. 49 (“The European Communities rejects the ‘mathematical equivalence’ argument... .”)

⁸⁴ Ritek Corp., para. 109.

⁸⁵ *US – Gasoline (AB)*, p. 23.

2. Article 2.1 of the AD Agreement and Article VI of the GATT 1994

65. As an initial matter, Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 are definitional provisions that, “read in isolation, do not impose independent obligations.”⁸⁶ For the reasons set out below, Mexico’s claims regarding these provisions must fail.

66. Nevertheless, these definitions are important to the interpretation of other provisions of the AD Agreement at issue in this dispute. In particular, it is most significant that Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define “dumping” and “margins of dumping” so as to require that export transactions be examined at an aggregate level. The definition of “dumping” in these provisions references “product . . . introduced into the commerce of another country at less than its normal value.” This definition describes the real-world commercial conduct by which a product is imported into a country, *i.e.*, transaction by transaction.⁸⁷ Thus, dumping is defined as occurring in the course of a commercial transaction in which the product, which is the object of the transaction, is “introduced into the commerce” of the importing country at an export price that is “less than normal value.”

67. In addition, the term “less than normal value” is defined as when the “price of the product exported . . . is less than the comparable price . . .”⁸⁸ Again, this definition describes the real-world commercial conduct of pricing such that one price is less than another price. The ordinary meaning of “price” as used in the definition of dumping is the “payment in purchase of something.”⁸⁹ This definition “can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level.”⁹⁰

68. The dumping definition’s description of the conduct that antidumping duties are intended to remedy provides strong contextual support for the interpretation of these provisions that permits an authority to examine dumping in relation to the particular conduct described, *i.e.*, individual import transactions. Thus, in the *US – Zeroing (Japan)* dispute, the panel correctly concluded that the definition of dumping itself “undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions.”⁹¹

69. In other words, dumping – as defined under these provisions – may occur in a single transaction. There is nothing in the GATT 1994 or the AD Agreement that suggests that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. Indeed, the commercial reality is that the

⁸⁶ *US – Zeroing (Japan) (AB)*, para. 140.

⁸⁷ *See US – Zeroing (EC) (Panel)*, para. 7.285.

⁸⁸ Article VI:1 of the GATT 1994, Article 2.1 of the AD Agreement.

⁸⁹ *New Shorter Oxford English Dictionary (1993)*, p. 2349.

⁹⁰ *US – Zeroing (Japan) (Panel)*, para. 7.106.

⁹¹ *US – Zeroing (Japan) (Panel)*, para. 7.106.

foreign producer or exporter itself exclusively enjoys the benefit of the extent to which the price of a non-dumped export transaction exceeds normal value.

70. In *US – Zeroing (Japan)*, the panel noted that “the record of past discussions in the framework of GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions.”⁹² Well before the recent debate about “zeroing” or “offsets,” a Group of Experts convened to consider numerous issues with respect to the application of Article VI of the GATT 1947. In this report, the Group of Experts considered that the “ideal method” for applying antidumping duties “was to make a determination of both dumping and material injury in respect of each single importation of the product concerned.”⁹³

71. Taking the same view, the panel in *US - Softwood Lumber Dumping (Article 21.5)* reasoned:

In referring to a "determination ... of ... dumping ... in respect of each single importation of the product concerned", the Group of Experts clearly envisaged the calculation of transaction-specific margins of dumping. This would suggest that the Group of Experts did not consider that there was anything in the definition of dumping set forth in Article VI of the GATT that would preclude the calculation of such transaction-specific margins.⁹⁴

72. Thus, as the panel in *US – Zeroing (Japan)* found, “historically the concept of dumping has been understood to be applicable at the level of individual export transactions.”⁹⁵

73. It bears recalling that the AD Agreement was negotiated against the background of the Antidumping Code and the antidumping investigation methodologies of individual Contracting Parties under the Code. The methodology of not offsetting dumping based on comparisons where the export price was greater than normal value was examined by two GATT panels and was found to be consistent with the Antidumping Code.⁹⁶ In view of these findings, the Uruguay Round negotiators actively discussed whether the use of “zeroing” should be restricted.⁹⁷ The text of Article VI of the GATT 1947, however, did not change as a result of the Uruguay Round

⁹² *US – Zeroing (Japan) (Panel)*, para. 7.107 and n.743.

⁹³ *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, L/1141, adopted on 27 May 1960, BISD 9S/194, para. 7.

⁹⁴ *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.64.

⁹⁵ *US – Zeroing (Japan) (Panel)*, para. 7.107.

⁹⁶ See, e.g., *EC – Audiocassettes*, para. 360; *EC – Cotton Yarn*, para. 502.

