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

WT/DS344

EXECUTIVE SUMMARY

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

April 10, 2007

I. INTRODUCTION

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

II. GENERAL PRINCIPLES

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

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

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

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

III. ARGUMENT

A. Scope of "As Such" Claims

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

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

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

9. Mexico has not established that a "single zeroing measure" exists. Mexico states that the findings concerning the precise content of zeroing procedures in the panel reports in *US – Zeroing (Japan)* and *US – Zeroing (EC)* "*themselves* constitute conclusive evidence as to the precise content of the measure challenged by Mexico in this case." However, as a general matter, a separate panel's findings are not evidence, but conclusions based on evidence. Further, the specific evidence before that separate panel, cited now by Mexico, does not support the Panel repeating those findings here.

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

11. As Mexico acknowledges, Commerce has never "zeroed" in a targeted dumping context and only once in a transaction-to transaction comparison, nor has Commerce ever made statements about its intentions with respect to zeroing in these contexts. Mexico cites to nothing in 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.

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

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

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

B. Claims Regarding Assessment Proceedings

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

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

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

18. The need to avoid such redundancy was recognized in *US – Zeroing (Japan)(AB)* when the Appellate Body changed its interpretation of this phrase. In *US – Softwood Lumber Dumping (AB)*, "margins of dumping" and "all comparable export transactions" were interpreted in an integrated manner. The Appellate Body found that in aggregating the results of the model-specific comparisons, "all" comparable export transactions must be accounted for. Thus, the

phrase necessarily referred to all transactions across all models of the product under investigation, *i.e.* the product "as a whole." However, in *US – Zeroing (Japan)(AB)*, the Appellate Body reinterpreted "all comparable export transactions" to relate solely to all transactions within a model, and not across models of the product under investigation. In doing so, the Appellate Body abandoned the only textual basis for its reasoning in *US – Softwood Lumber Dumping (AB)*.

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

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

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

22. In addition, the term "less than normal value" is defined as when the "price of the

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

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

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

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

26. Mexico's claim ultimately depends on the reasoning set forth in the Appellate Body reports in *US – Zeroing (EC)* and *US – Zeroing (Japan*), which rejected the notion that dumping may occur with respect to an individual transaction in the absence of the textual basis that was present in *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*. This interpretation relies on the term "product" as being solely and exclusively synonymous with the concept of "product as a whole." In particular, it denies that the ordinary meaning of the word "product" or "products" used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. However, as the panel report in *US – Zeroing (Japan)* explained, "[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis . . . ."

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

necessarily be established on an aggregate basis for the "product as a whole."

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

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

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

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

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

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

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

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

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

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

transaction-specific price difference calculated for a specific import transaction.

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

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

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

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

39. As the panels in *US – Zeroing (EC)* and *US – Zeroing (Japan)* have concluded, it is permissible to interpret "margin of dumping" as used in Article 9.3 as applying to an individual transaction. As a consequence, there is no obligation to aggregate transactions in calculating margins of dumping in an assessment proceeding, and there can be no obligation to offset the

antidumping duty liability for a transaction to reflect the extent to which other transactions were not dumped. Therefore, if the Panel finds, as the prior panels have found, that it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction, then the challenged assessment will not exceed the margin of dumping and there will be no basis, according to the rationale adopted by Mexico, for a finding of inconsistency with Article 2.4.

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

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

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

42. The United States recognizes that in *US – Softwood Lumber Dumping* the Appellate Body found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with Article 2.4.2, by interpreting the terms "margins of dumping" and "all comparable export transactions" as used in Article 2.4.2 in an integrated manner. The United States acknowledges that this reasoning is equally applicable with respect to this claim.

D. Mexico's Request for a Suggestion

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

IV. CONCLUSION

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