⁹⁷ See, e.g., *Communication from Japan*, MTN.GNG/NG8/W/30 (20 June 1988), item I.4(3), in which Japan expressed concern about a methodology wherein “negative dumping margins, i.e., the amount by which export price exceeds normal value, are ignored.”; *Proposed Elements for a Framework for Negotiations: Principles and Objectives for Anti-dumping Rules, Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (Oct. 13, 1989), at item II.E.(d) (proposing that in calculating dumping margins “‘negative’ dumping should be taken into account, i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value”); *Communication from the Delegation of Hong Kong*, MTN.GNG/NG8/W/46 (July 3, 1989), at 7.

agreements.⁹⁸ The normal inference one draws from the absence of a change in language is that the drafters intended no change in meaning.⁹⁹

74. Mexico's claims in this dispute depend on a contrary interpretation of these provisions holding that "dumping" and "margins of dumping" relate "solely, and exclusively, to the 'product' under consideration taken 'as a whole.'" ¹⁰⁰ Mexico claims to rely upon four Appellate Body reports in support of its interpretation. In *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*, however, as described above, a zeroing prohibition was found in the context of the average-to-average comparison methodology in investigations, where a textual basis for an obligation to provide offsets was present. Thus, Mexico's claim ultimately depends on the reasoning set forth in the Appellate Body reports in *US – Zeroing (EC)* and *US – Zeroing (Japan)*, which rejected the notion that dumping may occur with respect to an individual transaction in the absence of the textual basis that was present in *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*. This interpretation relies on the term "product" as being solely and exclusively synonymous with the concept of "product as a whole." In particular, it denies that the ordinary meaning of the word "product" or "products" used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. However, as the panel report in *US – Zeroing (Japan)* explained, "[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis" ¹⁰¹

75. *Softwood Lumber Dumping (AB)* reasoned that zeroing was not permitted in the context of "multiple averaging," on the basis of the phrase "all comparable export transactions," but did not explain how zeroing could be prohibited in the context of "multiple comparisons" generally. In contrast to *Softwood Lumber Dumping (AB)*, in *US – Zeroing (EC) (AB)* a new interpretation was embraced, such that the "product as a whole" concept led to the conclusion that zeroing is prohibited whenever "multiple comparisons" are made. The phrases "product as a whole" and "multiple comparisons" do not appear in the AD Agreement, but were derived from interpretations based on the phrase "all comparable export transactions," which appears only in connection with average-to-average comparisons in investigations. In considering this, the Panel in *US – Zeroing (Japan)* found

⁹⁸ Similarly, the text of Article 2.1 of the AD Agreement mirrors the text of the Tokyo Round Antidumping Code.

⁹⁹ Instructive in this regard is *US – Underwear (AB)*, p. 15, in which the Appellate Body found that the disappearance in the *Agreement on Textiles and Clothing* of the earlier *Multi-Fibre Agreement* provision for backdating the operative effect of a restraint measure, "strongly reinforced the presumption that such retroactive application is no longer permissible." The corollary, however, is that when a provision is not changed, there is a presumption that behavior that previously was permissible remains permissible.

¹⁰⁰ Mexico First Submission, para. 171.

¹⁰¹ *US – Zeroing (Japan) (Panel)*, para. 7.105, quoting *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, n.32.

no explanation of this shift from the use of the ‘product as a whole’ concept as context to interpret the term "margins of dumping" in the first sentence of Article 2.4.2 of the AD Agreement in connection with multiple averaging, on the one hand, to the use of this concept as an autonomous legal basis for a general prohibition of zeroing, on the other. In this regard, we note, in particular, that the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms ‘dumping’ and ‘margins of dumping’ cannot apply to a *sub-group* of a product logically leads to the broader conclusion that Members may not distinguish between *transactions* in which export prices are less than normal value and *transactions* in which export prices exceed normal value.¹⁰²

Thus, the “product as a whole” concept adopted by Mexico, ultimately does not support its claim that the challenged measures are inconsistent with a general prohibition of zeroing in all proceedings and under all comparison methods.

76. Examination of the term “product” as used throughout the AD Agreement and the GATT 1994 demonstrates that the term “product” in these provisions does not exclusively refer to “product as a whole.” Instead, “product” can have either a collective meaning or an individual meaning. For example, Article 2.6 of the AD Agreement – which defines the term “like product” in relation to “the product under consideration” – plainly uses the term “product” in the collective sense. By contrast, Article VII:3 of the GATT 1994 – which refers to “[t]he value for customs purposes of any imported product” – plainly uses the term “product” in the individual sense of the object of a particular transaction (*i.e.*, a sale involving a specific quantity of merchandise that matches the criteria for the “product” at a particular price). Therefore, it cannot be presumed that the same term has such an exclusive meaning when used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994.

77. As the panel in *US - Softwood Lumber Dumping (Article 21.5)* explained, “an analysis of the use of the words product and products throughout the GATT 1994, indicates that there is no basis to equate product with ‘product as a whole’... Thus, for example, when Article VII:3 of the GATT refers to ‘the value for customs purposes of any imported product’, this can only be interpreted to refer to the value of a product in a particular import transaction.”¹⁰³ The panel detailed numerous additional instances where the term “product,” as used in the AD Agreement and GATT 1994 do not support a meaning that is solely, and exclusively, synonymous with “product as a whole”:

To extend the Appellate Body's reference to the concept of "product as a whole" in the sense that Canada proposes to the T-T methodology would entail accepting that it applies throughout Article VI of GATT 1994, and the AD Agreement, wherever the term "product" or "products" appears. A review of the use of these terms does not support the proposition that "product" must always mean the entire

¹⁰² *US – Zeroing (Japan) (Panel)*, para. 7.101.

¹⁰³ *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23, n. 36.

universe of exported product subject to an anti-dumping investigation. For instance, Article VI:2 states that a contracting party "may levy on any dumped product" an anti-dumping duty. Article VI:3 provides that "no countervailing duty shall be levied on any product". Article VI:6(a) provides that no contracting party shall levy any anti-dumping or countervailing duty on the importation of any product...". Similarly, Article VI:6(b) provides that a contracting party may be authorized "to levy an anti-dumping or countervailing duty on the importation of any product". Taken together, these provisions suggest that "to levy a duty on a product" has the same meaning as "to levy a duty on the importation of that product". Canada's position, if applied to these provisions, would mean that the phrase "importation of a product" cannot refer to a single import transaction. In many places where the words product and products are used in Article VI of the GATT 1994, an interpretation of these words as necessarily referring to the entire universe of investigated export transactions is not compelling.¹⁰⁴

78. In sum, the terms "product" and "products" cannot be interpreted in such an exclusive manner so as to deprive them of one of their ordinary meanings, in particular the "product" or "products" that are the subject of individual transactions. Therefore, the words "product" and "products" as they appear in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 cannot be understood to provide a textual basis for an interpretation that requires margins of dumping established in relation to the "product" must necessarily be established on an aggregate basis for the "product as a whole."

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

Article VI:2 of the GATT 1994 provides that, for the purposes of Article VI, "the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1" of Article VI. Paragraph 1 of Article VI defines dumping as a practice "by which products of one country are introduced into the commerce of another country at less than the normal value of the products" (emphasis supplied). ... Article VI:1 provides that "a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product in the exporting country" (emphasis supplied). In other words, there is dumping when the export "price" is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase "price difference", it would be permissible for a Member to interpret the "price difference" referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that "price difference" as the "margin of dumping".¹⁰⁵

¹⁰⁴ *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23.

¹⁰⁵ *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.27.

Thus, the panel saw “no reason why a Member may not ... establish the ‘margin of dumping’ on the basis of the total amount by which transaction-specific export prices are less than the transaction-specific normal values.”¹⁰⁶ Although the panel was examining margins of dumping in the context of the transaction-to-transaction comparison method in investigations under Article 2.4.2, its reasoning is equally applicable to margins of dumping established on a transaction-specific basis in an assessment proceeding under Article 9.3.

80. Additionally, the term “margin of dumping,” as used elsewhere in the GATT 1994 and the AD Agreement, does not refer exclusively to the aggregated results of comparisons for the “product as a whole.” As used in the Note Ad Article VI:1, which provides for importer-specific price comparison, the term “margin of dumping” cannot relate to aggregated results of all comparisons for the “product as a whole” because an exporter or foreign producer may make export transactions using multiple importers.

81. Similarly, the term “margin of dumping” as used in Article 2.2 of the AD Agreement would require the use of constructed value for the “product as a whole,” even if the condition precedent for using constructed value under Article 2.2 relates only to a portion of the comparisons. The panel in *US - Softwood Lumber Dumping (21.5)* observed that this “would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2. ... We are not convinced that the Appellate Body could have intended its *US - Softwood Lumber Dumping* findings to be applied in this manner.”¹⁰⁷

82. Nevertheless, Mexico asserts that dumping and margins of dumping “are concepts that have no meaning unless considered with reference to the product under consideration taken as a whole.”¹⁰⁸ In this regard, the reasoning of the Appellate Body reports relied upon by Mexico is unpersuasive because it is contrary to the great weight of evidence indicating that the concepts of dumping and margin of dumping have long been understood as relating to individual transactions, as evidenced by the report of the Group of Experts, the reports of the GATT panels, the well-established practice of Members utilizing antidumping regimes, the negotiating history of the AD Agreement, as well as the ordinary meaning of the text the relevant provisions of the AD Agreement, the Antidumping Code, the GATT 1947 and the GATT 1994. Accordingly, Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define the terms “dumping” and “margin of dumping” such that export transactions must necessarily be examined at an aggregate level.

3. Article 9.3

83. Article 9 of the AD Agreement relates, as its title indicates, to the imposition and collection of antidumping duties. In particular, Article 9.3 states that the “amount of the

¹⁰⁶ *US - Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.28.

¹⁰⁷ *US - Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.62.

¹⁰⁸ Mexico First Submission, para. 182.

anti-dumping duty shall not exceed the margin of dumping as established under Article 2.” For the reasons set forth in detail above, the term “margin of dumping,” as defined in Article 2.1 of the AD Agreement and Article VI of the GATT 1994, may be applied to individual transactions. This understanding of the term “margin of dumping” is particularly appropriate in the context of antidumping duty assessment. In the real world of administering antidumping regimes, the individual transactions are both the means by which less than fair value prices are established and the mechanism by which the object of the transaction (i.e., the “product”) is “introduced into the commerce of the importing country.” Likewise, antidumping duties are assessed on individual entries resulting from those individual transactions. Therefore, the obligation set forth in Article 9.3 to assess no more in antidumping duties than the margin of dumping, is similarly applicable at the level of individual transactions.

84. Mexico’s claims with respect to assessment proceedings depend entirely on a conclusion that the above interpretation of Article 9.3 is not permissible.¹⁰⁹ Specifically, Mexico’s claim under Article 9.3 of the AD Agreement is that the amount of the antidumping duty has exceeded the margin of dumping established under Article 2.¹¹⁰ This claim depends upon whether Mexico’s preferred interpretation of the “margin of dumping,” which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the AD Agreement. In Mexico’s view, which agrees with the view asserted in *US – Zeroing (EC) (AB)* and *US – Zeroing (Japan) (AB)*, a Member breaches Article 9.3 by failing to provide offsets, because Members are required to calculate margins of dumping on an exporter-specific basis for the product “as a whole” and, consequently, a Member is required to aggregate the results of “all” “intermediate comparisons,” including those for which the export price exceeds the normal value.¹¹¹ The United States notes that the terms upon which Mexico’s interpretation rests are conspicuously absent from the text of both Articles 2.1 and 9.3. Mexico’s interpretation is not mandated by the definition of dumping contained in Article 2.1, as described in detail above. As set forth in this section, the text and context of Article 9.3 also strongly indicate that Mexico’s interpretation of the obligation set forth in Article 9.3 is erroneous.

85. As the panel in *US – Zeroing (EC)* correctly concluded, there is “no textual support in Article 9.3 for the view that the AD Agreement requires an exporter-oriented assessment of antidumping duties, whereby, if an average normal value is calculated for a particular review period, the amount of anti-dumping duty payable on a particular transaction is determined by whether the overall average of the export prices of all sales made by an exporter during that

¹⁰⁹ The Appellate Body recently explained that Article 2.1 of the Antidumping Agreement and Article VI:1 of GATT 1994 are merely definitional provisions and on their own “do not impose independent obligations.” *US – Zeroing (Japan) (AB)*, para. 140. Accordingly, to the extent Mexico is claiming that the challenged measures are inconsistent with “obligations” found in Article 2.1, Mexico has failed to establish the existence of any obligations pursuant to those definitional provisions and, therefore, Mexico’s claims should be rejected.

¹¹⁰ Mexico First Submission, paras. 241 and 242.

¹¹¹ Mexico First Submission, para. 240.

period is below the average normal value.”¹¹² The Panel in *US-Zeroing (Japan)* similarly rejected the conclusion that the “margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value”¹¹³

86. In *US – Zeroing (Japan)*, the panel found that “there are important considerations specific to article 9 of the AD Agreement that lend further support to the view that it is permissible . . . to interpret Article VI of the GATT 1994 and relevant provisions of the AD Agreement to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing.”¹¹⁴ In particular, the panel explained that such a requirement is inconsistent with the importer-and import-specific obligation to pay an antidumping duty:

In the context of Article 9.3, a margin of dumping is calculated for the purpose of determining the *final liability for payment of anti-dumping duties* under Article 9.3.1 or for the purpose of determining *the amount of anti-dumping duty* that must be *refunded* under Article 9.3.2. An anti-dumping duty is paid by an importer in respect of a particular import of the product on which an anti-dumping duty has been imposed. An importer does not incur liability for payment of an anti-dumping duty in respect of the totality of sales of a product made by an exporter to the country in question but only in respect of sales made by that exporter to that particular importer. Thus, the obligation to pay an anti-dumping duty is incurred on an *importer-and import-specific* basis. Since the calculation of a margin of dumping in the context of Article 9.3 is part of a process of assessing the amount of duty that must be paid or that must be refunded, this importer- and import-specific character of the payment of anti-dumping duties must be taken into account in interpreting the meaning of “margin of dumping.”¹¹⁵

87. Similarly, the panel in *US – Zeroing (EC)* explained:

In our view, the fact that in an assessment proceeding in Article 9.3 the margin of dumping must be related to the liability incurred in respect of particular import transactions is an important element that distinguishes Article 9.3

¹¹² *US – Zeroing (EC) (Panel)*, para. 7.204 (“In our view, if the drafters of the AD Agreement had wanted to impose a uniform requirement to adopt an exporter oriented-method of duty assessment, which would have entailed a significant change to the practice and legislation of some participants in the negotiations, they might have been expected to have indicated this more clearly.”).

¹¹³ *US – Zeroing (Japan) (Panel)*, para. 7.199. The panel in *US – Zeroing (EC)* expressed essentially the same view. *US – Zeroing (EC)(Panel)*, paras. 7.204 - 7.207 and 7.220-7.223.

¹¹⁴ *US – Zeroing (Japan) (Panel)*, para. 7.196.

¹¹⁵ *US – Zeroing (Japan) (Panel)*, para. 7.198 - 7199 (emphasis in the original).

proceedings from investigations within the meaning of Article 5. ... [I]n an Article 9.3 context the extent of dumping found with respect to a particular exporter must be translated into an amount of liability for payment of antidumping duties by importers in respect of specific import transactions.¹¹⁶

88. The panel’s understanding of Article 9.3 is, at a minimum, a permissible interpretation of the provision. Indeed, Mexico’s interpretation of “margin of dumping” as used in Article 9.3, if applied, would fundamentally alter the antidumping practices of numerous Members using this remedy and render many of these systems difficult, if not impossible, to administer. In particular, under Mexico’s interpretation of Article 9.3, antidumping duties would be prevented from fulfilling their intended purpose under Article VI:2 of the GATT 1994, because importers that contribute the most to injurious dumping would be favored over other importers (and domestic competitors) that price fairly, and prospective normal value systems would be rendered retrospective, as described further below.

89. Although, as stated by the Appellate Body in *US - Zeroing (Japan)*, dumping involves differential pricing behavior of exporters or producers between its export market and its normal value,¹¹⁷ dumping nevertheless occurs at the level of individual transactions. Moreover, the remedy for dumping provided for in Article VI:2 of GATT 1994, *i.e.*, antidumping duties, are applied at the level of individual entries for which importers incur the liability. In this way, the importer may be induced to raise resale prices to cover the amount of the antidumping duty, thereby preventing the dumping from having further injurious effect. If instead, the amount of the antidumping duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer, then the antidumping duty will be insufficient to have the intended effect. The importer of the dumped product would remain in a position to profitably resell the product at a price that continues to be injuriously dumped. For this reason, if Mexico’s interpretation of the margin of dumping is adopted as the sole permissible interpretation of Article 9.3, the remedy provided under the AD Agreement and the GATT 1994 will be prevented from addressing injurious dumping.

90. These concerns led the panel in *US – Zeroing (Japan)* to reject the same interpretation that Mexico offers in this dispute. The panel observed that the implication of this interpretation was that Members with retrospective assessment systems “may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value.”¹¹⁸ The panel found that this result was not supported by the text of Article 9.3, which “contains no language requiring such an aggregate examination of export transactions in determining final liability for payments of antidumping duties”

¹¹⁶ *US – Zeroing (EC) (Panel)*, para. 7.201.

¹¹⁷ *US – Zeroing (Japan) (AB)*, para. 156.

¹¹⁸ *US – Zeroing (Japan) (Panel)*, para. 7.199.

91. It also follows that if a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the amount of dumping is greatest will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports. Indeed, even if one were not to impose duties on importers whose entries were not responsible for the finding of dumping, the non-dumping importers would still be significantly disadvantaged because the dumping importers would still have a cost advantage, since the duties they pay on the dumped merchandise would be reduced by the amount by which the non-dumped merchandise exceeded normal value.

92. As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed, the perverse incentives created by providing offsets also arise in the context of prospective assessment systems:

[An] obligation to take all (including non-dumped) comparisons into account in determining the margin of dumping for the product as a whole ... is illogical, as it would provide importers clearing dumped transactions with a double competitive advantage vis-à-vis other importers: first, they would benefit from the lower price inherent in a dumped transaction; second, they would benefit from offsets, or credits, "financed" by the higher prices paid by other importers clearing non-dumped, or even less-dumped, transactions.

...

Again, this makes no sense in the context of a prospective normal value duty assessment system, because (as even Canada acknowledges) the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. And if other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers. We are unable to accept that the Appellate Body could have intended such absurd results to follow from its interpretation of the phrase "margins of dumping" in *US - Softwood Lumber V*.¹¹⁹

93. Mexico's interpretation of Article 9.3, requiring that antidumping duty liability be determined for the product "as a whole," is inconsistent with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment. Article 9.4(ii) of the AD Agreement "expressly refers to the calculation of the liability for payment of antidumping duties on the basis of a prospective normal value system."¹²⁰ Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction

¹¹⁹ *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.54-5.57.

¹²⁰ *US – Zeroing (Japan) (Panel)*, para. 7.201.

and the prospective normal value.¹²¹ For example, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payments of antidumping duties. The converse is also true. A liability for a dumped sale would be determined by comparing the price of individual export transaction with prospective normal value and the prices of other transactions have no relevance to this determination.¹²² As the panel in *US – Zeroing (Japan)* found, “there is no textual support in Article 9 for the proposition that export prices in other transactions are of any relevance.”¹²³

94. Because in a prospective normal value system, liability for antidumping duties is incurred only to the extent that prices of individual export transaction are below the normal value, the panel in *US – Zeroing (Japan)* concluded, “the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transaction below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same significance be accorded to export prices above the normal value as to export prices below the normal value.”¹²⁴

95. If in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, there is no reason why liability for payment of antidumping duties may not be similarly assessed on the basis of export prices less than normal value in the retrospective systems applied by the United States.¹²⁵

96. Further, accepting Mexico’s interpretation that a Member must aggregate the results of “all” comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value systems, in order to take into account “all” of the exporters’ transactions. The results of the retrospective review would be to determine antidumping duty liability on a retrospective basis. This result, however, is contrary to the very concept of the prospective normal value system. As the panel in *US – Zeroing (Japan)* explained, the “liability for payment of anti-dumping duties is final in prospective normal value

¹²¹ *US – Zeroing (Japan) (Panel)*, para. 7.201; *See also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53.

¹²² *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53 (“Under a prospective normal value duty assessment system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a prospective normal value. . . . In the context of such transaction-specific duty assessment, it makes no sense to talk of a margin of dumping being established for the product as whole, by aggregating the results of all comparisons, since there is only one comparison at issue.”)

¹²³ *US – Zeroing (Japan) (Panel)*, para. 7.201.

¹²⁴ *US – Zeroing (Japan) (Panel)*, para. 7.205; *see also US – Zeroing (EC) (Panel)*, para. 7.206.

¹²⁵ *US – Zeroing (Japan) (Panel)*, para. 7.208 (“We see no textual basis in Articles 9.3 and 9.4 for the view that if an authority assesses the amount of the anti-dumping duty on a retrospective basis by examining export transaction that have occurred during a certain period, it is obligated to take into account export prices above the normal value that it would not have been required to take into account if it had applied a prospective normal value system.”).

system at the time of importation of a product.”¹²⁶ In effect, prospective normal value systems will become retrospective, a conclusion also reached in a Canadian parliamentary report on potential changes to its prospective normal value system.¹²⁷ In that report and at its trade policy review, Canada expressed its view that in a prospective normal value system, each entry provides a margin of dumping.¹²⁸ If, in fact, Members had intended prospective normal value systems to have such reviews, one would have expected Members to have provided for this in explicit agreement language.

97. For the above reasons, the United States respectfully requests that the Panel reject Mexico’s “as such” and “as applied”¹²⁹ claims regarding antidumping assessment proceedings.

4. Article 2.4

98. The text of Article 2.4 requires that a “fair comparison shall be made between the export price and the normal value.” The text of Article 2.4, however, does not resolve whether any particular assessment of antidumping duties exceeds the margin of dumping because the text of Article 2.4 does not resolve whether “dumping” and “margins of dumping” are concepts that apply to individual transactions. Nor does the text resolve whether, for purposes of assessing antidumping duty liability, a margin of dumping may be specific to each importer that is liable for payment of the antidumping duties. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is “fair” or “unfair.” As the panel in *US – Zeroing (Japan)* noted, the “precise meaning of” the fair comparison requirement “must be understood in light of the nature of the activity at issue.”¹³⁰ The panel concluded that “the ‘fair comparison’ requirement

¹²⁶ *US – Zeroing (Japan) (Panel)*, para. 7.205.

¹²⁷ Report on the Special Import Measures Act, House of Commons Canada, December 1996, http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/chap4e.html (Exhibit US-6) (hereinafter “SIMA Report”). See also Special Import Measures Act Self-Assessment Guide (“Normal Value - Export Price = Antidumping Duty (or Margin of Dumping)”), <http://www.cbsa-asfc.gc.ca/sima/self-e.html#12> (Exhibit US-7).

¹²⁸ *Id.*

¹²⁹ In paragraph 255 of its First Submission, Mexico refers to six periodic reviews. We note that only five of those proceedings were identified in Mexico’s panel request. We also note that Mexico requests findings with respect to “five listed period reviews”. See paragraph 264. Therefore, the sixth period review identified by Mexico is not within the Panel’s terms of reference.

¹³⁰ *US- Zeroing (Japan) (Panel)*, para. 7.155; see also *US – Zeroing (EC)(Panel)*, para. 7.260 (“[C]autious ... is especially warranted where as in the case of the first sentence of Article 2.4, a legal rule is expressed in terms of a standard that by its very nature is more abstract and less determinate than most other rules in the AD Agreement. The meaning of ‘fair’ in a legal rule must necessarily be determined having regard to the particular context within which the rule operates.”); see also *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para.5.74 (“[W]e believe that a claim based on a highly general and subjective test such as ‘fair comparison’ should be approached with caution by treaty interpreters. For this reason, any concept of ‘fairness’ should be solidly rooted in the context provided by the *AD Agreement*, and perhaps the *WTO Agreement* more generally. As such there must be a discernible standard within the *AD Agreement*, and perhaps the *WTO Agreement*, by which to assess whether or not a comparison has been ‘fair’ or ‘unfair.’ Thus, the fact that comparison methodology A produces a higher margin of dumping than comparison methodology B would only make comparison methodology A unfair if comparison methodology B were the applicable standard. If however, the *AD Agreement* were to permit either comparison methodology A or B, this would not be the case.”).

cannot have been intended to allow a panel to review a measure in light of a necessarily somewhat subjective judgment of what fairness means in the abstract and in complete isolation from the substantive context.”¹³¹

99. Assessment of antidumping duties in the amount by which the normal value exceeded the export price on a transaction-specific basis, without providing an offset for non-dumped transactions does reflect a “fair comparison” made for each export transaction. Mexico’s assertion that the United States has assessed antidumping duties “in excess of the actual margin of dumping for the product” is predicated on the assumption that zeroing is prohibited – otherwise, the challenged assessments would reflect the correct magnitude of the margins of dumping.

100. Mexico’s claim of inconsistency with Article 2.4 adopts the reasoning set forth in the Appellate Body report in *US – Zeroing (Japan)*, finding that a methodology cannot be viewed as involving a “fair comparison” under Article 2.4 if the resulting assessments exceed the “margin of dumping established in accordance with Article 2, as we have explained previously.”¹³² The reasoning upon which Mexico relies, however, is entirely consequential of the Appellate Body report’s previous analysis of the term “margin of dumping.” Indeed, the passage quoted by Mexico makes plain that the rationale followed in the Appellate Body report was based on the *results* of the comparison methodology in relation to the previously interpreted “margin of dumping,” rather than on any inherently unfair aspect of the comparison methodology itself. Therefore, resolution of Mexico’s claims regarding assessment proceedings depends not on the text of Article 2.4, but on whether it is permissible to interpret the term “margin of dumping” as used in Article 9.3 as applying to transactions.

101. For the reasons previously described in detail, as the panels in *US – Zeroing (EC)* and *US – Zeroing (Japan)* have concluded, it is permissible to interpret “margin of dumping” as used in Article 9.3 as applying to an individual transaction.¹³³ As a consequence, there is no obligation to aggregate transactions in calculating margins of dumping in an assessment proceeding, and there can be no obligation to offset the antidumping duty liability for a transaction to reflect the extent to which other transactions were not dumped. Therefore, if the Panel finds, as the prior panels have found, that it is permissible to understand the term “margin of dumping” as used in Article 9.3 as applying to an individual transaction, then the challenged assessment will not exceed the margin of dumping and there will be no basis, according to the rationale adopted by Mexico, for a finding of inconsistency with Article 2.4.

102. In addition, as mentioned above, an interpretation of Article 2.4 that gives rise to a general prohibition of zeroing also renders the second sentence of Article 2.4.2, the “targeted dumping provision,” inutile.¹³⁴ The targeted dumping provision is an exception to the

¹³¹ *US- Zeroing (Japan) (Panel)*, para. 7.158, quoting *US - Zeroing (EC) (Panel)*, para. 7.261.

¹³² Mexico First Submission, para. 246, quoting *US – Zeroing (Japan) (AB)*, para. 168.

¹³³ *US – Zeroing (EC) (Panel)*, para. 7.201- 7.206; *US – Zeroing (Japan) (Panel)*, para. 7.194 - 7.199.

¹³⁴ *US – Zeroing (EC) (Panel)*, para. 7.266; *US – Zeroing (Japan) (Panel)*, para. 7.159.

symmetrical comparison methodologies generally required by Article 2.4.2. It is not an exception to the fair comparison requirement of Article 2.4. Thus, an interpretation of Article 2.4 that generally prohibits zeroing would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 without meaning.¹³⁵ A panel should not interpret provisions of the AD Agreement in such a way that its express provisions are rendered meaningless or superfluous.¹³⁶ As the Appellate Body has consistently found, “interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”¹³⁷ An interpretation of Article 2.4 of the AD Agreement to require that dumping margins be offset by non-dumped transactions is therefore impermissible and must be rejected.

5. Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement

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

C. Mexico’s As Applied Claim with Respect to Investigations

104. With respect to the antidumping investigation of stainless steel from Mexico at issue in this dispute, the United States acknowledges that Commerce did not provide offsets for non-dumped transaction when calculating the margin of dumping using the average-to average comparison methodology during the investigation phase. The United States recognizes that in *US – Softwood Lumber Dumping* the Appellate Body found that the use of “zeroing” with respect to the average-to-average comparison methodology in investigations was inconsistent with Article 2.4.2, by interpreting the terms “margins of dumping” and “all comparable export transactions” as used in Article 2.4.2 in an integrated manner.¹³⁸ The United States acknowledges that this reasoning is equally applicable with respect to this claim.¹³⁹

¹³⁵ *Id.*

¹³⁶ See *US – Gasoline*, p. 23; *Japan – Alcohol Taxes (AB)*, p. 12; *Egypt – Rebar*, para. 7.277.

¹³⁷ *US – Gasoline (AB)*, p. 23; see also *Japan – Alcohol Taxes (AB)*, p. 12 (same); *US – Underwear*, p. 16 (same).

¹³⁸ See *US – Softwood Lumber Dumping (AB)*, paras. 62-117.

¹³⁹ The United States wishes to note, however, that Mexico only alleges that if offsets for non-dumped transactions had been used, the recalculated margin of dumping from this proceeding would be reduced from 30.85 percent to 30.69 percent. See Mexico First Submission, para. 62. Thus, Mexico does not deny the existence of margins of dumping sufficient to warrant the imposition of an antidumping measure.

D. Mexico’s Request for a Suggestion

105. In addition, Mexico asks the Panel to “suggest” that the United States eliminate the “Zeroing Procedures” in all antidumping duty procedural contexts.”¹⁴⁰ Mexico argues that “it is essential that the Panel suggest that the United States withdraw all the inconsistent measures.”¹⁴¹

106. As an initial matter, the DSU does not identify any legal consequences that flow from suggestions under Article 19.1. In other words, a suggestion is just that: a suggestion. Therefore, by its very nature, a suggestion cannot be “essential” to resolve a dispute.

107. Moreover, it is well-established that a Member has the right to determine the “means of implementation.”¹⁴² That a complaining party may prefer one form of implementation over another does not affect the responding party’s right to determine such implementation. In a dispute, such as this, where a Member has undertaken implementation to comply with its WTO obligations in connection with another dispute involving the same obligations alleged in the present dispute, such suggestions may unnecessarily complicate ongoing compliance efforts.

108. Finally, it is not entirely clear whether Mexico intends by its request to obtain a suggestion that the antidumping duty order on stainless steel from Mexico be withdrawn. Even if Mexico were to prevail in all of its claims in this dispute, such a suggestion would be inconsistent with Mexico’s acknowledgment that, even in the absence of zeroing, the margin of dumping from the investigation would be 30.69 percent, well above the *de minimis* threshold. Accordingly, such a suggestion should not be made by the Panel.

109. The United States, therefore, respectfully requests that the panel reject Mexico’s request for a suggestion.

V. CONCLUSION

110. As set forth above, the United States requests that the Panel reject Mexico’s “as such” claims” and its “as applied” claims regarding assessment proceedings.

¹⁴⁰ Mexico First Submission, paragraph 268.

¹⁴¹ *Id.*, paragraph 265 (emphasis in original).

¹⁴² See, e.g., *US – OCTG from Mexico (AB)*, para. 187.

LIST OF EXHIBITS

- US-1 Excerpts from Code of Federal Regulations
- US-2 Excerpts from Tariff Act of 1930, as amended
- US-3 Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 Fed. Reg. 9508 (March 2, 2007).
- US-4 Communication by the United States of February 20, 2007 (WT/DS322/16)
- US-5 Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006.
- US-6 Report on the Special Import Measures Act, House of Commons Canada, December 1996,
http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/cha p4e.html (hereinafter "SIMA Report").
- US-7 Special Import Measures Act Self-Assessment Guide ("Normal Value - Export Price = Antidumping Duty (or Margin of Dumping"),
<http://www.cbsa-asfc.gc.ca/sima/self-e.html#12>.